Life After Graham: An Evolving "Kids Are Different" Eighth Amendment Jurisprudence and Its Promise for Juvenile Offenders Doing Adult Time

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Abstract

In *Graham v. Florida*, the United States Supreme Court declared that life sentences without the possibility of parole for non-homicides are off limits for all juveniles. Following its lead in *Roper v. Simmons*, the landmark decision in which the Court abolished the juvenile death penalty, the Court expanded on its Eighth Amendment juvenile jurisprudence by ruling that locking up juveniles for life based on crimes other than homicides is cruel and unusual and, therefore, prohibited by the Eighth Amendment. With that ruling, the Court erected a categorical bar to incarcerating forever those not yet adults at the time of their crimes. That categorical exclusion is itself a momentous development, and it will impact directly the lives of the 129 juvenile offenders whose sentences for non-homicides have relegated them to prison with no prospect of ever being freed. Of even greater import for the thousands of juvenile offenders whose sentences *Graham* does not impact directly, however, is the legal reasoning the Court used in striking down juvenile life without parole for non-homicides. The Court employed an analytical approach previously reserved exclusively for death penalty cases, and it did so without fanfare or explanation. The Court’s analytical approach unceremoniously leveled the wall that has separated its “death is different” jurisprudence from noncapital sentencing review since 1972. In its place, the Court fortified an expansive “kids are different” jurisprudence that traces its roots to *Thompson v. Oklahoma* and is now firmly planted with the Court’s rulings in *Roper* and *Graham*. Just as *Graham* crossed the rigid divide between the Court’s death and non-death cases, it places the Court’s categorical approach to sentencing, formerly the exclusive province of the death penalty, within reach of all juveniles serving adult sentences.
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In *Graham v. Florida*, the United States Supreme Court declared that life sentences without the possibility of parole for non-homicides are off limits for all juveniles. Following its lead in *Roper v. Simmons*, the landmark decision in which the Court abolished the juvenile death penalty, the Court expanded on its Eighth Amendment juvenile jurisprudence by ruling that locking up juveniles for life based on crimes other than homicides is cruel and unusual and, therefore, prohibited by the Eighth Amendment. With that ruling, the Court erected a categorical bar to incarcerating forever, with no opportunity to seek release before the end of their natural lives, juveniles who did not kill anyone. That categorical exclusion is itself a momentous decision, and it will impact directly the lives of the 129 juvenile offenders whose sentences for non-homicides have relegated them to prison with no prospect
of ever being freed. Now, they at least have the hope that their sentences will be reviewed and that they may win release.

Of even greater import for the thousands of juvenile offenders whose sentences *Graham* does not impact directly, however, is the legal reasoning the Court used in striking down juvenile life without parole for non-homicides. The Court employed an analytical approach previously reserved exclusively for death penalty cases, and it did so without fanfare or obvious heavy lifting. Indeed, the Court’s analytical approach unceremoniously knocked down the veritable Hadrian’s Wall that has separated its “death is different” jurisprudence from noncapital sentencing review since 1972. In its place, the Court fortified an expansive “kids are different” jurisprudence that traces its roots to *Thompson v. Oklahoma* and is now firmly planted with the Court’s rulings in *Roper* and *Graham*. And just as *Graham* crossed the rigid divide between the Court’s death and non-death cases, it places the Court’s categorical approach to sentencing, formerly the exclusive province of the death penalty, within reach of all juveniles serving adult sentences. Why this is so, and its implications for sentencing juvenile offenders to adult prison time, are the subjects of what follows.

I turn first to *Graham*, beginning with a summary of the underlying facts and an analysis of the Court’s ruling, highlighting the Court’s reasoning and the sources of its conclusion that juvenile life without parole is a cruel and unusual punishment prohibited by the Eighth Amendment. I next demonstrate the immensity of *Graham*’s ruling in Eighth Amendment jurisprudential terms by tracing the well-traveled divide between capital and noncapital proportionality analysis under the Court’s precedents. Following that review, I examine the criminalization of adolescence brought about by sweeping legislative changes that have made it easier to try increasing numbers of juveniles as adults, even while juvenile crime has steadily decreased. I then conclude by making the case for an enlightened proportionality review for all juvenile offenders serving adult sentences in adult prisons,
viewed through a “kids are different” lens that considers the characteristics of juveniles found first in
Roper, and now in Graham, to be determinative in resolving juveniles’ Eighth Amendment challenges.¹

I. Terrance Graham’s Path to the Supreme Court and His Weighty Victory

Terrance Graham was sixteen years old when he and three other teenagers² attempted to rob a
barbecue restaurant in Jacksonville, Florida.³ Although the would-be robbers were unsuccessful, the
prosecutor elected to try Graham as an adult, and not as a juvenile,⁴ charging him with armed burglary
with assault or battery, which carried a maximum penalty of life in prison without the possibility of
parole,⁵ and attempted armed robbery, which carried a maximum sentence of fifteen years.⁶ Graham
pleaded guilty to both charges, but the trial court withheld adjudication of guilt and sentenced him to
three years probation.⁷ Within a year, Graham was re-arrested, this time in connection with a home
invasion robbery after he fled from police.⁸ Another year passed before the court held a hearing on the
violations of probation filed by Graham’s probation officer relating to the home invasion and flight.⁹

Although Graham asserted that he had no involvement in the home invasion, he admitted that he had

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² The argument advanced here is not a concession to the continued wholesale incarceration of our youth in adult prisons. Rather, it accepts as a present reality that juveniles are being tried and sentenced as adults, and that many juvenile offenders are now serving sentences in adult prisons, and it offers a developmentally informed approach to proportionality review that would alter those sentences. The larger issues surrounding our nation’s criminalization of adolescence are left for another day.

³ Throughout this article, the terms “teenagers,” “juveniles,” “adolescents,” “children,” and “youth” are used interchangeably, and without distinction, to refer to those under the age of eighteen.


⁵ Under Florida law, prosecutors have the discretion to charge sixteen- and seventeen-year olds as either juveniles or adults for most felonies. 560 U.S. at ___, 130 S.Ct. at Id. 2018 (citing FLA. STAT. § 985.227(1)(b) (2003) (subsequently renumbered at § 985.557(1)(b)) (2006)).

⁶ Id. at ___, 130 S.Ct. at 2018 (citing FLA. STAT. §§ 810.02(1)(b), (2)(a) (2003)). See infra note 12 (noting abolition of parole in Florida).

⁷ Id. at ___, 130 S.Ct. at 2018 (citing FLA. STAT. §§ 812.13(2)(b) (2003), 777.04(1), (4)(a)(2003), 775.082(3)(c) (2003)).

⁸ Id. at ___, 130 S.Ct. at 2018-19.

⁹ Id. at ___, 130 S.Ct. at 2019.
violated the conditions of his probation by fleeing, even though that admission alone could trigger imposition of a life sentence.\textsuperscript{10} After hearing evidence related to the home invasion, the court found that Graham had violated the terms of his probation by attempting to evade arrest, by committing a home invasion robbery, by possessing a firearm, and by associating with persons engaged in criminal activity.\textsuperscript{11} At the sentencing hearing, the judge commented to Graham that he did not know “‘why it is that you threw your life away’”\textsuperscript{12} before ruling that Graham deserved the stiffest possible penalty – life in prison without parole\textsuperscript{13} - to “protect the community from [his] actions.”\textsuperscript{14}

On review before the First District Court of Appeal of Florida, the appellate court found that the serious and violent nature of the charges and Graham’s age – seventeen at the time of the crimes and nineteen at sentencing - warranted the extreme penalty.\textsuperscript{15} That finding was bolstered by the court’s view that Graham was incapable of rehabilitation because he had chosen to continue committing crimes “‘at an escalating pace.’”\textsuperscript{16} After the Florida Supreme Court denied review,\textsuperscript{17} the United States Supreme Court granted certiorari\textsuperscript{18} and overturned the sentence, ruling that “[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.”\textsuperscript{19} Although the Court did not go so far as to erect an outright prohibition of life imprisonment for juveniles, like its ban of the juvenile death penalty in \textit{Roper},\textsuperscript{20} it ruled that states must provide juvenile offenders serving life without parole for non-homicides “some realistic opportunity to obtain release

\textsuperscript{10} Id. at ___, 130 S.Ct. at 2019.
\textsuperscript{11} Id. at ___, 130 S.Ct. at 2019.
\textsuperscript{12} Id. at ___, 130 S.Ct. at 2019.
\textsuperscript{13} Id. at ___, 130 S.Ct. at 2020. The actual sentence was life in prison; however, because Florida had abolished its parole system, \textit{see} FLA. STAT. § 921.002(1)(e) (2003), the life sentence affords no opportunity for release absent executive clemency.
\textsuperscript{14} Id. at ___, 130 S.Ct. at 2020.
\textsuperscript{15} Id. at ___, 130 S.Ct. at 2020.
\textsuperscript{16} Id. at ___, 130 S.Ct. at 2020 (quoting Graham v. Florida, 982 So.2d 43, 52 (Fla. Dist. Ct. App. 2008)).
\textsuperscript{17} Id. at ___, 130 S.Ct. at 2020 (citing 990 So.2d 1058 (Fla. 2008) (table)).
\textsuperscript{18} Id. at ___, 130 S.Ct. at 2020.
\textsuperscript{19} Id. at ___, 130 S.Ct. at 2034.
\textsuperscript{20} 543 U.S. 551 (2005).
before the end of that term.”

The upshot for Graham, and for all other juvenile offenders serving sentences of life without parole for non-homicides, is that they now have the opportunity to petition for their release from prison. No longer will they face death in prison as the only way to live out their lives.

II. What the Graham Court Decided and How It Got There

The Graham Court began its analysis with a review of the Court’s Eighth Amendment precedents, emphasizing at the outset that the determination whether a punishment is cruel and unusual must be based on “the evolving standards of decency that mark the progress of a maturing society.”

While the Cruel and Unusual Punishments Clause prohibits “inherently barbaric punishments under all circumstances,” the Court recognized that its precedents generally do not consider punishments challenged as barbaric, but “as disproportionate to the crime.” The concept of proportionality, the Court said, “is central to the Eighth Amendment. Embodied in the Constitution’s ban on cruel and unusual punishments is the ‘precept of justice that punishment for crime should be graduated and proportioned to [the] offense.’”

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21 560 U.S. at ___, 130 S.Ct. at 2034. At oral argument, counsel for Graham conceded that even a sentence as long as forty years before parole consideration would be constitutional, Transcript of Oral Argument at 6-7, Graham v. Florida, 560 U.S. at ___, 130 S.Ct. 2011 (2010) (No. 08-7412), but the Court did not adopt that concession or endorse any other specific length of sentence as within or outside the reach of the Eighth Amendment.

22 Justice Kennedy wrote for the majority, with Justice Stevens filing a concurring opinion in which Justices Ginsburg and Sotomayor joined, 560 U.S. at ___, 130 S.Ct. at 2036 (Stevens, J., concurring), and with Chief Justice Roberts filing a separate opinion concurring in the judgment. Id. (Roberts, C.J., concurring in the judgment). Justice Thomas filed a dissenting opinion, joined in whole by Justice Scalia and in part by Justice Alito. Id. at 2043 (Thomas, J., dissenting). Justice Alito filed a separate dissenting opinion. Id. at 2058 (Alito, J., dissenting).

23 Id. at ___, 130 S.Ct. at 2021 (majority opinion) (citing Estelle v. Gamble, 429 U.S. 97, 102 (1976); Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

24 Id. at ___, 130 S.Ct. at 2021.

25 Id. at ___, 130 S.Ct. at 2021.

26 Id. at ___, 130 S.Ct. at 2021 (quoting Weems v. United States, 217 U.S. 349, 367 (1910)). This view is not universally held by the Supreme Court Justices. Justices Scalia and Thomas take the position that the Eighth Amendment does not contain a proportionality principle. See, e.g., Ewing v. California, 538 U.S. 11, 32 (2003) (Thomas, J., concurring in the judgment) (stating that Eighth Amendment prohibition against cruel and unusual
The Court next described its proportionality jurisprudence as falling within two general classifications.\textsuperscript{27} The first, the Court said, are challenges to the length of sentences in specific cases based on all of the circumstances of the particular cases.\textsuperscript{28} The Court acknowledged the difficulty of establishing a lack of proportionality in those cases, citing only one of its precedents in which the defendant raised a successful proportionality challenge.\textsuperscript{29} Since \textit{Harmelin v. Michigan} in 1991,\textsuperscript{30} a slim majority of the Court has recognized a “narrow proportionality principle” that forbids only those sentences that are “grossly disproportionate” to the crime.\textsuperscript{31} The two cases the Court has reviewed under the \textit{Harmelin} standard produced closely divided decisions, and neither sentence rose to the level of disproportionality required by \textit{Harmelin}.\textsuperscript{32}

The Court then proceeded to the second classification of Eighth Amendment cases, which has used categorical rules to define the limits of the Cruel and Unusual Punishments Clause.\textsuperscript{33} Within this classification are two subsets: one considering the nature of the offense,\textsuperscript{34} and another considering the nature of the offender.\textsuperscript{35} Under those two categorical approaches, the Court has ruled that the death punishments contains no proportionality principle); \textit{Harmelin v. Michigan}, 501 U.S. 957, 994-95 (1991) (Opinion of Scalia, J., joined by Rehnquist, C.J.) (stating that Eighth Amendment contains no proportionality guarantee):
\begin{itemize}
  \item \textsuperscript{27} 560 U.S. at ___, 130 S.Ct. at 2021.
  \item \textsuperscript{28} \textit{Id.} at ___, 130 S.Ct. at 2021.
  \item \textsuperscript{30} 501 U.S. 957 (1991).
  \item \textsuperscript{31} 560 U.S. at ___, 130 S.Ct. at 2021 (citing \textit{Harmelin}, 501 U.S. at 1000-01 (Kennedy, J., concurring in part and concurring in the judgment)).
  \item \textsuperscript{32} \textit{Id.} at ___, 130 S.Ct. at 2021-22 (citing \textit{Ewing v. California}, 538 U.S. 11 (2003) (upholding sentence of twenty-five years to life for theft of golf clubs worth in excess of $400, under California’s three-strikes recidivist statute); \textit{Lockyer v. Andrade}, 538 U.S. 63 (2003) (upholding sentence of fifty years to life for shoplifting videotapes, under California’s three-strikes statute)).
  \item \textsuperscript{33} \textit{Id.} at ___, 130 S.Ct. at 2022.
  \item \textsuperscript{34} \textit{Id.} at ___, 130 S.Ct. at 2022.
  \item \textsuperscript{35} \textit{Id.} at ___, 130 S.Ct. at 2022.
penalty is impermissible for non-homicide crimes and has adopted categorical rules barring the death penalty for those who function in an intellectually low range and for those who committed their crimes before age eighteen. It is the latter classification that received the Court’s greatest attention in *Graham*, and for good reason. As noted above, Terrance Graham was seventeen and still a child in the eyes of the law when he committed the crimes for which he later received the sentence of life without parole. Thus, like Christopher Simmons, whose appeal brought about the abolition of the juvenile death penalty, he was a juvenile serving a sentence intended for adults.

In the Supreme Court, Graham challenged the entire sentencing practice of condemning juvenile offenders to life in prison. In this respect, Graham’s case stood in contrast to all of the Supreme Court’s adult noncapital sentencing decisions. In each of those cases, the petitioner sought review solely of his particular sentence as disproportionate under the Eighth Amendment. Because Graham’s “categorical challenge” to his sentence, if successful, would place that penalty out of constitutional bounds for all juveniles, it more closely resembled the Court’s death penalty cases than its individual noncapital proportionality decisions.

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36 Id. at ___, 130 S.Ct. at 2022 (citing Kennedy v. Louisiana, 554 U.S. ___, 128 S.Ct. 2641 (2008) (holding that capital punishment for rape of a child violated Eighth Amendment); Enmund v. Florida, 458 U.S. 782 (1982) (holding that capital punishment for felony murder conviction where defendant did not kill, intend to kill, or attempt to kill violated Eighth Amendment); Coker v. Georgia, 433 U.S. 584 (1977) (holding that capital punishment for rape of an adult violated Eighth Amendment)).

37 Id. at ___, 130 S.Ct. at 2022 (citing Atkins v. Virginia, 536 U.S. 304 (2002)).

38 Id. at ___, 130 S.Ct. at 2022 (citing Roper v. Simmons, 543 U.S. 551 (2005)).

39 Id. at ___, 130 S.Ct. at 2023.


41 See *Graham*, 560 U.S. at ___, 130 S.Ct. at 2025 (“Once in adult court, a juvenile offender may receive the same sentence as would be given an adult offender, including a life without parole sentence. But the fact that transfer and direct charging laws make life without parole possible for some juvenile non-homicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole sentences.”).

42 Id. at ___, 130 S.Ct. at 2023.

43 See notes ______ through ______ and accompanying text.

44 560 U.S. at ___, 130 S.Ct. at 2022.

Thus, it is not surprising that the Court departed from its adult proportionality jurisprudence by relying on death penalty cases to reach its conclusion that juvenile life without parole for non-homicides offends the Eighth Amendment Cruel and Unusual Punishments Clause. The Court’s earlier decisions addressing terms of imprisonment challenges on proportionality grounds had explicitly eschewed reliance on death penalty cases that applied proportionality principles because “a sentence of death differs in kind from any sentence of imprisonment, no matter how long.”

But those cases, and the approach to proportionality review taken in them, were unsuited to Graham’s challenge, the Court said, because he was challenging a sentencing practice, and not solely the sentence he had received. The proper analysis, the Court reasoned, was that used in other cases establishing categorical rules. The fact that all of those cases had been challenges to the death penalty was of no consequence to the Court; it said simply: “The previous cases in this classification [categorical rules] involved the death penalty.” No matter, for here, the Court said, “in addressing the question presented, the appropriate analysis is the one used in cases that involved the categorical approach, specifically Atkins, Roper, and Kennedy,” all of which just happened to be death penalty cases.

Following the lead of those cases, the Court began with an examination of “objective indicia of national consensus” against the punishment, looking, first, to the enactments of state legislatures. The Court found that thirty-seven states, the District of Columbia, and federal law permitted imposition

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47 560 U.S. at ___, 130 S.Ct. at 2022.
48 Id. at ___, 130 S.Ct. at 2023.
49 Id. at ___, 130 S.Ct. at 2022.
51 560 U.S. at ___, 130 S.Ct. at 2023.
52 Id. at ___, 130 S.Ct. at 2023 (quoting Atkins, 546 U.S. at 312).
of life without parole on juvenile offenders. That number alone – representing three-quarters of the jurisdictions in the country – would have been sufficient in the past for the Court to reject Graham’s claim as not demonstrating anything approaching a national consensus against the punishment. Here, however, the Court looked beyond the raw number and found that the “actual sentencing practices in jurisdictions where the sentence in question is permitted by statute” was the critical question, and that sentencing juvenile non-homicide offenders to life without parole was “most infrequent.” By the Court’s own count, 129 juvenile offenders were serving life without parole for non-homicides, with seventy-seven of those in Florida and the remaining fifty-two in ten other states and the federal system. Thus, with the exception of Florida, other states had imposed the sentence quite rarely, and even though twenty-six additional states, the District of Columbia, and federal law authorized the sentence, none of those jurisdictions had sentenced a juvenile offender to life without parole for a non-homicide.

Moreover, the Court reasoned, the evidence of consensus was not undermined by the fact that many jurisdictions do not explicitly prohibit the practice of sentencing juveniles to life without parole for non-homicides. The fact that the practice is permitted, the Court explained, “does not justify a

53 Id. at ___, 130 S.Ct. at 2023.
55 560 U.S. at ___, 130 S.Ct. at 2023.
56 Id. at ___, 130 S.Ct. at 2023.
57 The Court cited a study reporting that 109 juvenile offenders were serving life without parole sentences for non-homicides nationwide. See 560 U.S. at ___, 130 S.Ct. at 2023 (citing P. ANNINO, D. RASMUSSEN, & C. RICE, JUVENILE LIFE WITHOUT PAROLE FOR NON-HOMICIDE OFFENSES: FLORIDA COMPARED TO NATION 2 (Sept. 14, 2009)). After the State of Florida criticized the study as inaccurate and incomplete, id. at ___, 130 S.Ct. at 2024, the Court conducted its own inquiry, which brought the tally to 129. Id. at ___, 130 S.Ct. at 2024.
58 560 U.S. at ___, 130 S.Ct. at 2024.
59 Id. at ___, 130 S.Ct. at 2024.
60 Id. at ___, 130 S.Ct. at 2024.
61 Id. at ___, 130 S.Ct. at 2025.
judgment that many States intended to subject [juvenile] offenders to life without parole sentences." 62

Instead, it was the movement away from treating juvenile crime in juvenile court to trying juveniles as adults through either transfer or direct charging in the adult system that had created the possibility for such extreme sentences to be imposed on those not yet adult in any sense of the word. As the Court recognized, “[o]nce in adult court, a juvenile offender may receive the same sentence as would be given to an adult offender, including a life without parole sentence.” 63 Even so, the Court observed, the actual use of life without parole for juvenile non-homicide offenders was “exceedingly rare.” 64 Based on that fact and the other objective indicia of the nation’s evolving standards of decency, the Court concluded that a national consensus had developed against sentencing juvenile offenders to life without parole. 65

The Court then proceeded to the exercise of its independent judgment, which requires “consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question.” 66 As another part of that exercise, the Court considered “whether the challenged sentencing practice serves legitimate penological goals.” 67 Here, the Court looked directly to Roper v. Simmons, 68 its 2005 decision that the death penalty violated juveniles’ Eighth Amendment right to be free from cruel and unusual punishments. Roper established

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62 Id. at ___, 130 S.Ct. at 2025. The Court elaborated: “the statutory eligibility of a juvenile offender for life without parole does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration. Similarly, the many States that allow life without parole for juvenile non-homicide offenders but do not impose the punishment should not be treated as if they have expressed the view that the sentence is appropriate.” Id. at ___, 130 S.Ct. at 2026.

63 Id. at ___, 130 S.Ct. at 2025. The Court pointed out the extreme nature of the transition to adult penalties: “For example, under Florida law a child of any age can be prosecuted as an adult for certain crimes and can be sentenced to life without parole. The State [of Florida] acknowledged at oral argument that even a 5-year old could receive such a sentence under the letter of the law.” 560 U.S. at ___, 130 S.Ct. at 2025-26.

64 Id. at ___, 130 S.Ct. at 2026.

65 Id. at ___, 130 S.Ct. at 2026 (citing Atkins, 546 U.S. at 316).

66 Id. at ___, 130 S.Ct. at 2026 (citing Roper, 543 U.S. at 568; Kennedy, 554 U.S. at ___, 128 S.Ct. at 2659-60; cf. Solem, 463 U.S. at 292).

67 Id. at ___, 130 S.Ct. at 2026 (citing Kennedy, 554 U.S. at ___, 128 S.Ct. at 2661-65; Roper, 543 U.S. at 571-72; Atkins, 536 U.S. at 318-20).

68 Id. at ___, 130 S.Ct. at 2026 (citing Roper, 543 U.S. at 569-73).
that “because juveniles have lessened culpability, they are less deserving of the most severe punishments.”

Juveniles’ lower level of culpability, the Roper Court said, was based on three general differences between juveniles and adults: “First, as any parent knows and as the scientific and sociological studies . . . tend to confirm, ‘[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.’” It is precisely that comparative immaturity and irresponsibility of juveniles, the Court observed, that had led almost every State to “prohibit those under 18 years of age from voting, serving on juries, or marrying without parental consent.” The second area of difference between juveniles and adults, the Roper Court found, was that “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.” The Court observed that juveniles’ particular vulnerability “is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment.” The Court concluded by recognizing a third broad difference between juveniles and adults: “the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.”

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69 Id. at ___, 130 S.Ct. at 2026 (citing Roper, 543 U.S. at 569).
70 Roper, 543 U.S. at 569 (citing Johnson v. Texas, 509 U.S. 350, 367 (1993); Eddings v. Oklahoma, 445 U.S. 104,115-16 (1982) (“Even the normal 16-year-old customarily lacks the maturity of an adult.”)). The Court also recognized that “adolescents are overrepresented statistically in virtually every category of reckless behavior.” 543 U.S. at 569 (citing Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 DEVELOPMENTAL REV. 339 (1992)).
71 543 U.S. at 569 (referring to the Court’s own appendices for an exhaustive catalog of state statutes disabling those under eighteen). See Appendices B-D.
72 Id. (citing Eddings, 455 U.S. at 115).
73 Id. (citing Laurence Steinberg & Elizabeth Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 AM. PSYCHOLOGIST 1009, 1114 (2003) (commenting that, “as legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting”)).
74 Id. at 570 (citing ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS (1968)).
The *Roper* Court then explained the implications of the three differences that set juveniles apart from adults: First, “[t]he susceptibility of juveniles to immature and irresponsible behavior means ‘their irresponsible conduct is not as morally reprehensible as that of an adult.’”\(^{75}\) Second, juveniles’ “own vulnerability and comparative lack of control over their immediate surroundings mean [they] have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment.”\(^{76}\) Finally, “[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.”\(^{77}\) Thus, the *Roper* Court concluded that, from a moral standpoint, a juvenile’s transgressions cannot be equated with those of an adult because a juvenile is more likely to experience reform than an adult.\(^{78}\) The Court explained that "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."\(^{79}\)

It was those differences and their implications for assessing culpability that drove the Court’s decision in *Roper*, and the *Graham* Court found no reason to reconsider the *Roper* Court’s conclusions.\(^{80}\) Instead, *Graham* found even more support for treating juveniles differently from adults: “[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to

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\(^{75}\) Id. (quoting *Thompson*, 487 U.S. at 835).

\(^{76}\) Id. at 570 (citing *Stanford*, 492 U.S. at 395 (Brennan, J., dissenting)).

\(^{77}\) Id.

\(^{78}\) Id.

\(^{79}\) Id. (citing *Johnson*, 509 U.S. at 368); see also Steinberg & Scott, *Less Guilty*, supra note ____, 543 U.S. at 570 (“For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.”).

\(^{80}\) 560 U.S. at ___, 130 S.Ct. at 2026.
mature through late adolescence.”81 Because juveniles “are more capable of change than are adults,”82 Graham concluded, as had Roper, that “‘from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.’”83

The Court turned next to the nature of the offenses to which the “harsh penalty”84 of life without parole might apply. Acknowledging that defendants “who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers,”85 the Court said that there is a line between “‘homicide and other serious violent offenses against the individual.’”86 Crimes like robbery and rape differ from homicide crimes “‘in a moral sense.’”87 Thus, the Court concluded, “when compared to an adult murderer, a juvenile offender who did not kill has a twice diminished moral culpability.”88

Having examined the age of the offender and nature of the crime, the Court turned to the punishment itself. The Court recognized the harshness of life without parole, “‘the second most severe penalty permitted by law,’”89 especially for juveniles, based on the sheer number of years a juvenile offender will serve in prison compared to an adult, particularly an adult of advanced years.90 Like the death penalty, life without parole “alters the offender’s life by a forfeiture that is irrevocable.

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81 Id. at ___, 130 S.Ct. at 2026 (citing Brief for American Medical Association et al. as Amici Curiae 16-24; Brief for American Psychological Association et al. as Amici Curiae 22-27).
82 Id. at ___, 130 S.Ct. at 2026.
83 Id. at ___, 130 S.Ct. at 2026-27 (quoting Roper, 543 U.S. at 570).
84 Id. at ___, 130 S.Ct. at 2027.
85 Id. at ___, 130 S.Ct. at 2027 (citing Kennedy, 554 U.S. at ___, 128 S.Ct. at 2559-60; Enmund, 458 U.S. 782 (1982); Tison v. Arizona, 481 U.S. 137 (1987); Coker, 433 U.S. 584 (1977)).
86 Id. at ___, 130 S.Ct. at 2027 (quoting Kennedy, 554 U.S. at ___, 128 S.Ct. at 2659-60).
87 Id. at ___, 130 S.Ct. at 2027.
88 Id. at ___, 130 S.Ct. at 2027.
89 Id. at ___, 130 S.Ct. at 2027 (quoting Harmelin, 501 U.S. at 1001 (opinion by Kennedy, J.)).
90 Id. at ___, 130 S.Ct. at 2028.
It deprives the convict of the most basic of liberties without giving hope of restoration.”\footnote{Id. at ___, 130 S.Ct. at 2027.} The deprivation is most severe for juvenile offenders, for, as the Court observed, “[a] 16-year old and a 75-year old each sentenced to life without parole receive the same punishment in name only.”\footnote{Id. at ___, 130 S.Ct. at 2028.} The Court then considered the penological justifications for the practice of sentencing juvenile offenders to life without parole. The Court took as its starting point the principle that “[a] sentence lacking legitimate penological justification is by its nature disproportionate to the offense.”\footnote{Id. at ___, 130 S.Ct. at 2028.} Life without parole for juvenile offenders, the Court concluded, finds no adequate justification in any of the four penological goals recognized as legitimate.\footnote{Id. at ___, 130 S.Ct. at 2028.} First, “retribution does not justify imposing the second most severe penalty on the less culpable juvenile non-homicide offender.”\footnote{Id. at ___, 130 S.Ct. at 2028 (explaining that “the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender” and that “the case for retribution is not as strong with a minor as with an adult”)).} Second, deterrence does not justify the sentence “in light of juvenile offenders’ diminished moral responsibility.”\footnote{Id. at ___, 130 S.Ct. at 2029 (observing that “the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence”).} Third, incapacitation does not warrant a life without parole sentence because it “denies the juvenile offender a chance to demonstrate growth and maturity.”\footnote{Id. at ___, 130 S.Ct. at 2029 (“To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable.”)).} The Court also warned that “[i]ncapacitation cannot override all other considerations, lest the Eighth Amendment’s rule against disproportionate sentences be a nullity.”\footnote{Id. at ___, 130 S.Ct. at 2029.} Fourth and last, rehabilitation does not justify the sentence because it “forswears altogether the rehabilitative ideal.”\footnote{Id. at ___, 130 S.Ct. at 2030 (“[B]y denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person’s value and place in society. This judgment is not appropriate in light of a juvenile non-homicide offender’s capacity for change and limited moral culpability.”)).}
The absence of any penological justification, the diminished culpability of juvenile offenders, and the severity of life without parole sentences all led the Court to conclude that sentencing juvenile non-homicide offenders to life without parole is cruel and unusual and, therefore, forbidden by the Eighth Amendment. But the Court did not go so far as to require all juvenile offenders to be released from prison. Instead, the Court said, it is sufficient that they be given some possibility of gaining release: “A State is not required to guarantee eventual freedom to a juvenile offender convicted of a non-homicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”

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

Nor would creating a rule requiring sentencers to consider the juvenile offender’s age, weighed against the seriousness of the crime, in a case-by-case gross disproportionality inquiry, adequately protect juvenile offenders, the Court said. “The case-by-case approach to sentencing must, however,
be confined by some boundaries. The dilemma of juvenile sentencing demonstrates this.”

The Court illustrated the point by positing a juvenile offender of sufficient maturity and a crime reflecting sufficient depravity to warrant the most severe penalty. Even then, the Court said, “it does not follow that courts taking a case-by-case approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.”

Continuing with its explanation, the Court noted the “special difficulties encountered by counsel in juvenile representation.” The Court stated the truism that “[j]uveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense.”

Moreover, juveniles are impulsive and have difficulty weighing long-term consequences, which can lead to poor decisions and, as a result, impaired legal representation. A categorical rule protects juvenile offenders from those deficiencies and avoids the risk that “a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a non-homicide.”

Finally, a categorical rule gives all juveniles serving life without parole for non-homicides “a chance to demonstrate maturity and reform.” The Court explained: “Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. . . . A categorical

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106 Id. at ___, 130 S.Ct. at 2031-32.
107 Id. at ___, 130 S.Ct. at 2032.
108 Id. at ___, 130 S.Ct. at 2032.
109 Id. at ___, 130 S.Ct. at 2032.
110 Id. at ___, 130 S.Ct. at 2032.
111 Id. at ___, 130 S.Ct. at 2032 (citing Brief for NAACP Legal Defense & Education Fund et al. as Amici Curiae 7-12; Kristin Henning, Loyalty, Paternalism and Rights: Client Counseling Theory and the Role of Child’s Counsel in Delinquency Cases, 81 NOTRE DAME L. REV. 245, 272 (2005)).
112 Id. at ___, 130 S.Ct. at 2032.
113 Id. at ___, 130 S.Ct. at 2032.
rule against life without parole for juvenile non-homicide offenders avoids the perverse consequence in which the lack of maturity that led to an offender’s crime is reinforced by the prison term.” 114

The Court concluded its analysis by noting that life without parole for juvenile non-homicide offenders is “a sentencing practice rejected the world over.” 115 While not dispositive, the judgments of other nations “are not irrelevant.” 116 As with the juvenile death penalty the Court rejected in Roper, “the United States now stands alone in a world that has turned its face against’ life without parole for juvenile non-homicide offenders.” 117 Although international law in no way prohibits the United States from sentencing juvenile offenders to life without parole, the “overwhelming weight of international opinion against” 118 the sentence provided “respected and significant confirmation” 119 for the Court’s own conclusions.

Taken together, all of the factors the Court considered led to one conclusion: sentencing juveniles to spend their entire lives in prison with no opportunity to seek parole is cruel and unusual and therefore violates the Eighth Amendment. 120 The Court’s ruling is both remarkable and

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114 Id. at ___, 130 S.Ct. at 2032-33.
115 Id. at ___, 130 S.Ct. at 2033.
116 Id. at ___, 130 S.Ct. at 2033 (citing Enmund, 458 U.S. at 796 n.22).
117 Id. at ___, 130 S.Ct. at 2034 (citing Roper, 543 U.S. at 577).
118 Id. at ___, 130 S.Ct. at 2034 (citing Roper, 543 U.S. at 578).
119 Id. at ___, 130 S.Ct. at 2034 (citing Roper, 543 U.S. at 578).
120 Id. at ___, 130 S.Ct. 2034. Justice Stevens concurred in the majority decision, and was joined by Justices Ginsburg and Sotomayor. Id. at ___, 130 S.Ct. at 2036 (Stevens, J., concurring). The concurrence is quite short, and its apparent purpose was to deflect Justice Thomas’s dissent. Justice Stevens noted that Justice Thomas had argued that the Court’s holding was not entirely consistent with the Court’s rulings in its term of years proportionality decisions. Id. at ___, 130 S.Ct. at 2036. That being the case, Justice Stevens said, the dissents in those cases (of which Justice Stevens was the primary author) “more accurately describe the law today than Justice Thomas’s rigid interpretation of the Amendment.” Id. at ___, 130 S.Ct. at 2036. Chief Justice Roberts concurred in the judgment that Terrance Graham’s sentence violated the Eighth Amendment, but the Chief Justice would not have crossed the “death is different” divide. He would have analyzed Graham’s sentence using the case-by-case approach that employs the “narrow proportionality” review of noncapital cases, informed by Roper’s conclusion that “juvenile offenders are generally less culpable than adults who commit the same crimes.” Id. at ___, 130 S.Ct. at 2036 (Roberts, C.J., concurring in the judgment). Justice Thomas filed a strenuous dissent, taking the Court to task for its application of the categorical approach to this case involving a noncapital offense. To Justice Thomas, the Graham decision was a wholly improper imposition of the Court’s “own sense of morality and retributive justice [on] that of the people and their representatives.” Id. at ___, 130
unremarkable. It is unremarkable precisely because it relies on Roper’s recognition that juveniles do not think or act like adults and that those differences are of constitutional significance. And it is remarkable in that, without pausing, without missing a beat, the Court deftly applied its capital jurisprudence to the analysis of a noncapital sentence. Just how remarkable that was, the following section shows, by tracing the development of two very distinct lines of Eighth Amendment analysis: one for death penalty cases and another for cases involving all other sentences.

III. Proportionality Review in Death and Non-Death Cases: Worlds Apart

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

S.Ct. at 2036 (Thomas, J., dissenting). Finally, Justice Alito wrote a separate dissent, making two points: first, he said, nothing in the Court’s holding prevents a sentence of a term of years without possibility of parole; and second, the question whether Graham’s sentence violated the narrow proportionality principle of the Court’s noncapital cases was not properly before the Court because Graham abandoned that argument in favor of a categorical rule. Id. at ___, 130 U.S. at 2058 (Alito, J., dissenting). Of course, the Court had relied on the categorical approach in deciding the case, so Justice Alito’s comment seems oddly critical of Chief Justice Roberts, who reached the same conclusion as the majority based on the narrow proportionality analysis reserved for a case-by-case inquiry. See id. at ___, 130 S.Ct. at 2037-42 (Roberts, C.J., concurring in the judgment). 121

121 Id. at ___, 130 S.Ct. at 2046 (Thomas, J., dissenting).

A. The Evolution of the Court’s “Death Is Different” Jurisprudence

The modern era of death penalty law has its origin, most would agree, in the 1972 decision, *Furman v. Georgia*, in which the Court struck down under the Eighth Amendment the death penalties imposed on three men. Only Justices Brennan and Marshall argued that the death penalty was on its face a cruel and unusual punishment always prohibited by the Eighth Amendment. Three other Justices – Justices Douglas, Stewart, and White – explicitly reserved judgment on the question whether a less arbitrary, more circumscribed death penalty sentencing scheme than those before the Court could withstand constitutional scrutiny. The effect of the *Furman* ruling was to abolish the

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

124 408 U.S. 338 (1972). The per curiam opinion consisted of one paragraph invalidating the death sentences for the three petitioners, two from Georgia and one from Texas. *Id.* at 239-40. Five Justices filed their own separate concurring opinions, *see id.* at 240 (Douglas, J., concurring); *id.* at 257 (Brennan, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring); *id.* at 314 (Marshall, J., concurring). The remaining four Justices filed separate dissents, often joining in others’ opinions. *See id.* at 375 (Burger, C.J., dissenting, joined by Blackmun, Powell, and Rehnquist, JJ.); *id.* at 405 (Blackmun, J., dissenting); *id.* at 414 (Powell, J., dissenting, joined by Burger, C.J., and Blackmun and Rehnquist, JJ.); *id.* at 465 (Rehnquist, J., dissenting, joined by Burger, C.J., and Blackmun and Powell, JJ.) The *Furman* decision was the longest in the Court’s history at that time. Steiker & Steiker, *Opening a Window*, supra note _____, at 165.

125 408 U.S. at 239-40 (two of the men were convicted of rape – one in Texas and one in Georgia; one was convicted of murder, also in Georgia; all three were black).

126 *Id.* at 257, 305 (Brennan, J., concurring) (“When examined by the principles applicable under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offensive to human dignity.”); *id.* at 358-59 (Marshall, J., concurring).

127 *Id.* at 257 (Douglas, J., concurring) (“[T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws.”); *id.* at 310 (Stewart, J., concurring) (“I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”); *id.* at 313 (White, J., concurring) (“That conclusion, as I
death penalty everywhere it existed - in 39 states, the District of Columbia, and the federal government.\(^{128}\)

Four years later, the Court disappointed everyone who had hoped that *Furman* spelled the end of the death penalty in America,\(^ {129}\) when it returned to the subject in *Gregg v. Georgia*\(^ {130}\) and its four companion cases.\(^ {131}\) If any doubt about the vitality of the death penalty remained before the Court took up those cases, no one could claim ignorance after the Court ruled. As death penalty scholars Carol and Jordan Steiker have explained: “The extent to which *Furman* was a beginning and not an end to constitutional regulation of the death penalty became clear only in 1976, when the *Gregg* Court considered five new state statutory schemes in light of its decision in *Furman*.”\(^ {132}\) *Gregg* minced no words in affirming the constitutional viability of capital sentencing: “We now hold that the punishment of death does not invariably violate the Constitution.”\(^ {133}\)

As it waded into the business of regulating capital sentencing, *Gregg* declined to chart the
definitive features necessary for a constitutional death penalty system.\textsuperscript{134} Rather, the Court examined each statute on its own terms, gauging whether it measured up to the norm recognized in 1958 by \emph{Trop v. Dulles}:\textsuperscript{135} “the evolving standards of decency that mark the progress of a maturing society.”\textsuperscript{136} That examination, the Court emphasized, “does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction.”\textsuperscript{137} The clearest indication of the public attitude toward the death penalty, the \emph{Gregg} Court said, was the 35 state legislatures that enacted new death penalty statutes after \emph{Furman}.\textsuperscript{138} So too, juries are a “significant and reliable objective index of contemporary values.”\textsuperscript{139}

Those measures of acceptability to contemporary society, however, were not sufficient to meet Eighth Amendment standards; a challenged punishment also must “comport[] with the basic concept of human dignity at the core of the [Eighth] Amendment.”\textsuperscript{140} The Court explained that a punishment “totally without penological justification . . . [would] result in the gratuitous infliction of suffering”\textsuperscript{141} and thereby violate that core concept. The death penalty for certain grievous crimes, the Court said, serves two penological purposes – retribution and deterrence – and therefore does not violate human dignity in those instances.\textsuperscript{142} However, to survive constitutional scrutiny, where any capital sentencing

\textsuperscript{134} \emph{Id.} at 195 (“We do not intend to suggest that only the above-described procedures would be permissible under \emph{Furman} or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of \emph{Furman}, for each distinct system must be examined on an individual basis.” (footnote omitted)) .

\textsuperscript{135} 356 U.S. 86 (1958).

\textsuperscript{136} \emph{Gregg}, 428 U.S. at 173 (plurality opinion) (quoting \emph{Trop v. Dulles}, 356 U.S. 86, 101 (1958) (denationalization of person convicted by court martial of desertion but giving no aid to foreign power violated Eighth Amendment)).

\textsuperscript{137} \emph{Id.} at 173.

\textsuperscript{138} \emph{Id.} at 179-80. Congress, too, enacted a death penalty statute in 1974, limited to aircraft piracy that results in death. \emph{Id.} at 180.

\textsuperscript{139} \emph{Id.} at 181. \textit{See also} \emph{Woodson}, 428 U.S. at 293, 295 (finding general juror reluctance to convict when the death penalty was mandatory and reluctance to impose the death penalty when given the discretion to sentence the defendant to life in prison).

\textsuperscript{140} 428 U.S. at 182. \textit{See also} \emph{Trop v. Dulles}, 356 U.S. 86, 100 (1958) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”).

\textsuperscript{141} \emph{Id.} at 183.

\textsuperscript{142} \emph{Id.}
scheme affords discretion to the sentencer, “that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”

The Court then proceeded to uphold three states’ death penalty statutes – those of Florida, Georgia, and Texas – based on their particular statutory schemes’ mix of procedural protections. The Court approved those statutes because they were “carefully drafted [to] ensure[] that the ultimate sentencing authority is given adequate information and guidance.” Making the death penalty mandatory for certain crimes, however, went too far and caused the Court to strike down as unconstitutional the death penalty statutes in the two remaining cases. In Woodson, the Court rejected North Carolina’s mandatory death penalty statute and set the issue in its historic context: “The history of mandatory death penalty statutes in the United States . . . reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid.” The Court continued, stating the basis for its conclusion: “The two crucial indicators of evolving standards of decency respecting the imposition of punishment in our society - jury determinations and legislative enactments - both point conclusively to the repudiation of automatic death sentences.”

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143 Id. at 189.
144 See id. at 196-97 (plurality opinion) (approving statutory scheme that narrowed class of murderers subject to death penalty by requiring a bifurcated proceeding, finding of at least one statutory aggravating factor, consideration of other aggravating and mitigating circumstances, and automatic appeal to Georgia Supreme Court); Proffitt v. Florida, 428 U.S. 242, 252, 259-60 (1976) (approving statutory scheme that required advisory jury and judge to weigh eight aggravating factors against seven mitigating factors to determine whether death sentence is warranted based on the particular circumstances of the offense and particular characteristics of the offender, and providing for automatic appeal to Supreme Court of Florida); Jurek v. Texas, 428 U.S. 262, 276 (1976) (approving statutory scheme that narrowed its definition of capital murder, requiring jury to consider five categories of aggravating circumstances, permitting consideration of mitigating circumstances, focusing on the particular circumstances of the individual offense and individual offender, and providing for prompt appeal).
145 Gregg, 428 U.S. at 195.
146 Roberts, 428 U.S. at 331-36 (holding that Louisiana death penalty statute that mandated death sentence for certain crimes violated Eighth Amendment); Woodson, 428 U.S. at 292-305 (holding that North Carolina death penalty statute that mandated death sentence for all first degree murders violated Eighth Amendment).
147 Woodson, 428 U.S. at 292-93.
148 Id. at 293.
provided no standards to guide jurors in deciding whether a case was first-degree murder, and therefore subject to the death penalty, or not.\textsuperscript{149}

The upshot of the \textit{Gregg} opinions for death penalty jurisprudence was to entrench the Court in an ongoing regulatory role unlike any it would ever take on in the noncapital context.\textsuperscript{150} And so began the “death is different”\textsuperscript{151} era.

One year after \textit{Gregg}, the Court again considered the Georgia death penalty statute. In \textit{Coker v. Georgia},\textsuperscript{152} the Court struck down the death penalty as a disproportionate sentence for the rape of an adult woman.\textsuperscript{153} With its consideration of the Eighth Amendment question, the four-person plurality established the general contours of the analytical framework the Court has used in every case since \textit{Coker} to determine whether the death penalty is an excessive punishment under the Eighth Amendment.\textsuperscript{154}

The \textit{Coker} plurality first stressed that the determination whether a punishment is excessive “should be informed by objective factors to the maximum possible extent.”\textsuperscript{155} As in \textit{Gregg}, the Court considered two objective factors. It looked first to what the states had legislated.\textsuperscript{156} There, the Court concluded that never in the preceding fifty years had a majority of states authorized the death penalty for rape, and, at the time of the \textit{Coker} decision, only the State of Georgia had made rape of an adult

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  \item \textsuperscript{149} \textit{Id.} at 301-304 (invalidating statutory scheme that provided no guided discretion in mandatory sentencing and no consideration of particular circumstances of the offense or the offender, which are essential to “evolving standards of decency”); \textit{Roberts}, 428 U.S. at 335 (invalidating statutory scheme that required instructions on second degree murder and manslaughter even if no evidence supported the charges because it created standardless jury decisions).
  \item \textsuperscript{150} \textit{See Steiker & Steiker, Sober Second Thoughts, supra note}, at 363.
  \item \textsuperscript{151} \textit{Furman}, 408 U.S. at 286-91 (Brennan, J., concurring) (arguing that death differs from other punishments not merely in degree but in kind, and that because of its severity and finality, it was always cruel and unusual).
  \item \textsuperscript{152} 433 U.S. 584 (1977) (plurality opinion). The plurality was comprised of four Justices, with Justices Brennan and Marshall again separately concurring.
  \item \textsuperscript{153} \textit{Id.} at 584.
  \item \textsuperscript{154} \textit{See Steiker & Steiker, Opening a Window, supra note}, at 178.
  \item \textsuperscript{155} 433 U.S. at 592.
  \item \textsuperscript{156} \textit{Id.} at 595.
\end{itemize}
woman a capital offense. The Court also extended its consideration for the first time to international law and opinion, here, as a component of its legislative analysis, when it considered it “not irrelevant” that only three of sixty nations surveyed in 1965 retained the death penalty for rape. The second objective factor the Court examined was jury decisions. There too, the Court found little support for imposing the death penalty for rape, Georgia juries having rendered that sentence only six times since Furman, a number which accounted for only ten percent of all rape sentences during those five years.

The Court then turned from consideration of objective indicia of consensus against the death penalty to the second part of its analysis: the exercise of its own independent judgment, “for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.” Bringing that judgment to bear on the acceptability of the death penalty for rape, the Coker plurality acknowledged the seriousness of rape: “It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity of the female victim . . . Short of homicide, it is the ‘ultimate violation of self.’” But when compared to murder, which ends a life, the Court regarded rape, which does not, as less deserving of

157 Id. Before Furman invalidated the death penalty nationwide in 1972, sixteen states made the rape of an adult woman a capital offense, but by 1977, Georgia’s statute was the sole remnant of that capital sentencing history. Id. at 593. At the time, two other states, Florida and Mississippi, authorized the death penalty for the rape of a child by an adult. Id. at 595.
158 In later cases, the Court has considered the international community in bringing its own judgment to bear on the constitutionality of the death penalty, rather than as a part of its legislative review. See, e.g., Roper v. Simmons, 543 U.S. 551, 577-78 (2005); Thompson v. Oklahoma, 487 U.S. 815, 830 (1988). Of all the factors that comprise the Court’s searching review of death penalty cases, the views of the international community is the one most criticized by dissenting Justices. See, e.g., Roper v. Simmons, 543 U.S. 551, 622-28 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.); Atkins v. Virginia, 536 U.S. 304, 324-25 (Rehnquist, C.J., dissenting, joined by Scalia and Thomas, J.J.); Thompson v. Oklahoma, 487 U.S. 815, 869 (Scalia, J., dissenting, joined by White, J.)
159 433 U.S. at 596 n.10 (citing UNITED NATIONS, DEP’T OF ECON. & SOC. AFF., CAPITAL PUNISHMENT 40, 86 (1968)).
160 Id. at 596.
161 Id.
162 Id. at 597.
163 Id.
the ultimate punishment. By declaring the death penalty off limits for a particular offense – rape – the *Coker* Court launched what would become, over the years, a series of categorical rulings that, using the analysis endorsed by *Coker*, set and re-set the boundaries of the death penalty in America.

In the first of those cases, the Court faced the question whether "death is a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life." In that case, *Enmund v. Florida*, Justice White, who had written the *Coker* plurality opinion, wrote for the majority, applying the *Coker* methodology to invalidate the death penalty for a getaway driver who was convicted of felony murder but who neither attempted nor intended to kill nor participated in the killing. The Court’s analysis expanded on *Coker* in two respects: first, by considering the number of actual executions of non-triggermen since 1955 (none),

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164 *Id.* at 598.
165 *Id.* ("Life is over for the victim of the murderer; for the rape victim, life may not be nearly as happy as it was, but it is not over and normally is not beyond repair").
167 *Id.* at 782.
168 *Id.* at 789-801. The Court again tallied the number of jurisdictions that authorized the death penalty in those circumstances – eight, *id.* at 792, and the number of such defendants whom juries had sentenced to death in the ten years post-*Furman* – just three. *Id.* at 794. Noting that “it is for us ultimately to judge,” *id.* at 797, the Court then exercised its independent judgment. As in *Coker*, the defendant had not taken a life and so did not deserve the ultimate punishment. *Id.* The Court’s analysis concluded with its rejection of the “two principal social purposes” of capital punishment – retribution and deterrence. *Id.* at 798 (citing *Gregg*, 428 U.S. at 183). Both failed as legitimate social purposes. *Id.* at 798-801.
169 *Id.* at 801. *Enmund*'s holding lasted only five years. In *Tison v. Arizona*, 481 U.S. 137 (1987), the Court reaffirmed the *Coker* methodology but held that, because the legislative landscape and number of jury verdicts against defendants for felony murder had changed dramatically since *Enmund*, allowing the death penalty without a showing of intent was no longer excessive under the Eighth Amendment. *Id.* at 154. Thus, the Court brought its own judgment to bear and concluded that a participant in a felony murder who did not intend to kill but who evinced a “reckless indifference to human life” could receive the death penalty without offending the Constitution. *Id.* at 158.
170 458 U.S. at 794.
and second, by requiring individualized consideration of the capital offender’s character and record.\textsuperscript{171} Here, the State had treated Enmund the same as his co-defendants who had killed, and that, the Court said, was “impermissible under the Eighth Amendment.”\textsuperscript{172}

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

William Wayne Thompson was fifteen years old when he “actively participated” with three older persons in a brutal murder.\textsuperscript{176} Like his adult co-defendants, Thompson was sentenced to death.\textsuperscript{177} In a now familiar litany, the Court previewed its analysis: “we first review relevant legislative enactments, then refer to jury determinations, and finally explain why these indicators of contemporary standards of decency confirm our judgment that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty.”\textsuperscript{178} To reach that conclusion, the Court also considered new categories of information – various statutes relating to the treatment of those under

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\item \textsuperscript{171} \textit{Id.} at 798 (citing Lockett v. Ohio, 438 U.S. 586, 605 (1978)). \textit{See also} Eddings v. Oklahoma, 455 U.S. 104 (1982) (reversing and remanding for consideration of all mitigating factors, in addition to Eddings’s youth (he was sixteen years old), his turbulent and often violent family life, his emotional disturbance, and his mental and emotional developmental problems).
\item \textsuperscript{172} \textit{Id.}
\item \textsuperscript{173} 487 U.S. 815 (1988).
\item \textsuperscript{174} 492 U.S. 302 (1989).
\item \textsuperscript{175} 492 U.S. 361 (1989).
\item \textsuperscript{176} 487 U.S. at 819.
\item \textsuperscript{177} \textit{Id.}
\item \textsuperscript{178} \textit{Id.} at 822-23. The states’ death penalty statutes, for the most part, did not establish a minimum age for imposition of the death penalty, \textit{id.} at 826, but all eighteen states that expressly established a minimum age required the defendant to be at least sixteen. \textit{Id.} at 828. During the period 1982 through 1986, only five defendants who received the death penalty, including Thompson, were younger than sixteen at the time of the offense, compared with 1388 who were sixteen or older. \textit{Id.} at 832-33. Based on all of the factors it considered, the Court concluded that the imposition of the death penalty on one so young did not serve either of the social purposes of the death penalty - neither retribution nor deterrence. \textit{Id.} at 836-38.
\end{itemize}
sixteen years of age as minors,\textsuperscript{179} the views of respected professional organizations,\textsuperscript{180} and well-established developmental differences between juveniles and adults that make juveniles less culpable.\textsuperscript{181} Based on that analysis, the Court established a categorical bar against imposition of the death penalty on a person under the age of sixteen.\textsuperscript{182}

The following year, the Court continued to allow the death penalty to thrive when it rejected, on the same day, two categorical challenges. In \textit{Penry v. Lynaugh},\textsuperscript{183} the Court found no national consensus against the execution of mentally retarded persons\textsuperscript{184} and, in \textit{Stanford v. Kentucky},\textsuperscript{185} reached the same conclusion regarding juveniles ages sixteen and seventeen at the time of their offenses.\textsuperscript{186} In neither case did state statutes or jury sentencing decisions persuade the Court to prohibit the death penalty for the specific category of offenders.\textsuperscript{187} While admonishing the states to provide for consideration of all mitigating evidence in each individualized sentencing decision,\textsuperscript{188} the Court was not prepared to go further. The \textit{Stanford} plurality even went so far as to reject the principle that the Court should bring its own judgment to bear in deciding the acceptability of the juvenile death penalty.\textsuperscript{189}

By 2002, however, the Court was ready to reconsider the question whether execution of a mentally retarded person offends the Eighth Amendment. In \textit{Atkins v. Virginia},\textsuperscript{190} the Court found the

\textsuperscript{179} Id. at 824.
\textsuperscript{180} Id. at 830.
\textsuperscript{181} Id. at 833-35.
\textsuperscript{182} Id. at 838. The Court declined the entreaties of Thompson’s counsel and various \textit{amici curiae} for the Court to “‘draw a line’” protecting anyone under the age of eighteen from the death penalty, restricting itself to “the case before us.” \textit{Id.}
\textsuperscript{183} 492 U.S. 302 (1989).
\textsuperscript{184} Id. at 334 (only two state statutes prohibited execution of the mentally retarded).
\textsuperscript{185} 492 U.S. 361 (1989).
\textsuperscript{186} Id. at 370-71 (only twelve states declined to impose the death penalty on seventeen-year olds; fifteen states declined to impose it on sixteen-year olds).
\textsuperscript{187} \textit{Penry}, 492 U.S. at 334-35; \textit{Stanford}, 492 U.S. at 370-74.
\textsuperscript{188} \textit{Penry}, 492 U.S. at 340; \textit{Stanford}, 492 U.S. at 375.
\textsuperscript{189} 492 U.S. at 377-78 (opinion of Scalia, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.).
\textsuperscript{190} 536 U.S. 304 (2002).
national consensus against such executions that it had found wanting in *Penry*. Writing for the Court, Justice Stevens began with a simple acknowledgement: “Much has changed since then.” And indeed, much had changed in the Court’s expanding endorsement of considerations relevant to the question whether a national consensus existed.

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

Every state legislature that had acted since *Penry* had enacted a prohibition against the execution of the mentally retarded, and the federal government had done the same when it expanded the federal death penalty law in 1994. Moreover, even in states with no prohibition against execution of the mentally retarded, only five had executed such offenders since *Penry*. The Court then cited, again for the first time, additional support for the prohibition from organizations with expertise in mental retardation, diverse religious communities, the world community, and polling data showing widespread consensus among Americans that executing the mentally retarded is wrong. While by no means dispositive, the consistency of those data with the legislative history, the Court said, “lends further support to our conclusion that there is a consensus

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191 *Id.* at 316 (finding that nearly twenty states had exempted the mentally retarded from the death penalty since *Penry* and that, even in states permitting such executions, the practice was “uncommon,” with only five offenders having IQs under 70 having been executed during the same time).
192 *Id.* at 314.
193 *Id.*
194 *Id.* at 315.
195 *Id.* at 314-15.
196 *Id.* at 314 n.10 (citing Federal Death Penalty Act of 1994, 18 U.S.C. § 3596(c)).
197 *Id.* at 316.
198 *Id.* at 316 n.21.
among those who have addressed the issue.”199

Moving on from its demonstration of a consensus against executing the mentally retarded, the Court next elaborated “two reasons consistent with the legislative consensus that the mentally retarded should be categorically excluded from execution.”200 The first is that “a serious question” exists whether either retribution or deterrence, the justifications the Court has recognized for the death penalty, apply to the mentally retarded because of their diminished culpability and diminished ability to control their behavior.201 The second is that the reduced capacity of mentally retarded persons makes them more likely, for example, to make false confessions or to be bad witnesses, and less likely to provide meaningful assistance to their counsel.202 Thus, they face “a special risk of wrongful execution.”203 Finally, bringing its independent judgment to bear, the Court found no reason to disagree with all the state legislatures that had acted in recent years204 and so concluded that execution of the mentally retarded was “excessive” and therefore unconstitutional.205

The Court did not hand down a similar ruling for juveniles on the day it decided Atkins, as it had with Stanford and Penry thirteen years earlier. However, within three years, the Court had returned to that question, with Roper v. Simmons,206 and there it followed Atkins’s lead. First, the Court found evidence of a national consensus against the juvenile death penalty similar to that in Atkins.207 Here,

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199 Id.
200 Id. at 318.
201 Id. at 319-20.
202 Id. at 320-21.
203 Id. at 321.
204 Id.
205 Id.
207 Id. at 564-65 (eighteen states explicitly excluded juveniles from the death penalty, and twelve more rejected the death penalty for anyone; even in the remaining states, executing juveniles was rare).
too, it was the “consistency of the direction of change” that was significant.\textsuperscript{208} Next, the Court, in exercising its independent judgment, considered at length whether juveniles fall within the “narrow category of crimes and offenders” for which the death penalty is reserved.\textsuperscript{209} Because of the three general differences between juveniles and adults\textsuperscript{210} discussed above in connection with Graham, the Court concluded that juveniles did not fall within that “narrow category.”\textsuperscript{211} For those same reasons, neither retribution nor deterrence was a sufficient penological justification for the continued existence of the juvenile death penalty.\textsuperscript{212} The Court also expressly denounced the Stanford plurality’s rejection of the constitutional requirement that the Court bring “its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders.”\textsuperscript{213}

Finally, the Court considered “the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”\textsuperscript{214} While not controlling, the opinions of the world community “provide respected and significant confirmation for our own conclusions,”\textsuperscript{215} and considering the “affirmation of certain fundamental rights by other nations,” the Court said, “underscores the centrality of those same rights within our own heritage of freedom.”\textsuperscript{216} And so the United States joined the rest of the world in repudiating the execution of juveniles.

\textsuperscript{208} Id. at 566 (the number of states that abandoned the juvenile death penalty after Stanford was smaller than those abandoning execution of the mentally retarded, but more states had always prohibited execution of juveniles).
\textsuperscript{209} Id. at 568-69.
\textsuperscript{210} Id. at 569-70 (“These differences render suspect any conclusion that a juvenile falls among the worst offenders.”).
\textsuperscript{211} Id. at 569-70.
\textsuperscript{212} Id. at 571-72.
\textsuperscript{213} Id. at 574 (“[I]t suffices to note that this rejection was inconsistent with prior Eighth Amendment decisions.”).
\textsuperscript{214} Id. at 575.
\textsuperscript{215} Id. at 578.
\textsuperscript{216} Id. at 578.
The final case in this catalog of the Court’s death penalty jurisprudence is *Kennedy v. Louisiana*, a categorical ruling in which the Court held that the Eighth Amendment prohibits the death penalty for the rape of a child. Making the expected comparisons to *Coker* and its other decisions placing certain offenses out of the reach of the death penalty, the Court began, as it has become accustomed to doing, with an examination of the relevant state statutes. The Court noted that Louisiana had reintroduced the death penalty for the rape of a child in 1995, and that five other states had done the same. Here, the Court confronted arguments from the State of Louisiana that the newly enacted statutes, taken together with those that had been proposed but were not yet enacted, “reflect a consistent direction of change in support of the death penalty for child rape.” The Court easily dispensed with the argument, finding “no showing of consistent change” and no showing as significant as that in *Atkins* or *Roper.*

Bringing its own judgment to bear, the Court acknowledged “the years of long anguish that must be endured by a victim of child rape.” In the end, however, the Court concluded, “the death penalty should not be expanded to instances where the victim’s life was not taken.” Considering the social justifications for the death penalty, retribution “does not justify the harshness of the death penalty

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218 Id. at ___, 128 S.Ct. at 2664.
219 Id. at ___, 128 S.Ct. at 2651.
220 Id. at ___, 128 U.S. at 2651.
221 Id. at ___, 128 S.Ct. at 2651-52 (naming the states and the years when they reintroduced the death penalty for rape of a child: Georgia, in 1999; Montana, in 1997; Oklahoma, in 2006; South Carolina, in 2006; and Texas, in 2007). The Court was required to dispel any notion that *Coker* had already made capital punishment for child rape unconstitutional so that “the small number of States that have enacted this penalty, then, is relevant to determining whether there is a consensus against capital punishment for this crime.” Id. at ___, 128 S.Ct. at 2656.
222 Id. at ___, 128 S.Ct. at 2656.
223 Id. at ___, 128 S.Ct. at 2656.
224 Id. at ___, 128 S.Ct. at 2656 (identifying six states, compared with eighteen states in *Atkins*).
225 Id. at ___, 128 S.Ct. at 2657 (cataloging five new states, plus twelve that already prohibited the death penalty for anyone under eighteen and fifteen that prohibited it for anyone under seventeen).
226 Id. at ___, 128 S.Ct. at 2658.
227 Id. at ___, 128 S.Ct. at 2659.
here," and because the death penalty “adds to the risk of non-reporting” of incidents of child rape, any deterrent effect it may have is diminished and cannot, therefore, support its use.\textsuperscript{228} Taken together, all of these considerations demonstrated the serious consequences of making child rape a capital offense and led the Court to conclude that “the death penalty is not a proportional punishment for the rape of a child.”\textsuperscript{230}

These cases show that what began with \textit{Gregg} and was firmly established by \textit{Coker} continues to guide the Court in its scrutiny of categorical death penalty challenges. Over the years, the Court has continued, first, to look to the objective indicia of a national consensus against the use of the death penalty in the cases before the Court, and second, having found that consensus, to bring the Court’s independent judgment to bear on whether the death penalty is excessive in those instances. But the contours of the Court’s analytical framework have been far from static, and, to borrow the Court’s own language, “the consistency of the direction of the change” has been marked.

In a number of its death penalty decisions, the Court has granted legitimacy to an ever-expanding array of factors that can lead to the conclusion that a national consensus exists or that can assist the Court in exercising its independent judgment about the constitutionality of the death penalty in certain cases. For example, \textit{Enmund} was a case that needed no additional data to support the Court’s finding of a national consensus against allowing the death penalty for a getaway driver, but the Court considered, in addition to the states’ legislative enactments and jury determinations, the number of executions of persons like Enmund that had occurred since 1955, which was none.\textsuperscript{231} The \textit{Enmund} Court also expanded on the \textit{Coker} analysis by requiring individualized consideration of a capital case.

\begin{itemize}
\item \textsuperscript{228} \textit{Id.} at ___, 128 S.Ct. at 2662.
\item \textsuperscript{229} \textit{Id.} at ___, 128 S.Ct. at 2663.
\item \textsuperscript{230} \textit{Id.} at ___, 128 S.Ct. at 2664.
\item \textsuperscript{231} 458 U.S. at 794.
\end{itemize}
offender’s character and record.\textsuperscript{232} In Thompson, the Court considered a wide range of laws that legally disable minors\textsuperscript{233} and for the first time acknowledged the views of respected professional organizations and other nations.\textsuperscript{234}

But it was with Atkins that the Court’s expansive analytical framework flourished. First, because no clear majority of states prohibited the execution of the mentally retarded, the Court looked, not to the mere number of statutes enacted, but to the “direction of the change.”\textsuperscript{235} Roper applied the same reasoning three years later in invalidating the death penalty for juvenile offenders.\textsuperscript{236} Second, the Atkins Court cited support for abolition of the death penalty for the mentally retarded from a variety of groups not seen in Supreme Court decisions before, including organizations for the mentally retarded, religious groups, and even American polling data showing widespread consensus against execution of the mentally retarded.\textsuperscript{237} On this measure, too, Roper found a foothold with the Court’s reliance on the work of developmental psychologists and adolescent psychiatric groups and the opinions of members of the international community.\textsuperscript{238}

In the end, we are left today with a death penalty jurisprudence that is both broad and deep. It is a body of law about which the Court has displayed an openness to change, at times acting in keeping with societal changes, and at other times, going against the current of popular opinion. With the death penalty, the Court has not shied away from staking out a course unpopular with the majority if it means protecting the rights of an accused who is less able, by lack of maturity or mental acuity, to do so himself. All of this, of course, is in the name of the Eighth Amendment. But, as the following section shows, when that same Amendment is invoked by one serving a noncapital sentence, even an

\textsuperscript{232} Id. at 798 (citing Lockett v. Ohio, 438 U.S. 586, 605 (1978)).
\textsuperscript{233} 487 U.S. at 824.
\textsuperscript{234} Id. at 830.
\textsuperscript{235} 536 U.S. at 315.
\textsuperscript{236} 543 U.S. at 566.
\textsuperscript{237} 536 U.S. at 316 n.21.
\textsuperscript{238} 543 U.S. at 569-78.
exceedingly long sentence for a seemingly minor offense, it is as if two separate Constitutional provisions existed. That such a separate and distinct analytical framework exists for noncapital cases is beyond dispute. The exposition that follows makes no attempt to answer the question why such separate lines of jurisprudence have evolved, when only one Eighth Amendment governs all punishments, but only seeks to show what the Court has done to those who would challenge their noncapital sentences.

B. The Failed Promise of Noncapital Proportionality Review

Anyone writing about Eighth Amendment jurisprudence, capital and noncapital sentencing alike, generally begins with *Weems v. United States*, the 1910 decision in which the Court held that being sentenced to twelve years of “hard and painful labor” in chains for the crime of falsifying a public document violated the Eighth Amendment prohibition against cruel and unusual punishment. Even as early as *Weems*, the Court recognized two categories of punishment that would offend the Eighth Amendment: “something inhumane and barbarous – torture and the like” – such as the punishment in *Weems* – and a term of years “so disproportionate as to constitute a cruel and unusual punishment.” Thus, disproportionality in sentencing is a vice of long standing – a full century, to be precise, and after *Weems*, the future held promise for those challenging their lengthy prison terms.

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240 217 U.S. 349 (1910).

241 *Id.* at 364.

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

243 *Id.* at 381-82.

244 *Id.* at 368.

245 *Id.* at 368.
The next significant Eighth Amendment case, nearly fifty years later, like *Weems*, offered hope for those suffering excessive punishments. In *Trop v. Dulles*, the Court spoke for the first time of “the evolving standards of decency that mark the progress of a maturing society,” the yardstick by which the Eighth Amendment measures all criminal punishments. The Court found no difficulty in ruling that the loss of citizenship faced by Private Trop after his conviction of a one-day stint of desertion from his Army post in French Morocco was constitutionally excessive. In its analysis, the Court warned of the perverse effect the continued existence of the death penalty may have on other punishments when it said, “the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.” Thus, even though wartime deserters faced the death penalty, denationalization for a non-wartime deserter was unconstitutionally cruel and unusual: “It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.” Moreover, the Court found support for its conclusion in the fact that only two other nations in the world – Turkey and the Philippines – permitted denationalization as a punishment for desertion. By considering international law, the Court set itself apart from later noncapital proportionality precedents. By recognizing the potential for abuse in noncapital sentencing caused by the continued existence of the death penalty, the Court exhibited remarkable prescience.

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247 Id. at 101.
248 Id. at 88. Private Trop had escaped from a stockade, where he was being disciplined, but the next day was walking with a companion back toward the army base when an Army truck drove by. Trop willingly got into the truck and went back to the base, where he was later court-martialed for desertion and given a dishonorable discharge. Id.
249 Id. at 99.
250 Id. at 101.
251 Id. at 103.
Four years later, the Court again overturned an imprisonment as cruel and unusual punishment, even though the sentence in *Robinson v. California*\(^{252}\) was just 90 days in a county jail.\(^{253}\) In so doing, the Court for the first time made the Eighth Amendment prohibition against cruel and unusual punishments applicable to the states through the Fourteenth Amendment.\(^{254}\) Robinson had been convicted under a California statute that criminalized the status of narcotic addiction.\(^{255}\) The Court compared narcotic addiction to mental illness, leprosy, and venereal disease, none of which any state would attempt in modern times to criminalize because it “would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”\(^{256}\) Narcotic addiction was no different, the Court held, even though “imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual.”\(^{257}\) Emphasizing that the question before the Court could not be considered in the abstract, the Court concluded, “[e]ven one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”\(^{258}\)

*Robinson* is significant, therefore, in two respects: first, for its explicit recognition that very short sentences can run afoul of the Cruel and Unusual Punishments Clause if they are imposed for the wrong reasons; and second, for its implicit recognition of the Eighth Amendment’s doctrinal grounding in the dignity of every human being. The future of noncapital proportionality review looked bright.

By 1980, the promise of *Trop* and *Robinson* had dimmed substantially, as the Court’s noncapital proportionality doctrine narrowed the range of relevant considerations. In *Rummel v. Estelle*,\(^{259}\) the

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\(^{252}\) 370 U.S. 660 (1962).

\(^{253}\) *Id.* at 667.

\(^{254}\) *Id.* at 667 (holding that “a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.”).

\(^{255}\) *Id.* at 661 n.1 (“No person shall use, or be under the influence of, or be addicted to the use of narcotics”).

\(^{256}\) *Id.* at 666.

\(^{257}\) *Id.* at 667.

\(^{258}\) *Id.* at 667.

\(^{259}\) 445 U.S. 263 (1980).
Court upheld a mandatory life sentence under a felony recidivist statute following the defendant’s conviction of obtaining $120.75 by false pretenses.\footnote{Id. at 266, 285.} On the way to its conclusion, the Court staked out a territory separate and apart from its recent death penalty decisions: “Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel.”\footnote{Id. at 272.} The Court held out no hope for anyone who might challenge as excessive any sentence, even a life sentence: “one could argue without contradiction by any decision of this Court that . . . the length of sentence actually imposed is purely a matter of legislative prerogative.”\footnote{Id. at 274.} Only the most outrageous example – mandatory life imprisonment for overtime parking, as suggested by dissenting Justices Powell, Brennan, Marshall, and Stevens\footnote{Id. at 288 (Powell, J., dissenting, joined by Brennan, Marshall, and Stevens, JJ.) (“A statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice.”).} – could evoke the Court’s acknowledgement that “a proportionality principle would . . . come into play.”\footnote{Id. at 274 n.11.} The future of proportionality challenges in noncapital cases looked dire indeed after Rummel.

Two years later, the Court summarily reversed the lower court’s grant of habeas corpus relief in \textit{Hutto v. Davis}.\footnote{454 U.S. 370 (1982).} Forty years in prison and a fine of $20,000 was the sentence Davis received for possession and distribution of approximately nine ounces of marijuana.\footnote{Id. at 370-71.} Holding that the Fourth Circuit Court of Appeals “failed to heed our decision in \textit{Rummel},” the Court reinstated Davis’s sentence.\footnote{Id. at 372.} To be sure, the Court could have distinguished Davis’s crimes from those committed by Rummel, as Davis was not sentenced under a habitual offender statute, as was Rummel. But the Court
did not draw on that, or any other, distinction and simply extended *Rummel* to *Davis*.\(^{268}\) Justice Brennan wrote a piercing dissent, concluding, “I can only believe that the Court perceives this case as one in which the narrow *Rummel* ruling concerning recidivist statutes can be extended to new terrain without the necessary exertion of argument and briefing. Unfortunately, it is Roger Trenton Davis who must now suffer the pains of the Court’s insensitivity, and serve out the balance of a 40-year sentence viewed as cruel and unusual by at least six judges below. I dissent from this patent abuse of our judicial power.”\(^{269}\)

But the next year, in *Solem v. Helm*,\(^ {270}\) the *Rummel* dissenters gained one Justice to become the majority\(^ {271}\) and, in a rejection of *Rummel*’s reasoning,\(^ {272}\) struck down a habitual offender sentence\(^ {273}\) of life without parole\(^ {274}\) for the crime of uttering a “no account” check for $100,\(^ {275}\) Helm’s seventh non-violent offense.\(^ {276}\) The Court dismissed the state’s argument that the Eighth Amendment proportionality principle does not apply to felony prison sentences: “The constitutional language itself suggests no exception for imprisonment. . . . It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not.”\(^ {277}\) The Court then set out, for the first time in the noncapital sentencing context, three factors to guide courts in reviewing sentences for compliance with

\(^{268}\) *Id.* at 375.
\(^{269}\) *Id.* at 388 (Brennan, J., dissenting, joined by Marshall and Stevens, JJ.).
\(^{271}\) Justice Blackmun was in the majority in *Rummel*, but not among the dissenters in *Helm*. See 463 U.S. at 303.
\(^{272}\) *Id.* at 303 n.32 (because the *Rummel* Court offered no standards for deciding Eighth Amendment challenges, its ruling must be read as “controlling only in a similar factual situation”).
\(^{273}\) *Id.* at 296-97.
\(^{274}\) *Id.* at 303.
\(^{275}\) *Id.* at 281-82.
\(^{276}\) *Id.* at 279-80 (noting that “alcohol was a contributing factor in each case”).
\(^{277}\) *Id.* at 288-89 (“There is also no historical support for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms.”).
the Eighth Amendment.²⁷⁸ Those factors, the Court said (not unlike those considered in reviewing death penalty cases) must be “objective.”²⁷⁹ The first of the three is “the gravity of the offense and the harshness of the penalty.”²⁸⁰ Second, the Court said, “it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction.”²⁸¹ Third, “courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions.”²⁸²

Applying those factors to Helm’s life without parole sentence, the Court first found Helm’s latest crime to be “‘one of the most passive felonies a person can commit.’”²⁸³ The Court also found all of his prior crimes minor and nonviolent²⁸⁴ and the sentence of life without parole far more severe than Rummel’s life sentence (with parole) and the most severe punishment authorized by the State of South Dakota.²⁸⁵ Proceeding to the second and third factors, the Court noted only a handful of crimes, including murder, treason, first-degree arson, and kidnapping, for which the penalty was authorized, and a large group of serious crimes, including aggravated assault and a third offense of heroin dealing, for which it was not authorized.²⁸⁶ Moreover, it appeared that no habitual offender other than Helm had ever been given the maximum sentence in South Dakota.²⁸⁷ The fact that Helm had been treated similarly to, or more severely than, more serious criminals, taken together with the fact that Helm could

²⁷⁸ Id. at 290-92.
²⁷⁹ Id. at 290.
²⁸⁰ Id. at 290-91(citing Enmund, 458 U.S. at 798; Coker, 433 U.S. at 597-98; Robinson, 370 U.S. at 666-67; Weems, 217 U.S. at 366-67).
²⁸¹ Id. at 291 (citing Enmund, 458 U.S. at 794-95; Weems, 217 U.S. at 380-81).
²⁸² Id. (citing Enmund, 458 U.S. at 794-95; Coker, 433 U.S. at 593-97; Weems, 217 U.S. at 380).
²⁸³ Id. at 296 (citing State v. Helm, 287 N.W.2d 497, 501 (S.D. 1980)).
²⁸⁴ Id. at 296-97. The dissent rejected the majority’s characterization of Helm’s prior crimes as “nonviolent,” calling that characterization a “fiction” and asserting that “[b]y comparison Rummel was a relatively ‘model citizen.’” Id. at 304 (Burger, C.J., dissenting, joined by White, Rehnquist, and O’Connor, JJ.).
²⁸⁵ Id. at 297.
²⁸⁶ Id. at 298-99.
²⁸⁷ Id. at 299.
have received life without parole in only one other state, Nevada.\textsuperscript{288} led the Court to conclude that Helm’s sentence was so disproportionate as to violate the Eighth Amendment.\textsuperscript{289}

What is notable about the Solem Court’s explanation of each of the factors to be considered in the objective review of noncapital sentences is that the Court made no distinction between capital and noncapital cases, citing to both as support for each factor.\textsuperscript{290} What the Court did not explain, however, is why it adopted a test different from and narrower than the test already established by earlier death penalty precedents.\textsuperscript{291} That departure remains a mystery, and a perhaps costly one for those serving long sentences. The Solem Court could not have known that it would be the last to grant relief in a noncapital case for the remainder of the twentieth century and the first decade of the twenty-first century.\textsuperscript{292}

By setting noncapital cases apart from capital cases for purposes of Eighth Amendment proportionality review, the Court, perhaps unwittingly, opened a door that would be slammed shut by Harmelin v. Michigan\textsuperscript{293} a mere eight years later, when a reconstituted Court struck back.

Harmelin produced no majority opinion on the question of the proportionality of a mandatory life without parole sentence for possession of a large amount of cocaine.\textsuperscript{294} The statute was unique to

\begin{footnotes}
\item[288] Id. at 299 (citing Nev. Rev. Stat. § 207.010(2) (1981) (noting that no one with crimes comparable to Helm’s had actually received life without parole in Nevada)).
\item[289] Id. at 303.
\item[290] See notes _____ through _____ [279-81].
\item[291] See notes _____ through _____ and accompanying text [Gregg, Coker, Enmund].
\item[292] The one noncapital sentencing decision in which the Supreme Court has found a sentence of life without parole disproportionate was Graham v. Florida, 560 U.S. ___, 130 S.Ct. 2011 (2010), and that decision relied on death penalty proportionality analysis, not the Solem v. Helm three-factor test. See notes _____ through _____ and accompanying text.
\item[294] Id. at 962. A majority of the Court ruled only that the Eighth Amendment does not require an individualized sentencing decision for any sentence other than the death penalty and that, therefore, the mandatory nature of Harmelin’s sentence of life without parole was not constitutionally infirm. Id. at 994-95 (opinion of Scalia, J., joined by Rehnquist, C.J.). See also id. at 996 (Kennedy, J., concurring, joined by O’Connor and Souter, JJ.) (concurring only with Justice Scalia’s rejection of Harmelin’s challenge to the mandatory nature of his sentencing).
\end{footnotes}
Michigan,295 but the Court did not even reach that consideration. One of the Court’s five opinions, authored by Justice Scalia and joined by Chief Justice Rehnquist, explicitly rejected the Solem three-part-test296 and pronounced that “the Eighth Amendment has no proportionality guarantee.”297 A second, concurring opinion, authored by Justice Kennedy and joined by Justices O’Connor and Souter, concluded that, to get to the intrastate and interstate comparisons contemplated by Solem, the Court first had to make the threshold determination that the sentence was “grossly disproportionate” to the crime.298 To those Justices, Harmelin’s sentence of life without parole did not rise to the level of “gross disproportionality,”299 and so no comparative analysis was necessary.300

The Kennedy trio did not stop there, however. Instead, they announced a further narrowing of the scope of noncapital proportionality review by dictating five principles that would “give content to the uses and limits of proportionality review.”301 Those principles, Justice Kennedy said, are: first, the fixing of prison terms is within the purview of legislatures, not courts;302 second, the Eighth Amendment does not require the states to adopt any particular penological theory;303 third, marked differences in sentencing theories and the length of prison terms are the inevitable consequence of a federal system;304 fourth, proportionality review should be informed by objective factors wherever possible;305 and fifth, the Eighth Amendment does not mandate strict proportionality between crimes

295 Id. at 1026 (White, J., dissenting). Even the Federal Sentencing Guidelines, not known for their leniency, would carry a sentence of no more than ten years. Id. (citing United States Sentencing Commission Guidelines Manual § 2D1.1 (1990)).
296 Id. at 962-63.
297 Id. at 965.
298 Id. at 1005 (Kennedy, J., concurring in part and concurring in the judgment)..
299 Id. at 1004. Justice Kennedy, applying the test to the case before the Court, reasoned: “Given the serious nature of petitioner’s crime, no comparative analysis is necessary.” Id.
300 Id. at 1004.
301 Id. at 998.
302 Id.
303 Id.
304 Id. at 999.
305 Id. at 1000.
and their sentences. Although the Kennedy specification of principles was novel in every respect and did not gain a majority, it was not lost on the other members of the Court, who transformed it into law by repeating it in a later majority decision.

The dissenters, in three separate opinions, took Justice Scalia to task for failing to explain why the words “cruel and unusual” contain a proportionality principle for some – those sentenced to death – but not for others, no matter how severe the sentence. Similarly, the White dissenters criticized Justice Kennedy for reducing Solem’s analysis from three factors to one, stating that Solem was “directly to the contrary, for there, the Court made clear that ‘no one factor will be dispositive in a given case.’” And no one factor could be dispositive, the dissenters said, because, without comparisons with other penalties and other jurisdictions, no objective assessment of the proportionality of a sentence could be made. Moreover, despite assertions to the contrary, evidence in the decisions of state courts demonstrated that the Solem analysis was working well, the dissenters said, with only a handful of courts having declared sentences unconstitutionally disproportionate. But the dissenters’ protests about the harm wrought by Harmelin would fall on deaf ears.

The next and, to date, last cases to test the Court’s noncapital proportionality doctrine are a pair of challenges to California’s “three strikes” recidivist statute. In Ewing v. California, Justice

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306 Id. at 1001.
308 501 U.S. at 1009 (White, J., dissenting, joined by Blackmun and Stevens, JJ.); id. at 1027 (Marshall, J., dissenting) (disagreeing with Justice White only in his view that the Eighth Amendment prohibits the death penalty); id. at 1028 (Stevens, J., dissenting, joined by Justice Blackmun) (adding to Justice White’s dissenting opinion the view that mandatory life without parole “shares an important characteristic with the death penalty: The offender will never regain his freedom.”).
309 Id. at 1014 (White, J., dissenting, joined by Blackmun and Stevens, JJ.).
310 Id. at 1009.
311 Id. at 1019 (citing Solem, 463 U.S. at 291 n.17).
312 Id. at 1021.
313 Id. at 1015-16 & n.2 (citing Clowers v. State, 522 So.2d 762 (Miss. 1988); Ashley v. State, 538 So.2d 1181 (Miss. 1989); State v. Gilham, 549 N.E.2d 555 (Ohio 1988); Naovarath v. State, 779 P.2d 944 (Nev. 1989)).
O’Connor wrote for a slim plurality,\(^{315}\) and in *Lockyer v. Andrade*,\(^{316}\) for a slim majority,\(^{317}\) that rejected petitioners’ Eighth Amendment claims because their sentences were not “grossly disproportionate” to their crimes.\(^{318}\)

The *Ewing* Court looked to Justice Kennedy’s five proportionality principles for guidance in applying the Eighth Amendment\(^{319}\) to Ewing’s sentence of twenty-five years to life for stealing golf clubs valued at slightly less than $1200.\(^{320}\) The Court paid substantial deference to the prerogative of the California legislature to make and implement policy decisions that would further the penological purposes of its criminal justice system.\(^{321}\) Thus, it was not merely the most recent crime the Court must consider in evaluating the constitutionality of the state’s “three strikes” law, but all of Ewing’s previous crimes: “In weighing the gravity of Ewing’s offense, we must place on the scales not only his current felony, but also his long history of felony recidivism.”\(^{322}\) The Court must do this, Justice O’Connor said, because “[a]ny other approach would fail to accord proper deference to the policy judgments that find expression in the legislature’s choice of sanctions.”\(^{323}\) In the end, the Court recognized that

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\(^{315}\) *Id.* at 11 (O’Connor, J., joined by Rehnquist, C.J., and Kennedy, J.); *see also* 538 U.S. at 31 (Scalia, J., concurring in the judgment) (rejecting noncapital proportionality principle in its entirety); 538 U.S. at 32 (Thomas, J., concurring in the judgment) (saying Eighth Amendment contains no proportionality principle). *Ewing* was a 5-4 decision, with Justices Stevens, Souter, Ginsburg, and Breyer dissenting. *See Ewing*, 538 U.S. at 32 (Stevens, J., dissenting, joined by Souter, Ginsburg, and Breyer, JJ.); *id.* at 35 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.).

\(^{316}\) 538 U.S. 63 (2003).

\(^{317}\) *Id.* at 65 (O’Connor, J., joined by Rehnquist, C.J., Scalia, Kennedy, and Thomas, JJ.). As this was a federal habeas case that required the petitioner to show that the lower court’s action was “contrary to, or an unreasonable application of” clearly established federal law, Justices Scalia and Thomas were able to join the other Justices to constitute a majority of five. *See also id.* at 77 (Souter, J., dissenting, joined by Stevens, Ginsburg, and Breyer, JJ.).

\(^{318}\) *Ewing*, 538 U.S. at 30; *Lockyer*, 538 U.S. at 77.


\(^{320}\) *Id.* at 28.

\(^{321}\) *Id.* at 24-28.

\(^{322}\) *Id.* at 29.

\(^{323}\) *Id.*
Ewing’s sentence was “a long one,” but “it reflects a rational legislative judgment, entitled to deference.”

*Lockyer v. Andrade* was to similar effect. Andrade had received a sentence of two consecutive terms of twenty-five years to life after his conviction of shoplifting videotapes valued at approximately $150. Because his was a habeas corpus action, Andrade was required to show that his sentence was contrary to, or an unreasonable application of, clearly established federal law, pursuant to 28 U.S.C. § 2254(d)(1). In deciding what constitutes clearly established federal law, the Court rejected Andrade’s argument that *Rummel, Solem,* and *Harmelin* “clearly establish” that his sentence was grossly disproportionate to his crime because the “precedents in this area have not been a model of clarity.” Through the “thicket of Eighth Amendment jurisprudence,” the Court could discern but one “clearly established” legal principle: “A gross disproportionality principle is applicable to sentences for terms of years.” Even then, the Court’s decisions lacked clarity regarding what constitutes gross disproportionality. What was clear to the Court, however, is that the gross disproportionality principle is reserved for the “extraordinary case,” and Andrade’s was not such a case.

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324 *Id.* at 30.
325 *Id.*
326 The Court reached the same conclusion as in *Ewing*, although it was required to perform a different analysis because *Lockyer* was a habeas corpus action. See 538 U.S. at 66.
327 *Andrade*, 538 U.S. at 66. Andrade admitted to taking the videotapes so that he could sell them and buy heroin, having been an addict for nearly twenty years. *Id.*
328 *Id.*
329 *Id.* at 71.
330 *Id.* at 72.
331 *Id.*
332 *Id.*
333 *Id.*
334 *Id.* at 77. “In applying this principle for § 2254(d)(1) purposes, it was not an unreasonable application of our clearly established law for the California Court of Appeal to affirm Andrade’s sentence of two consecutive terms of 25 years to life in prison.” *Id.*
Thus, to succeed on a disproportionality challenge to any sentence other than death, future petitioners must show not just that their sentences are disproportionate to their crimes, but that they are “grossly disproportionate.” What constitutes “gross disproportionality” is not clear, for the only case in which relief was granted to a noncapital petitioner, *Solem v. Helm*, preceded the Court’s wholesale rejection of its earlier precedents and its adoption of the stringent “gross disproportionality” test as the sole measure of a noncapital penalty’s Eighth Amendment viability. Although the Court has never expressly overruled *Solem*, it is for all intents and purposes a dead letter, and none of the post-*Solem* cases establishes with any clarity just what it will take for a majority of the Justices to find a sentence so extraordinary as to require striking it down as a cruel and unusual punishment.

The deeply troubling question that remains is why we have come to this – why noncapital proportionality review is withering on the vine while capital punishment review flourishes, as ever-increasing considerations hold sway with the Court. We are left to contemplate why it is that conducting a nation-wide legislative tally is a permanent fixture in death penalty cases, while no interjurisdictional comparisons are even contemplated unless the noncapital petitioner can prove that he is truly extraordinary and his sentence, grossly disproportionate to his crime. Similarly, nothing the Court has said can explain why even if the legislative tally is not dispositive in terms of raw numbers, *Solem* does not help with defining the “extraordinary” case that will prove “gross disproportionality” because *Graham* was not decided by employing those tests, but rather by analyzing juvenile life without parole for non-homicides using the analytical framework previously reserved exclusively for death penalty cases. This is not to say that every relevant consideration should not be examined when assessing the validity of the death penalty in a single case or in a category of cases. It is to say that nothing in the language of the Eighth Amendment or the Court’s precedents explains why those same concerns should not animate noncapital proportionality review.

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336 See Erwin Chemerinsky, *Is Any Sentence Cruel and Unusual Punishment?*, 39 TRIAL 78, 79 (May 2003) (“By upholding the life sentences imposed on Ewing and Andrade, the Supreme Court has made it extremely unlikely that any sentence will be deemed to constitute cruel and unusual punishment. Not one justice in the majority expressed concern, let alone outrage, that two men have been imprisoned for life for shoplifting a small amount of merchandise.”); Steiker & Steiker, *Opening a Window*, supra note ____, at 186 (stating that *Harmelin* majority “refined [] out of existence” Justice Powell’s three-part *Solem* test; the “new threshold requirement of gross disproportionality has proven an insurmountable hurdle for Eighth Amendment challenges to long prison terms.”).
337 Even *Graham* does not help with defining the “extraordinary” case that will prove “gross disproportionality” because *Graham* was not decided by employing those tests, but rather by analyzing juvenile life without parole for non-homicides using the analytical framework previously reserved exclusively for death penalty cases.
338 This is not to say that every relevant consideration should not be examined when assessing the validity of the death penalty in a single case or in a category of cases. It is to say that nothing in the language of the Eighth Amendment or the Court’s precedents explains why those same concerns should not animate noncapital proportionality review.
the Court will consider the direction of any legislative change and the actual use of the statutes at issue in assessing the proportionality of the death penalty, while none of this matters at all in challenges to long prison sentences. And if the scholarly opinions of experts in relevant fields of study, the views of the international community, and even polling numbers are all respected parts of the capital proportionality matrix, their total absence in noncapital sentencing review is difficult to fathom. Two lines of analysis emanating from the same constitutional provision could not be more different.

While it may be true beyond any reasonable dispute that “death is different,” the Eighth Amendment does not protect capital defendants alone. The problem is that the Court’s recent noncapital precedents, with the notable exception of Graham, make it appear that there can never be anything cruel and unusual about a prison term – no matter how long it is. For Justice Stevens, reaching this juncture was constitutionally unthinkable. In his short concurrence in Graham, Justice Stevens drove home the moral imperative of proportionality review for Eighth Amendment jurisprudence: “unless we are to abandon the moral commitment embodied in the Eighth Amendment, proportionality review must never become effectively obsolete.”

Thus, when Graham reached the Supreme Court, the Justices were faced with a dilemma. To follow the tattered remnants of noncapital review left by Harmelin and the “three strikes” cases would limit the Court’s review to examining Graham’s crime and sentence for “gross disproportionality.” On the other hand, to employ capital punishment analysis in reviewing Graham’s challenge to his sentence of life without parole for a non-homicide would mean crossing a divide that no other case had dared. In the end, and no doubt influenced in large part by the legal posture of Graham’s claim as a categorical one, the Court chose its robust death penalty analysis over its decidedly anemic noncapital approach.

339 See Steiker & Steiker, Opening a Window, supra note ____, at 204 (“To recognize that ‘death is different’ is also to assert that incarceration (as opposed to death) is different, too – less severe, less final, less problematic, and less worthy of attention. In light of our current crisis of mass incarceration, we need to be wary of any such implication.”).
340 560 U.S. at ___, 130 S.Ct. at 2036 (Stevens, J., concurring).
That choice was reinforced by the fact that the closest precedent was *Roper*, and it just happened to be a death penalty case. More significant than that distinction was the commonality that both cases dealt with juvenile offenders sentenced to the most extreme of adult sentences.

With *Graham*, the Court furthered an evolving “kids are different” Eighth Amendment jurisprudence that is sufficiently far-reaching to embrace all juvenile offenders serving adult sentences. This “kids are different” jurisprudence is borne of the criminalization of adolescence – the explosion in trying juveniles as adults that followed massive statutory incursions into the exclusive jurisdiction of the juvenile court in the late 1980s and 1990s. Absent that sea change in the treatment of youth who commit crimes, we would not be where we are today, as the following discussion shows.

IV. The Criminalization of Adolescence

The late 1980s and 1990s saw an unprecedented crackdown on teenagers committing violent crimes. During that decade, 45 states enacted laws that made it easier to try juveniles as adults, their fears fanned by reports, like the following, of a “blood bath of teenage violence” by juvenile “super-predators”: “On the horizon, therefore, are tens of thousands of severely morally impoverished juvenile super-predators.” The “super-predator” scare caught fire among elected representatives across the

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343 John J. Dilulio, Jr., The Coming of the Super-Predators, WKLY. STANDARD, Nov. 27, 1995, at 23 (coining the term “super-predators” to refer to “severely morally-impoverished” juvenile “street criminals” who, Dilulio claimed, were responsible for the “youth crime wave”). See also William J. Bennett, John J. Dilulio & John P. Waters, Body Count: Moral Poverty and How to Win America’s War Against Crime and Drugs 22 (1996) (“[A]s high as America’s body count is today, a rising tide of youth crime and violence is about to lift it even higher. A new generation of street criminals is upon us – the youngest, biggest, and baddest generation any society has ever known.”). But see Peter Elkind, Superpredators: The Demonization of Our Children by the Law 41-42, 66 (1999) (refuting claims of a young super-predator wave of violence).
country. The best way to achieve their public protection goal was to make certain that juveniles who committed serious crimes did serious time, so legislation favoring every mechanism for trying a juvenile as an adult mushroomed.

Public enthusiasm for treating juveniles as adults was captured in the chant, “Do the crime; do the time.” Juvenile offenders could no longer expect to receive the treatment designed for them in the juvenile courts, but increasingly faced the harshest of penalties in courts designed for, and largely populated by, adult offenders. Once in adult court, juveniles faced mandatory minimum sentences that were unheard of in the juvenile system. The fact that the “super-predator” uproar turned out to be a myth was lost on policymakers and prosecutors. In fact, violent juvenile crime had decreased

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344 OFFICE OF JUV. JUST. & DELINQ. PREVENTION, U.S. DEP’T OF JUST., STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 59-61 (July 1996), available at http://www.ncjrs.gov/pdffiles/stateresp.pdf (observing that perception that juvenile crime was on the rise led vast majority of states to change their laws during the early 1990s, resulting in a more punitive juvenile justice system and greater numbers of juveniles being tried as adults). See also MIKE A. MALES, FRAMING YOUTH: TEN MYTHS ABOUT THE NEXT GENERATION 32 (1999) (commenting on media’s mischaracterization of youth violence during the 1990s as “soaring,” when it was actually decreasing); Julian V. Roberts, Public Opinion and Youth Justice, 31 CRIME & JUST. 495, 499-503 (2004) (reporting that volume of crimes committed by juveniles was overestimated); J. Robert Flores, Foreword to HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP’T OF JUST., JUVENILE OFFENDERS AND VICTIMS: 2006 ANNUAL REPORT iii (2006), available at http://ojjdp.ncjrs.gov/ojstatbb/nr2006/downloads/NR2006.pdf (reporting that rate of juvenile violent crime arrests has decreased steadily since 1994, falling to a level “not seen since at least the 1970s”).

345 See, e.g., Andrew K. Block, A Back and a Look Forward: Legislative and Regulatory Highlights for 2008 and 2009 and a Discussion of Juvenile Transfer, 44 U. RICH. L. REV. 53, 74 (2009); Sara Glazer, Lawmakers Pressured to Give Adult Terms to Juvenile Offenders: Perception That Youth Crime Is Becoming More Violent Borne Out in Statistics, DALLAS MORNING NEWS, Mar. 13, 1994, at 6A (“lawmakers across the country are scrambling to respond to polls indicating that Americans see juvenile punishments as too short and too soft”).


347 See SNYDER & SICKMUND, JUVENILE OFFENDERS 1999, supra note ____, at 108.

348 The juvenile justice system has always operated as an indeterminate sentencing system. ELIKANN, supra note ____, at 41-42 (debunking the popular notion that we must live in fear of our children); OFFICE OF JUV. JUST. & DELINQ. PREVENTION, JUVENILE DELINQ. PREVENTION RESEARCH 2000 at 3 (reporting that “no evidence of a new and more serious ‘breed’ of child delinquent and young murderer exists”); Elizabeth Becker, As Ex-Theorist on Young “Super-Predators,” Bush Aide Has Regrets, NEW YORK TIMES, Feb. 9, 2001,
even before the “super-predator” scare hit the pages of the newspapers, and nothing suggested that the declining crime rates were brought about by the harsher laws enacted in the late 1980s and 1990s.\textsuperscript{351}

Every year since 1994, violent juvenile crime has decreased, and by 2006, it was at levels last seen in the 1970s.\textsuperscript{352} In response to statistics showing the steady decline in youth crime, the person who had warned of a teenage “blood bath” said he never meant that such an atrocity would come to pass, but only wanted to get people’s attention.\textsuperscript{353} But the harm was already done.\textsuperscript{354} Once the appetite for getting juveniles into adult court and adult prisons was whetted by statutes making adult prosecution of juveniles easier, there was no going back.\textsuperscript{355} For juveniles, trial in adult criminal court penalized them twice for society’s increased appetite for more punitive measures – first, when they were subjected to the fervor for transferring them out of the jurisdiction of juvenile court, and second, when they were punished under the more punitive measures demanded by the public in response to the War on Drugs.\textsuperscript{356}

\begin{itemize}
\item See Flores, Foreword, SNYDER & SICKMUND, JUVENILE OFFENDERS 2006, supra note \textbf{____}, at iii (reporting a steady decline in juvenile violent crime arrests since 1994, down to levels in the 1970s).
\item \textit{Id.}; ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 181 (2008).
\item \textsc{Cusac}, supra note \textbf{____}, at 175 (citing Vincent Schiraldi & Mark Kappelhoff, \textit{Where Have the Superpredators Gone?}, SALON.COM, May 13, 1997).
\item See SCOTT & STEINBERG, supra note \textbf{____}, at 109-12 (describing episodes of “moral panic” in which public fears generate political responses with punitive policies whose impact becomes institutionalized through legislative reform and continues to determine how the justice system deals with youth long after the panic has subsided). \textit{See also ERICH GOODE & NACHMAN BEN-YEHUDA, MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE} (1994).
\item See SCOTT & STEINBERG, supra note \textbf{____}, at 10-11 (“Moral panic” that swept juveniles into adult court in escalating numbers had an enduring impact because “once the legislative reform process is initiated, it seems to take on a life of its own.”); \textit{see also} MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 3-5 (2004) (“[M]oral panics’ typically occur when horrifying or notorious events galvanize public emotion and produce concern, sympathy, emotion, and overreaction. Examples in recent years include the kidnapping of Polly Klaas in California and the crack overdose death of Len Bias in Maryland . . . Results included, respectively, California’s three-strikes law and the federal 100-to-1 crack cocaine sentencing law.”).
\item See Steiker & Steiker, \textit{Opening a Window}, supra note \textbf{____}, at 167.
\end{itemize}
This certainly was not what the creators of the juvenile court had in mind when they established a separate court system that would recognize that children are different from adults and that their transgressions should be handled differently from those of adults. Although the concept of juvenile delinquency dates as far back as the seventeenth century, it was not until 1899 that the first juvenile court was founded in Chicago. When the Chicago Juvenile Court came into being, it was viewed as part social work, part law, with the goal of rehabilitating those who came before the court. Its inventors “used the doctrine of parens patriae to argue that benevolent state treatment of children was in their best interest.” Those early reformers found motivation in the objective of protecting young people from the punitive and destructive features of the criminal justice system. Common to all of the juvenile court systems across the country was a commitment to assuring the social welfare of the child; instead of punishment, children received rehabilitation and treatment from a benevolent court whose mission was to serve the complete child in a “judicial-welfare alternative to criminal justice.”


359 Elizabeth S. Scott & Laurence Steinberg, Blaming Youth, 81 Tex. L. Rev. 799, 804-05 (2003) (delinquents were described as wayward but innocent and in need of the court’s firm guidance and rehabilitation); David S. Tanenhaus, The Evolution of Transfer out of the Juvenile Court, in The Changing Borders of Juvenile Justice: Transfer of Adolescents to Criminal Court 18 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (juvenile court was concerned with the social welfare of children, not assignment of criminal responsibility).

360 Tanenhaus, Evolution of Transfer, supra note ____, at 8.


By 1925, all but two states had enacted statutes to establish juvenile courts with exclusive original jurisdiction over everyone under age eighteen who was charged with a crime.\footnote{See TANENHAUS, POLICING THE CHILD, supra note ____, at 6 (stating that Maine and Wyoming came along later). Over the years, the rehabilitative ideal of the juvenile court suffered setbacks and eventually collapsed. See Scott & Steinberg, Blaming Youth, supra note ____, at 804-05 (2003). The Supreme Court soon acknowledged that a youthful offender called into juvenile court often receives “the worst of both worlds: that he gets neither the [constitutional] protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.” Kent v. United States, 383 U.S. 541, 556 (1966). Critics of the absence of procedural protections and the sweeping custodial powers of juvenile court judges, see, e.g., DAVID ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 268 (1971); Roscoe Pound, Foreword, in YOUNG, SOCIAL TREATMENT IN PROBATION AND DELINQUENCY, xxvii (1937), charted the course that would lead to the recognition of juveniles’ due process rights, including the right to counsel, notice of charges, confrontation and cross-examination, and the privilege against self-incrimination. See In re Gault, 387 U.S. 1 (1967) (recognizing that “neither the Fourteenth Amendment nor the Bill of Rights is for Adults alone”). The procedural rights afforded juveniles for the first time made juvenile court more like adult criminal court, but retained protections for the young through the juvenile court’s retention of its “best interests of the child” orientation.} Only if the juvenile court waived its jurisdiction could a juvenile be transferred to criminal court for trial as an adult.\footnote{Tanenhaus, Evolution of Transfer, supra note ____, at 21. The term “transfer” is synonymous with “waiver” in the context of juvenile court vis a vis criminal court jurisdiction. A child under the exclusive jurisdiction of the juvenile court because she is under the age of eighteen may be “transferred” to adult criminal court under certain circumstances and for certain offenses. In the same instance, the juvenile court “waives” its exclusive jurisdiction over the matter and so it is a “waiver” decision as well.} Juvenile court transfer decisions employed individualized determinations that were made on a case-by-case basis using a “best interests of the child” standard.\footnote{Snyder & Sickmund, Juvenile Offenders 2006, supra note ____, at 94.} But as public sentiment and fears of violent teenage criminals captured the attention of elected representatives, two additional avenues for trial of youth as adults gained traction: legislative exclusion and prosecutorial waiver or “direct file.”\footnote{Barry C. Feld, Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO CRIMINAL COURT 84 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).} Today, every jurisdiction employs one or more of the three statutory mechanisms for prosecuting juveniles as adults.\footnote{Id. See also Tanenhaus, Evolution of Transfer, supra note ____, at 21 (reporting that in 1910, 32 states’ juvenile laws set explicit age limits, with only one setting the upper age at nineteen and three setting the upper age at eighteen; the others set their upper age limits at sixteen or seventeen; in addition, certain felonies were excluded from juvenile court jurisdiction in some states; and almost every state had transfer mechanisms).} Each category contributes in its own way to the criminalization of adolescence because each is a mechanism for removing an adolescent from the
protection of the juvenile court to face prosecution, conviction, and sentencing in the criminal justice system. However, judicial waiver is qualitatively different from either legislative exclusion or prosecutorial waiver, as the following shows.

Judicial waiver, the most common of the three approaches, was the subject of the inaugural juvenile justice case to reach the United States Supreme Court, *Kent v. United States*.\(^{368}\) Sixteen-year-old Morris Kent challenged the District of Columbia juvenile court judge’s decision to waive juvenile court jurisdiction over him and transfer him to adult criminal court for prosecution and sentencing.\(^{369}\) Kent had been charged with multiple counts of housebreaking, robbery, and rape.\(^{370}\) The juvenile court judge, without a hearing, without ruling on defense counsel’s motions to retain juvenile court jurisdiction and commit Kent to a psychiatric facility for treatment and to gain access to Kent’s social service (probation) file, without conferring with Kent or his parents, and without making findings or providing reasons, transferred Kent for trial in the United States District Court for the District of Columbia.\(^ {371}\)

On petition for certiorari to the United States Supreme Court, Kent fared much better than he had in the lower courts. While agreeing with the Court of Appeals that the District of Columbia transfer statute\(^ {372}\) permits the juvenile court “considerable latitude” in determining whether to retain or

\(^{368}\) 383 U.S. 541 (1966).
\(^{369}\) *Id.* at 553. *Kent* also commenced the “constitutional domestication” of the juvenile court. Although the case did not establish a constitutional right to the procedures it laid out, it made clear that any waiver or transfer statute that did not comport with the basics of due process and fairness would not pass constitutional muster. *Id.* at 557. *See In re Gault, 387 U.S. 1, 22 (1967)* (stating that “the features of the juvenile system which its proponents have asserted are of unique benefit will not be impaired by constitutional domestication”; ruling that due process is not for adults alone and requiring that juvenile court provide for right to counsel, notice of charges, and right to confrontation and cross-examination, and that Fifth Amendment privilege against self-incrimination applies to juveniles as well as adults).
\(^{370}\) 383 U.S. at 543-44. During police interrogation, Kent volunteered information about his involvement in multiple crimes. *Id.* at 544.
\(^{371}\) *Id.* at 345-46. At trial, Kent was found not guilty by reason of insanity on the rape charges, but was convicted on the six other charges and received a sentence of five to fifteen years for each, or a total of thirty to ninety years. Because of the insanity ruling, Kent was sent to St. Elizabeth’s Hospital. *Id.* at 550.
waive jurisdiction over a child charged with a criminal offense, the Court recognized limits on the
court’s discretion: “But this latitude is not complete. At the outset, it assumes procedural regularity
sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness,
as well as compliance with the statutory requirement of a ‘full investigation.’” The Court made clear
its intention to provide guidance to future courts and policymakers by attaching an appendix of
“determinative factors.” Thus, trial of juveniles as adults was not to be treated lightly, but must meet
statutory or other provisions which themselves comport with due process and fairness. So it is today
that most states’ judicial waiver provisions trace their origins to the Kent factors.

On the heels of Kent and in reaction to increasing juvenile crime rates in the 1970s, legislatures
nationwide began to pass “mandatory transfer” laws that “transformed children who committed serious

373 383 U.S. 552-53. The Court continued: “[The statute] does not confer upon the Juvenile Court a license for
arbitrary procedure. The statute does not permit the Juvenile Court to determine in isolation and without the
participation of any representative of the child the ‘critically important’ question whether a child will be deprived
of the special protections and provisions of the Juvenile Court Act. It does not authorize the Juvenile Court, in
total disregard of a motion for hearing filed by counsel, and without any hearing or statement of reasons, to
decide-as in this case-that the child will be taken from the Receiving Home for Children and transferred to jail
along with adults, and that he will be exposed to the possibility of a death sentence instead of treatment for a
maximum, in Kent's case, of five years, until he is 21.” Id. at 553-54 (internal citations omitted).
374 Id. at 565-66. The “determinative factors” came from a policy memorandum prepared in 1959 by the chief
judge of the District of Columbia’s juvenile court:

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

Justice: Transfer of Adolescents to Criminal Court 52 (Jeffrey Fagan & Franklin E. Zimring eds.,
2000).
offenses into automatic adults.”

“Mandatory transfer” or “mandatory waiver” laws substitute a conditional legislative exclusion for the judicial discretion of ordinary waiver provisions. Mandatory waiver provisions exclude certain offenses for certain ages of children with certain juvenile histories from juvenile court jurisdiction, but the exclusion is conditional because it is available only if the prosecutor requests it through filing a petition or motion and only if the juvenile court judge finds that the case characteristics match the statutory elements for exclusion. These hybrid provisions signaled what would become a full frontal onslaught on judicial waiver by a wave of statutory provisions vesting all authority for juvenile prosecution in the hands, not of a judge, but of the legislature or a prosecutor.

After judicial waiver, the most common species of statute leading to the trial of a juvenile as an adult is legislative or statutory exclusion. This approach removes certain juveniles charged with certain offenses from the jurisdiction of the juvenile court. It focuses on the seriousness of the offense and, at times, the age of the offender, and forswears the rehabilitative ideal of the juvenile courts, opting instead for the retributive criminal justice rationale. A juvenile charged with an excluded offense is tried as an adult, automatically, without any hearing in either juvenile or criminal court. A form of statutory exclusion that has had a dramatic effect on the numbers of juveniles tried as adults is legislation that lowers the upper age limit for juvenile court jurisdiction from seventeen to sixteen, or even fifteen. Thirteen states now set the upper age for juvenile court jurisdiction at fifteen

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378 *Id.*
379 See Feld, *Legislative Exclusion*, supra note ____, at 91 (“legislative offense exclusion . . . provides the primary conceptual alternative to judicial waiver”).
380 See SCOTT & STEINBERG, supra note ____, at 97 (discussing the distrust of juvenile court judges reflected in reforms giving criminal courts automatic jurisdiction); Feld, *Legislative Exclusion*, supra note ____, at 91.
381 See Feld, *Legislative Exclusion*, supra note ____, at 84.
382 See *id.*
or sixteen.\textsuperscript{384} Every year, those states try as many as 200,000 chronological juveniles as adults because of their lower age limits for juvenile court jurisdiction,\textsuperscript{385} nearly four times the number tried through all other transfer and exclusion mechanisms combined.\textsuperscript{386}

Statutory exclusions have been roundly criticized for mandating adult prosecution purely on the basis of the offense charged (or the offender’s age) rather than on any consideration of the individual characteristics of the offender.\textsuperscript{387} Excluded juveniles have challenged their “automatic adulthood” under these statutes as a denial of due process, because they receive neither the safeguards nor the judicial review provided by \textit{Kent}.\textsuperscript{388} Their arguments have met with no success.\textsuperscript{389} Even though the consequences of statutory exclusion are comparable to the consequences of waiver, the same

\begin{itemize}
\item laws that lowered upper limit of juvenile court jurisdiction to fifteen and then provided no mechanism for seeking return to juvenile court; chronicling the human cost and consequences of prosecuting 26,000 sixteen- and seventeen-year olds in the North Carolina adult criminal courts each year).
\item POE-YAMAGATA & JONES, AND JUSTICE FOR SOME, supra note ____, at 5 (reporting that more than 200,000 juveniles are tried annually because of lower age limits on juvenile court jurisdiction); see also CAMPAIGN FOR YOUTH JUSTICE, NATIONAL STATISTICS, 2010, available at http://www.campaignforyouthjustice.org/national-statistics.html (reporting that 200,000 juveniles are tried, sentenced, or incarcerated as adults every year); CAMPAIGN FOR YOUTH JUSTICE, THE CONSEQUENCES AREN’T MINOR 6 (2006) (reporting that in states in which juvenile court jurisdiction ends at fifteen or sixteen years of age, the vast majority of youth those ages are prosecuted in adult criminal court for non-violent crimes); SNYDER & SICKMUND, JUVENILE OFFENDERS 2006, supra note ____., at 110-16.
\item Feld, \textit{Legislative Exclusion}, supra note ____, at 91.
\end{itemize}
procedural safeguards do not apply. Statutory exclusions are here to stay.

The third, and last, mechanism for converting juveniles to adult criminal defendants is known as prosecutorial waiver or “direct file” legislation. These laws give the prosecutor the unfettered power to choose whether to file charges in juvenile or criminal court without having to justify that choice in a judicial hearing. In the absence of invidious discrimination, judges generally will decline to review prosecutorial charging decisions because the separation of powers doctrine bars the judicial branch from passing judgment on the exercise of what are essentially discretionary functions by the executive branch, of which prosecutors are a part. As a result, challenges to the exercise of direct file authority, like challenges to statutory exclusions, generally have been unsuccessful.

In all, 45 states and the District of Columbia have judicial waiver provisions. Twenty-nine states have enacted certain statutory exclusions that allow for trial of juveniles automatically in adult

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390 See Bland, 472 F.2d at 1341 (Skelly Wright, J., dissenting) (arguing that statutory exclusion was a “blatant attempt to evade the force of the Kent decision” and that the same procedural protections should apply).
392 See Cox v. United States, 414 U.S. 909 (1973) (rejecting any requirement of procedural safeguards as a precondition to prosecutor’s exercise of discretion to try juvenile as adult); see also Bishop & Frazier, supra note ____, at 281; Francis Barry McCarthy, The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction, 389 ST. LOUIS U.L.J. 629 (1994).
393 See, e.g., United States v. Armstrong, 517 U.S. 456, 464 (1996) (holding that Attorney General and U.S. Attorneys had broad discretion as to whom to prosecute; petitioners’ selective prosecution claim asked federal court to do what it would not – invade the province of the executive); Wayte v. United States, 470 U.S. 598, 607 (holding that federal government had broad discretion as to whether to prosecute petitioner, a vocal Vietnam War critic who had failed to register with the Selective Service).
394 Feld, Legislative Exclusion, supra note ____, at 93.
395 See, e.g., Flakes v. People, 153 P.3d 427, 438 (Colo. 2007) (holding that direct file statute did not violate separation of powers doctrine; prosecutorial discretion is not unconstitutional); Manduley v. Superior Court, 27 Cal.4th 537, 557-58, 41 P.3d 3, 16 (2002) (holding that prosecutor has discretion to file certain charges against a juvenile directly in criminal court; prosecutor does not usurp any judicial function in exercising such discretion, even though in other situations juvenile court is authorized to decide whether juvenile is fit for disposition in juvenile court). But see State v. Mohi, 901 P.2d 991 (Utah 1995) (holding that direct file provision violated juveniles’ right under state constitution to uniform operation of general laws of the state).
396 SNYDER & SICKMUND, JUVENILE OFFENDERS 2006, supra note ____, at 112.
criminal court.\textsuperscript{397} Fifteen states have prosecutorial waiver or “direct file” provisions.\textsuperscript{398} With these laws has come a dramatic increase in the number of youth tried in adult criminal court and incarcerated in adult prisons.\textsuperscript{399} Although studies consistently report lower admissions to adult prison in recent years, due in part to a decrease in juvenile crime since the mid-1990s,\textsuperscript{400} the number of juveniles tried and sentenced as adults remains high.\textsuperscript{401}

At bottom, the problem for anyone adversely affected by judicial waiver, legislative exclusion, or prosecutorial “direct file” is that there is no right to be treated as a juvenile delinquent rather than as an adult criminal. Juvenile courts, and the jurisdiction they exercise, are creatures of statute, and what the legislature gives, the legislature may take away.\textsuperscript{402} Thus, nothing can prevent the trial of a juvenile as an adult if the prosecution so chooses or the juvenile court judge waives her exclusive jurisdiction over a given case. What can minimize the negative effects of adult prosecution on one of tender years is a concerted effort to educate the judiciary about the limitations of branding one yet a child an adult for criminal prosecution. Being tried in criminal court does not automatically make an adult out of a child; it merely changes the court where the proceedings will play out.

\begin{thebibliography}{99}
\bibitem{397} Id. at 113.
\bibitem{398} \textit{Id}.
\bibitem{399} \textit{See} JAMES AUSTIN, KELLY DEDDELL JOHNSON \& MARIA GREGORIOU, \textit{JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT} iii (2000).
\bibitem{400} Charles Puzzanchera, \textit{Juvenile Arrests 2008} (Office of Juv. Just. \& Delinq. Prevention), at 1 (reporting that juvenile crime continued to decrease in 2008 and that 2008 arrest rates for violent crimes were substantially lower than the peak year of 1994); \textit{see also} Richard E. Redding, \textit{Juvenile Transfer Laws: An Effective Deterrent to Delinquency?} (Office of Juv. Just. \& Delinq. Prevention), June 2010, at 1 (concluding that transfer laws have little or no general deterrent effect in preventing serious juvenile crime).
\bibitem{401} As of June 30, 2009, by one report a total of 15,500 youth under the age of eighteen and 68,200 who were eighteen or nineteen were incarcerated in adult prisons. U.S. DEP’T OF JUST. OFF. OF JUST. PROGRAMS, BUREAU OF JUST. STATISTICS, \textit{PRISON INMATES AT MIDYEAR 2009 – STATISTICAL TABLES}, Table 17, Estimated number of inmates held in custody in state or federal prisons or in local jails, by sex, race, Hispanic origin, and age, June 30, 2009 (June 2010). The dataset does not include a category for those younger than 18. However, it reports that the total includes persons under 18, so, the 15,500 number for those under eighteen is a calculation based on the totals reported for each age group beginning with 18-19 and ending with 65 or older, subtracted from the overall total reported in the table, the remainder comprising the under 18 group. \textit{See} Table 17.
\bibitem{402} Feld, \textit{Legislative Exclusion, supra} note \_, at 91.
\end{thebibliography}
Justice Kennedy recognized that simple truth in both *Roper* and *Graham*. Tried as adults and sentenced to the two harshest penalties our criminal justice system knows – death and life without parole, respectively, Christopher Simmons and Terrance Graham got a reprieve from the Supreme Court, not because the statutes pursuant to which they were tried as adults were hopelessly broken, but because they were still kids at the time of their crimes and were therefore less culpable than they would have been as adults. The three differences Justice Kennedy highlighted that set juveniles apart from adults\(^{403}\) find strong support in the literature of child and developmental psychology, and it is that body of knowledge that should guide future courts.

V. An Enlightened “Kids Are Different” Eighth Amendment Jurisprudence

*Graham*’s categorical ruling should not be seen as the endgame for juvenile sentencing. Instead, what the Court did should be viewed for what it is – a ruling that directly affects a very small cohort of juvenile offenders in adult prison and that leaves undisturbed thousands of other adult sentences being served by offenders who were minors at the time of their crimes, including over 2,000 sentenced to life without parole for homicide.\(^{404}\) Those whose sentences *Graham* left intact should look to capitalize on the Court’s reasoning and pursue categorical rulings across the spectrum of sentencing because all adult sentences are by their nature disproportionate when visited upon juveniles. We know this because the Court said as much and because the sources the Court relied on are unimpeachable.\(^{405}\)

\(^{403}\) *Roper*, 543 U.S. at 569-70; *Graham*, 560 U.S. at ____, 130 S.Ct. at 2026.


We begin, as the Court so often has done, with an examination of the “objective indicia” of society’s “evolving standards of decency.”\footnote{See notes \____ through \____ and accompanying text.} At first blush, a review of legislative enactments would seem to support current sentencing practices because all states have some form of transfer or statutory exclusion that permits or mandates trial of certain juveniles as adults.\footnote{See notes \____ through \____ and accompanying text.} But, as the Court has recognized in its death penalty precedents, it is not always the sheer number of statutes permitting a practice that governs.\footnote{See notes \____ through \____ and accompanying text.}\footnote{See Redding, \textit{Juvenile Transfer Laws, supra note \____, at 1; see generally SNYDER & SICKMUND, JUVENILE OFFENDERS 2006; Christopher Hartney, \textit{Fact Sheet: Youth Under Age 18 in the Adult Criminal Justice System} (Nat’l Council on Crime & Delinq.), May 2006; Ashley Nellis & Ryan S. King, \textit{No Exit: The Expanding Use of Life Sentences in America} (Sent’g Project), July 2009.} The 1990s’ rewriting of juvenile transfer and legislative exclusion provisions may have increased the number of juveniles being tried as adults, but it said nothing about juvenile sentencing.\footnote{See notes \____ through \____ and accompanying text.} Instead, the measures enacted during that flurry of legislative activity simply affect the jurisdiction of the juvenile court and either permit or require the juvenile court to relinquish its exclusive jurisdiction over certain juveniles so that they may be tried in adult criminal court.\footnote{487 U.S. at 826 n.24 (emphasis in original); \textit{see also id.} at 850 (O’Connor, J., concurring in the judgment) (“When a legislature provides for some fifteen-year olds to be processed through the adult criminal justice system, and capital punishment is available for adults in that jurisdiction, the death penalty becomes at least theoretically applicable to such defendants. \ldots However, it does not necessarily follow that the legislatures in those jurisdictions have deliberately concluded that it would be appropriate.”).} As the Court said in \textit{Thompson}, juvenile transfer laws show “that the States consider 15-year olds to be old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), \textit{but tell us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders.”}\footnote{560 U.S. at ____, 130 S.Ct. at 2025.} Similarly, \textit{Graham} recognized that many states had “chosen to move away from juvenile court systems and to allow juveniles to be transferred to, or charged directly in, adult court under certain circumstances”\footnote{560 U.S. at ____, 130 S.Ct. at 2025.} and to face the same sentences as
adult offenders.\textsuperscript{413} The Court made clear, however, the limits of those laws: “But the fact that transfer and direct charging laws make life without parole possible for some juvenile non-homicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole sentences.”\textsuperscript{414}

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

In the exercise of its independent judgment, \textit{Graham} quoted liberally from \textit{Roper} to explain the Court’s conclusion that juveniles have lesser culpability for the offenses they commit than do adults and therefore do not deserve to be punished as severely as adults.\textsuperscript{415} The Court focused, as had the \textit{Roper} Court, on three differences that set juveniles apart from adults.\textsuperscript{416} Compared to adults, first, juveniles lack maturity and have an “‘underdeveloped sense of responsibility.’”\textsuperscript{417} Second, juveniles are “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”\textsuperscript{418} Third, juveniles have characters that are “‘not as well formed’” as those of adults.\textsuperscript{419} \textit{Graham} found no reason to reconsider \textit{Roper}’s conclusions and observed that developments in brain

\begin{itemize}
\item \textsuperscript{413} \textit{Id}. at \_,\_\_, 130 S.Ct. at 2025.
\item \textsuperscript{414} \textit{Id}. at \_,\_\_, 130 S.Ct. at 2025.
\item \textsuperscript{415} \textit{Id}. at \_,\_\_, 130 S.Ct. at 2026-27 (quoting \textit{Roper}, 543 U.S. at 569-70).
\item \textsuperscript{416} \textit{Id}. at \_,\_\_, 130 S.Ct. at 2026 (quoting \textit{Roper}, 543 U.S. at 569-70).
\item \textsuperscript{417} \textit{Id}. at \_,\_\_, 130 S.Ct. at 2026 (quoting \textit{Roper}, 543 U.S. at 569-70).
\item \textsuperscript{418} \textit{Id}. at \_,\_\_, 130 S.Ct. at 2026 (quoting \textit{Roper}, 543 U.S. at 569-70).
\item \textsuperscript{419} \textit{Id}. at \_,\_\_, 130 S.Ct. at 2026 (quoting \textit{Roper}, 543 U.S. at 579-70).
\end{itemize}
science and psychology continue to reflect those fundamental differences between juveniles and adults. So too, the inherent transience of youth sets those in their teenage years apart from adults and is itself the explanation for juveniles’ greater capacity for change. Thus, Graham found continued validity in Roper’s conclusion that “from a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”

The behavioral science support for Graham’s conclusions concerning the lessened culpability of youth is incontrovertible. The “gold standard” in developmental psychology and its legal implications is the collaboration of law professor Elizabeth Scott and developmental psychologist Laurence Steinberg. In their most recent work, RETHINKING JUVENILE JUSTICE, Scott and Steinberg

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420 Graham referred to brain science in passing, while Roper referred to it not at all. Graham observed only that “parts of the brain involved in behavior control continue to mature through late adolescence.” 560 U.S. at ____, 130 S.Ct. at 2026 (citing Brief for American Medical Association et al. as Amici Curiae 16-24; Brief for American Psychological Association, et al. as Amici Curiae 22-27). In the view of at least one commentator, the Court got it right: “[T]he behavioral science was crucial to proper resolution of the case [Roper] and furnished completely adequate resources to decide the issue. The neuroscience was largely irrelevant... Roper properly disregarded the neuroscience evidence and thus did not provide unwarranted legitimization for the use of such evidence to decide culpability questions generally.” Stephen J. Morse, Brain Overclaim Syndrome and Criminal Responsibility: A Diagnostic Note, 3 OHIO ST. J. CRIM. L. 397, 411 (2006). See also Bruce Bower, Teen Brains on Trial: The Science of Neural Development Tangles with the Juvenile Death Penalty, 165 SCI. NEWS 299, 299 (2004) (reporting on lack of consensus within the scientific community about brain-imaging studies and legal policy, with David Fassler and Robin Gur on the side of believing the science is strong enough, and Ronald Dahl and Elizabeth Sowell believing the evidence is not yet solid enough to be introduced into the legal system); Nitin Gogtay, et al., Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood, 101 PROC. NAT’L ACADEMY SCI. 8174, 8177 (2004) (asserting that adolescent behavioral immaturity mirrors the anatomical immaturity of their brains); Terry A. Maroney, The False Promise of Adolescent Brain Science in Juvenile Justice, 85 NOTRE DAME L. REV. 89 (2009) (cautioning against overuse of developmental neuroscience, based on analysis of cases in which juvenile defendants attempted to put the neuroscience into practice and, almost to a one, failed); Elizabeth Sowell, et al., Development of Cortical and Subcortical Brain Structures in Childhood and Adolescence: A Structural MRI Study, 44 DEVELOPMENTAL MED. & CHILD NEUROLOGY 4 (2002) (demonstrating that MRI studies show how a particular brain operates over time, but no more).

421 560 U.S. at ____, 130 S.Ct. at 2026.

422 Id. at ____, 130 S.Ct. at 2026.

423 Id. at ____ 130 S.Ct. at 2026-27 (quoting Roper, 543 U.S. at 570).

424 See infra notes ____ through ____ and accompanying text.

first make the case that adolescent offenders are different from adult offenders in ways that bear on their culpability and then tie their developmental case for reduced adolescent culpability to the criminal law doctrine of mitigation.

Scott and Steinberg’s work establishes what Graham identified as the first distinguishing feature of adolescence – immaturity and “an underdeveloped sense of responsibility.” While adolescents’ basic cognitive capacity – the ability to employ logical reasoning – equals that of adults by mid-adolescence, their psychosocial and identity development continue well into young adulthood. It is the psychosocial aspects of development that make juveniles less able to control their impulses and more attracted to risky behaviors, both of which feature prominently in criminal offending. Certain critical life skills set even older adolescents apart from adults. Decision-making, for example, is a learned skill that adults, by virtue of their greater experience in life, manage better than adolescents. Teenagers do not think ahead and are prone to making decisions based on a
preference for immediate or short-term results over long-term consequences.434 Even if adolescents could plan and anticipate future events in the abstract, that capability does not necessarily translate into competence in making real world choices “on the street” when friends are getting ready to hold up a Stop ‘n Shop.435 Teenagers’ tendency to live in the moment leads them to discount risks that would be given great weight by adults, especially when they are under emotional stress or when there is no obvious solution to a problem.436

Similarly, limited impulse control, a normative feature of adolescence, impairs decision making and interferes with adolescents’ ability to act on their choices.437 Thus, adolescents’ crimes are more often than not impulsive and unplanned.438 Even crimes that may appear to the casual observer to be calculated acts of revenge are often impulsive and moralistic in origin when committed by adolescents.439 In one study, not a single juvenile involved in a shooting could remember deciding to shoot and then pulling the trigger; instead, they all said the gun just “went off.”440 What those

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434 SCOTT & STEINBERG, supra note ____, at 39; Beyer, supra note ____, at 27. See also Gerald Koocher, Different Lenses: Psycho-Legal Perspectives on Children’s Rights, 16 NOVA L. REV. 711, 716 (1995).
437 SCOTT & STEINBERG, supra note ____, at 125-26; see also Beyer, supra note ____, at 27.
438 David P. Farrington, Developmental and Life-Course Criminology: Key Theoretical and Empirical Issues, 41 CRIMINOLOGY 221 (2003).
439 Beyer, supra note ____, at 33 (observing that juveniles have a high moral sense and are intolerant of “anything that seems unfair”).
440 Id. at 27.
adolescents experienced is a dramatic illustration of their psychosocial immaturity or, as Justice Kennedy put it, their “underdeveloped sense of responsibility.”

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

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441 560 U.S. at ____, 130 S.Ct. at 2026.
442  Id. at ____, 130 S.Ct. at 2026.
444  These observations are not the province of social scientists alone. Justice Stevens, writing for the Court in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), commented on the power of peer influence: “Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by emotion or peer pressure than is an adult.” *Id.* at 835 (ruling that execution of anyone under the age of sixteen violates the Eighth Amendment’s prohibition of cruel and unusual punishments).
The drive to gain acceptance by peers creates fertile ground for juvenile crime. As Zimring has observed, “[m]ost adolescent decisions to break the law or not take place on a social stage, where the immediate pressure of peers is the real motive for most teenage crime.” Peer influence over moral judgments about whether to break the law is particularly compelling because moral development is at its peak during adolescence. A teenager may know the difference between right and wrong, “but resisting temptation while alone is a different task from resisting the pressure to commit an offense when among adolescent peers who wish to misbehave.” Thus, a necessary condition for a teenager to remain law-abiding is the ability to resist peer pressure, and many lack that skill for a long time. Peer conformity plays such a powerful role in adolescent decision-making that it renders teens much less able than adults to make decisions based on their own independent judgment. And the desire for peer approval, coupled with the short-term orientation characteristic of youth, causes teens to take risks that adults would anticipate and avoid. It is, then, no accident that the most consistently reported feature of teenage criminality is its group nature.

The third distinguishing feature that influenced the Graham Court is the undeveloped nature of

YEARS 71 (1985) (reporting that teens in a community outside Chicago spent a full one-half of the hours in a week with peers)).


WARR, supra note ___, at 66.

Id. at 66-67 (citations omitted).

ZIMRING, supra note ___, at 78.

Beyer, supra note ___, at 33; see also Laurence Steinberg & Robert G. Schwartz, Developmental Psychology Goes to Court, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 9, 23 (Thomas Grisso & Robert G. Schwartz eds., 2000) (describing adolescence as a “period of tremendous malleability, during which experiences in the family, peer group, school, and other settings have a great deal of influence over the course of development). Beyer, supra note ___, at 27 (reporting that the typical gun-toting sixteen-year old has no intention of shooting anyone, but just wants to scare someone or “look bigger”).

ZIMRING, supra note ___, at 79; see also WARR, supra note ___, at 5; Reiss, supra note ___, at 121. Data from the National Crime Panel show a striking difference between robberies committed by those under twenty-one and those over twenty-one: two-thirds of those under twenty-one committed the crime with others, whereas only slightly over one-third of those over twenty-one offended with others, choosing instead to offend alone. Franklin E. Zimring, Kids, Groups and Crime: Some Implications of a Well-Known Secret, 72 J. CRIM. & CRIMINOLOGY 867, 870 (1981) (citing National Crime Panel data, provided by Wesley Skogan, Northwestern University).
adolescents’ character as compared to adults.\footnote{60 U.S. at ____, 130 S.Ct. at 2026.} For this concept the Roper Court cited the seminal work of psychologist Erik Erikson, who described the psychosocial developmental stage of adolescence as a “moratorium” during which “to allow youths to identify with new roles of competency and invention.”\footnote{ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS 128 (1968).} Erikson said identity formation is the primary developmental project of adolescence.\footnote{ERIK H. ERIKSON, CHILDHOOD AND SOCIETY 227-29 (1950).} Thus, adolescence is a time to “try on” different personas and to learn about oneself as reflected through one’s interactions with others.\footnote{See id. at 228 (“[T]he sense of ego identity, then, is the accrued confidence that the inner sameness and continuity are matched by the sameness and continuity of one’s meaning for others.”); Daniel Seagrave & Thomas Grisso, Adolescent Development and the Measurement of Juvenile Psychopathy, 26 LAW & HUM. BEHAV. 219, 226 (2002) (cautioning against misidentifying adolescents as “psychopaths in the making” because behaviors common to adolescence also describe adult psychopathy).} It is a time for both individuation – separating from one’s parents – and identity development – “creating a coherent and integrated sense of self.”\footnote{SCOTT & STEINBERG, supra note ____ , at 50.} The intrinsic nature of this stage of life has caused it to be described as a period of “identity crisis.”\footnote{Id. at 51; ERIKSON, IDENTITY, supra note ____, at 91 (“We may, in fact, speak of the identity crisis as the psychosocial aspect of adolescing.”).} As youth struggle to define their own unique identities, they experiment in ways that often involve risky, illegal, or dangerous activities, all in the quest for immediate rewards and ever-greater thrills.\footnote{SCOTT & STEINBERG, supra note ____ , at 51.} For most, “this period of experimentation is fleeting; it ceases with maturity as identity becomes settled.”\footnote{Id. at 51.} The transition to adulthood is marked by “the attainment of a settled identity” – a sense of being a competent person with a useful role to play in society.\footnote{Id. at 34-35; James E. Marcia, Development and Validation of Ego Identity Status, 3 J. PERSONALITY & SOC. PSYCHOL. 551 (1966) (reporting on empirical research into Erikson’s theory regarding the attempt to establish identity during adolescence and finding that those best equipped to resolve the crisis of early adulthood are those who have most successfully resolved the crisis of adolescence).}

The relevance to adolescent criminal behavior of the developmental characteristics of adolescence is that “a large portion of youthful criminal activity represents the experimentation in risky
behavior that is a part of the developmental process of individuation and identity formation – combined
with the psychosocial immaturity that contributes to poor judgment and deficient decision-making
generally.” 463 Because an adolescent’s identity is still in the formative process, “an important
component of culpability in the typical criminal act – the connection between the bad act and morally
deficient character – is missing in [the adolescent’s] conduct.” 464 Scott and Steinberg observe, further,
that “[m]ost teenagers desist from criminal behavior . . . [as they] develop a stable sense of identity, a
stake in their future, and mature judgment.” 465 Thus, because most adolescents who commit crimes are
“not on a trajectory to pursue a life of crime, a key consideration in responding to their criminal
conduct is the impact of dispositions on their prospects for productive adulthood.” 466 That concern is
particularly poignant when one considers that once in adult court, even a five year old is subject today
to the same mandatory minimum and maximum sentences in adult prison as his adult counterparts. 467

To be afforded “some realistic opportunity to obtain release” as mandated by Graham, 468 every
juvenile offender serving an adult sentence must have his sentence reviewed for disproportionality
under a categorical analysis, like Graham’s, which takes full account of his youth at the time of the
offense and of all of the implications of that youth. 469 If juveniles by virtue of their youth have lesser

463 SCOTT & STEINBERG, supra note ____ , at 53.
464 Id. at 137.
465 Id. at 53. See also Terrie Moffitt, Adolescent-Limited and Life-Course Persistent Behavior: A Developmental
Taxonomy, 100 PSYCHOL. REV. 674 (1993) (explaining that adolescent offenders fall into one of two groups: a
large group whose antisocial behavior begins and ends in adolescence; and a much smaller group whose
behavior continues into adulthood).
466 SCOTT & STEINBERG, supra note ____ , at 55.
467 See Graham, 560 U.S. at ____ , 130 S.Ct. at 2025-26 (recounting the State of Florida’s acknowledgement at
oral argument that, under Florida law, even a five-year old could be prosecuted as an adult and receive a life
without parole sentence). See also SNYDER & SICKMUND, JUVENILE OFFENDERS 1999, supra note ____ , at 108.
468 See 560 U.S. at ____ , 130 S.Ct. at 2034.
469 One of the implications of adolescents’ youth when incarcerated in adult prisons is the pain of that
incarceration. Even one day in an adult prison is harsh for a juvenile offender, given reports of rampant sexual
assault of younger, smaller inmates by their older, more powerful counterparts. See Barkow, supra note ____ , at
1168. Yet the pain of incarceration has not received the Court’s attention. Every day in our country’s prisons,
inmates suffer abuse and physical injury at the hands of fellow inmates and rogue guards. Id. When Congress
was considering what became the Prison Rape Elimination Act of 2003, it received evidence that over 1,000,000
culpability in death penalty and life without parole cases, as the Supreme Court has told us, that same
lessened culpability must diminish their responsibility when they have suffered less severe, but still
adult, penalties. It is true, as Zimring has observed, that “[d]iminished responsibility is either generally
applicable or generally unpersuasive as a mitigating principle.”

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

Whether at the time of sentencing or in a challenge to a sentence already imposed, penal
proportionality must be the overriding governing principle. This is not a radical assertion, for penal
proportionality has been at the heart of our criminal justice system since its beginnings. However,
somewhere along the line, we seem to have lost our way, as the Court’s noncapital proportionality

prisoners had been sexually assaulted in prison over the previous 20 years. See Eva S. Nilsen, Decency, Dignity,
and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse, 41 U.C. DAVIS L. REV. 111,
125-26 (2007). See also Jeffrey Fagan, This Will Hurt Me More Than It Hurts You: Social and Legal
Consequences of Criminalizing Delinquency, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 1, 21-22 (2002)
(describing the substantive quality of punishment adolescents experience in adult incarceration as far harsher
than the sanctions they experience as delinquents); Tigar, supra note ____, at 852-53 (telling the story of the
sexual abuse by prison guards suffered by fifteen-year old Joseph Galloway in a Texas detention facility).

470 ZIMRING, supra note ____, at 84.
471 560 U.S. at ____, 130 S.Ct. at 2032.
472 See FRANCIS ALLEN, HABITS 42-43 (1996) (commenting that, for more than two centuries, “a persistent
strand in liberal thought relating to penal justice has been the notion that the severity of criminal penalties should
be limited by and proportioned to the culpability of the offender and his offense.”) Even though, or perhaps
because, he is a Briton, Allen for decades has written with great insightfulness about the American Legal system.
See, e.g., Francis Allen, The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties, 45 ILL. L. REV.
1 (1950); Francis Allen, The Exclusionary Rule in the American Law of Search and Seizure, 52 J. CRIM. L. &
decisions evidence.\textsuperscript{473} To regain the high ground, we must train our sights on restoring to its central place in our criminal justice policy the principle that punishment must be proportionate to the culpability of the criminal actor.\textsuperscript{474} Only such a system will have the moral credibility to command the respect of all who operate within it.\textsuperscript{475} For our youth, that means recognizing that the normative developmental deficiencies of adolescence mitigate their culpability.\textsuperscript{476} Mitigating conditions generally recognized in the criminal law – diminished capacity, coercive circumstances, and lack of bad character – are present in adolescent criminal behavior and collectively signify the special nature of adolescence as mitigating.\textsuperscript{477}

As discussed above, juveniles lack the fully developed decision-making capacity of adults because their psychosocial development is incomplete; they focus on short-term consequences, are more impulsive and volatile, and are “inclined to engage in risky behaviors that reflect their immaturity of judgment.”\textsuperscript{478} Those normative features of adolescence establish their diminished capacity in the

\textsuperscript{473} See notes ____ through ____ and accompanying text.

\textsuperscript{474} See Barry C. Feld, A Slower Form of Death: Implications of Roper v. Simmons for Juveniles Sentenced to Life Without Parole, 22 NOTRE DAME J.L. ETHICS & PUB. POL’Y 9 (2008) (criticizing courts for ignoring the principle of penal proportionality by focusing solely on the gravity of the offense and not on the culpability of the offender); see also AMNESTY INT’L & HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES 113 (2005), available at http://www.amnestyusa.org/countries/usa/clwop/report.pdf (arguing that penal proportionality requires consideration of both the nature of the offense and the culpability of the offender, and that juveniles are categorically less culpable than adults); Scott & Steinberg, Blaming Youth, supra note ____, at 822 (“Only a blameworthy moral agent deserves punishment at all, and blameworthiness (and the amount of punishment deserved) can vary depending on the attributes of the actor or the circumstances of the offense.”); Franklin E. Zimring, Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity, and Diminished Responsibility, in YOUTH ON TRIAL 271 (Thomas Grisso & Robert 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.”).


\textsuperscript{476} SCOTT & STEINBERG, supra note ____ , at 118-48 (describing the role of mitigation in trial of adolescents and explaining the need for a categorical approach that recognizes the mitigating character of youth in assigning blame); see generally YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE. (Thomas Grisso & Robert G. Schwartz eds., 2000); Elizabeth Cauffman & Laurence Steinberg, (Im)Maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults, 18 BEHAV. SCI. & L. 741, 742 (2000); Steinberg & Scott, Less Guilty, supra note ____ , at 1012.

\textsuperscript{477} SCOTT & STEINBERG, supra note ____ , at 130.

\textsuperscript{478} Id. at 131-33.
eyes of the law. Similarly, the defense of duress based on extreme external circumstances is a natural byproduct of adolescents’ lack of control over their environment, coupled with their peer orientation, and the extremes to which they feel compelled to go to avoid the ridicule of peers. The environment in which they live exacerbates adolescent crime, and because teenagers are generally financially dependent on their parents and legally subject to their authority, they are not in a position to cut themselves loose from their neighborhoods. The law recognizes in these circumstances manifestations of duress or coercion sufficient to mitigate criminal acts. So too, adolescence is defined by the third mitigating condition – lack of bad character – because the characters of adolescents are unformed. Most juvenile criminal conduct is the product of transitory developmental processes; the vast majority of youth will outgrow their criminal inclinations as they mature into adults. Thus, this factor as well is mitigating for youth, for whom the absence of character development is normative.

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

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479 Id. at 133; ZIMRING, supra note ____, at 140; see Barry C. Feld, Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy, 88 J. CRIM. L. & CRIMINOLOGY 68, 70 (1997).
481 SCOTT & STEINBERG, supra note ____ , at 135 (discussing research that has shown that when families move out of high-crime neighborhoods, the adolescents in those families are involved in less violent crime and less crime overall) (citing Jens Ludwig, Greg Duncan & Paul Hirschfeld, Urban Poverty and Juvenile Crime, 117 Q.J. ECON. 655, 676 (2001)).
482 SCOTT & STEINBERG, supra note ____ , at 135.
approach is appropriate for adolescents because “[their] development follows a roughly predictable course to maturity and [their] criminal choices are affected predictably in ways that are mitigating of culpability.” As the *Graham* Court recognized, even expert psychologists cannot “differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile whose crime reflects irreparable corruption.” Scott and Steinberg echo *Graham*’s caution, pointing out that current diagnostic tools permit neither evaluation of psychosocial maturity on an individualized basis nor the identification of young “career criminals” as distinct from ordinary adolescents who will repudiate their youthful recklessness as adults. Moreover, “litigating maturity on a case-by-case basis is likely to be an error-prone undertaking, with the outcomes determined by factors other than psychological immaturity – such as physical appearance or demeanor.” Thus, sentencing reform must be systemic and categorical if it is to give proper weight to the mitigating effect of youth.

One possible approach to sentencing reform is that advocated by Feld – a “youth discount” which provides “fractional reductions in sentence-lengths based on age as a proxy for culpability.” Feld’s system recognizes both the diminished responsibility of youth and the fact that adult sentences “exact a greater ‘penal bite’ from younger offenders than older ones.” What Feld proposes is a

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486 SCOTT & STEINBERG, *supra* note ____., at 139.
487 560 U.S. at ____, 130 S.Ct. at 2029 (quoting *Roper*, 543 U.S. at 572).
488 SCOTT & STEINBERG, *supra* note ____., at 140.
489 *Id.*; see also *id.* at 141 (raising concern about racial and ethnic bias and its effect on punishment of youthful offenders).
491 Feld, *A Slower Form of Death, supra* note ____., at 61. See also David S. Tanenhaus & Steven A. Drizin, *Owing to the Extreme Nature of the Accused: The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM.
“sliding scale of diminished responsibility that corresponds with developmental differences . . . in maturity of judgment and self-control.”\textsuperscript{492} Feld acknowledges that the specific amounts of the youth discounts are matters for political and legislative debate\textsuperscript{493} but posits that a twenty or thirty year sentence is the most the states would ever need to satisfy their legitimate penal goals.\textsuperscript{494} With the youth discount, Feld maintains, “we can hold juveniles accountable, manage the risks they pose to others, and provide them with ‘room to reform’ without extinguishing their lives.”\textsuperscript{495} Moreover, recognizing the value of mitigation for youthful offenders “provides a buffer against political pressure” to stiffen penalties every time a juvenile commits a serious offense.\textsuperscript{496}

Feld’s “youth discount” is consonant with Scott and Steinberg’s call for recognition of a categorical mitigating principle for adolescents who commit crimes, but it is not the only possible approach to proportionality in adolescent sentencing. Given society’s special responsibility for the welfare of its young, policy makers and juvenile justice experts must seize the opportunity to fashion a system that does justice to both our young people and the society in which they will mature into adulthood. Employing mitigation principles at the sentencing stage will prevent the kinds of sentences that have punished without consideration of proportionality or mercy and now must be undone through categorical rulings in the state and federal courts. The wave of punitive laws that swept through the country in the late 1980s and 1990s no longer can be allowed to define criminal justice policy for our

\textsuperscript{492} Feld, \textit{A Slower Form of Death}, supra note \underline{\textsuperscript{____}}, at 62.

\textsuperscript{493} \textit{Id.} at 63.

\textsuperscript{494} \textit{Id.}

\textsuperscript{495} \textit{Id.} at 64.

\textsuperscript{496} Barry C. Feld, \textit{Juvenile and Criminal Justice Systems’ Responses to Youth Violence}, 24 CRIME \& JUST. 189 (1998).
youth, knowing what we now know of the profound effects that adolescent immaturity has on blameworthiness. Juveniles are not adults, and our sentencing laws need to stop pretending otherwise.

VI. Conclusion

The Supreme Court’s decision in *Graham v. Florida* mandates review of the sentences of all juvenile offenders serving life without parole for non-homicides. For everyone else who was a juvenile at the time of the crime for which they are now serving time in adult prison, including those serving life without parole for homicide, *Graham* opened the door to sentencing review based on the Court’s reasoning in its precedents that established categorical rulings. Because sentencing of our youth in the adult criminal justice system never was contemplated by the measures that caused their trial as adults, the sentences they have received do not reflect the lessened culpability that is a necessary attribute of youth. The well-known and well-established differences between adolescents and adults must take center stage in the review of current sentences and the imposition of future ones. The facts of youth are, and must be seen as, mitigating of any punishment that an adult would receive for the same crime. And if the lower courts are not up to the task, youthful offenders, following in the steps of Terrance Graham and Christopher Simmons, will continue to look to the Supreme Court to protect them when the vicissitudes of majoritarian politics cause those who should know better to lose sight of the fact that they are still kids.