Nebraska Law Review

Volume 97 | Issue 2 Article 3

2018

Known Unknowns: Legislating for a Juvenile's Reformative Uncertainty

Tiffani N. Darden
Michigan State University College of Law, dardent@law.msu.edu

Tiffani N. Darden*

Known Unknowns: Legislating for a Juvenile's Reformative Uncertainty

TABLE OF CONTENTS

I. Introduction 334
II. Juvenile Sentencing: The Eighth Amendment in Focus 338
A. Indeterminacy as an Evolving Standard in Juvenile Sentencing 339
B. Reconciling Constitutional Norms and State Policy . 343
C. Detangling Proportionality and Term-of-Years Sentences 347
D. State Courts Interpret the Constitutional Fault Lines 350
III. States Delineate the Scope and Implement Policy 354
A. The Science Advantage: Recognizing Youth Deficiencies & Its Consequences 354
B. Age Matters: Commonsense Supplemented with Expert Opinion 358
IV. The Undulating Public Response to Juvenile Crime 362
A. The Road to Finding National Consensus 363
B. The Gatekeepers to Criminal Court 368
V. Avoiding Social Ignorance 373
A. The Forgotten Political Carve-Out 373
B. Translating a Constitutional Norm into State Level Policy 377
VI. Conclusion 381

I. INTRODUCTION

Three landmark decisions drastically changed the sentencing standards for juvenile offenders. In *Roper v. Simmons*[1] and *Miller v. Alabama*,[2] the Supreme Court held that states may not impose the death

* Associate Professor, Michigan State University College of Law.

1. Roper v. Simmons, 543 U.S. 551 (2005).
2. Miller v. Alabama, 567 U.S. 460 (2012).

penalty and mandatory life without parole sentences in cases with juvenile defendants. These cases vanquished the most severe consequences for youthful criminal behavior. Most recently, *Montgomery v. Louisiana* retroactively applied the *Miller* opinion.[3] The majority clarified that the prohibition against mandatory life without parole prior to conducting an individualized assessment was a substantive rule fulfilled through procedural means because juveniles are constitutionally different from adults.[4] The intermediate case of *Graham v. Florida*[5] also speaks volumes about the newfound influence of adolescent development research on constitutional law. In each opinion, the Court drew heavily on social science, developmental psychology, and neuroscience research to make a final determination on the constitutional outer-boundaries of juvenile sentencing.

The Eighth Amendment's evolving standard, in light of the juvenile sentencing cases, cannot tolerate mandatory sentences imposed without an individualized assessment. The U.S. Supreme Court solidified the norm that juveniles are constitutionally different from adults.[6] After *Graham* and *Miller*, states began to revisit their punishment priorities, but they need to dig deeper in seeking a balance between retribution and rehabilitation. This will necessarily include a shift from harsher punishment to mitigation and effective intervention. Procedural safeguards, such as those identified in *Miller*, permit state legislatures to leave individualization to courts and executive agencies under a grant of deferential decision-making. In order to effect change, however, state legislatures must delineate the full scope of juvenile sentencing guidelines.

The Supreme Court applies a two-part test under the Eighth Amendment's "cruel and unusual punishment" clause.[7] The Court first discerns whether a national consensus exists to justify an evolving standard, and then the Court discerns its own judgment.[8] In the juvenile sentencing context, an observer could argue that the Court's sound judgment on the issue takes priority over societal sentiments. Moreover, history demonstrates that the national consensus is susceptible to moral panic and ripples in public opinion. Protection against such criticisms required the *Graham* and *Miller* majorities to affirm the legitimacy of research and the role to be played by experts in juvenile criminal behavior. The Court's decision to anchor its holdings in social science, developmental psychology, and scientific advancements erects a structural deterrent against unwieldy ideological whims.

3. Montgomery v. Louisiana, 136 S. Ct. 718 (2016).
4. *Id.* at 736.
5. Graham v. Florida, 560 U.S. 48, 62 (2010).
6. *Montgomery*, 136 S. Ct. at 736.
7. *Graham*, 560 U.S. at 61.
8. *Id.*

Juvenile offenders are constitutionally different from their adult counterparts.[9] This constitutional revelation, interpreted and applied differently across statehouses, deserves greater depth in its implication. In this Article, I argue that when reviewing juvenile sentences in criminal courts, the Supreme Court's Eighth Amendment analysis should treat the national consensus prong as subordinate to its own judgment based on social science, developmental psychology, and neuroscience research advancements. It's a decision-making model that more fully protects a constitutional norm. The Supreme Court slated a path for juvenile offenders confronting the death penalty and life without parole, but term-of-years sentences remain unscathed by these pronouncements. Even to pass rational basis review, state legislatures should have to consider the evidence-based, constitutional difference between juveniles and adults before enacting criminal sentencing statutes affecting minor defendants. Accordingly, all mandatory sentencing statutes imposed against transferred juvenile offenders, if equivalent to their adult counterparts without an individualized assessment, are unconstitutional.

This Article argues that the Supreme Court's juvenile sentencing cases sketch a process for constitutional legislation. The reasoning and dicta used to support these holdings rested on two pillars: evidence-based sentencing and deference to experts. The central learnings of those pillars are that children are malleable and can change. Such conclusions have been tracked and affirmed in Supreme Court cases for over twenty years, and they exemplify the practice of relying less on common sense and more on reliable advancements in psychology and neuroscience. Juvenile sentencing cases also resemble children policies in public education and institutionalization. Despite these constitutional reforms, state judges continue imposing lengthy sentences on juvenile offenders.

This Article provides arguments for upending mandatory sentences across the board for juveniles transferred to criminal court. State legislators must revisit juvenile sentencing practices to ensure the constitutional principle that "juveniles are constitutionally different from adults."[10] As it stands, the cursory proportionality review given to anything less than death and life without parole sentences, which grants great deference to state policymakers, may no longer withstand constitutional muster for juvenile offenders. The arguments herein propose that the Court and state legislatures alike must consider and prioritize evidence-based youthfulness traits over a social consensus meant to survey the citizenry's conscience in the moment. The proposed shift to evidence-based policy making would run

9. *Montgomery*, 136 S. Ct. at 736.
10. *Id.*

congruent with establishing policies in public education and juvenile institutionalization.

Blended sentencing provides a model for structuring statutes in line with these constitutional cases. Twenty-nine states implement state legislative mitigation through blended sentencing statutes.[11] Thirteen implement only criminal blended sentencing statutes, and ten implement juvenile and criminal blended sentencing statutes.[12] This Article does not propose blended sentencing as a preferred solution. Instead, it argues that blended sentencing variants are structurally capable of encompassing both the building blocks of developmental research and deference to experts for policy and implementation. Moreover, robust systems would normalize the specialization of crafting juvenile dispositions and criminal court sentencing.

Part II reviews the Supreme Court's Eighth Amendment cases specific to juvenile sentencing, as well as term-of-years sentences. The juvenile sentencing pronouncements find their justification in social science, developmental psychology, and neuroscience advancements. In contrast, the Eighth Amendment review for term-of-years sentences of less than life without parole defer to state policymakers under a rational basis review. The discussion also covers the divergent interpretations in state courts and legislatures to the Supreme Court's own judgment that juveniles are constitutionally different from their adult counterparts.

Part III explores the challenges that states face to enact juvenile sentencing laws and policies that epitomize the Court's evolving view on juvenile criminal culpability. Every state must prioritize penological goals for youthful offenders in alignment with constitutional norms. These sentencing boundaries should also advance the opinions of adolescent behavioral experts. Nonetheless, states may still maintain space to define the nuances.

Part IV considers how the Supreme Court's reliance on expert opinions to inform its own judgment on the cruel and unusual punishment issue for youth should take precedence over any national consensus analysis based on public sentiment.

Finally, Part V proposes that blended sentencing, a '90s political compromise, may breathe constitutional life into under-utilized state-level sentencing options. While not served up as the solution, a case study overview elucidates the information gathering potential of effective interventions focused on these most challenging juvenile offenders.

---

11. *Jurisdictional Boundaries*, JUV. JUST. GEOGRAPHY, POL'Y, PRACTICE & STAT., www.jjgps.org/jurisdictional-boundaries [https://perma.unl.edu/F2C7-SE56].

12. *Id.*

II. JUVENILE SENTENCING: THE EIGHTH AMENDMENT IN FOCUS

The Eighth Amendment protects criminal defendants from excessive and disproportionate punishment.[13] The "cruel and unusual" punishment analysis melds together subjective viewpoints on discrete components—severity of the criminal act, the offender's culpability, penological justifications, and evolving standards—to reach a conclusion.[14] This constitutional determination ultimately assesses whether the punishment comports with "evolving standards of decency that mark the progress of a maturing society."[15]

When analyzing cases under the Eighth Amendment, the Court first reviews objective indicia to either support or refute the argument that a national consensus exists regarding legitimacy of the punishment in question.[16] From the Justices' perspective, state legislation provides the "clearest and most reliable objective evidence of contemporary values."[17] The Court also views jury outcomes as "a significant and reliable objective index of contemporary values because [juries are] so directly involved."[18] The "objective" indicia of evolving standards, such as criminal legislation and sentences imposed by juries, inevitably varies from state to state. Accordingly, every national consensus analysis tallies the number of state jurisdictions that legislatively impose the punishment in dispute and the frequency with which those states impose such punishment. The Court also observes the *rate of change* and *consistency of the direction of change* in state legislatures towards either sanctioning or affirmatively prohibiting a sentence.[19] Although the Justices often interpret the data to reach different consensuses, the research necessary to begin the inquiry remains consistent across majority, concurring, and dissenting opinions.[20]

Next, the Court invokes its own judgment regarding legitimacy of the punishment in question, which empowers it to contradict the opinion of state legislators and citizens.[21] To perform the second step of

13. Weems v. United States, 217 U.S. 349 (1910).
14. *See* Trop v. Dulles, 356 U.S. 86, 101–02 (1958).
15. *Id.* at 101. According to the Court, an interpretation of the "cruel and unusual punishment" clause must contemplate "history, tradition, and precedent, . . . with due regard for its purpose and function in the constitutional design." Roper v. Simmons, 543 U.S. 551, 551 (2005).
16. *Roper*, 543 U.S. at 564.
17. *Id.*; Atkins v. Virginia, 536 U.S. 304, 313 (2002).
18. Graham v. Florida, 560 U.S. 48, 62 (2010) ("Actual sentencing practices are an important part of the Court's inquiry into consensus."); Coker v. Georgia, 433 U.S. 584, 596 (1977) (citing Gregg v. Georgia, 428 U.S. 153, 181 (1976)).
19. *See, e.g.*, *Roper*, 543 U.S. at 564–67; *Atkins*, 536 U.S. at 315.
20. *See* Miller v. Alabama, 567 U.S. 460, 482–85 (2012).
21. *Roper*, 543 U.S. at 564; *Atkins*, 536 U.S. at 313.

this constitutional analysis, the Court reviews a collection of sources to reach its own judgment about the proportionality of a sentence.[22] The Court also considers "history, tradition, and precedent" with due regard for the Amendment's "purpose and function in the constitutional design."[23] This analysis includes an examination of the "'evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual."[24] On this point, the Court's statements concerning a defendant's age should fully upend the "objective" societal indicators and penological justifications used to support conventional practices applied to juveniles. Most relevant and specific to this Article, the Supreme Court has found juveniles less culpable than adults committing similar violations because they exhibit diminished culpability for criminal acts.

A. Indeterminacy as an Evolving Standard in Juvenile Sentencing

The juvenile sentencing trilogy briefly discussed above sets forth categorical bans for juvenile offenders who were under the age of eighteen years old at the time they committed their charged criminal act: *Roper* prohibited the death penalty;[25] *Graham* prohibited life without parole for those committing nonhomicide offenses;[26] and *Miller* prohibited the application of mandatory life without parole sentencing statutes.[27] Notably, *Roper* marked a continuation in the Supreme Court's attempt to articulate the role of age when meting out criminal punishment.[28] Leading to *Roper*, distinct categories of defendants

22. "The judicial exercise of independent judgment 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. In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals." *Graham*, 560 U.S. at 67–68 (internal citations omitted).
23. *Roper*, 543 U.S. at 560.
24. *Id.* (citing Trop v. Dulles, 356 U.S. 86 (1958)). According to the Court, the Eighth Amendment "embodies a moral judgment" and applying the standard ebbs in congruence with "the basic mores of society change." *Graham*, 560 U.S. at 58 (citing Kennedy v. Louisiana, 554 U.S. 407, 419 (2008)).
25. *Roper*, 543 U.S. at 578
26. *Graham*, 560 U.S. at 82.
27. *See* Miller v. Alabama, 567 U.S. 460, 489 (2012).
28. *See* Johnson v. Texas, 509 U.S. 350, 367 (1993) ("A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults . . . . [Therefore, a] sentencer in a capital case must be allowed to consider the mitigating qualities of youth in the course of its deliberations over the appropriate sentence."); Stanford v. Kentucky, 492 U.S. 361 (1989); Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) ("[T]he Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation."); Eddings v. Oklahoma, 455 U.S.

could not receive the death penalty, including "juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime."[29] The differences identified between adults and juveniles, set forth by the *Roper* majority to justify a constitutional ban on the death penalty for offenders younger than eighteen years old, supported intermediate conclusions that juveniles possess a diminished culpability. Conventional penological justifications therefore continue to prove impertinent in this context.[30]

First, "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."[31] Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment."[32] And third, "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."[33]

These traits lead to diminished culpability. According to the Court, the lack of maturity in juveniles explains why their "irresponsible conduct is not as morally reprehensible as that of an adult."[34] Additionally, their "vulnerability and comparative lack of control over [their] immediate surroundings" lessens both the expectation and responsibility for juveniles to remove themselves from harmful situations.[35] And finally, a juvenile's amorphous self-constitution tamps down the validity of any definitive determinations that "even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."[36]

Five years after *Roper*, in *Graham v. Florida*, the Supreme Court moved a little further along the path to defining the concrete distinctions between juveniles and adults that must be recognized, especially when imposing sentences.[37] As seen in *Roper*, the majority opinion

104, 115–16 (1982) (holding youth to be a necessary mitigating factor in death penalty cases, characterizing youth as "more than a chronological fact," but as a "time and condition of life when a person may be most susceptible to influence and to psychological damage").

29. *Roper*, 543 U.S. at 568 (citing Atkins v. Virginia, 536 U.S. 304, 304 (2002); *Thompson*, 487 U.S. 815; Ford v. Wainwright, 477 U.S. 399 (1986)).
30. *Id.* at 569–75.
31. *Id.* at 569 (quoting *Johnson*, 509 U.S. at 367).
32. *Id.*
33. *Id.* at 570.
34. *Id.* (quoting *Thompson*, 487 U.S. at 835).
35. *Id.*
36. *Id.*
37. Graham v. Florida, 560 U.S. 48 (2010).

haled legislative reform as the "clearest and most reliable objective evidence of contemporary values."[38] The *Graham* Court delved deeper into examining such reform, not only assessing legislative provisions on the issue, but also determining the number of states that have actually applied their existing laws on life without parole for nonhomicide offenses committed by juveniles—according to the Court, "most of those do so quite rarely."[39] *Graham* established a categorical ban to a term-of-years sentence. A prohibition previously reserved for the death penalty.[40] The majority opinion echoed *Roper*'s acceptance of the constitutional difference between juveniles and adults, stating that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."[41]

In *Miller v. Alabama*, the Court addressed the constitutionality of applying mandatory life without the possibility of parole statutes to juvenile offenders.[42] The Court relied on two sets of sentencing cases: (1) its categorical bans based on disproportionality between the defendant's characteristics and the offense committed, and (2) its prohibition against imposing the death penalty without an individualized consideration of a defendant's characteristics.[43] With these precedents in mind, the Court reiterated the core reasoning stated in *Roper* and *Graham*, which "establish[ed] that children are constitutionally different from adults for purposes of sentencing."[44]

While prohibiting the mandatory sentencing of juveniles to life without parole, the *Miller* Court refused to address whether the Eighth Amendment required a categorical ban against the sentence. The majority laid bare the intersection between youth and sentencing as follows:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecu-

38. *Id.* at 62 (citing Atkins v. Virginia, 536 U.S. 304, 312 (2002)).
39. *Id.* at 62–64 ("Actual sentencing practices are an important part of the Court's inquiry into consensus."). The Court even went as far as conducting independent research on the issue to supplement findings provided by the parties. *Id.* at 62–63.
40. Miller v. Alabama, 567 U.S. 460, 475 (2012) (quoting *Graham*, 560 U.S. at 89–90).
41. *Graham*, 560 U.S. at 68.
42. *Miller*, 567 U.S. at 469–70.
43. *Id.* at 470.
44. *Id.* at 471 (citing *Graham*, 560 U.S. at 48; Roper v. Simmons, 543 U.S. 551 (2005)).

> tors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.[45]

Justice Kagan clarified, in response to counterarguments from her colleagues and the states, that "[o]ur decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty."[46]

Roper, Graham, and *Miller* also share commonalities with respect to the Court's rationale for rejecting the penological reasons offered for imposing harsh, determinate sentences on juvenile offenders.[47] In each of these cases, the Court's analysis addressed the four most common theories of punishment: retribution, deterrence, incapacitation, and rehabilitation.[48] According to the Court, retribution loses its significance when applied to a juvenile, and even more so when applied to a juvenile committing a nonhomicide crime.[49] The deterrence rationale similarly loses significance given the diminished capacity of juveniles to appreciate the gravity and consequences of their actions.[50] To incapacitate a juvenile for life concedes that person's inability to ever change. Thus, "[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity."[51] In the same vein, rehabilitation and parole should be in sync with one another; however, by "denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society," which "is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability."[52]

In *Montgomery v. Louisiana*, the Supreme Court granted retroactive application of its ban against sentencing juvenile offenders under mandatory life without parole statutes.[53] The Court's explanation for why *Miller v. Alabama* constituted a new substantive rule, and not simply a procedural change, helps to understand the relation between an offender's age and sentencing determination. The constitutional

45. *Id.* at 477–78 (internal citations omitted).
46. *Id.* at 483 (citing Sumner v. Shuman, 483 U.S. 66 (2009); Lockett v. Ohio, 438 U.S. 586, 602–08 (2001) (plurality opinion); Eddings v. Oklahoma, 455 U.S. 104, 110–17 (1982) ("The limitations placed by these courts upon the mitigating evidence they would consider violated the rule in *Lockett*.")).
47. *Id.* at 472–75; *Graham*, 560 U.S. at 71–72.
48. *Graham*, 560 U.S. at 70–74.
49. *Id.* at 71.
50. *Id.* at 72.
51. *Id.* at 73.
52. *Id.* at 74 (stressing concern for the inability for some life without parole prisoners to receive rehabilitative services while incarcerated).
53. Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

prerequisite for conducting an individualized assessment arises from the diminished culpability of children as well as the harsh consequences associated with lifelong imprisonment.[54] The Court stated:

> A hearing where "youth and its attendant characteristics" are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not. The hearing does not replace but rather gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.[55]

At first blush, the length of the sentence seems to dictate the need for an individualized assessment. Yet, the Court made clear that the Eighth Amendment violation rests in sentencing a juvenile to life without parole except in the rarest of circumstances, and only through an individualized assessment may courts avoid imposing a disproportionate punishment.[56] The *Montgomery* Court reminded lawmakers and judges alike that *Miller* not only required trial courts to consider the offender's age, but went further to "establish[ ] that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'"[57]

B. Reconciling Constitutional Norms and State Policy

The Supreme Court's ambition to measure the national consensus on juvenile sentencing occupies a nebulous position. Legal scholars too seem intrigued with the role that national consensus plays in settling constitutional rights.[58] The national consensus determination may be viewed as a gateway to the Court exercising independent judgment on a punishment issue, but Justices and observers hypothesize absolute irrelevance and ministerial afterthought to this prong.[59] For certain rights, some constitutional observers read stabilizing potential into the Court's adherence to a national consensus; but the Supreme

54. "Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence." *Id.* at 732–33.

55. *Id.* at 735.

56. "*Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. . . . Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to life without parole . . . ." *Id.* at 734.

57. *Id.* (citing Miller v. Alabama, 567 U.S. 460, 472 (2012)).

58. Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 136 (2006); Robert J. Smith & Zoe Robinson, *Constitutional Liberty and the Progression of Punishment*, 102 CORNELL L. REV. 413, 419–20 (2017).

59. "[T]he Court does not exercise its own judgment unless it first determines, objectively, that there is a contemporary national consensus favoring the particular constitutional claim before it. To this extent, at least, the Court's task is that 'of a translator, the reading of signs and symbols given from without.'" Conkle, *supra* note 58 (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 174 (1921)).

Court, when applying the Eighth Amendment, incessantly disputes how to evaluate and then value its national consensus prong.[60] Nevertheless, state legislation plays an important role.

The declaration that children reside on a wholly separate constitutional plateau from adults in the criminal context should have immediately erupted from the halls of justice in every statehouse. Not because the Supreme Court presented the public with new knowledge, but because it made explicit that this commonsense-based truth required action for youth transferred to criminal court. Advocates and researchers work year-round to reform juvenile justice policies. Every now and again, in local communities, real names and faces draw national attention to the juvenile sentencing issue. Similarly, state legislators debate juvenile justice reform from either an informed posture with Supreme Court backing or a cringe-worthy posture meant to resist validated knowledge to appease the masses.

The most visible nationwide movement to date focused on increasing the upper maximum age for juvenile jurisdiction. The jurisdictional age limit has two consequences: it instantly curtails the number of young people landing in criminal courts and it generates the largest reduction in the teenage population. Most states across the country extend juvenile court jurisdiction through age seventeen. In the four year interim between *Miller* and *Montgomery*, the states of Illinois, Massachusetts, and New Hampshire increased their upper age from sixteen to seventeen.[61] New York and North Carolina were the last two states to increase the maximum jurisdictional age from fifteen to seventeen. Both states have recently enacted legislation to phase in their changes over a two- to three-year period.[62] Currently, a small minority of seven states, including Louisiana, Georgia, Michigan, Missouri, South Carolina, Texas, and Wisconsin, limit their juvenile jurisdiction through the age of sixteen.[63] Louisiana and South Carolina, however, have passed phase-in legislation to increase their maximum jurisdictional age to seventeen years old.[64]

Unfortunately, the much-needed efforts to increase jurisdictional age parameters leave untouched the transfer statutes in every state. Legislative floor debates on "raise the age" statutes use waiver in all forms as a bargaining chip to entice hesitant lawmakers. For example, less than a year after *Miller v. Alabama*, the Illinois State Legislature held floor debates on raising the jurisdictional age of juvenile courts to seventeen years old for defendants accused of low-level felony charges. A prior bill had opened juvenile courts to seventeen-year-olds charged

60. *Id.* at 136–37.
61. *Jurisdictional Boundaries*, *supra* note 11.
62. *Id.*
63. *Id.*
64. *Id.*

with misdemeanor violations. Notably, proponents frequently prefaced and backstopped their comments with a reminder that automatic and mandatory transfer laws remained intact.

Illinois House Leader's, Barbara Flynn Currie, arguments supporting this newly proposed carve-out emphasized the rehabilitative options available through juvenile jurisdiction, the developmental science that young "minds are not fully formed and their judgment is not always as mature as we would like it to be," and research demonstrating a reduction in recidivism rates for offenders processed in juvenile court instead of criminal court.[65] Other representatives on the record echoed the sentiments regarding recidivism and access to rehabilitation. Two advocates framed juvenile jurisdiction as an opportunity for restorative justice aimed "to ensure that we have systems in place that protect those who are young and do things out of . . . out of maybe naivete or stupidity versus them who do things versus out of malice or violence."[66] Congressman Ford outlined the cumulative failures experienced by these young individuals, stating that the "inequities in education, in housing and opportunities in this state, it leaves me no choice but to support this legislation for the students, for the kids that have been failed by the State of Illinois."[67] Supporters of the bill also found room to distinguish their criticisms concerning the system's ineffectiveness from their desire to not needlessly over-punish juvenile offenders, opining that the "juvenile justice system . . . in the State of Illinois is failing miserably."[68]

The Illinois legislator opposing the house bill played a familiar tune. State Representative Reboletti encouraged his colleagues to trust the prosecutors and preyed on fears borne from a premonition that "gangs will now use 17 year olds [sic] to do more of the dirty work that they couldn't do before."[69] He urged that this change in the law would "send[ ] a bad message" to so-called intuitive, very ingenious, and sophisticated teenagers waiting to exploit a free pass to juvenile detention homes and youth facilities as punishment.[70] The bill overwhelmingly passed the House 89–26–1.

State Senator Steans delivered statements about the bill the following month. Once again, the jurisdictional expansion issue arose, accompanied by the counterbalance that waiver provisions would remain unaffected. Senator Steans grounded his arguments in hopes that diversion counseling and community restorative justice programs would decrease recidivism rates, as the state previously experienced

65. 2404 H.R. 98th Gen. Assemb., at 49 (Ill. 2013) (statement of Leader Currie).
66. *Id.* at 55 (statement of Rep. Zalewski).
67. *Id.* at 56 (statement of Rep. Ford).
68. *Id.* at 52 (statement of Rep. Bost).
69. *Id.* at 51 (statement of Rep. Reboletti).
70. *Id.*

similar positive results after implementing changes to its misdemeanor provisions. The senator also drew a connection between lower recidivism rates and improvements in public safety.[71] The bill again overwhelmingly passed 51–1.

In the same year *Montgomery v. Louisiana* was decided, California voters enacted Proposition 57, the Public Safety and Rehabilitation Act of 2016, to abolish prosecutorial direct-file and require a judicial hearing to determine the appropriateness of transfer petitions. The revised statute removes "fitness" from the equation, and courts must now decide whether or not "the minor should be transferred to a court of criminal jurisdiction."[72] The statute also eradicates any presumptions about transfer based on a defendant's age and prior record.[73] Finally, the revision addresses crime-specific transfer eligibility. The most severe crimes committed by an accused youth may no longer be automatically brought in criminal court, and the reform shrinks the list of crimes eligible for prosecutorial transfer petitions.[74]

Opponents of Proposition 57 argued that it applies to violent criminals,

> [Proposition 57] will increase crime and make you less safe. . . . [T]he weakening of California's anti-crime laws has gone too far. Don't amend California's Constitution to give even more rights to criminals. Make no mistake. If Prop. 57 passes, every home, every neighborhood, every school will be less safe than it is today.[75]

On the other side, proponents argued that "Prop. 57 focuses our system on evidence-based rehabilitation for juveniles and adults because it is better for public safety than our current system. . . . Prop. 57 saves tens of millions of taxpayer dollars . . . [and] keeps[ ] dangerous criminals behind bars."[76] State-level reaction to *Miller v. Alabama* and *Montgomery v. Louisiana*, like that seen in California, reveals the dichotomy between policymakers willing to fully embrace juvenile reform and those willing to go no further than the most restrictive interpretation of constitutional requirements.

---

71. 98th Gen. Assemb., Reg. Sess., at 81 (Ill. 2013) (statement of Sen. Steans).

72. *Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016*, INVITATION TO COMMENT (2016); *Prop 57: Criminal Sentences. Parole. Juvenile Criminal Proceedings and Sentencing. Initiative Constitutional Amendment and Statute*, OFFICIAL VOTER INFO. GUIDE (2016), vigarchive.sos.ca.gov/2016/general/en/quick-reference-guide/57.htm [https://perma.unl.edu/TY6Y-NCY3].

73. *Juvenile Law: Implementation of Proposition 57, the Public Safety and Rehabilitation Act of 2016*, *supra* note 72.

74. *Id.*

75. *Id.*

76. *Id.*

C. Detangling Proportionality and Term-of-Years Sentences

Miller v. Alabama completes the Supreme Court's most recent endeavors into juvenile sentencing and the constitutional mandates applicable to this practice.[77] Although state legislative statutes factored into the equation, Justice Kagan delivered an opinion that thematically reiterated the conclusion that juvenile sentencing should consider the offender's "'lessened culpability' and greater 'capacity for change.'"[78] *Miller v. Alabama* convincingly expounds upon the reasons for differentiating juveniles from adults when considering sentences for equally awful criminal behavior. The Court expressed a universal norm, in that: "none of what [may be] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. . . . So *Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offense."[79] It follows, then, that if the constitutional difference based on age status flows from one offense category to another when imposing life without parole, why does not age status similarly speak to mandatory sentencing for lesser offenses? The Supreme Court established a constitutional distinction that clearly relies on the age of an individual, not the severity of the alleged offense; therefore, we must reconsider term-of-years sentences for juveniles.

Eighth Amendment doctrine contains a proportionality principle: convicted persons should be punished in proportion to the offense committed, and the punishment should be comparable to that imposed on others convicted of similar offenses in the sentencing jurisdiction and other jurisdictions.[80] The view that one's punishment should be in proportion to the severity of the crime invokes few qualms among judges and commentators.[81] The proportionality determinations, however, infuse subjectivity, especially when drawing norms specific to juvenile sentencing practices.

The Supreme Court's steady progression on setting proportionality boundaries in juvenile sentencing demonstrates an expansion in constitutional law that is approaching a delicate national consensus. In reaching the current state of affairs, the Court used past textual interpretations and precedent to annunciate a norm that reflects expert

77. Miller v. Alabama, 567 U.S. 460 (2012).
78. *Id.* at 465 (citing Graham v. Florida, 560 U.S. 48, 68 (2010)).
79. *Id.* at 473. The Court makes clear that an offender's age and juvenile status must be incorporated into the proportionality determination. *Id.* at 473–74 (referencing *Graham* and *Roper*'s "foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children").
80. Tison v. Arizona, 481 U.S. 137 (1987); Solem v. Helm, 463 U.S. 277 (1983); Enmund v. Florida, 458 U.S. 782 (1982).
81. Weems v. United States, 217 U.S. 349, 367 (1910).

opinions based on social science, developmental psychology, and neuroscience research.[82] The Court's Eighth Amendment juvenile decisions announced constitutional rules that undoubtedly strained society's position on punishing juvenile offenders. Public opinion still wrestles with accepting these advancements in adolescent research and the import of how these awakenings should affect criminal policy. Moreover, the constant movement on the constitutional level and expert level has not trickled down evenly to state policymakers. For this reason, the Court's term-of-years analysis must also accommodate the advancements made in adolescent behavior knowledge outside of the harshest penalties available.

The Court applies a rational basis style test to determine whether term-of-years sentences pass constitutional review.[83] Under its most recent pronouncements, *Solem v. Helm*[84] and *Harmelin v. Michigan*,[85] the Court hesitated to overturn long term-of-years sentences under the Eighth Amendment's proportionality requirement. In determining whether an imposed sentence is unconstitutionally disproportionate to the crime committed, the Court considers the following: "the gravity of the offense and the harshness of the penalty"; a comparison of "the sentences imposed on other criminals in the same jurisdiction"; and, a comparison of "the sentences imposed for commission of the same crime in other jurisdictions."[86] Specific to the first inquiry, the Court proposes that "[c]omparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender."[87]

The *Solem* Court applied a three-part test that compared the offense's gravity to the penalty, the defendant's sentence to others in the jurisdiction, and the sentences of defendants who committed similar crimes in other states. In its next iteration, the *Harmelin* Court explicitly deferred to each state's legislature to choose its penological goals and set appropriate sentences rationally related to those goals. Unlike *Solem*, *Harmelin* required defendants to meet an initial burden of gross disproportionality before the Court would engage in crime-pun-

82. *See* Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts and Law*, 117 HARV. L. REV. 4, 82–83 (2003); *see also Miller*, 567 U.S. at 68; Roper v. Simmons, 543 U.S. 551, 569–71 (2005).

83. "Under *Ewing v. California* and *Harmelin v. Michigan*, a prison sentence that reflects a 'rational legislative judgment' and furthers a 'legitimate penological goal' will be allowed to stand, particularly when there is no suggestion that the claimed motive for the sentence is a 'pretext' for an illegitimate motive." Michael P. O'Shea, *Purposeless Restraints: Fourteenth Amendment Rationality Scrutiny and the Constitutional Review of Prison Sentences*, 72 TENN. L. REV. 1041, 1086 (2005).

84. *Solem*, 463 U.S. 277.

85. Harmelin v. Michigan, 501 U.S. 957, 1006 (1991).

86. *Solem*, 463 U.S. at 290–92.

87. *Id.* at 292.

ishment comparisons. That the legislature statutorily mandated the life without parole sentence in dispute was a key factor in the *Harmelin* decision. The Supreme Court held that absent a procedural defect, it would be unprecedented for the Court to overturn a punishment based solely on the term length.[88] According to Justice Thomas's interpretation of the Eighth Amendment, the Supreme Court may not rule upon the proportionality of sentences based on either the crime or the class of defendants. Instead, the clause "leaves the unavoidably moral question of who 'deserves' a particular nonprohibited method of punishment to the judgment of the legislatures that authorize the penalty, the prosecutors who seek it, and the judges and juries that impose it under circumstances they deem appropriate."[89]

In *Ewing v. California*,[90] the Supreme Court applied its *Harmelin* holding to California's former "three strikes" statute to determine whether a rational basis existed to justify the imposed sentence when reviewing the State's entire punishment framework as a whole. The constitutionality analysis also took into account the four punishment goals, and the Court reached a conclusion that California acted rationally in its decision to impose enhanced sentences on recidivists.[91] The Court's apparent willingness to find a rational basis for state actors attaching a lengthy sentence to any punishment goal undoubtedly increases the probability that state sentencing statutes will pass constitutional muster.[92] Even in the criminal context, however, states may not ignore the rehabilitation goal when fashioning punishment schemes applicable to juvenile offenders.

The current term-of-years analysis and its consideration of legislative action prevents any judiciary driven insistence on reforming the juvenile system from getting too far ahead of state-level legislative actors. At the end of the day, it is still the state legislatures that define criminal violations and set the length of terms for punishment, limited only by the constraints of the Eighth Amendment.[93] Unfortunately, experts have yet to devise the "ideal" sentence to match any given cir-

88. "We have never invalidated a penalty mandated by a legislature based only on the length of sentence, and . . . we should do so only in the most extreme circumstance." *Harmelin*, 501 U.S. at 1006.

89. Graham v. Florida, 560 U.S. 48 (2010).

90. 538 U.S. 11 (2003).

91. *Id.* at 28–31.

92. "[S]ince Eighth Amendment scrutiny is satisfied by a rational connection to a permissible sentencing goal, the Court's broadening of the permissible bases for a noncapital sentence in *Harmelin* and *Ewing* reduces rather than increases the courts' discretion to intervene." O'Shea, *supra* note 83, at 1084.

93. "Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals. But no penalty is *per se* constitutional." Solem v. Helm, 463 U.S. 277, 290 (1983).

cumstance.[94] This inevitably results in state jurisdictions treating the same crime differently under the various state penal codes.[95] Beginning with *Rummel* through *Ewing*, the Court expressed a hesitancy to overturn term-of-years sentences out of deference to state legislatures.[96] For juveniles, however, any term-of-years sentencing that lacks an individualized assessment, or is passed without any consideration for evidence-based youthfulness traits, should not pass constitutional scrutiny.

D. State Courts Interpret the Constitutional Fault Lines

In *Miller v. Alabama*, the Supreme Court set forth the common link between its juvenile death penalty and life without parole sentencing decisions: "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."[97] Under the Eighth Amendment proportionality cases, the Supreme Court's own judgment yielded to social science, developmental psychology, and neuroscience when placing limits along the outer boundaries of juvenile sentencing. In determining the evolving standard, the Supreme Court often arrived at its most sound reasoning for reforming juvenile sentencing through application of its own judgment under the Eighth Amendment's proportionality analysis, which includes acceptance of prevailing social science and review of penological goals.[98] This conscientious analysis serves as a model for state courts—not just what's said, but the process of what's reliable and persuasive for making sentencing determinations for juvenile offenders.

State appellate court cases from Iowa, Illinois, and Idaho provide illustrative examples of the inconsistencies that arise when the Court's holding and analysis is extended to term-of-years sentences for juveniles. The Iowa Supreme Court expanded *Miller* to mandatory

94. "Penologists themselves have been unable to agree whether sentences should be light or heavy, discretionary or determinate. This uncertainty reinforces our conviction that any 'nationwide trend' toward lighter, discretionary sentences must find its source and its sustaining force in the legislatures, not in the federal courts." Rummel v. Estelle, 445 U.S. 263, 283–84 (1980).

95. *Id.* at 282.

96. "This Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime." *Id.* at 271. But "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare." *Id.* at 272. "Although we stated that the proportionality principle 'would . . . come into play in the extreme example . . . .'" *Ewing*, 538 U.S. at 21 (citing *Rummel,* 445 U.S. at 272–74); *see*, *e.g.*, *Solem*, 463 U.S. at 289; Hutto v. Davis, 454 U.S. 370, 372 (1982).

97. Miller v. Alabama, 567 U.S. 460 (2012).

98. Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 116–18 (2010).

sentences lesser than life without parole, concluding that "all mandatory minimum sentences of imprisonment for youthful offenders are unconstitutional under the cruel and unusual punishment clause" of their state constitution.[99] The court connected the youthfulness traits accepted in *Miller v. Alabama* to the crime's severity in finding that "some serious crimes can at times be committed by conduct that appears less serious when the result of juvenile behavior."[100] Therefore, the pertinent reasoning revolves around the mandatory nature of the sentencing statutes.[101]

According to the Iowa Supreme Court, when comparing harsh sentences to lesser ones, "Mandatory minimum sentencing results in cruel and unusual punishment due to the differences between children and adults. . . . [N]o principled basis exists to cabin the protection only for the most serious crimes."[102] This extension stems from interpreting the "spirit of *Miller*" to "even a short sentence . . . deprives the district court of discretion in crafting a punishment that serves the best interests of the child and of society."[103] The *Lyle* majority clarified that such a holding did not prohibit imposing the maximum sentence or minimum sentence before parole eligibility; instead, its proscription merely followed the Supreme Court's lead that "prohibits the one-size-fits-all mandatory sentencing for juveniles."[104]

In *People v. Patterson*, the Illinois Supreme Court reviewed the constitutionality of its mandatory transfer statute in light of the U.S. Supreme Court's holdings in *Roper*, *Graham*, and *Miller*.[105] There, the defendant challenged the Illinois automatic transfer statute under the due process clause and the Eighth Amendment. The Illinois statute at issue required the transfer of anyone at least fifteen years old who commits an enumerated crime to criminal court for prosecution as an adult.[106] The majority rejected the defendant's federal procedural and substantive due process claims, reasoning that the juvenile sentencing trilogy reflected only an analysis of the Eighth Amendment standard, and therefore "[a] ruling on a specific flavor of constitutional claim may not justify a similar ruling brought pursuant to another constitu-

99. State v. Lyle, 854 N.W.2d 378, 400 (Iowa 2014).

100. *Id.*

101. "Accordingly, the heart of the constitutional infirmity with the punishment imposed in *Miller* was its mandatory imposition, not the length of the sentence. The mandatory nature of the punishment establishes the constitutional violation." *Id.* at 401.

102. *Id.* at 402.

103. *Id.*

104. *Id.* at 403.

105. People v. Paterson, 25 N.E.3d 526 (Ill. 2014).

106. *Id.* at 548.

tional provision."[107] But if not transferred back to juvenile court based on the validated developmental research, what should happen?

Turning to the Eighth Amendment argument, defendant contended that the automatic transfer statutes "fail to recognize modern scientific research showing that youths are different from adults . . . ."[108] The majority rejected this argument on two bases important to this exploration. First, the Illinois Supreme Court held that its automatic transfer statute did not "function[ ] as a sentencing statute."[109] Therefore, the *Patterson* court reasoned that jurisdiction in either a juvenile or criminal court merely presents a procedural question and no punitive issues.[110] It is also important to remember that juvenile courts established in every state operate under the authority of legislation and not state or federal constitutional requirements. Such knowledge factored in the *Patterson* decision because the majority also accepted that

> the purpose of the transfer statute is to protect the public from the most common violent crimes, not to punish a defendant. In enacting the automatic transfer statute, the [Illinois] legislature . . . *reasonably* deemed criminal court[s] to be the proper trial setting for a limited group of older juveniles charged with at least one of five serious named felonies.[111]

For this reason, the defendant's Eighth Amendment claim against a procedural statute could not move forward.

Second, the Illinois Supreme Court concluded that the lengthy sentence resulting from defendant's transfer to criminal court and the subsequent application of mandatory sentencing provisions in no way violated the juvenile sentencing trilogy's message or holding.[112] Nevertheless, the Justices simultaneously gave a nod to the trilogy's spirit against imposing lengthy sentences, providing this caution:

> We do, however, share the concern expressed in both the Supreme Court's recent case law and the dissent in this case over the absence of any judicial discretion in Illinois's automatic transfer provision. . . . Accordingly, we strongly urge the General Assembly to review the automatic transfer provision based on the current scientific and sociological evidence indicating a need

107. *Id.* at 549.

108. *Id.* at 550.

109. *Id.* at 551.

110. *Id.*

111. *Id.* (emphasis added).

112. The court stated,

> Here, defendant was sentenced to 12 years in prison on each of three counts of aggravated criminal sexual assault. The sentences were required to be served consecutively, and defendant was statutorily mandated to serve at least 85% of his total prison term, or 30 years, 7 months. Although lengthy, that term is not comparable to either the death penalty or "'the second most severe penalty permitted by law,'" life in prison without parole.

Id. at 552 (internal citations omitted).

> for the exercise of judicial discretion in determining the appropriate setting for the proceedings in these . . . cases.[113]

Justice Theis of the Illinois Supreme Court wrote a dissenting opinion in *Patterson* on the singular issue of whether the state's automatic transfer statute violates the Eighth Amendment.[114] Her critique began with an observation that the majority's "approach is overly simplistic, and elevates form over substance. The automatic transfer statute may indeed protect the public, but it does so by mandatorily placing juveniles in criminal court based only on their offenses, and thereby exposing them to vastly higher adult sentences, and in effect, punishing them."[115] I wholly agree with this assessment, and as discussed below, the argument could go further in support of this position.

The opinion's most enlightening portion tracked the state legislative floor debates about passing the automatic transfer statute, where punishment and rehabilitation played no role in the discussion.[116] Specific to the Eighth Amendment, Justice Theis opined that "[w]hat makes the automatic transfer statute unconstitutional is not that it is punishment, but that it runs afoul of 'evolving standards of decency that mark the progress of a maturing society.'"[117] Furthermore, "the constitutional infirmity with the statute is not that it exposes juveniles to adult sentences, but that it operates automatically for those juveniles charged with certain offenses."[118] The dissent concluded by finding that the Eighth Amendment did apply, especially because "[t]ransfers are automatic, and the statute contains no mechanism by which a judge can consider characteristics of juveniles before transferring them to criminal court, where, if convicted, they face stiffer adult penalties, enhancements, and other rules to extend their time in prison."[119]

In *State v. Jensen*, an Idaho appellate court addressed a challenge to automatic waiver drawing from the juvenile sentencing trilogy. The defendant argued that even though the sentencing trilogy "do[es] not directly apply to his constitutional challenge to the automatic waiver, [his] overarching contention from these cases is that 'youth matters,' and that the automatic waiver forecloses consideration of his youth and attendant characteristics, thereby triggering similar Eighth Amendment concerns."[120] While concluding that the procedural statute in no way imposed a punishment, and thus any Eighth Amend-

113. *Id.* at 553.
114. *Id.* at 556.
115. *Id.* at 557.
116. *Id.* at 558–61.
117. *Id.* at 561.
118. *Id.* at 567.
119. *Id.* at 569.
120. State v. Jensen, 385 P.3d 5, 9 (Idaho Ct. App. 2016).

ment argument must fail—the court acknowledged that individual characteristics must be considered when sentencing juveniles convicted in criminal court. The court presented this requirement as an Eighth Amendment requirement that is "safeguard[ed] in sentencing for juveniles because blended sentences are allowed."[121]

III. STATES DELINEATE THE SCOPE AND IMPLEMENT POLICY

The political motivations behind choosing one method over another for juvenile crime control wear many colors. Historically, this melee ran freely across the legal landscape with no tether to constitutional principles. The Supreme Court, however, has gently reined in public opinion on juvenile criminal punishment. Backed by *Montgomery v. Louisiana*, the juvenile sentencing trilogy provides a clear outline for developing a sound policy on sentencing a juvenile offender, but the nuances of such a policy are still awaiting further definition by state legislatures and state agencies. As the Court's doctrine creates a paint-by-numbers portrait of juvenile justice, legal commentators and advocates continue to understand the full import of supplementing common sense with social science, developmental psychology, and neuroscience in constitutional law.

The Court's opinions, grounded in external expertise on the topic, continue to gain durability and legitimacy through compliant state legislative acts.[122] Our knowledge about the adolescent brain and behavior patterns is constantly expanding; the Supreme Court noted as much in its post-*Roper* decisions. The question of how to constitutionally recognize these advancements in the form of criminal statutes remains in flux and unanswered.[123] The social and political movement depicted by the Court, however, does provide solid support for a leap into uncharted waters for state-level legislation when justified through expert research and opinion.[124]

A. The Science Advantage: Recognizing Youth Deficiencies & Its Consequences

At present, a constitutional norm sits largely vulnerable and too often trampled upon due to political expediency coupled with weak checks.[125] Legal history amply demonstrates the penchant for state lawmakers to mollify public outrage with juvenile delinquency

121. *Id.* at 11.
122. Post, *supra* note 82, at 107–08.
123. Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 837–39 (2002).
124. Post, *supra* note 82, at 77, 81.
125. Kennedy, *supra* note 123, at 860.

through heightened punishment schemes. I argue that *Roper*, *Graham*, and *Miller* established a different prioritization when determining the evolving standard for juvenile sentencing. The traditional objective indicia based largely on public opinion, expressed via jury verdicts and legislation, now takes a back seat to social science, developmental psychology, and neuroscience discoveries related to this demographic. In effecting this change, the Supreme Court has erected a constitutional buffer that takes the shape of its own evidence-based judgment in the juvenile sentencing context. The Court's reordering should be reflected in the roles played by legislatures, the courts, and state agencies when imposing sentences on youthful offenders.

Under *Roper*, *Graham*, and *Miller*, the Eighth Amendment provides a proscriptive right alongside a procedural requirement, which would support arguments for an individualized assessment in all criminal law sentencing to accommodate rehabilitation goals. In the juvenile context though, the *Roper* Court examined how the distinctive traits of youth undercut two penological justifications recognized for imposing the death penalty: the goals of retribution and deterrence.[126] In *Graham*, turning its focus to life without the possibility of parole, the Court explained why incapacitation and rehabilitation goals are not satisfactorily served when imposing such sentences upon juveniles who have committed a nonhomicide offense.[127] The Court revised, ever so slightly, its thoughts on rehabilitation in the latest juvenile sentencing case, *Miller v. Alabama*, which challenged mandatory life without parole statutes.[128] There, the Court drew an analogy between imposing the death penalty on adults and sentencing juveniles to life without parole. Although the Court did not remove life without parole as a sentencing option for juvenile offenders, it predicted that in light of the sentencing trilogy's statements on "children's diminished culpability and heightened capacity for change, . . . appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[129] In *Montgomery v. Louisiana*, the Court once again revisited these themes in deciding to retroactively apply the *Miller* opinion as a substantive and not procedural change to juvenile sentencing requirements.

126. Roper v. Simmons, 543 U.S. 551, 571 (2005) ("Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults."); *see also* Atkins v. Virginia, 536 U.S. 304, 319 (2002) (citing Gregg v. Georgia, 428 U.S. 153, 183 (1976) (arguing that retribution and deterrence are not fulfilled due to mental incapacity of the defendant); Thompson v. Oklahoma, 487 U.S. 815, 836–37 (1988); Enmund v. Florida, 458 U.S. 782, 797–801 (1982) (arguing that retribution and deterrence are not fulfilled based on defendant's lack of intent).

127. Graham v. Florida, 560 U.S. 48, 71–74 (2010).

128. Miller v. Alabama, 567 U.S. 460, 472–74 (2012) (citing *Graham*, 560 U.S. 48).

129. *Id.* at 479–81.

The Supreme Court's shift raises broader questions coming off a period marked with an increase in offense-based legislation, rather than offender based rules. What cuts to the core of our expectations for the justice system when confronting hard juvenile cases: do our priorities lie in seeking behavior transformation, fairness, or retribution? How do we accomplish these goals while maintaining integrity when distinguishing children from adults? The social science, developmental psychology, and neuroscience for youth offenders should not serve as deterministic or an impenetrable shield from exposure to adult consequences; instead, the expert advancements should temper our punishment disposition through an educated lens.[130] The Supreme Court speaks of culpability, and even though this measure is subjective, the general baseline that most juveniles lack the degree of culpability attributed to an adult, independent of the crime, does not betray our common sense.[131]

Many juvenile reform endeavors will be considered major upheavals, and each jurisdiction will be required to determine its own prioritization for youth justice in an effort to build socially palatable criminal interventions and consequences, although the Court's conclusions indeed carry gravitas. Each of the Supreme Court's juvenile cases define important fringe boundaries, but states must fine-tune the remedies by simultaneously balancing their obligation to protect citizens with providing services to identified youth miscreants. Not unlike learning disabilities and mental illness, juvenile criminal actors committing serious and violent crimes stretch the curative imagination. But here, we must act responsibly to vindicate the wronged, protect society, and recognize youthfulness at the crucial sentencing stage. The majority's analyses of retribution, incapacitation, deterrence, and rehabilitation in the juvenile sentencing cases reveal the significance those Justices assigned to adolescent behavioral traits when evaluating proportionate sentencing. In this way, the Court is able to impart its value judgments onto society at large through constitutional law.

If juveniles are truly "constitutionally different" from adults, then they deserve a different test under the Eighth Amendment's cruel and unusual punishment clause. When considering cruel and unusual punishment for adults, the Court principally has examined objective indicia based on evolving standards, which focuses primarily on legis-

130. "[B]est utilized not to establish a bright-line boundary between adolescence and adulthood, but to point to age-related trends in certain legally relevant attributes, such as the intellectual or emotional capabilities that affect decision making in court and on the street." Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Jurisdictional Boundary*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE 379, 387 (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

131. *Id.* at 393–99.

lative cues. "Legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency."[132] For juveniles, however, we should still consider the best interests of the child. This is a standard that pervades our child welfare and delinquency jurisprudence, and it should carry no lesser weight in the criminal context. The best interests of children must not waver based on public opinion as expressed through a legislator's "tough on crime" agenda. Instead, just as we measure the diminished capacity of juveniles by using social science evidence, so must we depend on such studies to determine the most effective punishments for rehabilitating juveniles in criminal jurisdictions. This approach connects a core goal of the juvenile system—rehabilitation—with studied methods that do not rely solely on mimicking the "justice" and "punishment" meted out for adults convicted of similar crimes.

Balancing morality with constitutional punishment under the Eighth Amendment may draw controversy. It is true that juveniles, like adults, are capable of committing unthinkable acts against another's life and security. Even so, the constitutional differences between juveniles and adults must be acknowledged at the sentencing stage, regardless of the severity of the act. Dealing with juvenile offenders in criminal courts also exposes competing norms: serious offenses necessitate proportionate punishment under state law; however, children are constitutionally different from adults. This second norm injects into judges and lawmakers a moral consciousness to somehow recognize the diminished culpability of children as compared to adults when adjudicating and sentencing identical criminal acts. These competing interests present yet another conflict between long-held values preserved through state action: protecting the child's best interests while simultaneously protecting public safety. The conundrums seemingly confound state actors that are intent on treating youth as pint-sized adults by turning a blind eye to the offender's traits and focusing exclusively on that individual's offense and criminal history. Fortunately, the social science, developmental psychology, and neuroscience supporting the Supreme Court's juvenile sentencing trilogy helps call into question where we stand today as a society with rehabilitating versus punishing youth.

I do not read a right to rehabilitation into the Supreme Court's juvenile sentencing cases, but treatment appears to be the only way to realize the Supreme Court's stated goals. The *Graham* Court stressed the near impossibility of predicting the likelihood of future criminal deviance from juvenile offenders because developmental research un-

132. Woodson v. North Carolina, 428 U.S. 280, 294–95 (1976) (citing Gregg v. Georgia, 428 U.S. 153, 179–81 (1976)).

dercuts our ability to construct a reliable looking glass.[133] Blended sentencing, on the other hand, permits society to work against dark currents: this child possesses deviant tendencies far past the juvenile system's capacity to heal, and we must punish a broken yet developing mind for unthinkable transgressions committed upon an innocent citizen. A blended sentencing framework also captures this demographic in a defined space. Moreover, rehabilitation serves the public's goals too by returning an upstanding citizen to society.[134]

Under adequate procedural restraint, judicial discretion may preserve legitimacy in the system when used as a vehicle to express developments in juvenile delinquency and effective intervention.[135] Predetermined categories based on offense and age simply do not align with the prevailing developmental psychology; the push towards individualized assessment more aptly meets any punishment goals directed at juvenile offenders. Steinberg and Cauffman draw a firm policy conclusion in light of the unknowns about adolescent behavior patterns: "the psychological heterogeneity of the adolescent population makes it difficult to develop policies, including transfer policies, that are based on bright-line distinctions made on the basis of age."[136] They cite to three reasons that support this conclusion: (1) adolescents experience "rapid and dramatic changes in . . . physical, intellectual, emotional, and social capabilities" unlike any age group other than during infancy; (2) adolescence is a "period of potential malleability, during which experiences in the family, peer group, school, and other settings still have a chance to influence the course of development;" and (3) adolescence "is an important formative period, during which many development trajectories become firmly established and increasingly difficult to alter."[137] Further still, we admittedly are still sitting in the dark about whether these observations may vary along demographic lines, i.e. race, ethnicity, or socioeconomic status.[138]

B. Age Matters: Commonsense Supplemented with Expert Opinion

A juvenile's fate resting in the hands of elected officials and criminal procedures designed for adult offenders makes for a precarious ex-

133. "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." *Graham*, 560 U.S. at 72.

134. ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 246 (2008).

135. "Sentencing discretion permits the enforcement of newly developing norms through the criminal law to proceed without doing too much violence to a sense of justice . . . ." Kennedy, *supra* note 123, at 839.

136. Steinberg & Cauffman, *supra* note 130, at 383–84.

137. *Id.*

138. *Id.* at 385.

perience. Ideally, public education administrators, social services, law enforcement, and the judiciary—experienced professionals and experts—would work in tandem, guided by common principles meant to achieve a desired rehabilitative outcome that is in both the child's and society's "best interest." The Supreme Court's pronouncements on juvenile sentencing complement such a reform agenda.

Rehabilitation serves as a central theme for juvenile courts, and the transfer statutes inherently bring to bear all four theories of punishment upon particular juveniles. The social science, developmental psychology, and neuroscience, relied upon in *Roper*, *Graham*, and *Miller*, seems to encourage a resurrection of the justice system's responsibility to juvenile offenders. Juvenile courts include safeguards, programs, and a case team of professionals trained to rehabilitate and monitor juvenile behavior. It is time that we harness this expertise to develop appropriate rehabilitative programs that strive to reintegrate these inmates back into society, whenever possible.

There is no question that we stand ready to show deference to professionals in other contexts involving minors, including public education and mental institutionalization. The deference given education administrators to direct school policy runs deep and gained more credence in an era when federal courts began terminating desegregation consent decrees. The next-generation of federal legislative reforms, implemented through programs like No Child Left Behind required evidence-based classroom methods. Moreover, the Supreme Court has consistently held that children do not "shed their constitutional rights at the schoolhouse doors." This constitutional lineage sets forth limitations that are defined by the student-school administrator relationship and the purpose of public education. In *Parham v. J.R.*, for example, the Supreme Court dispensed with requiring a formal hearing prior to institutionalization in fulfilling constitutional due process. The Court justified diminutive procedural protections in light of the ultimate decision-maker's expertise, stating,

> Due process has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer. Surely, this is the case as to medical decisions, for "neither judges nor administrative hearing officers are better qualified than psychiatrists to render psychiatric judgments."[139]

Family and juvenile judges have appreciated the uncertainty wrought when making decisions about a young person's future,

> Juvenile courts utilized indeterminate processes that integrated principles of psychology and social work in their evaluation of children. With this, they developed specific and individualistic treatment plans to meet the child's

139. Parham v. J.R., 442 U.S. 584, 607 (1979) (quoting *In re* Roger S., 569 P.2d 1286, 1299 (Cal. 1977) (Clark, J., dissenting)).

> needs. This required exercising vast discretion in order to develop appropriate remedies that would adequately address the child's issues."[140]

In discussing child-custody adjudications, Professor Robert Mnookin points to the difficulty in choosing the right parent pursuant to the indeterminate "best interest" standard: indeterminacy encourages contentious proceedings; consistency waivers; unspoken factors enter the rubric; but finally,

> the indeterminacy flows from our inability to predict accurately human behavior and from a lack of social consensus about the values that should inform the decision . . . . Our inadequate knowledge about human behavior and our inability to generalize confidently about the relationship between past events or conduct and future behavior make the formulation of rules especially problematic. Moreover, the very lack of consensus about values that makes the best-interests standard indeterminate may also make the formulation of rules inappropriate.[141]

History demonstrates that the layman-sourced "objective" indicia, relied upon to elucidate an evolving standard, inadequately accommodates child development research and traditionally-held rehabilitation goals. Instead, a focus on age and defining juvenile court jurisdiction around constitutionally recognized traits of diminished culpability for youth helps to avoid mimicry of adult punishment schemes.

Based on the sentencing trilogy, whether apparent through an Eighth Amendment or due process analysis, an offender's youthfulness should affect his or her procedural treatment in the justice system.[142] Legal academia is replete with concrete policy suggestions regarding the juvenile sentencing dilemma. In *The Youth Discount*, Professor Barry Feld argues that legislators should reduce juvenile offenders' punishment based on the child's age and the maximum sentence available for adults convicted of similar charges.[143] Feld submits that states should incorporate youth-based sentence reductions in statutes as a preferred alternative to case-by-case evaluations reliant on the judge's or jury's discretion.[144] Statutory reductions cued to the offender's age acknowledges lessened juvenile culpability as a norm instead of an objectively measurable quantity, and they would avoid the penchant to disproportionately weigh a crime's severity

140. Lahny R. Silva, *The Best Interest Is the Child: A Historical Philosophy for Modern Issues*, 28 BYU J. PUB. L. 415, 423 (2014).

141. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 264 (1975).

142. Janet C. Hoeffel, *The Jurisprudence of Death and Youth: Now the Twain Should Meet*, 46 TEX. TECH L. REV. 29, 54 (2013).

143. Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 108 (2013).

144. "A categorical Youth Discount would provide adolescents with substantially reduced sentences based on age-as-a-proxy for culpability. The Youth Discount would give the largest sentence reductions to the youngest, least mature offenders based on a sliding scale of diminished responsibility." *Id.* at 141.

against the mitigating features attributed to youthfulness.[145] Moreover, he argues that a "Youth Discount imposes sentences that hold juveniles accountable, manage the risks they pose to others, and provide them with a meaningful opportunity to reform without extinguishing their lives."[146]

Professor Janet Hoeffel addresses the difficulty in realizing consistency and individualization in the transfer process.[147] In surveying the transfer eligibility statutes, the most threatening juveniles are not the only ones who are brought into criminal courts without juvenile judicial review.[148] Hoeffel argues for categorical changes to transfer parameters in combination with changes to judicial discretionary considerations designed to ensure greater predictability, transparency, and accountability.[149] Lahny Silva argues that currently, best interest principles play no role in the event of automatic transfer statutes, and a presumption of immaturity would serve as a "legislative safety valve prior to the transfer decision."[150] The existence of such a presumption would force a hearing prior to any movement between jurisdictions for youth offenders.[151] He argues that evidentiary support on the issue may include "whether the juvenile has ever been adjudged 'mature' in a previous legal proceeding, the juvenile's mental health status, I.Q., familial status, social service history, financial dependency, and criminal history."[152] The defendant may employ experts to present testimony on "the general psychosocial developmental characteristics of juveniles as well as the maturity level of the individual specifically."[153]

Not every advocate for progressive juvenile justice reform ascribes to diminished culpability as being a prioritized justificatory position. In *Treating Juveniles like Juveniles*, Professor Slobogin explains why a preventive model for juvenile justice based on risk assessments and deterrence goals may be superior to retributive and rehabilitation

145. *Id.* at 139–40.
146. *Id.* at 146–47.
147. Hoeffel, *supra* note 142, at 35.
148. "Allowing transfer at such young ages and for such minor offenses means it is practically certain that transfer is not being authorized for the worst of the worst." *Id.* at 40.
149. Professor Hoeffel explains,

> By far the most challenging and least successful effort in both the death penalty jurisprudence and in the juvenile transfer jurisprudence (which is practically non-existent) is the effort to meaningfully guide the decision-maker's discretion in whether to impose death or transfer, and to lower the risks of arbitrary and capricious decision-making.

Id. at 41, 55–56.
150. Silva, *supra* note 140, at 429, 452.
151. *Id.* at 459–60.
152. *Id.* at 460.
153. *Id.* at 464.

models resting on a diminished culpability theory.[154] As described in his words, "the focus of the individual prevention model is specific deterrence through treatment and, if necessary, incapacitation."[155] As compared to rehabilitation, "this path avoids claiming that juveniles are excused because of their youth."[156] In contrast to the retributive model, individual prevention "retains the . . . threshold requirement of a criminal act, and is narrowly focused on policies and procedures that promote recidivism-reduction rather than the broader goal of creating a well-socialized individual."[157] This approach to juvenile sentencing also rejects "relative culpability as the basis for the duration and type of disposition," in favor of "assessments of risk that vary the intervention depending on the most effective, least restrictive means of curbing future crime."[158] The multitude of shifting details inherent in resolving the juvenile delinquency problem invites many opinions, but the law does not need to rigidly support one approach over another. Instead, the law should accommodate these experimental solutions based on each state's preference as cabined by constitutional goals and principles.

IV. THE UNDULATING PUBLIC RESPONSE TO JUVENILE CRIME

An unknown outcome for the individual offender, coupled with a desired result for greater society, spurred juvenile justice reformers to take action. Their larger mission resembles today's hope for juvenile delinquents, but the caseload and the severity of the offenses present a stark contrast. Added to this dilemma is an omnipresent influence that comes from society-at-large and its representatives. The intensity of the social pressure felt in state houses and state courthouses often fluctuates. During periods of high juvenile crime and media attention, policymakers have reacted to public outrage by using their legislative authority to stiffen punishments. Moments such as these have threatened the very existence of juvenile courts. The social pressure to punish juvenile offenders in kind with the criminal offense, the goal of treating and reintegrating them into communities, represents the

154. Referencing previous work, Slobogin and Fondacaro argue that "the best rationale for treating juveniles differently than adults is not their lesser culpability, but their lesser deterrability or, more precisely, the fact that criminal sanctions do not have the same deterrent effect on juveniles as they do on adults." Christopher Slobogin, *Treating Juveniles like Juveniles: Getting Rid of Transfer and Expanded Adult Court Jurisdiction*, 46 TEX. TECH L. REV. 103, 106 (2013) (citing CHRISTOPHER SLOBOGIN & MARK R. FONDACARO, JUVENILES AT RISK: A PLEA FOR PREVENTIVE JUSTICE (2011).

155. *Id.* at 108 (citing SLOBOGIN & FONDACARO, *supra* note 154).

156. *Id.*

157. *Id.*

158. *Id.*

quintessential unending debate spanning across generations. Meanwhile, social science, developmental psychology, and neuroscience developments in adolescent behavior all move forward undeterred by the electoral consensus.

The underlying purpose behind punishment and redemption for juvenile offenders has played itself out in a cyclical manner long before *Roper v. Simmons* and subsequent juvenile sentencing cases. Throughout legal history, the juvenile court has confronted attempts to destroy, undermine, and dismantle its very existence. Every state possesses *parens patriae* authority, which grounds juvenile courts in English common law and imposes on states an obligation to protect the welfare of their children. States also exercise a police power that is intended to serve societal interests, and it should be used to inure benefits to citizens in every state, including the children.[159] Unfortunately, balancing stakeholder interests means that state efforts are generally skewed towards allaying frantic public fears, much to the disadvantage of juvenile delinquents perpetuating social perceptions. Lawmakers, public voices, and media have pandered to misconceptions of youth crime in ways that undermine the juvenile court's original purpose and have intensified the punishment repercussions without retreat, even when faced with conflicting facts.

A. The Road to Finding National Consensus

The traditional juvenile court system sought to reform deviant behavior of a lesser magnitude than the crimes currently addressed through transfer and blended sentencing statutes.[160] Juvenile incidents involving murder, rape, and lethal violence did not present with the frequency seen in modern society.[161] Instead, the Progressive reformers focused not on felons but more on petty crimes indicative, in their judgment, of deficient parenting at home.[162] Advancements in psychiatry and psychology fueled reformers' beliefs that professionals could diagnose and then cure deviant behavioral patterns. As a result, they developed a theory that focused exclusively on the individual offender and the notion that society would receive residual benefits through decreased juvenile crime rates and more productive citizens.[163] Therefore, the reform movement sought to build productive

159. SCOTT & STEINBERG, *supra* note 134, at 69–70.

160. CHAD R. TRULSON ET AL., LOST CAUSES: BLENDED SENTENCING, SECOND CHANCES AND THE TEXAS YOUTH COMMISSION 17 (2016).

161. *Id.*

162. THOMAS J. BERNARD & MEGAN C. KURLYCHEK, THE CYCLE OF JUVENILE JUSTICE 74 (2d ed. 2010).

163. SCOTT & STEINBERG, *supra* note 134, at 87.

citizens from wayward origins, and transfers to criminal court rarely crossed their radar.[164]

Post-World War II, juvenile crime rates initially spiked in the 1970s much to the public's dismay. Research on career criminals and delinquents during the '70s gave license for policy makers to dispense with individualized assessments based on the notion that recidivism could be foreseen through an offender's repeat behavior and progressively more severe deviance.[165] Transfer to criminal courts reflected an initial value judgment through which society responds to an accused juvenile offender in the event of a conviction. A shift subsequently occurred in juvenile policy during the '80s and '90s. The underlying philosophy had effectively placed child welfare and rehabilitation on the shelf—priorities deemed secondary to punishment and protecting the public.[166] Social science literature fully fleshes out the moral panic that galvanized the hardening of juvenile punishments.[167] As described in *Rethinking Juvenile Justice*:

> [T]he reforms were largely the product of a powerful interaction among three forces: intense media interest in violent juvenile crime, public outrage and fear in response to the perceived threat, and politicians seeking to capitalize on these fears to win elections or retain popularity. These are the ingredients of a moral panic.[168]

Even after juvenile crime rates began to decrease, the harsh policies continued to move forward under a false perception of violence.[169] The psychologist responsible for "super-predator" eventually admitted that his rash label and "insight" into a morbid future proved false over time.[170] Despite this acknowledgment, the term super-predator still carries heavy weight in some communities. In fact, a presidential candidate recently apologized for using the term in speeches given more

164. BERNARD & KURLYCHEK, *supra* note 162, at 77.

165. Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 130, at 83, 102.

166. "Legislative offense exclusion laws that define chronological juveniles as adults on the basis of a serious offense reflect a retributive, just deserts alternative to individualized, rehabilitative juvenile justice jurisprudence." *Id.* at 103; *see also* SCOTT & STEINBERG, *supra* note 134, at 87 (noting that Progressivists in the twentieth century focused on rehabilitation for juveniles for the benefit of society).

167. Then urban gangs, crack cocaine, and acts of extreme violence captured the attention of the public and the imagination of the press. Legislators began to view juvenile justice as a politically fruitful area for exploration. The focus was upon violent offenses, and the political slogan of "Do an adult crime, do adult time" filled the airwaves and print media." Robert O. Dawson, *Judicial Waiver in Theory and Practice, in* THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 130, at 45, 58–59; SCOTT & STEINBERG, *supra* note 134, at 84.

168. SCOTT & STEINBERG, *supra* note 134, at 102.

169. *Id.* at 84, 101, 266.

170. *Id.* at 265.

than two decades ago in their political careers.[171] Public perception only needs media, opportunistic politicians, and an ill-informed audience.[172]

The thought that juvenile courts treated juvenile offenders with kid gloves that encourage bad behavior is one that continues to surface in cycles throughout our political history.[173] It is unsurprising then that the list of transfer-eligible crimes expanded in ways that ignored the actual violence rates.[174] In the current space, social scientists, developmental psychologists, and neuroscientists work in tandem to demonstrate that juveniles are indeed different from adults.[175] Scott and Steinberg suggest in their seminal work that their developmental model of juvenile justice may "serve as a stable foundation for a system of legal regulation solidly grounded in scientific knowledge."[176] I agree, but the trouble is that we have not yet developed a sufficiently strong constitutional framework on which to build these regulations and hold state legislatures responsible for respecting this burgeoning knowledge.

That juveniles are constitutionally different from their adult counterparts represents a categorical pronouncement best realized through individualization at the sentencing stage. Professors Robert Smith and Zoe Robinson describe an Eighth Amendment analysis focused on protecting the constitutional liberty of criminal defendants from majoritarian retributive excesses arising from moral panic.[177] The argument further asserts that the Court's juvenile sentencing cases support the Court's role as a buffer against social outrage and preserving one's dignity; therefore, the Eighth Amendment remains an open canvas to overturning mandatory sentencing statutes applied to juvenile offenders.[178] I would add, most importantly, that the Court's decision to rest its own judgment on external adolescent behavioral experts, rather than its own common sense, further insulates the judiciary from public ridicule and oppression.

---

171. Janell Ross, *Why Hillary Clinton's 'Super-Predator' Concession Is Such a Big Moment for Political Protest*, WASH. POST (Feb. 26, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/02/26/why-hillary-clintons-super-predator-apology-is-such-a-big-moment-for-political-protest/?noredirect=on&utm_term=b1dfd9215880 [https://perma.unl.edu/V4X-BZQZ].

172. "Experiences in other states, however, indicate that arousing public furor over juvenile crime and support for punitive legislation is not difficult, particularly in response to high-profile juvenile crimes that become the focus of media attention." SCOTT & STEINBERG, *supra* note 134.

173. *Id.* at 95.

174. *Id.* at 98.

175. *Id.* at 268.

176. *Id.* at 269.

177. Smith & Robinson, *supra* note 58.

178. *Id.* at 446–51.

The original juvenile rehabilitative ideal sought to suppress retributive goals by addressing the social welfare needs evident in some juvenile offenders.[179] The more astute current-day arguments concede that punishment needs to enter the conversation.[180] Balancing competing interests is also a key component that cannot be ignored, regardless of the nature of the discussion. Members of society want to lower juvenile crime rates, feel safe and secure in their everyday lives, and instill accountability simultaneous with personal growth for those inevitably released back into the community. These societal interests teeter precariously alongside juvenile offenders' rights to liberty and the shared interest of improvement.[181] In general, the public draws a distinction between violent offenders and repeat offenders. The public also frequently hones in on an offender's age and recognizes a disparity between juveniles and adults, expressed through the belief that the former group should receive more lenient punishment than their adult counterparts. And yes, the public does lean towards rehabilitating youth offenders.[182] In practice, this can be seen when juveniles are transferred into adult court, both judges and juries hesitate to throw down the gauntlet. The result is that juveniles either go unpunished and not rehabilitated at any level or they receive ridiculously long sentences.[183] An individualized, evidence-based criminal court sentencing policy for juvenile offenders forms this Article's main argument, but transfer statutes from juvenile to criminal court trace the moral panic surrounding youth criminal behavior and are the first step in exposing juveniles to adult punishment.

A fluid posture towards understanding and responding to youthful criminality describes the nation's prescriptions for troubled juveniles. By the 1970s, nearly every state had passed some form of a judicial waiver law, but automatic transfer statutes and prosecutorial discretion appeared at a later date.[184] From the 1980s to 1990s, state legislatures enacted transfer statutes in reaction to an increase in violent crimes by juvenile perpetrators.[185] Transfer statutes provided a mechanism for removing juvenile jurisdiction and trying youth in criminal courts. These statutes also lowered the minimum jurisdictional age, added transfer-eligible crimes, or redefined prosecutorial and judicial

179. Silva, *supra* note 140, at 421.

180. "In short, the model failed to recognize and accommodate explicitly the inherent tension between the state's professed purpose of acting in the interest of young offenders and its interest in retribution and protecting society against those who engage in criminal conduct." SCOTT & STEINBERG, *supra* note 134, at 92.

181. *Id.* at 92 (discussing public safety, fairness, and social welfare goals).

182. *Id*.

183. BERNARD & KURLYCHEK, *supra* note 162, at 170–71.

184. PATRICK GRIFFIN ET AL., TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 8 (2011).

185. *Id.* at 8–9.

discretion in the transfer decision.[186] Since 2000, few states have proposed revisions to their transfer laws as state legislatures seem reluctant to scale back transfer eligibility for juvenile offenders.[187]

During the super-predator era, which accounts for an increase in transfer statutes, state legislatures also adjusted the punishments available for adult offenders. These reforms, by default, affected juveniles transferred to the criminal system without any appreciation for their youthful attributes. For example, mandatory sentences lesser than life without parole were enacted for felony offenses, and legislatures eliminated the possibility of parole for certain felonies.[188] These reforms necessarily affected juveniles who were transferred to the criminal system without any appreciation or regard for their youthful attributes. Continuing to impose this treatment upon juveniles, in light of the Court's current understanding of developmental science, draws into question the constitutional proportionality for minor-aged offenders.

The national consensus strung together in the juvenile sentencing cases appears vulnerable under close examination. When considering the "objective indicia of consensus," the Court looks to sentencing statutes and the frequency of their application.[189] For this prong of the analysis, a strong interplay exists between policymakers and what will be considered lawful punishment. The Court literally tallies movement at the legislative level and enforcement of pre-existing laws to determine the constitutionality of a particular punishment.[190] In *Graham* and *Miller*, the Supreme Court questioned whether a "penalty has been endorsed through deliberate, express, and full legislative consideration."[191] This should be the universal standard for sentencing statutes applied to juvenile offenders, measured by the state legislature's consideration of the social science, developmental psychology, and neuroscience research currently available. The juvenile delinquent's entryway into criminal court, when achieved through statutory exclusion or prosecutorial direct-file, undermines the expec-

186. RICHARD E. REDDING, JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY? 1 (2010).

187. GRIFFIN ET AL., *supra* note 184.

188. The federal government, through the Truth in Sentencing statute, linked supplementary federal funding to the state's willingness to prevent early parole. ELIZABETH SCOTT ET AL., THE SUPREME COURT AND THE TRANSFORMATION OF JUVENILE SENTENCING 1, 15 (2015).

189. Roper v. Simmons, 543 U.S. 551, 564–65 (2005).

190. In *Roper v. Simmons*, the Court compared the number of states prohibiting the sentencing of death for mentally disabled and juvenile defendants. *Id.* The Court also observed the number of states with these statutes still in effect that actually sentenced someone pursuant to the provisions. *Id.*

191. Miller v. Alabama, 567 U.S. 460, 486–87 (2012); Graham v. Florida, 560 U.S. 48, 66–67 (2010).

tation of a deliberative legislative process based on adolescent behavior experts.

B. The Gatekeepers to Criminal Court

The Supreme Court has long recognized the influence that a defendant's age should have when making constitutional determinations. While erecting a blanket prohibition against the death penalty and life without parole for nonhomicide offenses based on adolescent research, the Court left open the option of imposing life without parole on defendants convicted of murder. The notion that jurisdictional waiver may be best suited for a small subset of juvenile offenders does not seem improbable to our common senses. This assumption could be applied to juveniles committing heinous crimes, those posing harm to young people detained in juvenile facilities, and those with an insatiable penchant for crime.[192] Transfer statutes, however, permit legislatures, judges, and prosecutors to prematurely determine a youth's prospects without the benefit of first being able to evaluate results from rehabilitative interventions. Juveniles transferred to the adult criminal system more often receive a harsher sentence than offenders adjudicated for similar violations in juvenile court. This is problematic, especially because the adult detention experience intensifies, instead of ameliorates, a juvenile offender's core deficiencies.

Concerning transfer from juvenile to criminal jurisdiction, Barry Feld observes that the practice "is at the nexus between the more deterministic and rehabilitative premises of the juvenile court and the free-will and punishment assumptions of the adult criminal justice system."[193] *Kent v. United States* and *Miller v. Alabama* both advocate for an offender-based approach to transfer and sentencing in the juvenile law context. Judicial discretion similarly reflects an offender-based approach, whereas statutory exclusion and prosecutorial direct-file adopt an offense-based approach to transfer.[194]

The pursuit to align state law and policy with the Court's holding in *Miller v. Alabama* and later *Montgomery v. Louisiana* illuminates a winding rollercoaster, and not a national consensus, on the adult treatment of juvenile offenders. In the interim between *Miller* and *Montgomery*, state courts and legislatures confronted the retroactivity issue. State supreme courts unabashedly shut down interpretations that required resentencing procedures. Some state prosecutors, complicit with state courts, sought to circumvent the Supreme Court's *Miller* ruling by conducting a resentencing hearing only to impose

192. Laurence Steinberg & Elizabeth Cauffman, *A Developmental Perspective on Jurisdictional Boundary*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 130, at 379.
193. FELD, *supra* note 165, at 83.
194. *Id.* at 84–85.

lengthy sentences that stretched beyond the defendant's natural life expectancy. While *Montgomery* resolved the retroactivity issue, the latter problem of dealing with its application remains an open question.

Transfer to criminal court represents only one practice that affects the presence of youth in the adult justice system; the jurisdictional age limit wields the most influence over this reality.[195] The generalized age bracket for juvenile jurisdiction, however, doesn't present a clear picture because a nuanced review reveals the shifts based on offense severity and prior records. *Miller v. Alabama* invites a broad interpretation that a defendant's age, not the crime, should drive sentencing decisions.[196] Therefore, we must consider how acknowledging developmental maturity affects sentences beyond the harshest penalties of death and life without parole. Instead, the juvenile sentencing trilogy should be used to upend our whole approach to treating juveniles who commit punishable crimes on par with their adult counterparts, especially as it relates to mandatory sentencing statutes.

Whereas rehabilitation serves as a central theme for juvenile courts, the transfer statutes inherently bring to bear all four theories of punishment upon particular juveniles. The Supreme Court, in *Graham* and *Miller*, addressed each theory of criminal punishment as applied specifically to juvenile offenders. Youth carted into the adult criminal justice system lose access to certain beneficial features unique to juvenile jurisdiction—most importantly, the priorities of individualization and rehabilitation. Separate from sentencing, the accountability structure to provide rehabilitative services is a more prominent feature of the juvenile justice system. The "hard" cases are those that involve older teenagers charged with criminal acts laced undoubtedly with immaturity. Ultimately, developing perfect policy solutions proves rather difficult because maturity levels fluctuate from one adolescent to the next and maturity even varies from one trait to another for any individual.

The transfer population represents a small percentage of youth in the justice system. Judicial waiver numbers give insight into this demographic. Just over 600,000 juvenile offenders confront a formal petition in juvenile courts on an annual basis.[197] Pursuant to discretional judicial waiver, approximately 1% of juveniles sixteen years and older get transferred to criminal court, while only 0.1% of juveniles age fifteen and below get transferred out of juvenile court.[198] Black

195. Dawson, *supra* note 167, at 46–47.

196. Miller v. Alabama, 567 U.S. 460 (2012).

197. Sarah Hockenberry & Charles Puzzanchera, U.S. Dep't of Just. Off. of Juv. Just. & Delinq. Prevention, Delinquency Cases Waived to Criminal Court, 2011, 1 (2014).

198. *Id.*

males over age sixteen are removed from juvenile jurisdiction at a higher percentage than their white peers.[199] Cases involving violent offenses against a person are transferred more often than property offenses.[200] After the '90s, the number of judicial transfers greatly decreased, falling to around 5,400 in 2011.[201] Experts attribute this trend to the expansion of non-judicial transfer statutes.[202]

The social science, developmental psychology, and neuroscience research underlying the Supreme Court's more recent conclusions on youth culpability demand an infusion of greater professionalism in transfer determinations and juvenile sentencing. An excerpt from the trial judge in *Graham v. Florida* reveals an attitude lacking empathy and an aloofness concerning the developmental behavior research necessary to accurately assess, weigh, and dole out punishment for juveniles. The judge stated,

> I don't see where any further juvenile sanctions would be appropriate. I don't see where any youthful offender sanctions would be appropriate. Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided that this is the way you are going to live your life and that the only thing I can do now is to try and protect the community from your actions.[203]

On their face, the judge's statements read as harsh, not nuanced, and lacking any mitigation based on the defendant's status as a youth. This judge, despite contrary recommendations from the defense attorney and prosecution,[204] decided to follow his unsubstantiated proselytization. Whether for a life or lesser sentence, such decisions dispense with the state's obligation to protect children and instead shatter their life prospects by moving a vulnerable population into adult detention facilities.

The juvenile transfer rate varies from one state to another; however, the sentencing trilogy may provide an umbrella principle to control this reality.[205] State representatives passed transfer laws with the hope that juveniles facing lengthier adult sentences may be deterred from criminal involvement.[206] A juvenile convicted in criminal court of committing a violent offense will more likely receive a longer

199. *Id.*

200. *Id.*

201. *Id.*

202. PATRICK GRIFFIN ET AL., U.S. DEP'T OF JUST. OFF. OF JUV. JUST. & DELINQ. PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING (2011).

203. Graham v. Florida, 560 U.S. 48, 56–57 (2010) (sentencing the juvenile to a life sentence without the possibility of parole).

204. *Id.* at 92 (Roberts, C.J., concurring).

205. GRIFFIN ET AL., *supra* note 184, at 17.

206. *Id.* at 26; REDDING, *supra* note 186, at 2.

sentence than if convicted of the same crime in a juvenile court.[207] But once transferred to an adult court, juveniles have not been shown to reverse their criminal behavior traits. In fact, research shows that, due to the same juvenile traits invoked to justify the Supreme Court's decisions in *Roper*, *Graham*, and *Miller*, youth offenders may not even appreciate the repercussions associated with a transfer to criminal court. The U.S. Department of Justice's Office of Justice Programs funded and collected studies concluding,

> [F]ew violent juvenile offenders knew that they could be tried as adults, none thought it would happen to them, and few thought they would face serious punishment. Moreover, few reported thinking about the possibility of getting caught when they committed the offense. Indeed, it seems that offenders generally underestimate the risk of arrest. Juveniles' psychosocial immaturity, including their tendency to focus on the short-term benefits of their choices, may reduce the likelihood that they will perceive the substantial risk of being arrested or punished as an adult.[208]

Additionally, juvenile offenders transferred to criminal courts and subsequently incarcerated in adult prisons, or granted parole through the criminal court, prove more likely to reoffend as compared to those taking advantage of rehabilitation programs offered in the juvenile correctional system.[209] Researchers studied the experiences of youth sentenced to Florida juvenile and adult correctional facilities and the results are illuminating. Those sentenced to between nine and thirty-six months in a high security juvenile facility found vocational training to be the most valuable aspect of their treatment.[210] These juveniles also felt that the availability of rehabilitative treatment and case management were prevalent and helpful features unique to the juvenile system.[211] Juvenile offenders incarcerated in adult prisons, on the other hand, reported exposure to criminal conduct, lack of attention to rehabilitation, and insufficient familial support.[212] These juveniles also felt as though they existed in constant fear of other inmates. With respect to prison personnel, youth in juvenile facilities more often viewed guards as shepherds, while their counterparts experienced and witnessed assaults at the hands of guards in adult prisons.[213] Specific to physical endangerment, one study found that juveniles in adult prisons are "eight times more likely to commit suicide, five times more likely to be sexually assaulted, and almost twice

207. "Overall, 68% of the transferred youth received sentences involving incarceration in jail or prison, whereas only 40% of the nontransferred youth received dispositions involving placement in juvenile correctional facilities." *Id.* at 24 (citing REDDING, *supra* note 186, at 1).
208. REDDING, *supra* note 186, at 4 (internal citations omitted).
209. *Id.* at 5–7.
210. *Id.*
211. *Id.* at 7.
212. *Id.* at 5–7.
213. *Id.* at 2.

as likely to be attacked with a weapon by inmates or beaten by staff."[214]

The Supreme Court's increased reliance on developmental psychology and science led to the constitutional norm that juveniles are different from their adult criminal counterparts. This shift in justification to common sense, supplemented with expert opinions, may protect youths from future episodes of social unrest with juvenile delinquency resulting in the imposition of harsher punishment. We know that many young people eventually outgrow criminal behavior, no matter their one-time rendezvous with violence or irreverence to property rights.[215] Conversely, the juvenile delinquent exhibiting career criminal antisocial behavior typically has multiple escalating contacts with law enforcement beginning at a relatively young age. The violent felony cases that are committed by fifteen to seventeen-year-old offenders are the ones that stretch the boundaries between juvenile and criminal jurisdiction. This population also challenges the State's punishment goals. The truly odious cases question where a constitutional resolution should lie, marked with individualization and evidence-based policy weighted against public sentiment.

The journey from *Miller* to *Montgomery* demonstrates that a national constitutional standard can serve an important normative function while not inhibiting a state's ability to draft jurisdiction-specific policy.[216] In harkening back to a classic debate for juvenile justice advocates, the current retroactivity battle struggles to weather the competing thoughts that surround the issues of holding offenders accountable for the severity of their offense while also weighing their status as juveniles. The well-established tradition of acting in the best interests of the child inspired the original juvenile justice courts' emphasis on rehabilitation, which in turn commands that contemporary courts may not ignore the fundamental differences between adult and juvenile offenders. That the Supreme Court chose to recognize these important distinctions in the juvenile sentencing context speaks volumes. In sum, the juvenile sentencing trilogy, read in light of other opinions explaining juvenile rights, implies that broader strides must be taken to realize the rehabilitation goals linked to juvenile justice.

---

214. *Id.*

215. SCOTT & STEINBERG, *supra* note 134, at 252–54 (discussing the persistent delinquent behavior at a young age that truly predicts an adolescent destined to be a criminal recidivist); Paul E. Tracy et al., Delinquency in Two Birth Cohorts, Executive Summary (Sept. 1985); Marvin E. Wolfgang et al., *Delinquency in a Birth Cohort* (1972).

216. "[S]ubstantive due process—regardless of the theory employed—serves a nationalizing function." Conkle, *supra* note 58, at 94, 112.

V. AVOIDING SOCIAL IGNORANCE

Blended sentencing statutes sit buried in state criminal codes throughout the country. These statutory schemes speak to the densely layered juvenile offender statutes, but more importantly, their existence demonstrates a social awareness that *something different* must take place in situations involving the grey area of juvenile offenders. Under blended sentencing statutes, which appear in varying forms, juvenile judges may choose between a juvenile disposition or adult sentencing, elect to extend their jurisdiction over an adjudicated youth beyond the upper age limit, or they may impose an adult sentence in addition to the delinquency disposition.[217] Upon the prosecutor's motion, a judge will usually conduct an individualized assessment of the offender. The prosecutor must meet the burden of proof to trigger the imposition of a blended sentence, and the defendant possesses a right to counsel, right to a jury, and the right to present evidence and cross-examine witnesses at a juncture designated by statute.[218]

I latch onto blended sentencing because it displays an intersection between the deficiencies in the current constitutional analysis regarding national consensus, the value attached to legislative action as a societal litmus test, and evidence-based policy. State legislation specific to juvenile sentencing policy, such as mandatory sentencing for transferred youth, paints just one picture of our national consensus. Blended sentencing evaluated under current standards, however, calls into question the value of the national consensus value. During the height of passing tough-on-crime legislation, the opposing force quietly acted through a campaign to codify this legislative compromise. Today, more than half of the states in our country implement a version of blended sentencing and extended juvenile jurisdiction.

A. The Forgotten Political Carve-Out

From a constitutional procedure perspective, as set forth in *Graham* and *Miller*, states must balance youthful transience against the pernicious act on a case-by-case basis, currying hope and skepticism. The process doles out evidence-based prescriptions within a state's

217. Across states, blended jurisdiction comes in three forms:

> (1) impose a juvenile or an adult sentence, (2) impose both a juvenile and adult sentence . . . (3) impose a sentence past the normal limit of juvenile courts jurisdiction; typically, a hearing is held when the juvenile reaches eighteen to twenty-one to determine if an adult sentence will be imposed.

Richard E. Redding & James C. Howell, *Blended Sentencing in American Juvenile Courts*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 130, at 146; Franklin E. Zimring, *The Punitive Necessity of Waiver*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 130, at 215.

218. Redding & Howell, *supra* note 217, at 155–57; Zimring, *supra* note 217, at 215.

moral tolerance and budgetary means. Most importantly, it captures individualization in juvenile jurisdiction and the realization that even the most dangerous are constitutionally different from their adult counterparts. Unfortunately, few controls exist to prevent bias from taking a front seat in decisions involving judicial and prosecutorial discretion. Moreover, no justice system or procedure beams perfect introspection on these most challenging youth, but blended sentencing is distinct in that it exemplifies spoken constitutional ideals.

Similar to statutory exclusion and prosecutorial direct-file, blended sentencing arose in response to political pressure and a philosophical shift in attitudes toward juvenile offenders. These statutes entered the national conversation as a counterbalance to legislative reforms imposing adult time for adult crimes on alleged juvenile "superpredators." Blended sentencing sought to appease two opposing constituencies: advocates that associated accountability and public safety with harsher punishment for juvenile offenders and adherents to steadfastly applying traditional juvenile justice principles to all minor-aged offenders with a few extreme exceptions.[219] Professors Redding and Howell identify three reasons for the creation of such statutes: (1) the media sensationalizing the youth crime rates as a rampant epidemic in the '90s; (2) punishment in lieu of rehabilitation, a spillover from the criminal justice system, which infiltrated the juvenile justice system; and relatedly, (3) juvenile courts inaccurately calibrating punishment and rehabilitation.[220]

The national uncertainty surrounding juvenile violent crime played out openly in newspapers throughout the late '90s. In 1996, the Los Angeles Times provided an opinion supporting blended sentencing as the idea gained traction in other states:

> The alarming rise in violent and serious offenses by children understandably frightens the public. Many view the juvenile justice system as a failure and are anxious to fix it. . . . To our mind, the "blended sentence" already used in Minnesota, Connecticut and other states—maximizes the both carrot of the juvenile court's promise of rehabilitation and the stick of adult sentences. Compared to automatic transfer of juveniles to adult court and incarceration in state prison, the blended-sentence approach also appears to result in lower rates of recidivism and subsequent acts of violence. And that's what everyone wants.[221]

219. FRED CHEESMAN, NAT'L CTR. FOR STATE COURTS, A DECADE OF NCSC RESEARCH ON BLENDED SENTENCING OF JUVENILE OFFENDERS 113, 116 (2011); Pam Belluck, *Fighting Youth Crime, Some States Blend Adult and Juvenile Justice*, N.Y. TIMES (Feb. 11, 1998), http://www.nytimes.com/1998/02/11/us/fighting-youth-crime-some-states-blend-adult-and-juvenile-justice.html; *Blended Sentences for Youths*, L.A. TIMES (July 1, 1996), http://articles.latimes.com/1996-07-01/local/me-20198_1_adult-sentence [https://perma.unl.edu/86M9-QR7Y].

220. Redding & Howell, *supra* note 217, at 145.

221. *Blended Sentences for Youths*, *supra* note 219.

Two years later in the New York Times' article, experts wrongly predicted an increase in juvenile crime due to a population increase, while also bemoaning the juvenile court's ineffectiveness at staving off the problem in relation to the perils presented with criminal court transfer. The article read as follows:

> Juvenile violent crime has only recently begun to decline, . . . [b]ut many experts are bracing for another juvenile crime wave over the next decade as the number of teenagers grows by 15 percent. Faced with these statistics and with a number of sensational murders committed by children barely out of grade school, many states began lowering the age at which juveniles could be tried as adults and lengthening the list of crimes for which adult penalties might apply. . . . Some experts believe juvenile courts have become overburdened and ill-equipped to handle most kinds of juvenile crime. But there is broiling debate about whether the push to treat young offenders like adults keeps youths from committing more crimes or merely reinforces early criminal tendencies.[222]

Juvenile and criminal blended sentences play a lesser understood role in the transfer equation.[223] On its face, blended sentencing provides a social compromise between choosing either rehabilitation or punishment as the predominant goal when handling youth who commit serious criminal acts of violence and against property.[224] Juvenile blended sentencing statutes permit juvenile courts to work with young offenders through tailored programs, but their effect on decreasing the number of juveniles in criminal court as a replacement to transfer requires more study. On the other hand, criminal blended sentencing can come with restrictions that fail to cure the individualized assessment problem discussed here. Moreover, for criminal blended sentencing, in some jurisdictions, the corrections offices decide in which facility a juvenile will serve his or her sentence.[225]

General agreement exists that the national consensus analysis examines any policies that would directly govern the offender and offense, but we should look further into the forgotten policy that incorporates individualization into juvenile sentencing.[226] Such an exploration would more accurately place the spotlight on the underlying constitutional issue and analysis, as opposed to narrowly tussling over the statutory authority employed to impose the disputed sentence. Not everyone champions blended sentencing for juvenile offenders, however. Scott and Steinberg argue for extended juvenile jurisdiction as

222. Belluck, *supra* note 219.

223. Redding & Howell, *supra* note 217, at 148–51.

224. *Id.* at 146–47.

225. Donna Bishop & Charles Frazier, *Consequences of Transfer*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 130, at 243.

226. "The Court's analysis of the consensus question is directed to the specific issue at hand, and it depends mainly upon the Court's examination of legislative enactments, legislative trends, and patterns of actual enforcement or nonenforcement." Conkle, *supra* note 58, at 138.

superior to blended sentencing based on juvenile developmental psychology. The authors argue that extending juvenile court dispositional jurisdiction appropriately weighs immaturity and permits lengthy incapacitation. Importantly, the intervening programs and facilities must be tailored to education and reintegration into the community.[227]

Blended sentencing statutes, though not a perfect solution, affirm the idea that juvenile "hard cases" necessitate punitive restraint informed by evidence-based policy and state-level policy experimentation. Both transfers and blended sentencing occur sporadically in relation to the total number of juvenile cases handled in each state.[228] The point at which we draw the hypothetical "line in the sand" between transferring a child to adult court and invoking the blended sentencing option, and the rationalization behind it, remains unclear based on recent studies. The National Center for State Courts compiled research from three states employing blended sentencing, and their summative conclusions revealed that whether a child gets transferred or benefits from a blended sentencing alternative greatly depends on the judicial district where that child is prosecuted; the unexplained biases are often based on an offender's race, gender, and age, but not always on the seriousness of the offense.[229] The report recommended that states build consistency by performing objective risk-and-needs assessments designed to inform judicial determinations.[230] Moreover, the report suggests that "the use of blended sentencing should be expanded at the expense of transfers to avoid the transfer of inappropriate juvenile offenders to the adult criminal justice system, keeping more juvenile offenders in the juvenile justice system while also holding them accountable."[231]

The following section reviews a case study from a well-established blending sentencing program. The State of Texas's experience exemplifies the analogy to be drawn between professionals in other children law contexts implementing evidence-based policies to work towards the child's best interests. The Texas story also showcases the political trajectory to implementing juvenile sentencing policies wherein reformation is not a guarantee, but tracking programmatic progress stimulates effective interventions and reforms.

227. SCOTT & STEINBERG, *supra* note 134, at 240–41.

228. CHEESMAN, *supra* note 219, at 113.

229. *Id.* at 114–16 (reviewing studies conducted using Minnesota, Ohio, and Vermont juvenile sentencing schemes).

230. *Id.* at 113, 116.

231. *Id.*

B. Translating a Constitutional Norm into State Level Policy

The Texas determinate sentencing statute provides an illustrative example of the political history and implementation of blended sentencing for juvenile offenders. Determinate sentencing is a blended sentencing variant and will be discussed in greater detail below. Through a longitudinal study, published in *Lost Causes*, a group of juvenile law researchers set about answering the following question: "What happened when determinately sentenced offenders—many of whom committed the most serious and violent crimes in Texas—were temporarily spared adult justice and given one more chance at redemption?"[232] This study covers what should be deemed policy generating research about these youthful and serious offenders, institutional programming and the State's response, and recidivism results.[233]

In similar historical timeliness, Texas created its juvenile court in 1907. However, Texas focused at the outset on punishment and accountability over and above rehabilitation and welfare, which reflected regional attitudes put into action through state policy.[234] Fifty years later, the state began a major overhaul, moving away from punishment-centered policies and toward child welfare based on social science research. Texas developed the Texas Youth Council to provide juvenile offenders with rehabilitative services informed by advancements in psychology, sociology, and social work, administered through individualized treatment plans, and implemented by learned professionals in the field.[235] Unfortunately, these aspirations were never brought to full fruition due to a change in leadership, an occurrence which commonly derails reform efforts anywhere. Instead, a newly appointed Texas Youth Council director espoused a get "tough on crime" message. His views converted into a statewide ethos: political leaders were swayed in his direction, and his message gained more political momentum when convicted juveniles from the state reform institution committed heinous murders upon release and detainees attacked a guard.[236] During this period, less than ten percent of boys, and less than five percent of girls were incarcerated for serious violent crimes.[237] Not unlike its sister states, Texas began to see a surge of

232. TRULSON ET AL., *supra* note 160, at 148.
233. *Id.* at 32.
234. *Id.*
235. "Detailed diagnostic procedures, classification systems, treatment plans, trained and professional staff, and other rehabilitation-related functions were the foundations of this brave new plan to again change from old thinking that lauded punishment to a new way of thinking that embraced care, rehabilitation, and nurturing." *Id.* at 23.
236. *Id.* at 24.
237. *Id.* at 25.

juvenile violent offenses in the '80s, and political actors felt compelled to respond through policy.[238]

Texas enacted adult certification laws during the 1970s when juvenile crime initially spiked across the country. When the second increase took place a decade later, state legislatures hesitated to lower the transfer age below fifteen years old, but they needed a mechanism to address children committing violent serious crimes.[239] Both sides weighed philosophical and practical concerns regarding proposed legislation. In one instance, bills that proposed lowering the age for certain offenses confronted the practical challenge of where to house such young offenders convicted in criminal court. Moreover, the then-current sentence disparities between someone receiving a juvenile disposition versus an adult sentence for the same crime highlighted arguments for both sides—juvenile jurisdiction was too lenient, and adult jurisdiction too harsh.[240]

In comes the Determinate Sentencing Act.[241] A brief description of the mechanics may be worthwhile to this discussion. The original statute addressed the worst violent crimes, and the list steadily grew to thirty total criminal charges.[242] The prosecuting attorney decides whether to pursue determinate sentencing as opposed to judicial waiver, which is the only path to criminal court transfer in this state.[243] If convicted, the juvenile receives a determinate sentence as prescribed by statute. Those juvenile offenders then serve their juvenile sentence in the custody of the Texas Youth Commission (TYC) custody while also awaiting the life-altering determination hearing that follows. At the determination hearing, the judge decides whether, for this offense, the juvenile will continue under juvenile jurisdiction or be sent to the adult corrections system. The court may also release the youth or release the youth on probation.

Here is how *Lost Causes* articulates the state legislative compromise:

> The goal behind this legislation was simple: to apply the rehabilitative foundation of the juvenile justice system, and if that failed, to exercise the more punitive and long-term option of adult incarceration. Determinate sentencing in Texas, for all intents and purposes, featured the best of both worlds—a true blending of juvenile and adult justice.[244]

There is no universal agreement regarding the motives underlying blended sentencing, and/or whether this compromise in and of itself presents a desired solution, but divergent opinions do not negate the

238. *Id.* at 28.
239. *Id.* at 28–29, 35.
240. *Id.* at 36.
241. TEX. FAM. CODE ANN. § 53.045 (West 2017).
242. *Id.*
243. TRULSON ET AL., *supra* note 160, at 143.
244. *Id.* at 36.

tremendous potential to build and study policy around a persistently challenging youth demographic.

In *Lost Causes*, researchers delineated the intended consequences and unintended consequences of determinate sentencing. Most importantly, with a finite demographic marked for rehabilitation, the TYC began specialized programming with a clear rehabilitative purpose. Other notable intended consequences include offender responsibility through longer sentencing in youth confinement, juvenile courts acquired greater sentencing power, fewer juveniles were certified to adult jurisdiction in the state, cases traditionally handled by juvenile courts found their way into the determinate sentencing paradigm, and more youth were incarcerated due to the offense list expansion.[245] The unintended consequence involved the inevitable bureaucratic merging between the juvenile and adult justice systems at an operational level.[246]

Determinate sentencing effectively accommodates the challenging delinquency cases that arouse public frustration and thrust policymakers into a cycle of harsh tough on crime reactionary legislation. The result is that these youths become a defined population and benefit from evidence-based sentencing and interventions when state resources permit. The Texas specific statistics drawn out in the *Lost Causes* study may be of little interest to some, but the ability to pull pertinent information and identify where we need further study to develop sound policy and programming further legitimizes the Supreme Court's approach to juvenile sentencing. First, the researchers determined that thirty-three percent of juveniles sentenced under the Determinate Sentencing Act between 1987 and 2011 were ultimately transferred to adult correctional facilities.[247] They concluded that the transfer decision is "highly individualized and must filter through numerous actors involved in the juvenile and criminal justice systems."[248] While the study could not adequately quantify the impact of judicial philosophy and victim statements at the determination hearings, it did reveal several influential factors, including race, the length of one's determinate sentence, program participation, age when committed, and institutional behavior.[249] With only about thirty percent being transferred to adult jurisdiction, the social consciousness question becomes what happened to the others? There is no doubt that the public would benefit from and would want to be aware of this pertinent information regarding whether rehabilitation proved effective,

245. *Id.* at 46–47.
246. *Id.* at 47.
247. *Id.* at 138–39.
248. *Id.*
249. *Id.*

which in turn improves the offender's life and relates to public safety concerns.

On a recidivism deep dive, the *Lost Causes* researchers produced results to understand not only how many offenders return to the system, but more importantly, what are the conditions leading to this repeat behavior.[250] The researchers found that "a chaotic home environment, being a habitual offender, . . . having a history of substance abuse, and engaging in institutional misconduct increased recidivism risks . . . . Conversely, those offenders placed on post-release community supervision had significantly lower recidivism risks compared to offenders released without supervision . . . ."[251] The solution reaches beyond this Article and my expertise, but I feel assured based on common sense that post-release support plays a large role in reducing recidivism. Moreover, institutional resources may contribute to helping the most derelict offenders, especially in light of the fact that the study found "[h]omicide offenders participating in TYC's Capital Offender Program were less likely to experience recidivism than homicide offenders not participating in the program. The Capital Offender Program was the only correctional treatment program to reduce recidivism risk among these offenders."[252]

Lost Causes provides a perspective on blended sentencing that stands in rather stark contrast to other scholars, both in recognizing the juvenile development psychology and related research. In *Lost Causes*, the authors conclude:

> [The Texas] approach included a focus on rehabilitation that recognized the immaturity, malleability, and redemptive potential of youth—even for serious and violent offenders . . . . At the same time, the Texas approach featured a fail-safe measure if rehabilitation was shunned or otherwise failed to take: placement of the serious juvenile offender in the Texas prison system . . . . Looking back, determinate sentencing was structured to provide the best of what the regular juvenile justice system and the adult justice system had to offer . . . .[253]

Currently, blended sentencing statutes waste away in a constitutional purgatory.[254] More than a political compromise, blended sentencing fulfils statements implicit in *Roper*, *Graham*, and *Miller* while building competence in evidence-based policy development. For exam-

250. *Id.* at 139–40.
251. *Id.*
252. *Id.* at 140.
253. *Id.* at 135.
254. In discussing the treatment of juvenile offenders in historical alignment, Professor Guggenheim observes that "[f]ew took seriously that children have any kind of 'right' to be treated as children when the state is prosecuting them for crimes; in its place was the view that the great juvenile justice experiment was a legislative gift that could be taken away at will." Martin Guggenheim, Graham v. Florida *and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 487 (2012).

ple, a juvenile defendant would probably be less likely to argue that a constitutional violation occurred after being sentenced under a blended sentencing statute. Further, blended sentencing addresses the individualization argument that is made when transferred youth are incarcerated pursuant to a mandatory sentence. A constitutional right to rehabilitation for juvenile offenders, in my opinion, cannot be sustained based on *Graham* and *Miller*; however, blended sentencing schemes address the ideal that youth possess transitory, redeemable traits. Relatedly, recidivism reduction remains a societal goal for punishment, and more so than transfer to criminal court, programming and institutionalization attendant to blended sentencing schemes permits research on effectiveness.[255] Since its inception, and still today, some advocates believe the most important feature of a blended sentence is not the threat of adult punishment, but the additional treatment and supervision given to these juvenile offenders.[256] A transferred youth often becomes just another inmate, with a number instead of a name and a decreased opportunity to participate in behavioral interventions. Those studying blended sentencing entrants, on the other hand, continue to work to isolate factors predicting recidivism and identify post-release supports contributing to reintegration success.[257]

VI. CONCLUSION

The U.S. Supreme Court's approach to framing its own judgment in treating juvenile offenders, and youth policy in other contexts provides an approach for state actors and a litmus test for reasonableness. As an extension to this, we should recognize the specialization that is needed to craft more appropriate dispositions and sentencing for challenging cases through legislative indeterminacy. Additionally, juvenile courts should cede a measure of discretion to professionals while at the same time upholding strong procedural safeguards.

The U.S. Supreme Court's reliance on social science began long before its more recent juvenile sentencing cases. The Supreme Court's intervention into the treatment of juveniles began in earnest with *Kent* and *In re Gault*, wherein the Court began defining the fundamental fairness due offenders when considering transfer to criminal

255. *See generally* Chad R. Trulson et al., *Blended Sentencing, Early Release, and Recidivism of Violent Institutionalized Delinquents*, 91 PRISON J. 255 (2011) (studying the recidivism outcomes for juveniles released early from a contiguous blended sentencing jurisdiction).

256. CHEESMAN, *supra* note 219, at 113; Belluck, *supra* note 219.

257. Trulson et al., *supra* note 255, at 273–74 (showing that institutional misconduct assists in predicting recidivism, whereas interventions related to known contributors such as gang membership and substance abuse may be addressed through greater institutional and release supports).

jurisdiction or facing adjudication in juvenile courts. The *In re Gault* Court freely cited social science research to support its decision to permit certain procedural protections for juvenile defendants analogous to their adult counterparts.[258] The Supreme Court in later cases treaded a balance between fulfilling the juvenile court's mission to individually address each child's unique needs while shielding against the pitfalls associated with youth. Much later in *Roper v. Simmons*, the Court once again bolstered its commonsense knowledge regarding youth-specific behavior with social science evidence to develop restrictions on juvenile punishment and interrogation methods. The breadth of the Court's opinions is likely to remain in dispute for the foreseeable future. The Court's sourcing to reach these conclusions, however, should be authoritative in and of itself: constitutionally reasonable government action involving juvenile offenders should be based on known adolescent behavior and development.

Blended sentencing arose as a conciliatory legislative act to hold at bay "tough on crime" adherents. The blended sentence alternative did not come with its own institutional structure and capacity. Instead, blended sentencing statutes present judges with an option to shift juveniles from one jurisdiction to another under limited circumstances based on their age, criminal act, and progress towards rehabilitation. The conceptual space created by blended sentencing, the acknowledgement of a child's malleable nature, and our limited ability to predict reformation, accommodates robust programs premised on the universal norm that children are different from adults but some offenders present greater challenges than others.

Currently, transfer and blended sentencing serve as a bargaining chip used to appease opponents to raising the maximum jurisdictional age and decreasing the list of enumerated offenses in statutory exclusion laws. I propose that blended sentencing statutes represent fertile ground for implementing programs geared towards the challenging cases. First, a national consensus arguably exists today in twenty-nine states surrounding the need to wrestle with placing youth following an individualized assessment and follow-up evaluation. To embrace its full potential, states would need to legislate with the awareness that juvenile offenders need rehabilitation and monitoring by professionals. As set forth above, the reform begins with accepting the best interests standard for juvenile delinquents typically shuffled off to criminal jurisdiction. Legislatures would also need to settle on their prioritization of punishment goals—striking a balance between retribution and rehabilitation. The statutory translation would be an

258. Relying on social science research, the *In re Gault* majority held that: "[t]he appearance as well as the actuality of fairness . . . may be a more impressive and more therapeutic attitude so far as the juvenile is concerned." *In re* Gault, 387 U.S. 1, 26 (1967).

expansion in the number of the offenses handled through blended sentencing schemes.

Second, the most accurate evolving standard in juvenile jurisdiction is to support and guide our policymaking with expert research. The national consensus based on objective indicia has proven less than reliable in producing rational, sober results for this demographic. This prong in determining "cruel and unusual" punishment stands subordinated to the Court's own judgment because the Court contracted out the job to adolescent behavioral experts and professionals. Similarly, state policymakers must incorporate deferential treatment when passing juvenile sentencing statutes. Term-of-years sentences, as applied to juvenile offenders, must deliberate the known social science, developmental psychology, and neuroscience to pass constitutional muster. Accordingly, mandatory sentences imposed upon youth in the same manner as their adult counterparts simply fail the test. The constitutional analysis of reasonableness requires legislative indeterminacy in the juvenile context to permit flexibility in courts and agencies.

The persuasive strength to be given social science, developmental psychology, and neuroscience appears most clear in the sentencing context. The Supreme Court's Eighth Amendment analysis required the Justices to discern whether a national consensus existed regarding the punishments in dispute and to also bring to bear its own judgment. The Court's own judgment placed a premium on the evidence-based advancements in adolescent development. State legislatures should delegate developing and executing programmatic details to the more qualified courts and state agencies. The deference accorded these stakeholders should mirror that given to education and mental health professionals charged to administer youth-based public commitments. Furthermore, the Court has acknowledged the unknown element present in predicting a youth's reformation. This means that in order to pass a rational basis review, any and all legislative actions affecting juveniles sentenced in criminal court must have considered the youthfulness traits identified here. Mandatory sentencing statutes that are applied equally to juvenile and adult convicted defendants, without an individualized assessment or alternative deliberative process, should fail.