# CRUEL AND UNUSUAL PUNISHMENT: MANDATORY SENTENCING OF JUVENILES TRIED AS ADULTS WITHOUT THE POSSIBILITY OF YOUTH AS A MITIGATING FACTOR

*Alison Powers**

*It was once said that the moral test of government is how that government treats those that are in the dawn of life, the children . . . .*

Hubert H. Humphrey[1]

## I. INTRODUCTION

On November 28, 2001, twelve-year-old Christopher Pittman was not deemed old enough to vote,[2] to drink alcohol,[3] to operate a motor vehicle,[4] to serve as a juror,[5] to form a binding contract,[6] or

* Managing Editor, *Rutgers Law Review*; 2010 J.D. Candidate, Rutgers University School of Law – Newark; Master of Fine Arts, Brooklyn College; Bachelor of Arts, Binghamton University. I would like to thank my parents, Maureen and Tom Powers, for encouraging me to fly and for being there to catch me when I fall; my fiancé, Edward Herman, for holding my hand during the law school journey and loving me anyway; my grandmother, Grace Leddy, for reminding me that laughter makes everything better; my uncle, Daniel D. Leddy, Jr., for being the attorney (and person) that I aspire to be; and the Editors and Staff of the *Rutgers Law Review* for their excellent work and friendship. I dedicate this Note to the loving memory of my grandfather, Daniel Leddy, the wisest and kindest man I've ever known, who taught me all I really need to know in life while playing school when I was five.

1. THE YALE BOOK OF QUOTATIONS 376 (Fred R. Shapiro ed., 2006). Hubert H. Humphrey (1911-1978), "untiring champion" of the Civil Rights Movement, arms control, health care, and public education, served as Vice President of the United States under Lyndon B. Johnson from 1965 to 1969 and, as nominee of the Democratic Party in 1968, lost the presidential election to Richard Nixon. HUBERT H. HUMPHREY, THE EDUCATION OF A PUBLIC MAN: MY LIFE AND POLITICS (Norman Sherman ed., Univ. of Minn. Press 1991) (1976).

2. *See* U.S. CONST. amend. XXVI, § 1 (standardizing the voting age in the United States to eighteen).

3. *See* National Minimum Drinking Age Act of 1984, 23 U.S.C. § 158 (2006) (withholding federal highway funds from states which do not set a minimum age of twenty-one to purchase or possess alcoholic beverages).

4. *See* South Carolina Department of Motor Vehicles, Initial Driver License, http://www.scdmvonline.com/dmvnew/default.aspx?n=initial_driver_license (last visited Nov. 13, 2009) (allowing eligibility for a "regular driver license" to those at least seventeen years of age).

5. *See* Jury Act, 28 U.S.C. § 1865 (2006) (setting eighteen as the age qualification

even to watch a PG-13 movie.[7] However, Christopher Pittman was held responsible as an adult for his actions on that day, and the resultant loss of freedom will see Christopher incarcerated in an adult-offender prison, without possibility of parole, until 2031.[8]

Despite being a "troubled child from an unhappy home,"[9] Christopher Pittman has been described as an "extremely well-mannered"[10] child and a "normal kid."[11] Abandoned by his mother shortly after birth, Christopher spent most of his young life in Florida with his father, a "strict disciplinarian" who struggled to raise his two children through an overseas tour in the Army during the Persian Gulf War and multiple failed marriages.[12] During the summer of Christopher's twelfth year, his life was "thrust . . . into emotional turmoil" when his mother abruptly returned to his life only to subsequently abandon the child for a second time.[13] The "shy, gentle, and loving" boy lashed out at his father, attempted to run away, and ultimately was prescribed antidepressants after threatening to harm himself.[14] Christopher was "rescued" when Joe and Joy Pittman, paternal grandparents with whom he enjoyed an "extremely close, loving, and devoted" relationship, convinced the father that the child would be better off living with them in South Carolina.[15]

Soon thereafter, on November 28, 2001, Christopher was dismissed from school early for disciplinary problems on the school bus the day before and was "beat . . . with a belt as punishment" by

---

for jury service).

6. *See* RESTATEMENT (SECOND) OF CONTRACTS § 14 (1979) (stating that an individual "has the capacity to incur only voidable contractual duties until the beginning of the day before the person's eighteenth birthday").

7. *See* Motion Picture Association of America Film Rating System, http://www.mpaa.org/FlmRat_Ratings.asp (last visited Jan. 7, 2010) (describing how a PG-13 rating strongly cautions parents of the strong content in films that may be unsuitable for children under the age of thirteen).

8. Sarah Obeid, *Pardoning Pittman*, OPEDNEWS, Oct. 16, 2008, http://www.opednews.com/articles/Pardoning-Pittman-by-salah-obeid-081015-803.html (last visited Nov. 13, 2009) (explaining that without a pardon, Christopher will be in his mid-forties when released from incarceration).

9. Jim Polk, *Teen Gets 30 Years in Zoloft Case*, CNN.COM, Feb. 16, 2005, http:www.cnn.com/2005/LAW/02/15/zoloft.trial/index.html.

10. Erin Moriarty, *Prescription for Murder?*, CBS NEWS, Apr. 17, 2005, http://www.cbsnews.com/stories/2005/04/13/48hours/main687855.shtml.

11. Amended Initial Brief of Appellant at 1, State v. Pittman, 373 S.C. 527 (2007) (Nos. 2004-GS-12-00571 and 2004-GS-12-00572), http://www.justiceseekers.com/html/Appealbrief.pdf.

12. *Id.*

13. *Id.* at 2.

14. *Id.* at 2-3.

15. *Id.* at 1, 3.

his grandfather and sent to bed.[16] That evening, the ninety-six-pound child loaded the .410 gauge shotgun his father had given him as a gift and shot his "Pop Pop" and "Nana" to death in their bed.[17]

While the family court had original jurisdiction over Christopher's case, South Carolina has no minimum age at which to transfer a child accused of murder.[18] The State requested a waiver to the court of general sessions to try the child as an adult,[19] thereby perpetuating the "preposterous, albeit popular notion that little kids magically become mature adults when they do bad things."[20] With transfer findings focused solely on the seriousness of the offense and likelihood that Christopher would be found guilty, "[t]he only mention of [Christopher's] youth in the transfer order [was] the recitation of [his] birth date, current age, and age at the time of the offense."[21]

During the twenty-one-plus months that Christopher remained incarcerated before trial, he grew from a "scrawny little kid"[22] to a six-foot, one-inch young man.[23] The defense attorneys unsuccessfully attempted to persuade the jury that the twelve-year-old's age rendered him unable to form the requisite criminal intent to commit murder.[24] On February 15, 2005, more than three years after Christopher pulled the trigger, the jury ultimately decided that the now grown young man before them was able to discern right from wrong when he took the lives of the people he once called "Pop Pop"

---

16. Bill Mears, *Supreme Court Turns Down Boy Killer's Appeal*, CNN.COM, Apr. 14, 2008, http://www.cnn.com/2008/CRIME/04/14/juvenile.killer/index.html?iref=mpstoryview.

17. Amended Initial Brief of Appellant, *supra* note 11, at 1, 6-9; *see also* Polk, *supra* note 9.

18. Patrick Griffin, National Center for Juvenile Justice, *State Juvenile Justice Profiles: South Carolina Transfer Provisions* (2008), http://www.ncjj.org/stateprofiles/asp/transfer.asp?topic=Transfer&state=SC06.asp&print=no# (last visited Nov. 13, 2009). As of 2007, twenty-three states have at least one provision for juvenile transfer with no explicit minimum age requirement. *See* Patrick Griffin, National Center of Juvenile Justice, *State Juvenile Justice Profiles: National Overviews* (2008), http://www.ncjj.org/stateprofiles/overviews/transfer5.asp (last visited Nov. 13, 2009).

19. Petition for Writ of Certiorari at 6, *Pittman*, 128 S. Ct. 1872 (Apr. 14, 2008).

20. Daniel Leddy, *Compounding Tragedy: Legal Victimization*, STATEN ISLAND ADVANCE, Feb. 14, 2005, at B2.

21. Petition for Writ of Certiorari, *supra* note 19, at 6-7.

22. John Springer, *Prosecutors End Rebuttal Against Teenage Killer, Closings Set for Monday*, COURT TV, Feb. 11, 2005, http://news.findlaw.com/court_tv/s/20050211/11feb2005174210.html (last visited Nov. 13, 2009).

23. Amended Initial Brief of Appellant, *supra* note 11, at 9.

24. John Springer, *Jurors Deliberate Fate of Teen Accused of Gunning Down His Grandparents*, COURT TV, Feb. 14, 2005, http://prawl.sartorelli.gen.nz/news/16.htm (last visited Nov. 13, 2009).

and "Nana."[25]

With a conviction of two counts of murder, the sentencing judge had extremely limited options.[26] Judge Pieper sentenced Christopher to the shortest sentence permitted under South Carolina law: imprisonment for thirty years without possibility of parole.[27] Prevented by law from considering Christopher's age in his sentence, Pieper noted the tragedy of the situation and stated that "[t]his case has called attention to the very core values of this society about the treatment of juveniles and punishment."[28]

Was Christopher a troubled child under the influence of antidepressants, unable to discern right from wrong, and in need of rehabilitation? Or was he "as malicious a . . . murderer as you're ever going to get"[29] and deserving of punishment? In the words of the Pittman family's pastor, "[w]e have been left with a question we must resign ourselves that we will never have the answer to, of how this could happen and why."[30] But Christopher's story raises strong questions about a justice system that, in essence, rejects the possibility of a child's rehabilitation, once the cornerstone of the juvenile justice movement, and substitutes the "informed and individualized" decision of the judge, with the "legislature's generalized judgments about an entire category of youth offenders."[31]

In practice, "[m]andatory sentencing schemes eliminate statutory provisions allowing a judge to exercise discretion because of a child offender's age, background, the legal interpretations of facts established at trial, or any other factor provided for by statute that might make another sentence more appropriate."[32] Such inflexible

---

25. Polk, *supra* note 9; *see also* Amended Initial Brief of Appellant, *supra* note 11, at 1.

26. *See* S.C. CODE ANN. § 16-3-20(A) (2007) ("A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years.").

27. *Id.*

28. Obeid, *supra* note 8. Defense attorney Andy Vickery advocated that Pieper rule the mandatory minimum sentence unconstitutional considering Christopher's youth by stating that "[y]ou have a legislative mandate that says you shall not give him less than 30 years but you have a constitutional imperative . . . that the sentence must be in light of the full circumstances, including his age." John Springer, *Jurors Find Teenager Guilty of Murdering His Grandparents*, COURT TV, Feb. 16, 2005, http://www.courttv.com/trials/pittman/021505_verdict_ctv.html (last visited Nov. 13, 2009).

29. Moriarty, *supra* note 10 (relating Prosecutor Barney Giese's description of Christopher from the closing argument).

30. *Id.*

31. AMNESTY INTERNATIONAL HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 90-91 (2005), http://www.amnestyusa.org/countries/usa/clwop/report.pdf.

32. *Id.*

mandates in juvenile sentencing hold inevitable potential for Eighth Amendment violation as excessive or cruel and unusual punishment, especially in light of the Supreme Court's reasoning in *Roper v. Simmons*.[33] The scary reality is that despite neurological and psychological studies of juvenile development,[34] judges lamenting the injustice resulting from their inability to use discretion in the individualized case,[35] and the "evolving standards of decency regarding the diminished capacity of children,"[36] approximately seventy-three people are serving life sentences for offenses committed while thirteen or fourteen years of age,[37] and hundreds more, like Christopher Pittman, are incarcerated from a sentence imposed by a judge whose hands were tied by mandatory sentencing schemes.[38]

This Note explores the constitutionality of mandatory sentences imposed upon juveniles tried in the adult criminal system without judicial discretion to consider youth as a mitigating factor. Part II traces the history and goals of juvenile justice policy in the United States, from the instatement of the juvenile justice system and

---

33. Roper v. Simmons, 543 U.S. 551 (2005) (abolished the death penalty for offenders under eighteen years of age).

34. See *infra* Part IV for a discussion of neurological and psychological discoveries regarding juvenile development and culpability.

35. *See* AMNESTY INTERNATIONAL HUMAN RIGHTS WATCH, *supra* note 31, at 90-92. The Honorable David Scott DeWitt "reflected on his own lack of discretion" in sentencing a fifteen-year-old to life imprisonment without parole and stated:

> [T]he sentence that I must impose is mandated by law. I don't have any choice in the matter. I'm not at all comfortable with this case, not because the Defendant didn't receive a fair trial. I think that he did. . . .
>
> One is always tempted in a case like this to search for some way to lessen the severity of the law because of the fact that the Defendant is only fifteen years old. The Motion for New Trial presented a certain amount of temptation to ignore the law and do something to fit the circumstances. I have sworn duty to follow the law, and think in the long run the performance of duty to follow the law is in the best interests of not only this community but the whole state.
>
> . . . It's obvious to me that we can't, as a society, say that fifteen-year-old children should be held to the same standards as adults. Our law provides this. I think the law is wrong.

*Id.* at 91 (quoting Sentencing Transcript, People v. Lashuay (1984) (on file with Human Rights Watch)).

36. Petition for Writ of Certiorari, *supra* note 19, at 8.

37. EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON 20 (2007), http://www.eji.org/eji/files/20071017cruelandunusual.pdf (reporting data compiled "[b]y reviewing court decisions, searching media reports, and collecting information from state departments of corrections and from prisoners directly").

38. *See generally* AMNESTY INTERNATIONAL HUMAN RIGHTS WATCH, *supra* note 31.

emphasis on child rehabilitation to the establishment of transfer and waiver laws and the shift toward punishment and retribution. Part III explores how this evolution in juvenile justice policy impacts the sentencing of youths today, specifically addressing mandatory minimum sentences as applied to juveniles tried in the adult criminal system and proposing that such ultimate treatment violates the Eighth Amendment's prohibition on excessive and cruel and unusual punishment. Part IV discusses the 2005 United States Supreme Court decision, *Roper v. Simmons*, as an affirmative acknowledgment of the discounted culpability and maturity of the developing juvenile, and applies the Court's reasoning to abolish the death penalty for offenders under eighteen, in conjunction with modern scientific and psychological studies, to mandatory sentencing of juveniles. Part V explores the Supreme Court's interpretation of the Eighth Amendment leading up to *Roper*, applies the "gross proportionality" comparison standard, and concludes that the mandatory sentencing of juveniles without the possibility of consideration of youth as a mitigating factor clearly constitutes cruel and unusual punishment and thereby violates the Eighth Amendment.

## II. THE HISTORY AND GOALS OF JUVENILE JUSTICE POLICY: WHERE HAVE WE GONE WRONG?

In eighteenth century America, no distinction was made between adult and juvenile defendants.[39] Children considered above the "age of reason," traditionally seven years of age or older, were deemed capable of criminal intent, and therefore were tried in the same courts and subjected to the same punishment as adult defendants.[40] The Progressive Era ushered in social reform[41] and a shifted perception of juveniles from "miniature adults" to "persons with less than fully developed moral and cognitive capacities."[42] Specialized

39. Janet Tobias & Michel Martin, *Frontline: Juvenile Justice* (PBS television broadcast Jan. 30, 2001), http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/stats/childadult.html (last visited Nov. 13, 2009) (discussing the evolving view of juvenile culpability).

40. HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 94 (2006), http://ojjdp.ncjrs.org/ojstatbb/nr2006/downloads/chapter4.pdf (noting that the child, who was over seven years of age, could be sentenced to life imprisonment or death if found guilty).

41. During the Progressive Era (1900-1918), America "saw the growth of the women's suffrage movement, the campaign against child labor, the fight for the eight-hour workday, and the uses of journalism and cartooning to expose 'big business' corruption." History of America's Juvenile Justice System, http://www.lawyershop.com/practice-areas/criminal-law/juvenile-law/history/ (last visited Nov. 13, 2009).

42. SNYDER & SICKMUND, *supra* note 40, at 94. Children were viewed as "passive

facilities were established to focus on tending to the individualized needs and rehabilitation of the child, culminating in the establishment of the first juvenile court in Cook County, Illinois in 1899.[43]

The juvenile courts were instituted under the *parens patriae*[44] legal doctrine, where the role of the state was "not only to protect the public interest," but also to primarily "serve as the guardian" of the juvenile's interests.[45] As children were considered more amenable to change and reformation than their adult counterparts, the juvenile court was "designed to be flexible, informal and to tailor to a juvenile's individual needs, with the ultimate goal of rehabilitation."[46] In the words of Judge Julian Mack, one of the first judges to preside over a juvenile court,

> [t]he child who must be brought into the court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude. The ordinary trappings of the court-room are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.[47]

This benevolent mission of protecting and treating the child through a non-adversarial, rehabilitation model led to procedural and substantive differences in the juvenile and adult criminal systems.[48] The judge presiding in the juvenile court, a "concerned father" figure, was "free to consider all relevant information without regard for rules of evidence . . . . [which were deemed] too limiting in an endeavor where everyone was acting in the best interest of the

---

and innocent beings incapable of possessing criminal intent." Joseph F. Yeckel, *Violent Juvenile Offenders: Rethinking Federal Intervention in Juvenile Justice*, 51 WASH. U. J. URB. & CONTEMP. L. 331, 334 (1997).

43. ABA DIV. FOR PUB. EDUC., THE HISTORY OF JUVENILE JUSTICE: DIALOGUE ON YOUTH AND JUSTICE 5 (2007), http://www.abanet.org/publiced/features/DYJpart1.pdf.

44. A Latin term for "parent of the country," *parens patriae* refers to the legal doctrine which gives the state the power to serve as parent or guardian to a juvenile with legal issues. *Id.*

45. Tobias & Martin, *supra* note 39.

46. *Id.* In stark contrast to the adult criminal system, the juvenile system "focused on the offender rather than the offense and emphasized rehabilitation over punishment." Yeckel, *supra* note 42, at 335.

47. ABA DIV. FOR PUB. EDUC., *supra* note 43, at 5 (quoting Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 120 (1909)).

48. SNYDER & SICKMUND, *supra* note 40, at 94.

child."[49] Additionally, because the goal of the juvenile justice system was protective rather than punitive in nature, "no due process protections" applied.[50]

The 1960s brought great change to juvenile justice, beginning a trend toward "[b]lurring the [l]ines [b]etween [j]uvenile and [c]riminal [j]ustice."[51] With *Kent v. United States*,[52] the Supreme Court heard the first of many "cases that would profoundly change proceedings in the juvenile courts" and start the pendulum swinging in the direction of punishment and formal, adversarial proceedings.[53] In *Kent*, the Court held that juveniles are constitutionally entitled to the "essentials of due process and fair treatment" in ruling that Kent was entitled to a waiver hearing and explanation of the juvenile court's waiver decision.[54] One year later, the Supreme Court continued its extension of constitutional due process rights to juveniles in *In re Gault*.[55] The Court explicitly rejected the concept of *parens patriae*[56] and replaced individualized assessment and discretion with the juvenile's right to notice of the charges against him or her,[57] to legal counsel,[58] to privilege against self-incrimination,[59] and to confront and cross examine witnesses.[60] Noting the intended distinction between juvenile proceedings and

---

49. Marygold S. Melli, *Symposium: Juvenile Justice Reform: Introduction: Juvenile Justice Reform in Context*, 1996 WIS. L. REV. 375, 378-79 (1996) (discussing the characteristics of the separate juvenile system).

50. Tobias & Martin, *supra* note 39.

51. ABA DIV. FOR PUB. EDUC., *supra* note 43, at 7.

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

53. ABA DIV. FOR PUB. EDUC., *supra* note 43, at 6.

54. *Kent*, 383 U.S. at 562.

55. *In re* Gault, 387 U.S. 1 (1967).

56. *See id.* at 17 ("The constitutional and theoretical basis for this peculiar system is—to say the least—debatable.").

> The early conception of the Juvenile Court proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise institutions of the State provided guidance and help "to save him from a downward career." . . . But recent studies have, with surprising unanimity, entered sharp dissent as to the validity of this gentle conception. They suggest that the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude so far as the juvenile is concerned.

*Id.* at 25-26 (footnote omitted).

57. *Id.* at 33.

58. *Id.* at 41.

59. *Id.* at 55.

60. *Id.* at 56-57.

criminal trials,[61] Justice Stewart warned in his dissent that by requiring the same due process guarantees, "the Court's opinion . . . serves to convert a juvenile proceeding into a criminal prosecution."[62]

In the years that followed, the Court continued to "erod[e] the difference[] between juvenile courts and traditional criminal courts,"[63] in requiring the reasonable doubt standard in juvenile delinquency proceedings[64] and applying the double jeopardy protections of the Fifth Amendment to juveniles.[65] Dissenters continued to protest the transformation of juvenile justice[66] as "[t]he once rehabilitative ideal of the juvenile justice system gave way to aggressive implementation of transfer policies and procedures, representing a new retributive focus."[67]

Additional evidence of the juvenile justice pendulum's continued swing from benevolent, individualized assessment and rehabilitative goals toward prosecution and retributive goals can be seen in the increased transfer of juveniles to adult courts.[68] While mechanisms to transfer juveniles to criminal court are not new,[69] the 1980s and 1990s ushered in an era of "substantial misperception regarding increases in juvenile crime,"[70] and many states reacted by passing

---

61. *See id.* at 79 (Stewart, J., dissenting) ("[A] juvenile proceeding's whole purpose and mission is the very opposite of the mission and purpose of a prosecution in a criminal court. The object of the one is correction of a condition. The object of the other is conviction and punishment for a criminal act.").

62. *Id.*

63. *In re* Winship, 397 U.S. 358, 376 (1970) (Burger, C.J., dissenting). The Court only expressly denied juveniles the constitutional protection of right to trial by jury. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) (holding that juveniles are not entitled to trial by jury in a juvenile court).

64. *In re Winship*, 397 U.S. at 368 (holding that proof beyond a reasonable doubt is required during the adjudicatory stage when a juvenile is charged with an act which "renders him liable to confinement for as long as six years").

65. Breed v. Jones, 421 U.S. 519, 541 (1975) (holding that the double jeopardy clause bars waiver of a juvenile to criminal court following adjudication in juvenile court).

66. *See In re Winship*, 397 U.S. at 376 (Burger, C.J., dissenting) ("What the juvenile court system needs is not more but less of the trappings of legal procedure and judicial formalism; the juvenile court system requires breathing room and flexibility in order to survive, if it can survive the repeated assaults from this Court.").

67. Enrico Pagnanelli, *Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of* Roper v. Simmons, 44 AM. CRIM. L. REV. 175, 178 (2007).

68. *See* Bree Langemo, *Serious Consequences for Serious Juvenile Offenders: Do Juveniles Belong in Adult Court?*, 30 OHIO N.U. L. REV. 141, 141 (2004) (discussing how "the recent trend has been to restore the pre-reformation view of treating juvenile offenders as adults in order to punish and deter juvenile crime" by trying juveniles as adults).

69. SNYDER & SICKMUND, *supra* note 40, at 110.

70. *Id.* at 96.

laws intended to increase incidence of juveniles handled as adults in criminal courts.[71] Between 1992 and 1997, forty-five states modified transfer provisions, "ma[king] it easier to transfer juvenile offenders from the juvenile justice system to the criminal justice system."[72]

In addition, the past several decades have seen great modification in the transfer statutes of many states in order to "streamline" the transfer process and facilitate easier prosecution of juveniles in criminal court.[73] Methods implemented by the states to achieve this goal include:

> (1) expanding the types of cases and offenders judges can transfer for adult trials after a hearing; (2) lowering the age of criminal jurisdiction; (3) shifting the transfer decision from judges to

---

71. *See id.* ("[O]ffenders charged with certain offenses now are excluded from juvenile court jurisdiction or face mandatory or automatic waiver to criminal court. In several states, concurrent jurisdiction provisions give prosecutors the discretion to file certain juvenile cases directly in criminal court rather than juvenile court. In some states, certain adjudicated juvenile offenders face mandatory sentences.").

72. *Id.* Transfer laws vary by state and are generally constricted by both the offender's age and the offense charged. Three categories of transfer provisions have alternate defining terms depending on the state: (1) judicial waiver, "certification, remand, or bind over;" (2) concurrent jurisdiction, "prosecutorial waiver, prosecutor discretion, or direct file;" and (3) statutory exclusion or legislative exclusion. *Id.* at 110. The mechanisms differ regarding where the decision responsibility for transfer exists:

> Waiver provisions leave transfer decisionmaking to the State's juvenile courts: juveniles may not be prosecuted as if they were adult criminals pursuant to a waiver provision until a juvenile court judge has ordered it. Waiver provisions differ from one another in the degree of decisionmaking flexibility they allow the courts. Some make the waiver decision entirely discretionary. Others set up a presumption in favor of waiver. And still others specify circumstances under which waiver is mandatory. . . .
>
> Direct File provisions leave it up to the prosecutor to determine whether to initiate a case against a minor in juvenile court or in criminal (adult) court.
>
> Statutory Exclusion provisions grant criminal courts original jurisdiction over a whole class of cases involving juveniles. Under statutory exclusion, a State legislature is essentially predetermining the question of criminal prosecution for itself and taking the decision out of both the prosecutor's and the court's hands.

PATRICK GRIFFIN, PATRICIA TORBET & LINDA SZYMANSKI, NAT'L CTR. FOR JUVENILE JUSTICE, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS 1 (1998), http://www.ncjrs.gov/pdffiles/172836.pdf (emphasis omitted).

73. *See* Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 84 (2000) (discussing the "quick and dramatic" transformation of transfer policy in the 1990s as legislatures in forty-four states and the District of Columbia enacted provisions to facilitate transfer through "offense-based, categorical, and absolute alternatives to individualized, offender-oriented waiver proceedings").

> prosecutors; and (4) increasing the number of offenses and types of offenders that are automatically tried in criminal courts as mandated by legislatures.[74]

"[A]s of the end of the 2007 legislative session [a]ll state[s] allow adult criminal prosecution and sentencing of juveniles under some circumstances."[75] Unfortunately, this "zeal for retribution,"[76] which has replaced the desire to reform the individual child, ignores both the interests of the child and ultimately the interests of the country. Simultaneously, it loses sight of the innate developmental differences between adult and child, and fails both in refusing to accommodate those distinctions.

## III. MANDATORY MINIMUM SENTENCES: UNIFORMITY IN SENTENCING OR LOSS OF INDIVIDUALIZED ASSESSMENTS?

Prior to the enactment of the Sentencing Reform Act of 1984,[77] federal judges had great discretion in sentencing offenders.[78] Because most statutes provided only maximum sentences, judges were free to impose a broad range of punishments that reflected both their personal views of justice and the purposes of sentencing, and an individualized assessment of the specific circumstances of the offender and the offense.[79] While such discretion allowed judges to customize a punishment to match the crime,[80] critics noted the unpredictability and disparity of sentences.[81] As a result, as part of

---

74. Langemo, *supra* note 68, at 141.

75. Patrick Griffin, National Center of Juvenile Justice, *National Overviews: State Juvenile Justice Profiles*, http://www.ncjj.org/stateprofiles/overviews/transfer_state_overview.asp. It must be noted that without state transfer mechanisms, juveniles would never be subjected to the mandatory minimum sentences of the adult criminal court. However, analysis of transfer policy is beyond the scope of this note. See generally Bishop, *supra* note 73, Langemo, *supra* note 68, Pagnanelli, *supra* note 67, and Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 UTAH L. REV. 709 (1997) for a discussion of this topic.

76. Bishop, *supra* note 73, at 85.

77. Sentencing Reform Act, 18 U.S.C. § 3551 (1984).

78. SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, CRIMINAL LAW AND ITS PROCESSES, CASES AND MATERIALS 105 (8th ed. 2007).

79. *Id.* at 105-06, 109-10.

80. *See* David Risley, Drug Watch International, Mandatory Minimum Sentences: An Overview, http://www.drugwatch.org/Mandatory%20Minimum%20Sentences.htm (last visited Nov. 13, 2009) (noting that judges had "unbridled discretion to impose whatever sentences they deemed appropriate, in their personal view, up to the statutory maximum").

81. *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 47-54 (1991), http://www.ussc.gov/manmin/manmin51.htm.

the Comprehensive Crime Control Act,[82] Congress instated the Sentencing Reform Act of 1984,[83] "the most sweeping and dramatic reform of federal sentencing," in order to "reduce unwarranted disparity, increase certainty and uniformity, and correct past patterns of undue leniency for certain categories of serious offenses."[84]

While the initial intention of this reform movement was to maintain discretion for the judiciary, it shifted in its development "toward a model of sharply limited discretion."[85] In 1986, Congress enacted mandatory minimum sentencing laws which force judges to impose fixed sentences on offenders, regardless of mitigating circumstances,[86] and by 1994 all states had enacted at least one mandatory minimum sentence law.[87] Premised on the goals of "deterrence and incapacitation," mandatory minimum sentencing allows "legislators [to] convey the message that certain crimes are deemed especially grave and that people who commit them deserve, and may expect, harsh sanctions."[88] However, mandatory minimums

---

82. Comprehensive Crime Control Act of 1984, 5 U.S.C. §§ 5314, 5315 (1984).

83. Sentencing Reform Act, 18 U.S.C. § 3551 (1984).

84. U.S. SENTENCING COMM'N, *supra* note 81, at 7. The United States Sentencing Commission was thereby established as:

> [A]n independent commission in the judicial branch of the United States . . . which shall consist of seven voting members and one nonvoting member. . . . The purposes of the United States Sentencing Commission are to (1) establish sentencing policies and practices for the Federal criminal justice system that (A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code; (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . . and (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process . . . .

28 U.S.C. § 991 (2006). The adoption of the United States Sentencing Guidelines, effective November 1987, resulted from this Commission and provided a resource for courts to determine a narrow sentencing range based on the severity of the offense and the extent of the offenders' criminal history. Risley, *supra* note 80; *see* 2005 FEDERAL SENTENCING GUIDELINES, SENTENCING TABLE, http://www.ussc.gov/2005guid/5a.htm.

85. PAUL J. HOFER, CHARLES LOEFFLER, KEVIN BLACKWELL & PATRICIA VALENTINO, U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 7 (2004), http://www.ussc.gov/15_year/chap1.pdf.

86. Drug Policy Alliance Network, What's Wrong with the War on Drugs: Mandatory Minimum Sentences (2009), http://www.drugpolicy.org/drugwar/mandatorymin/ (last visited Nov. 13, 2009).

87. DALE PARENT, TERENCE DUNWORTH, DOUGLAS MCDONALD & WILLIAM RHODES, NAT'L INST. OF JUSTICE RESEARCH IN ACTION, KEY LEGISLATIVE ISSUES IN CRIMINAL JUSTICE: MANDATORY SENTENCING (Jan. 1997), http://www.ncjrs.gov/txtfiles/161839.txt.

88. *Id.*

exclusively further retributive and deterrent goals of punishment without providing a possibility for sentencing judges to consider the individual offender or the circumstances surrounding the offense.[89] Mandatory minimums as applied to juveniles tried in the adult criminal justice system, therefore, showcase the extreme opposite considerations which founded the juvenile justice movement in the first place.[90] Instead of protecting the juvenile and working as a father figure determined to meet the child's best interest through rehabilitation,[91] these judges' hands are tied, forced to impose "harsh, automatic prison terms."[92]

Mandatory minimums provide potential for injustice in part because "[a] nuanced assessment of similarity across cases is not only a uniquely judicial function, but one that is best carried out by a judge immersed in the facts of the individual case."[93] The Supreme Court has recognized the importance of individualized assessment in holding the sentencing guidelines system instituted by the United States Sentencing Commission to be merely advisory, rather than mandatory.[94] Greater potential for just, individualized sentences seems to lie with an advisory sentencing guideline, rather than a mandatory minimum sentencing structure.[95] While sentencing guidelines "differentiate[] defendants convicted of the same offense by a variety of aggravating and mitigating factors, the consideration of which is meant to provide just punishment and proportional

89. U.S. SENTENCING COMM'N, *supra* note 81, at 8.

90. See *supra* text and accompanying notes 44 to 50 for a discussion of the principles supporting the juvenile justice movement which established the first juvenile courts.

91. Tobias & Martin, *supra* note 39.

92. Families Against Mandatory Minimums, What are Mandatory Minimums?, http://www.famm.org/UnderstandSentencing/WhatAreMandatoryMinimums.aspx (last visited Nov. 13, 2009) (noting that "judge[s] cannot lower a mandatory sentence because of the circumstances of the case or a person's role, motivation, or likelihood of repeating the crime"). Furthermore, in addition to the likelihood for unjust sentences due to lack of discretion, mandatory minimums have been found ineffective for a multitude of reasons, including its failure to deter crime and its impact on prison overcrowding. *See* Drug Policy Alliance Network, *supra* note 86 (noting that the Sentencing Commission and Department of Justice determined that deterrence has not been realized by mandatory minimums, which have "contributed greatly toward prison overcrowding").

93. Eric Citron, *Sentencing Review: Judgment, Justice, and the Judiciary*, YALE L.J. POCKET PART 150, 152 (2006), http://yalelawjournal.org/images/pdfs/3.pdf.

94. *See* Gall v. United States, 552 U.S. 38, 45-46 (2007) (rejecting the requirement of "extraordinary" circumstances to justify punishments outside of the Sentencing Guidelines specified range).

95. U.S. SENTENCING COMM'N, *supra* note 81, at 7 (quoting Pub. L. No. 91-513, 84 Stat. 1236 (1970)) (noting that mandatory minimum sentencing prevents "the judge from us[ing] his discretion in individual cases").

sentences, the structure of mandatory minimums lacks these distinguishing characteristics."[96] Therefore, mandatory minimums clearly disserve the best interests of juveniles tried as adults in failing to consider the distinct needs and developmental level of each child offender, while providing questionable benefits, if any,[97] to the country as a whole.

## IV. THE REASONING OF *ROPER*: WHAT SHOULD THE ACKNOWLEDGEMENT OF JUVENILES' DIMINISHED CULPABILITY MEAN FOR JUVENILES SENTENCED AS ADULTS WITH MANDATORY MINIMUMS?

While juvenile jurisprudence has delineated a very clear transition in focus from rehabilitation to retribution and deterrence,[98] it is less clear what the future holds for offending juveniles. The Supreme Court in *Roper v. Simmons* "adopt[ed] a groundbreaking understanding of juvenile development, and the rationale undergirding its holding may have extreme implications" for the future of juvenile justice.[99] Throughout American history, the treatment of juveniles by the justice system has coincided with the attitude of society regarding the capability and culpability of children and adolescents as influenced by our evolving understanding of human development and maturity.[100] The Court's bold statement in *Roper*, that the Eighth Amendment's proscription against cruel and unusual punishment prohibited imposition of the death penalty for crimes committed when offenders were under the age of eighteen in part because "society views juveniles . . . as 'categorically less culpable than the average criminal,'" clearly indicates the Court's acknowledgement of the importance of youth and development in the sentencing of juveniles.[101] As such, *Roper* opens the door to the conclusion that mandatory minimum sentences imposed upon offenders under eighteen without the possibility of youth as a mitigating factor are equally afoul of the Eighth Amendment.[102]

---

96. *Id.*

97. *See* Drug Policy Alliance Network, *supra* note 86 (noting that the Sentencing Commission and Department of Justice determined that deterrence has not been realized by mandatory minimums, which have "contributed greatly toward prison overcrowding").

98. See *supra* Part II for a discussion of the history of the juvenile justice system.

99. Pagnanelli, *supra* note 67, at 175.

100. Hillary J. Massey, Note, *Disposing of Children: The Eighth Amendment and Juvenile Life Without Parole after* Roper, 47 B.C. L. REV. 1083, 1083 (2006).

101. Roper v. Simmons, 543 U.S. 551, 567 (2005) (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

102. *See id.* at 569-71 (holding that minors' "lack of maturity" and "underdeveloped sense of responsibility," as well as "vulnerab[ility] . . . to negative influences and outside pressures" and "transitory" personality traits, make the imposition of the

### A. *The Court's Acknowledgement of the Decreased Culpability of Children under Eighteen in* Roper v. Simmons *and the Science Behind the Reasoning*

In *Roper*, a seventeen-year-old boy was sentenced to death in Missouri after planning and executing a vicious murder.[103] The Court affirmed the Missouri Supreme Court's decision to set aside the capital punishment and held the death penalty to be cruel and unusual punishment for all juveniles under the age of eighteen.[104] The Court acknowledged the Eighth Amendment guarantee against excessive punishment which "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'"[105] The Court continued on to note that the determination of whether a sentence is "so disproportionate as to be cruel and unusual" punishment[106] must be assessed by "referring to 'the evolving standards of decency that mark the progress of a maturing society.'"[107] Relying on *Atkins v. Virginia*,[108] the Court identified a nation-wide consensus that juveniles are "categorically less culpable than the average criminal."[109]

The Court identified three main differences between children under eighteen and adults which "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders."[110] First, the Court noted that "'[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.'"[111] Second, the Court pointed to the high level of vulnerability and lack of control of juveniles in identifying youth as "'a time and condition of life when a person may be most susceptible

---

death penalty a cruel and unusual punishment).

103. *Id.* at 556-58. Christopher Simmons, "[i]n chilling, callous terms," discussed his murder plan, entered his victim's home, tied her up, threw her off a bridge, and bragged about the murder to his friends. *Id.* at 556-57.

104. *Id.* at 560.

105. *Id.* (quoting *Atkins*, 536 U.S. at 311).

106. *Id.* at 561.

107. *Id.* (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (plurality opinion)).

108. *Atkins*, 536 U.S. at 316 (holding the death penalty to be cruel and unusual punishment with respect to mentally retarded individuals).

109. *Roper*, 543 U.S. at 567 (quoting *Atkins*, 536 U.S. at 316). Evidence of the consensus includes, "the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice." *Id.*

110. *Id.* at 569.

111. *Id.* (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

to influence and to psychological damage.'"[112] Third, the Court stated that "the character of a juvenile is not as well formed as that of an adult."[113] These distinct, albeit general, differences between juveniles and adults led the Court to hold that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed."[114]

Although such general observations of differences between adolescents and adults seem "intuitively obvious,"[115] the Court presents little specific evidence in its opinion of the diminished culpability of juveniles despite the "substantial research"[116] presented to it in the sixteen amicus briefs submitted on behalf of the Respondent.[117] The juvenile's diminished culpability as a result of underdevelopment and immaturity is scientifically documented to a greater extent than the *Roper* Court explicitly discussed.[118] In 2006, the Coalition for Juvenile Justice held a national conference to illuminate current research on brain development and its implications on the criminal culpability of juveniles.[119] The research confirms and elaborates on that which is generally stated by the *Roper* Court: "[T]he distinction between youth and adults is not simply one of age, but one of motivation, impulse control, judgment,

---

112. *Id.* (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

113. *Id.* at 570.

114. *Id.* at 578.

115. Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & FAM. STUD. 11, 45 n.191 (2007). Feld notes the Court's use of the phrase "as any parent knows" in its discussion of juveniles' immaturity and irresponsibility. *Id.* (quoting *Roper*, 543 U.S. at 569).

116. *Id.* at 45.

117. The Court broadly accepts and relies on "the scientific and sociological studies respondent and his amici cite" without clarifying the specific research which had impact on the Court's decision, thereby making it difficult to determine precisely what developmental research may be relied upon going forward. *See Roper*, 543 U.S. at 569; *see also* Deborah W. Denno, *The Mind of a Child: The Relationship between Brain Development, Cognitive Functioning, and Accountability under the Law: The Scientific Shortcomings of* Roper v. Simmons, 3 OHIO ST. J. CRIM. L. 379, 384-85 (2006) ("The *Roper* Court makes a strong move toward accepting the reliability and validity of social science research . . . . However, the Court never adequately explains how any of the research illuminates its conclusions. Likewise, the Court does not differentiate among the studies discussed in the sixteen amicus briefs to clarify which had the most impact on its decision making. . . . The Court's broadness could . . . suggest that these different kinds of research studies are comparably eligible for later use in case law. . . . On the other hand, there is some frustration in not knowing how *Roper* can be used more precisely as precedent since the Court is coy about these important details.").

118. *See generally* COAL. FOR JUVENILE JUSTICE, EMERGING CONCEPTS BRIEF: WHAT ARE THE IMPLICATIONS OF ADOLESCENT BRAIN DEVELOPMENT FOR JUVENILE JUSTICE? 2 (2006), http://juvjustice.org/media/resources/resource_134.pdf.

119. *Id.*

culpability and physiological maturation."[120]

1. The Immaturity, Irresponsibility, and Recklessness of Adolescents

In recognizing the diminished culpability of juveniles, the *Roper* Court acknowledged the immaturity, irresponsibility, and recklessness of adolescents and noted that they are "overrepresented statistically in virtually every category of reckless behavior" due to their indulgence in "impetuous and ill-considered" activity that is "understandable [for] the young."[121] More precisely, this behavior exists in adolescents because the prefrontal cortex, the part of the brain which controls the "executive functions" of reasoning, is the last section of the brain to mature, a process which concludes in approximately the human brain's twenty-fifth year.[122] As a result, adolescents are generally forced to rely on the emotional centers of the brain rather than the underdeveloped frontal regions, thereby functioning more so on impulse than on strategic decision-making.[123] Additionally, adolescents tend to participate in elevated risk-taking behavior because of fluctuating dopamine levels and other "changes in the brain's neurotransmitters . . . which influence memory, concentration, problem-solving and other mental functions."[124] Risk-taking behavior is further increased due to changes in the limbic system, a portion of the brain responsible for processing and regulation of emotion, which "stimulate[s] adolescents to seek higher levels of novelty."[125]

Because the adolescent brain is in a constant flux of development

120. *Id.*

121. *Roper*, 543 U.S. at 569.

122. COAL. FOR JUVENILE JUSTICE, *supra* note 118, at 3 (citing Beatrice Luna, *Brain and Cognitive Processes Underlying Cognitive Control of Behavior in Adolescence* (Univ. of Pittsburgh Oct. 2005) and Paul Thompson, *Time-Lapse Imaging Tracks Brain Maturation from Ages 5 to 20* (Nat'l Inst. of Mental Health and the Univ. of Cal., L.A. May 2004)). "Executive functions" of reasoning include advanced thought and impulse control. *Id.*

123. Adam Ortiz, Am. Bar Ass'n, Juvenile Justice Center, *Cruel and Unusual Punishment: The Juvenile Death Penalty: Adolescence, Brain Development and Legal Culpability* 2 (2004), http://www.abanet.org/crimjust/juvjust/Adolescence.pdf (noting that a result of relying on the emotional centers of the brain is that "teenagers seem to . . . respond more strongly with gut response than they do with evaluating the consequences of what they're doing") (quoting PBS Frontline, *Inside the Teen Brain: Interview with Yurgelon-Todel*, www.pbs.org/wgbh/pages/frontline/shows/teenbrain/ (last visited Nov. 13, 2009)).

124. *See id.* (citing Linda Patia Spear, *Neurodevelopment During Adolescence, in* NEURODEVELOPMENTAL MECHANISMS IN PSYCHOPATHOLOGY 62 (Dante Cicchetti ed., 2003)) (noting that during adolescence dopamine is "not yet at its most effective level").

125. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 816 (2003).

and formation, "[i]t's sort of unfair to expect [adolescents] to have adult levels of organizational skills or decision making before their brain is finished being built."[126] Therefore, while the *Roper* Court does not explicitly disclose the aforementioned developmental discoveries, its observation of the diminished culpability that accompanies youth because of "immaturity" and "irresponsibility" is clearly well-documented in recent scientific analysis.[127]

### 2. The Vulnerability to Peer Pressure and Negative Influences of Adolescents

In addition to acknowledging the immaturity, irresponsibility, and recklessness of adolescents, the *Roper* Court cited the "vulnerab[ility] or susceptib[ility] to negative influences and outside pressures, including peer pressure," that young adults endure as further support for their diminished culpability.[128] While the Court broadly regards youth as "a time and condition of life when a person may be most susceptible to influence,"[129] substantial research supports the proposition that adolescents are influenced by peers to a greater extent than adults.[130] Susceptibility to peer pressures climaxes at age fourteen and embarks on a slow decline thereafter,[131] not nearing adult level of ability to resist negative influences until the early-twenties.[132] During this time, adolescent judgment is impacted by a desire for peer approval and a belief that adhering to examples set by peers will assist in achieving goals.[133]

---

126. Ortiz, *supra* note 123, at 2.

127. *See* Roper v. Simmons, 543 U.S. 551, 569 (2005) (discussing the "lack of maturity and . . . underdeveloped sense of responsibility . . . found in youth"); *see also supra* notes 122-25 and accompanying text.

128. *Roper*, 543 U.S. at 569.

129. *Id.* (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

130. Scott & Steinberg, *supra* note 125, at 813.

131. *Id.* (citing Laurence Steinberg & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 CHILD DEV. 841, 848 (1986)).

132. Feld, *supra* note 115, at 56.

133. Scott & Steinberg, *supra* note 125, at 813; *see* Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 LAW & PSYCHOL. REV. 53, 62 (2007) (discussing the "heightened vulnerability [of adolescents] to coercive circumstances . . . [which forces them to] 'respond adversely to external pressures that adults are able to resist'") (quoting Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 357 (2003); *see also* MICHAEL A. CORRIERO, JUDGING CHILDREN AS CHILDREN: A PROPOSAL FOR A JUVENILE JUSTICE SYSTEM 30 (2006) ("The consequence of 'saying "no" to negative peer pressure is not just withstanding the "heat" of the moment,' but it is also coping with a sense of exclusion as others engage in the behavior and leave the adolescent increasingly alone . . . . This feeling of loneliness then becomes persuasive and carries an easy solution. Go along with the crowd.").

The Court also notes that individuals under eighteen have little power over their own environment.[134] Financial dependency and legal restrictions on freedom impede adolescents from controlling their surroundings and removing themselves from outside pressures that may exist in the home, school, or community.[135] Through the *Roper* Court's broad acknowledgment of the adolescent's vulnerability to surrounding influences[136] and the scientific world's recognition of human beings as more resistant to outside pressure as age increases,[137] a consensus has formed that "youths who fail to resist [such pressures] are not as responsible for their behavior as we expect adults to be."[138]

### 3. The Underdeveloped Character and Transient Identity of Adolescents

The third difference between individuals under eighteen and adults relied on by the Court in *Roper* as reason for diminished culpability is the transient, un-formed personality that accompanies the adolescent stage of life.[139] While the Court does not delve into a great deal of scientific support,[140] studies of developmental psychologists show that two processes exist in this period of transition from child to adult: "individuation" and "identity development."[141] Individuation is "the process of establishing

134. *Roper*, 543 U.S. at 569 ("[J]uveniles have less control, or less experience with control, over their own environment.").

135. *See* Scott & Steinberg, *supra* note 125, at 818 ("Because adolescents lack legal and practical autonomy, they are in a real sense trapped in whatever social setting they occupy and are more restricted in their capacity to avoid coercive criminogenic influences than are adults.").

136. *Roper*, 543 U.S. at 569.

137. *See* MACARTHUR FOUND. RESEARCH NETWORK ON ADOLESCENT DEV. AND JUVENILE JUSTICE, DEVELOPMENT AND CRIMINAL BLAMEWORTHINESS, http://www.adjj.org/downloads/3030PPT-%20Adolescent%20Development%20and%20Criminal%20Blameworthiness.pdf (charting the decline of susceptibility to influences with increased age); *see also* MACARTHUR FOUND. RESEARCH NETWORK ON ADOLESCENT DEV. AND JUVENILE JUSTICE, LESS GUILTY BY REASON OF ADOLESCENCE, http://www.adjj.org/downloads/6093issue_brief_3.pdf (chronicling recent research illuminating a decline in vulnerability to peer pressure with age and connecting adolescent risk-taking to the presence of peers).

138. Feld, *supra* note 115, at 56.

139. *Roper*, 543 U.S. at 570 ("The personality traits of juveniles are more transitory, less fixed.").

140. *See id.* (dedicating two short sentences to this difference); *see also* Denno, *supra* note 117, at 389-96 (questioning the Court's lone use of general support in Erikson's book).

141. Scott & Steinberg, *supra* note 125, at 819 (citing Peter Blos, *The Second Individuation Process of Adolescence*, 22 THE PSYCHOANALYTIC STUDY OF THE CHILD 162-68 (1967)).

autonomy from one's parents" and identity development is "the process of creating a coherent and integrated sense of self."[142] These processes delineate the transition from pleasing and "parroting" influential adults' beliefs to establishing a unique identity and often involve "risky behavior reflecting rebellion."[143]

> According to developmental theory, the process of identity development is a lengthy one that involves considerable exploration and experimentation with different behaviors and identity "elements." These elements include both superficial characteristics, such as style of dress, appearance, or manner of speaking, and deeper phenomena, such as personality traits, attitudes, values, and beliefs. As the individual experiments, she gauges the reactions of others as well as her own satisfaction, and through a process of trial and error, over time selects and integrates the identity elements of a realized self. Not surprisingly, given adolescent risk preferences (perhaps combined with rebellion against parental values in the course of individuation), identity experimentation often involves risky, illegal, or dangerous activities – alcohol use, drug use, unsafe sex, delinquent conduct, and the like. For most teens, this experimentation is fleeting; it ceases with maturity as identity becomes settled.[144]

Therefore, because the coherent "self" does not generally form until early adulthood,[145] an adolescent is clearly less blameworthy for his or her actions than a fully formed adult and, as noted by the *Roper* Court, more likely to reform upon maturation.[146]

### *B. The* Roper *Court's Assessment that the Justifications for the Death Penalty are Inadequate When Applied to Juveniles*

The Court rationalized that "[o]nce 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."[147] Neither retribution nor deterrence can satisfactorily justify the capital sentencing of children who are broadly distinct from adults in development, maturity, and vulnerability.[148] Considering retribution, the Court noted that "[w]hether viewed as

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 820.

146. *See* Roper v. Simmons, 543 U.S. 551, 570 (2005) ("The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.").

147. *Id.* at 571.

148. *Id.* at 569-72; *see supra* text and accompanying notes in Part III(A).

an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult."[149] Considering deterrence, the Court acknowledged the lack of evidence of deterrent impact and concluded that "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence."[150] Therefore, the Court clearly determined that the death penalty was inappropriate for even the worst juvenile offenders not only because children under eighteen have diminished culpability, but also because the overall purposes of the punishment, in this case retribution and deterrence, were ineffective.[151]

### C. Roper's *Reasoning Applied to Mandatory Minimum Sentences for Juveniles Tried as Adults*

Because the Court in *Roper* acknowledged a diminished culpability of juveniles under eighteen due to underdevelopment, immaturity, and vulnerability,[152] it is logical to transfer that same reasoning to juveniles subjected to mandatory minimum sentencing. As discussed in Part III of this Note, mandatory minimum sentencing schemes "are aimed at deterring known and potentially violent offenders and incapacitating convicted criminals through long-term incarceration."[153] Not only are such justifications ineffective in punishment for juveniles, but they also fail to consider the individualized need of each specific, distinct child for an equally individualized rehabilitative punishment. The Court in *Roper* stated:

> The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and

149. *See Roper*, 543 U.S. at 571 ("Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.").

150. *Id.* The Court quoted *Thompson v. Oklahoma* and noted "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." *Id.* at 572 (quoting Thompson v. Oklahoma, 487 U.S. 815, 837 (1988)).

151. *Id.*

152. *Id.* at 569-70.

153. PARENT ET AL., *supra* note 87.

recklessness that may dominate in younger years can subside."[154]

The Court clearly indicates a shift in trajectory for juvenile justice back toward the rehabilitative thrust which motivated the establishment of the juvenile justice system to begin with. By recognizing the diminished culpability of juveniles and admitting the failure of retributive and deterrent justifications for punishment, the Court "denounces the shift towards retributive stance on violent juvenile offenders and advocates a return to a focus on rehabilitation."[155]

The Court, therefore, impliedly rejects the basic foundation of mandatory minimum sentences when applied to individuals under the age of eighteen because mandatory minimums are aimed to deter crime and punish offenders through incarceration.[156] Developmental psychologists have noted that "juvenile decisions, as opposed to adult decisions, are influenced more heavily by the potential rewards of their choices rather than by the potential risks involved, as well as the short-term, rather than long-term, consequences of their actions."[157] In *Roper*, the Court clearly recognized the failure to deter juveniles because of this skewed reward/risk balancing ability,[158] and as such, it follows that if juveniles would not be deterred by the potential of a death sentence as punishment for their actions, then certainly the expectation of a mandatory minimum term of incarceration cannot be expected to impact their underdeveloped decision-making methods.[159]

---

154. *Roper*, 543 U.S. at 570 (quoting Johnson v. Texas, 509 U.S. 350, 368 (1993)). "For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist to adulthood." *Id.* (quoting Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence, Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)).

155. Pagnanelli, *supra* note 67, at 191.

156. PARENT ET AL., *supra* note 87.

157. Benjamin Steiner & Emily Wright, *Assessing the Relative Effects of State Direct File Waiver Laws on Violent Juvenile Crime: Deterrence or Irrelevance?*, 96 J. CRIM. L. & CRIMINOLOGY 1451, 1469 (2006) (citing Steinberg & Scott, *supra* note 154, at 1011-13.)

158. Roper v. Simmons, 543 U.S. 551, 570-72 (2005).

159. *See* Steiner & Wright, *supra* note 157, at 1469 (applying this same reasoning to conclude that juveniles would not be deterred by the potential of being transferred to an adult criminal court).

## V. THE EIGHTH AMENDMENT: WHERE HAVE THE STANDARDS OF DECENCY EVOLVED TO NOW AND WHAT SHOULD IT MEAN FOR MANDATORY MINIMUM SENTENCES FOR JUVENILES?

### *A. The Evolution of Eighth Amendment Interpretation by the Supreme Court*

The prohibition against cruel and unusual punishment specified in the Eighth Amendment has been evoked and analyzed in a variety of ways. While proportionality principles have traditionally been based on a retributive theory which compares the offense to the punishment imposed on the offender,[160] the culpability of the offender is a natural consideration which should, and at times has, been a factor in the analysis.[161] While the Court has narrowed the proportionality analysis away from culpability concerns and toward a more objective inquiry into the comparison of sentence to crime, the Justices have spoken out on a variety of occasions through this less-than-smooth Eighth Amendment jurisprudence to call for an individualized evaluation of culpability in the proportionality assessment.[162]

The proportionality analysis of the Eighth Amendment was first pronounced by the Court as a three-factor test in *Solem v. Helm*:

> When sentences are reviewed under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized. First, we look to the gravity of the offense and the harshness of the penalty. . . .
>
> Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. . . .

---

160. *See* Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring) (discussing the "threshold comparison of the crime committed and the sentence imposed [which] leads to an inference of gross disproportionality").

161. *See* Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 701-02 (1998) (noting that the Court has been mindful of the culpability of the offender in its assessment of punishment and "acted in a manner consistent with a basic precept of Anglo-American law: that proportionality bars punishment in excess of the moral blame of the offender").

162. *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 394 (1989) (Brennan, J., dissenting) ("Proportionality analysis requires that we compare 'the gravity of the offense,' understood to include not only the injury caused, but also the defendant's culpability, with 'the harshness of the penalty.'") (quoting Solem v. Helm, 463 U.S. 277, 292 (1983)); Thompson v. Oklahoma, 487 U.S. 815, 853 (1988) (O'Connor, J., concurring) ("'[P]roportionality requires a nexus between the punishment imposed and the defendant's blameworthiness.'") (quoting Enmund v. Florida, 458 U.S. 782, 825 (1982) (O'Connor, J., dissenting)).

> Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions. [163]

However, eight years later, in *Harmelin v. Michigan*,[164] the Court retreated from the proportionality factors enunciated in *Solem* and held that for noncapital sentences "intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."[165] Delivering the opinion of a fractured Court, Justice Scalia rejected Harmelin's contention that his life without parole ("LWOP") sentence was contrary to the Eighth Amendment because it is cruel and unusual to impose a mandatory sentence without consideration of mitigating factors.[166] Scalia noted that "[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our nation's history."[167]

Joined by Chief Justice Rehnquist, Scalia additionally concluded that "the Eighth Amendment contains no proportionality guarantee"[168] and that proportionality review should not be extended beyond capital cases because "death is different" and therefore requires "protections that the Constitution nowhere else provides."[169] In contrast, in separate concurring and dissenting opinions, all seven other Justices concluded that a proportionality analysis applies to both capital and noncapital cases.[170] Since *Harmelin*, the modified view of the *Solem* proportionality factors enunciated in Justice Kennedy's concurrence has "emerged as the operative test for proportionality."[171] Therefore, in analyzing an Eighth Amendment

---

163. *Solem*, 463 U.S. at 290-92 (holding that a sentence of LWOP was cruel and unusual and disproportionate to the crime committed).

164. 501 U.S. 957 (1991).

165. *Id.* at 1005 (Kennedy, J., concurring). The Court sustained a mandatory LWOP sentence for drug possession. *Id.* at 994-95.

166. *Id.*

167. *Id.* In addition, Scalia noted that "here can be no serious contention . . . that a sentence which is not otherwise cruel and unusual becomes so simply because it is 'mandatory.'" *Id.* at 995.

168. *Id.* at 965.

169. *Id.* at 994.

170. In his concurring opinion, Justice Kennedy, joined by Justice O'Connor and Justice Souter, while recognizing that the "proportionality decisions have not been clear," *id.* at 996 (Kennedy, J., concurring), acknowledged the existence of a "narrow proportionality principle" that applies to both capital and noncapital sentences, *id.* at 997. In separate dissenting opinions, Justice White (joined by Justices Blackmun and Stevens), Justice Marshall, and Justice Stevens (joined by Justice Blackmun) all acknowledged a proportionality requirement in the Eighth Amendment. *Id.* at 1009-29 (White, J., dissenting; Marshall, J., dissenting; Stevens, J., dissenting).

171. Logan, *supra* note 161, at 699. Logan notes that the majority of the *Harmelin*

claim of cruel and unusual punishment, the Court must determine whether a "threshold comparison of the crime committed and the sentence imposed leads to an inference of gross proportionality."[172] Such comparison requires a consideration of the "gravity of the offense" and the "harshness of the penalty."[173] However, exactly what factors should be considered and weighted in this comparison is unclear; therefore, because of the diminished culpability of juveniles, it may be argued that youth should be considered in the "gravity of the offense" evaluation and that the impact of severe sentences on juveniles should be considered in the "harshness of the penalty" evaluation.[174]

### B. *Juveniles and the Eighth Amendment: Looking Beyond Capital Punishment and* Roper *to the Unconstitutional Nature of Mandatory Minimum Sentences*

In holding that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed,"[175] the *Roper* Court looked to its own judgment regarding the culpability of juveniles,[176] as well as confirmed its conclusions through analysis of national consensus and world opinion,[177] in an effort to coincide with the "evolving standards of decency."[178] As Justice O'Connor noted:

> It is by now beyond serious dispute that the Eighth Amendment's prohibition of 'cruel and unusual punishments' is not a static command. Its mandate would be little more than a dead letter today if it barred only those sanctions—like the execution of children under the age of seven—that civilized society had already

---

Court refused to overrule *Solem*. *Id.* at 699 n.96 ("Although some doubt has been expressed as to the continued validity of *Solem* in the wake of *Harmelin*, the great majority of courts have concluded that *Solem*'s three-part test remains intact, although in the modified form enunciated by Justice Kennedy.").

172. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).

173. *Id.* at 1004 (quoting Solem v. Helm, 463 U.S. 227, 290-91 (1983)).

174. See *infra* Part V(B) for an application of this proposal and ultimate conclusion that mandatory minimum sentences without the opportunity to consider youth as a mitigating factor violate the Eighth Amendment as grossly disproportionate sentences.

175. Roper v. Simmons, 543 U.S. 551, 578 (2005).

176. See *supra* Part IV for a discussion of diminished culpability.

177. *Roper*, 543 U.S. at 578.

178. *See id.* at 560-61 ("The prohibition against 'cruel and unusual punishments' . . . must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design. To implement this framework we have established the propriety and affirmed the necessity of referring to '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.") (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958)).

repudiated in 1791.[179]

As time progresses, the scientific world advances, moral consensus shifts, and accepted beliefs and norms modify; such evolution significantly impacts the interpretation of the Eighth Amendment.[180] Groundbreaking studies have illuminated physiological and psychological realities of the unique developmental period in human maturity that exists prior to full adulthood.[181] The acknowledgement of the diminished culpability of juveniles under the age of eighteen by the *Roper* Court cannot be ignored in future Eighth Amendment analysis. Despite the *Harmelin* Court's refusal to consider mandatory sentences a per se violation of the Eighth Amendment, the now-recognized developmental differences between juveniles and adults, as discussed in *Roper*, mandate that the Court distinguish its *Harmelin* holding.

Culpability and developmental considerations severely impact the Eighth Amendment comparison of the "gravity of the offense" and the "harshness of the penalty," and ultimately reveal that mandatory minimum sentences imposed on minors without allowing sentencing judges the opportunity to consider youth as a mitigating factor create an inference of "gross disproportionality."[182] When discussing the evaluation of the "gravity of the offense," the Court in *Solem* stated 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*."[183] Therefore, in light of the Court's holding in *Roper*, the future of Eighth Amendment proportionality analysis should include a consideration of youth and the developmental position of the child offender.

The second factor in the proportionality comparison, "harshness of the penalty," should also be impacted by *Roper*'s groundbreaking developmental understanding of adolescents. Children are impacted to a greater extent than adults by punishment.[184] To conclude that a fourteen-year-old is affected by a mandatory thirty-year

179. *Id.* at 589 (O'Connor, J., dissenting).

180. *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 368 (1989), overruled by *Roper*, 543 U.S. 551).

181. See *supra* Part IV(A) for a discussion of the science behind the reasoning of *Roper*.

182. *See* Massey, *supra* note 100, at 1109-13 (concluding that juvenile LWOP sentences are a constitutional violation).

183. Solem v. Helm, 463 U.S. 277, 292 (1983) (emphasis added); *see also Stanford*, 492 U.S. at 394 (Brennan, J., dissenting) ("[T]he gravity of the offense [is] understood to include not only the injury caused, but also the defendant's culpability . . . .") (internal quotation omitted).

184. *See* EQUAL JUSTICE INITIATIVE, *supra* note 37, at 11 ("A sentence of imprisonment until death is a different and harsher punishment when inflicted on a young child.").

imprisonment sentence in the same way that a fully-developed adult is affected, would be to strip adolescence of its developmental significance. Realistically speaking, "[t]he years child offenders spend in prison are the most formative ones, in which typical adolescents finish their education, form relationships, start families, and gain employment."[185] Therefore, any penalty is clearly harsher when applied to an individual at the fragile developmental period of life known as adolescence.

## VI. CONCLUSION

Imposing mandatory minimum sentences on juveniles under the age of eighteen violates the Eighth Amendment as cruel and unusual punishment. Mandatory sentences eliminate the opportunity for a judge to "exercise discretion because of a child offender's age, background, the legal interpretations of facts established at trial, or any other factor . . . that might make another sentence more appropriate"[186] or more suitable to the rehabilitative needs of the child. The Court's acknowledgement in *Roper v. Simmons* of both the diminished culpability of juveniles and the resultant ineffectiveness of retributive and deterrent justifications of punishment clearly signal a long due shift away from blind application of punitive punishments to children.[187] Hopefully this shift will continue its trajectory toward proportional punishment for juveniles in light of their newly-recognized diminished culpability, developmental state, and rehabilitative potential.

The Court will have the opportunity to continue this ideological shift toward proportional punishment for juveniles in *Sullivan v. Florida*[188] and *Graham v. Florida*.[189] The Supreme Court granted certiorari in the two Florida cases on May 4, 2009, thereby agreeing to consider the constitutionality of life without parole sentences for juveniles.[190] While neither case specifically involves the imposition of a mandatory sentence, and neither case deals with the loss of a life from the minor's actions,[191] at the very least the review of these cases should allow the Court to clarify the scope of the *Roper v. Simmons*

185. Massey, *supra* note 100, at 1111.

186. AMNESTY INTERNATIONAL HUMAN RIGHTS WATCH, *supra* note 31, at 91.

187. *See* Roper v. Simmons, 543 U.S. 551, 569-72 (2005).

188. Sullivan v. Florida, 129 S. Ct. 2157 (2009).

189. Graham v. Florida, 129 S. Ct. 2157 (2009); Adam Liptak, *Justices Agree to Take Up Sentencing for Young Offenders*, N.Y. TIMES, May 4, 2009, http://www.nytimes.com/2009/05/05/us/05scotus.html.

190. Liptak, *supra* note 189.

191. Larry A. Wojcik, ABA Criminal Justice Section. *Supreme Court Grants Certiorari in Juvenile Life Without Parole Cases*, June 2009, http://www.abanet.org/crimjust/juvjust/newsletterjune09/june09/lwop.htm.

decision.[192] While it is certainly possible that the Court will narrowly focus its decision to the specific facts of these cases and "leave for another day . . . the question of how murders committed by juveniles may be punished"[193] or the question of whether juveniles should be blindly subjected to mandatory punishments, it is the great hope of this author that the Supreme Court will seize the opportunity to take *Roper*'s reasoning beyond the narrow scope of the death penalty and embrace a broad acknowledgment that minors are simply developmentally different than adults, and therefore less culpable than adults, more receptive to rehabilitation, and more severely damaged by punishments that fail to consider their individuality and unique developmental state.

192. Equal Justice Initiative, Death in Prison Sentences for 13- and 14-Year-Old Kids, http://eji.org/eji/childrenprison/deathinprison/sullivan.graham (last visited Nov. 13, 2009). In both *Sullivan v. Florida* and *Graham v. Florida*, the Court is asked to "address whether the differences between children and adults that led the Court to strike down the death penalty for children also make permanent imprisonment a constitutionally impermissible punishment for a child." *Id.*

193. Liptak, *supra* note 189.