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Bringing our Children Back from the Land of Nod: Why the Eighth Amendment Forbids Condemning Juveniles to Die in Prison for Accessory Felony Murder

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NOTES

BRINGING OUR CHILDREN BACK FROM THE LAND OF NOD:
WHY THE EIGHTH AMENDMENT FORBIDS CONDEMNING
JUVENILES TO DIE IN PRISON FOR ACCESSORIAL FELONY
MURDER

*Mariko K. Shitama**

Abstract

Over 2,589 individuals sit in prison, where they have been condemned to die for crimes they committed before their eighteenth birthday. At least a quarter of these individuals received this sentence for accessorial felony murder, or a crime in which they did not kill or intend to kill the victim. Beginning with *Roper v. Simmons* in 2005 and continuing with *Graham v. Florida* in 2010, recent Eighth Amendment jurisprudence has recognized that juveniles are fundamentally different from adults in ways that limit the constitutionality of imposing adult punishment on them. In June 2012, the Supreme Court held that sentencing juveniles to mandatory life without parole constitutes cruel and unusual punishment in another landmark ruling, *Miller v. Alabama*. *Miller* did not extend *Graham*'s categorical rule against life without parole to those convicted of homicide, including accessorial felony murder. However, it gives at least 2,000 individuals currently serving life without parole for crimes they committed as juveniles a chance at resentencing, and requires that the sentencer take into account their child status and any other mitigating circumstances surrounding their offense in meting out a new sentence.

This Note focuses on juvenile life without parole and current Eighth Amendment jurisprudence in the context of felony murder and makes two arguments. First, it argues that the Eighth Amendment as interpreted by *Graham* categorically prohibits sentencing those juveniles who do not kill or intend to kill to life without parole. Second, it argues that even without a categorical rule, lower courts properly applying *Miller* should resentence those who do not kill or intend to kill to something less than life without parole.

* J.D. Candidate 2013, University of Florida Levin College of Law. My deepest appreciation goes to Professor Michael L. Seigel for helping me to distill my ideas into a worthwhile Note topic, and for his support and advice since my very first semester of law school. Thank you also to the members of the *Florida Law Review* for their companionship and hard work, and to Professor Dennis A. Calfee for encouraging us all to reach high. Finally, I am thankful to my family and Nicholas Outman for their love, support, and input while writing this Note.

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INTRODUCTION

After Cain kills his brother Abel in the Old Testament, God appears and tells Cain he will forever be a “fugitive and a vagabond” upon the earth.¹ Although God does not punish Cain with death, he condemns him to perpetual shame as an outsider in the land of Nod, never again to return to Eden.² In *Roper v. Simmons*,³ the Supreme Court laid the groundwork for its Eighth Amendment jurisprudence challenging the imposition of adult punishment on juvenile⁴ offenders, and held that sentencing juveniles to death constitutes cruel and unusual punishment.⁵ However, as juveniles continue to be prosecuted as adults, far too many of them have been sentenced to a different kind of death—to live and die within the walls of adult prisons, forever banished from society in their own land of Nod.

In 2011, the Supreme Court revisited the Eighth Amendment’s prohibitions on the cruel and unusual punishment of juvenile offenders in *Graham v. Florida*,⁶ where the defendant, Terrence Graham, was sentenced to life without parole for his participation in a home-invasion robbery when he was sixteen.⁷ The Court reversed Graham’s sentence and held that sentencing juveniles to life without the possibility of parole for a nonhomicide offense is unconstitutional.⁸ The Court affirmed its conclusion in *Roper* that developmental differences in juveniles make them categorically less culpable than adults. Specifically, it cited their lack of maturity and impulsiveness; limited control over their environment; increased vulnerability to peer pressure; and unformed character.⁹ The Court found that juveniles “cannot with reliability be classified among the worst offenders,” and that it is morally unacceptable “to equate the failings of a minor with those of an adult” because there is a greater possibility that a minor’s characteristic deficiencies will be reformed.” It required states to give juveniles convicted of nonhomicide offenses a “meaningful opportunity to obtain release based on demonstrable maturity and

1. *Genesis* 4:12.

2. *Genesis* 4:16.

3. 543 U.S. 551 (2005).

4. This article employs the term “juvenile” and “child” as the Supreme Court does—to refer to any child who was under the age of eighteen at the time of his or her offense and was tried as an adult. The term “adolescent” is also used interchangeably.

5. *Roper*, 543 U.S. at 573–74 (abrogating *Stanford v. Kentucky*, 492 U.S. 361 (1988), which held that the death penalty could be imposed on juvenile offenders between the ages of sixteen and seventeen). The Eighth Amendment, which provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,” U.S. CONST. amend. VIII, is made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *Id.* at 560.

6. 130 S. Ct. 2011 (2010).

7. *Id.* at 2018–19.

8. *Id.* at 2034.

9. *Id.* at 2026 (citing *Roper*, 543 U.S. at 570).

rehabilitation.”¹⁰

Despite *Roper* and *Graham*,¹¹ and a proliferation of neuroscientific evidence that juveniles have an extraordinary capacity for change and rehabilitation,¹² there are an estimated 2,589 individuals in the United States who were tried as adults and are now serving life without parole for crimes they committed before their eighteenth birthday.¹³ The lives of most of these children before they went to prison were filled with trauma.¹⁴ They grew up in extremely poor, violent neighborhoods.¹⁵ They suffered abuse, neglect, brutality, and a dire lack of adult and familial support,¹⁶ and as juveniles, they lacked the ability to remove themselves from this trauma.¹⁷ Of course, the devastating backgrounds of these individuals do not justify the harm they inflicted when they committed their crimes. But their haunting profiles demand an honest assessment of whether a desire for retribution should outweigh any commitment to their rehabilitation and

10. *Id.* at 2030.

11. *Id.* at 2026–27.

12. See, e.g., Charles Geier & Beatriz Luna, *The Maturation of Incentive Processing and Cognitive Control*, 93 PHARMACOLOGY, BIOCHEMISTRY & BEHAV. 212, 218 (2009) (concluding that the lack of cognitive development in adolescents leading to risk taking and impulsive behavior is “best . . . understood as an emergent property of a still-maturing brain”).

13. HUMAN RIGHTS WATCH, STATE DISTRIBUTION OF ESTIMATED 2,589 JUVENILE OFFENDERS SERVING LIFE WITHOUT PAROLE (2009), [hereinafter JUVENILES SERVING LWOP], available at http://www.hrw.org/sites/default/files/related_material/updatedJLWOP10.09.pdf. In its initial report, HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES I (2005) [hereinafter THE REST OF THEIR LIVES], available at <http://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf>. Human Rights Watch (HRW) explained that it is difficult to get a precise number of those serving juvenile life without parole because individual states’ departments of corrections do not provide publicly accessible statistics about juvenile offenders incarcerated in adult prisons, and there is no national database with this information. HRW “collect[ed] [this] data . . . by requesting that it be specially produced . . . by each state’s corrections department. *Id.* Despite the difficulty in obtaining a concrete number, it is clear that the number of individuals serving juvenile life without parole has increased significantly since 2005. See *id.* at 1 (finding that in 2005, 2,225 children had been sentenced to life without parole).

14. See EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON 15 (2007) [hereinafter CRUEL AND UNUSUAL], available at http://eji.org/eji/files/Cruel%20and%20Unusual%202008_0.pdf; ASHLEY NELLIS, PH.D., THE SENTENCING PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 8–13 (2012) [hereinafter THE LIVES OF JUVENILE LIFERS].

15. See reports cited *supra* note 14.

16. See *id.* Before they were sentenced to die in prison, approximately a third of these children were living in public housing, THE LIVES OF JUVENILE LIFERS, *supra* note 14, at 9; almost 80% witnessed violence in their homes; nearly half were themselves victims of physical abuse, *id.* at 10; one fifth were victims of sexual abuse; 40% were enrolled in special education classes, *id.* at 13; and more than a quarter had a parent in prison, *id.* at 12.

17. The Supreme Court in *Roper* explained that “[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting.” 543 U.S. 551, 569 (2005).

redemption. As it stands, society has sent an unequivocal message to these children that no matter what transformative change and growth they undergo, they are forever irredeemable.¹⁸ This practice represents a complete departure from the rehabilitative ideals that led to the creation of a separate juvenile justice system in this country, a system intended to replace punitive treatment of child offenders in light of their lessened culpability and great capacity for change.¹⁹ This departure is particularly shameful given that the United States is the only country in the world known to have any children serving this sentence.²⁰

While *Graham* gave the 123 individuals serving juvenile life without parole for nonhomicide offenses²¹ a second chance at redemption, it did nothing to alleviate the bleak futures of the rest of those serving the sentence. Perhaps unsurprisingly, approximately 93% of the 2,589 juveniles tried as adults and serving life without parole were convicted of a homicide offense.²² More surprising is that a conservative estimate shows that 26% of these individuals were convicted of felony murder, or murder based on accessorial liability²³—often in cases in which the juvenile participated in a robbery or burglary during which an accomplice killed the victim without the juvenile’s knowledge or intent.²⁴ The child-status of these defendants and the circumstances of their offenses make

18. See THE REST OF THEIR LIVES, *supra* note 13, at 82.

19. See *infra* Sections II.A–B.

20. Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 989 (2008) (explaining that while “ten countries other than the United States . . . have laws with the potential to permit” life without parole for juveniles, “there are no known cases where this has occurred”). The United States has been the lone dissenter among over 180 countries who have voted to ratify The United Nations General Assembly’s resolutions to abolish life without parole for juveniles. See G.A. Res. 61/146, ¶ 31(a), U.N. Doc. A/Res/61/146 (Dec. 19, 2006); G.A. Res. 62/141, ¶ 36(a) U.N. Doc. A/Res/62/141 (Dec. 18, 2007); G.A. Res. 63/241, ¶ 43(a), U.N. Doc. A/Res/63/241 (Dec. 24, 2008).

21. *Graham v. Florida*, 130 S. Ct. 2011, 2024 (2010).

22. THE REST OF THEIR LIVES, *supra* note 13, at 27. Contrary to popular assumption, an estimated 59% of children received life without parole for their first criminal conviction. *Id.* at 1.

23. “Felony murder” and “accessorial felony murder” are used interchangeably in this Note to refer to murder based on transferred intent: where an accomplice kills the victim, and the defendant does not himself kill or intend to kill. In these cases, the defendant’s intent to commit the underlying felony substitutes as his intent to kill. See *infra* notes 223–227 and accompanying text.

24. THE REST OF THEIR LIVES, *supra* note 13, at 27. According to HRW there are roughly 673 juveniles (26% of 2,589 total individuals) serving life without parole for felony murder, or for “aiding and abetting” a murder in which another person pulled the trigger. *Id.* In many of these cases, the triggerman was an older accomplice. *Id.*; JUVENILES SERVING LWOP, *supra* note 13. While data is not available to confirm a concrete number, more in-depth research in specific jurisdictions suggests that this may be a conservative estimate. See THE REST OF THEIR LIVES, *supra* note 13, at 27–28. HRW notes that in Colorado 33% of the 24 juveniles investigated by HRW were serving life without parole for felony murder, and in Michigan nearly half of the 146 youth surveyed by the ACLU in 2004 were sentenced to life without parole for felony murder, or for “aiding and abetting” a murder in which another person pulled the trigger.” *Id.*

unconscionable such an ultimate condemnation for murders they did not intend or perpetrate. Although the Court in *Graham* reasoned in dicta that “a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability” and is “categorically less deserving of the most serious forms of punishment,”²⁵ the Court was not forced to address the issue of unintentional felony murder because no one was killed during the commission of Terrence Graham’s crime.²⁶ And unfortunately, without a direct mandate from the high Court, lower courts have interpreted *Graham* narrowly and have refused to extend its categorical rule to juveniles convicted of felony murder.²⁷

But little more than a year after *Graham*, in June 2012, the Supreme Court issued another landmark ruling in *Miller v. Alabama*,²⁸ in which it consolidated the cases of petitioners Evan Miller and Kuntrel Jackson²⁹—each convicted of homicide and sentenced to mandatory life without parole at the age of fourteen.³⁰ A narrow 5–4 majority held that a mandatory sentence of life without parole for a juvenile convicted of *any* offense constitutes cruel and unusual punishment,³¹ and remanded both cases for

25. 130 S. Ct. at 2027.

26. *See id.* at 2018.

27. *See, e.g.*, *Bear Cloud v. State*, 2012 WY 16, 35 (Wyo. 2012); *Bell v. State*, 2011 Ark. 379, *1 (Ark. 2011); *State v. Ninham*, 797 N.W.2d 451, 463, 471 (Wis. 2011); *People v. Adderley*, No. B217620, 2011 WL 817751, *12 (Cal. Ct. App. 2d Dist. 2011) (unpublished); *State v. Andrews*, 329 S.W.3d 369, 377–78 (Mo. 2010); *Meadoux v. State*, 325 S.W.3d 189, 196 (Tex. Crim. App. 2010); *State v. Pierce*, 225 P.3d 1146, 1147–48 (Ariz. Ct. App. 2010). All of these courts have held that felony murder is a homicide offense and therefore does not fall under *Graham*’s categorical rule. *Cf. Arrington v. State*, 37 Fla. L. Weekly D155, 6 (Fla. 2d DCA 2012) (refusing to apply *Graham*’s categorical ban to felony murder but holding that *Graham* requires a narrow proportionality review on a case-by-case basis for juveniles mandatorily sentenced to life without parole for accessorial felony murder).

28. 132 S. Ct. 2455 (2012).

29. *See* 132 S. Ct. 548 (2011). The Equal Justice Initiative (EJI) argued both *Miller v. Alabama* and *Jackson v. Hobbs*. *See* Brief for Petitioner Miller, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (No. 10–9646), 2012 WL 92505, ECF No. 20; Brief for Petitioner Jackson, *Jackson v. Hobbs*, 132 S. Ct. 548 (Nov. 7, 2012) (No. 10–9647), 2012 WL 92506 [hereinafter *Jackson Brief*].

30. In both cases, EJI argued for a categorical rule prohibiting life without parole for individuals fourteen and younger and alternatively for a rule prohibiting any mandatory sentence of life without parole. In Kuntrell Jackson’s case, EJI also argued for a rule prohibiting the sentence in cases involving accessorial felony murder. *See* *Jackson Brief*, *supra* note 29, 2012 WL 92506, *63–66. EJI previously argued the companion case to *Graham*, *Sullivan v. Florida*, 130 S. Ct. 2059 (2010), in which a mentally disabled thirteen-year-old was sentenced to life without parole for sexual battery. *See* *Petition for Writ of Certiorari* at 5, *Sullivan v. Florida*, 130 S. Ct. 2059 (2010) (No. 08-7621) (filed Dec. 4, 2008). *Sullivan* was dismissed as improvidently granted in a per curiam opinion. 129 S. Ct. at 2059. EJI has been instrumental in challenging life without parole sentences for juveniles, and in the development of Eighth Amendment jurisprudence challenging this punishment. *See Children in Adult Prison*, EQUAL JUSTICE INITIATIVE, <http://www.eji.org/childrenprison> (last visited Feb. 19, 2013).

31. *Miller*, 132 S. Ct. at 2460.

resentencing.³²

In reaching this holding, the *Miller* majority relied on two lines of precedent.³³ First, it concluded that *Roper* and *Graham* require that a sentencing body “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”³⁴ Second, because *Graham* likened juvenile parole to a sentence of death, *Miller* relied on the Court’s Eighth Amendment jurisprudence requiring individualized sentencing in capital punishment,³⁵ and concluded that “a sentencer [must] have the ability to consider the mitigating qualities of youth,”³⁶ including the age and background of a child offender and the circumstances surrounding the offense.³⁷ The *Miller* majority explained that although *Graham*’s “flat ban” against juvenile life without parole was explicitly confined to nonhomicide offenders, “none of what [it] said about children . . . is crime specific,” and its “reasoning implicates any life-without-parole sentence imposed on a juvenile.”³⁸ The majority also explained that “given all” the Court has said “about children’s diminished culpability and heightened capacity for change” in *Roper*, *Graham*, and *Miller*, it “think[s] appropriate occasions for sentencing juveniles to this harshest penalty will be uncommon.”³⁹ In other words, only in the most extreme cases involving juvenile offenders would a sentence of life without parole constitute a legally proportionate sentence under the Eighth Amendment.

The *Miller* Court declined to categorically prohibit juvenile life without parole, or alternatively to address whether *Graham* requires a categorical rule prohibiting the sentence for those who did not kill or intend to kill.⁴⁰ However, *Miller* invalidated juvenile mandatory life without parole statutes in twenty-nine jurisdictions,⁴¹ and provides a chance at resentencing for at least 2,000 individuals sentenced under these statutes.⁴²

32. *Id.* at 2475.

33. *Id.* at 2463.

34. *Id.* at 2469.

35. *Id.* at 2467.

36. *Id.* at 2467, 2475 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

37. *Id.* at 2475.

38. *Id.* at 2465.

39. *Id.* at 2469.

40. *See id.* at 2469. Justice Stephen Breyer, joined by Justice Sonia Sotomayor, wrote a concurrence in which he argued that “the Eighth Amendment as interpreted in *Graham* forbids sentencing [a juvenile] to such a sentence, regardless of whether its application is mandatory or discretionary under state law.” *Id.* at 2475 (Breyer, J., concurring). *See infra* Part V.

41. *Miller*, 132 S. Ct. at 2470–71 n.9 (explaining that “26 states and the Federal Government make life without parole the mandatory . . . punishment for some form of murder” for children beginning at age fourteen or younger, Louisiana makes the punishment mandatory for children as young as fifteen, and Texas for seventeen-year-olds).

42. *See id.* at 2477 (Roberts, C.J., dissenting) (“The Court accepts that over 2,000 of those [serving juvenile life without parole] received that sentence because it was mandated by a

Further, many of those mandatorily sentenced to life without parole were convicted of accessorial felony murder,⁴³ and *Miller* therefore requires that they be resentenced.⁴⁴ In resentencing them, the judge or jury is also required to consider any mitigating evidence, including their age when they committed their crime, their background, and other mitigating circumstances surrounding the offense.⁴⁵ Because juveniles who do not kill or intend to kill cannot be classified among the most culpable juvenile offenders,⁴⁶ *Miller* should result in resentencing these individuals to something less than life without parole (the harshest penalty available to juvenile offenders).

This Note focuses on juvenile life without parole in the context of felony murder and makes two arguments. First, it argues that the Eighth Amendment, as interpreted by *Graham*, categorically prohibits sentencing those juveniles convicted of accessorial felony murder—those who do not kill or intend to kill—to life without parole. Second, it argues that lower courts properly applying *Miller* should resentence those who do not kill or intend to kill to something less than life without parole. Part I examines the case of Kuntrell Jackson—who was sentenced to juvenile life without parole for accessorial felony murder⁴⁷—and compares it with *Graham* to raise questions about diminished culpability and proportionality in sentencing juveniles to the harshest of punishments. Part II traces the legal and political developments that transformed the juvenile justice system from one of rehabilitation into one of retribution, justifying the prosecution and sentencing of juveniles as adults and subjecting them to death in prison sentences. Part III explains how the Court has applied the Eighth Amendment’s prohibition on cruel and unusual punishment to scale back the adult punishment of children, and where it has stopped short. Part IV discusses the doctrine of accessorial felony murder, and argues that the Court should extend its categorical rule in *Graham* to juveniles convicted of this offense. Finally, Part V makes two suggestions for lower courts

legislature.”).

43. There is no data that gives an estimate of how many of those mandatorily sentenced to life without parole are serving the sentence for felony murder. However, HRW estimates that at least 26% of *all* individuals serving life without parole are serving the sentence because of felony murder. *See supra* note 24. Because most states classify felony murder as first degree murder, or a capital offense, *see* Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death*, 31 B.C. L. REV. 1103, 1105–06 (1990), and most mandatory juvenile life without parole statutes encompass first degree murder, *see State-By-State Legal Resource Guide*, UNIV. OF S.F. SCH. OF LAW (Mar. 1, 2013, 12:10 PM), http://www.usfca.edu/law/jlwop/resource_guide/, it is likely that HRW’s estimate also applies to those juveniles mandatorily sentenced to life without parole for felony murder. By this logic, there are at least 500 individuals serving mandatory life without parole for felony murder who must be resentenced under *Miller*. *See supra* note 42.

44. *Miller*, 132 S. Ct. at 2475.

45. *Id.*

46. *Id.* (Breyer, J., concurring); *see infra* Section IV.A.

47. *Miller*, 132 S. Ct. at 2461 (majority opinion).

resentencing juveniles under *Miller*.

I. KUNTRELL JACKSON AND THE CASE FOR REDEMPTION

Kuntrell Jackson grew up in the public housing projects of Blytheville, Arkansas, a community racked by poverty, drugs, and violence.⁴⁸ He had little in the way of role models. His father left before he was born and was replaced by his mother's boyfriend: an abusive alcoholic, a leech on the family's resources, and the only father figure Kuntrell ever knew.⁴⁹ Kuntrell's mother went to prison for shooting a neighbor when he was six, and his older brother followed in her footsteps just seven years later.⁵⁰ Not long after that, his mother's boyfriend left, two of his teenage sisters became pregnant, and several other relatives were also sent to prison.⁵¹ Perhaps in part because of these formidable challenges during childhood, Kuntrell's mental capacity has been described as "borderline or near borderline," and "at the 4th percentile compared to children his age."⁵²

In 1999, seventeen days after Kuntrell turned fourteen, he, his older cousin Travis Booker, and another older boy Derrick Shields decided to rob the local Movie Magic video store while walking through a housing project in Blytheville.⁵³ It was only once the boys were headed to the video store that Kuntrell realized that Shields was carrying a shotgun in his sleeve.⁵⁴ Although the other boys went inside when they arrived at the store, Kuntrell chose to stay outside.⁵⁵ Shields pointed the shotgun at the clerk, Laurie Troup, and demanded money six or seven times, to which she refused.⁵⁶ Kuntrell entered the store during this interaction.⁵⁷ The parties disputed at trial whether Kuntrell warned Troup that "[w]e ain't playin'," or told his codefendants "I thought you all was playin'."⁵⁸ When Troup threatened to call the police, Shields shot the clerk and the boys fled the video store without taking any money.⁵⁹

The prosecutor in Kuntrell's case had the choice to send Kuntrell to juvenile court or to try him as an adult for either capital felony murder or

48. Petition for Writ of Certiorari at 4, *Jackson v. Arkansas*, WL 478600 (Ark. Feb 9, 2011), *petition for cert.* filed, No. 09-145, 2011, 5 (U.S. Mar. 21, 2011) [hereinafter *Jackson Petition*].

49. *Id.* at 4–5.

50. *Id.* at 5.

51. *Id.*

52. *Id.* at 5 (quoting the record).

53. *Id.* at 5; *Jackson v. State*, 194 S.W.3d 757, 758 (Ark. 2004).

54. *Miller v. Alabama*, 132 S. Ct. 2455, 2461 (2012).

55. *Id.*

56. *Jackson*, 194 S.W.3d at 758–59.

57. *Miller*, 132 S. Ct. at 2461.

58. *Id.* The state presented codefendant Booker's pretrial statement that Kuntrell said "we ain't playin'." *Id.* At trial Booker recanted this statement, and both he and Kuntrell testified that Kuntrell actually said "I thought you all was playin'." *Jackson*, 194 S.W.3d at 760.

59. *Miller*, 132 S. Ct. at 2461.

aggravated robbery.⁶⁰ He chose to try him as an adult for both offenses.⁶¹ Kuntrell's trial counsel moved to transfer the case to juvenile court, but the trial court denied the motion after considering the statutory factors at the transfer hearing.⁶² In denying Jackson's motion, the trial judge emphasized the "seriousness of the offense," in particular the fact that the "offense involved a firearm, was for pecuniary gain, and endangered the life of another."⁶³ The judge did not appear to place any weight on Kuntrell's traumatic upbringing, his nonviolent juvenile arrest history (involving shoplifting and three incidents of car theft), his limited involvement in the crime, and the fact that he inflicted no violence on the victim.⁶⁴ Kuntrell remained in criminal court and was convicted by a jury of capital murder and aggravated robbery.⁶⁵

Under Arkansas's felony murder statute,⁶⁶ the state had a burden only to prove that Kuntrell had attempted to commit a robbery and that in the course of that offense he *or* his accomplice caused the clerk's death "under circumstances manifesting extreme indifference to the value of human life."⁶⁷ It was undisputed that Shields was the one who shot the clerk, and the prosecution was under no obligation to prove, and did not argue, that Kuntrell had participated in or intended the killing in any way.⁶⁸ The only

60. *See id.* (citing ARK. CODE ANN. § 9-27-318(c)(2) (1998)). The Arkansas statute reads in relevant part:

A prosecuting attorney may charge a juvenile in either the juvenile or criminal division of circuit court when a case involves a juvenile:

(2) Fourteen (14) or fifteen (15) years old when he or she engages in conduct that, if committed by an adult, would be: (A) Capital murder, § 5-10-101; (B) Murder in the first degree, § 5-10-102

ARK. CODE ANN. § 9-27-318(c)(2) (1998).

61. *Miller*, 132 S. Ct. at 2461.

62. *Id.*; *Jackson v. State*, No. 02-535, 2003 WL 193412, at *1 (Ark. App. Jan. 29, 2003) (quoting ARK. CODE ANN. § 9-27-318(g) (2002), which lists the statutory factors a trial judge must consider upon a motion to transfer or retain jurisdiction of a juvenile) (reviewing and affirming the circuit judge's decision to deny Jackson's motion to transfer to juvenile court).

63. *Jackson*, 2003 WL 193412, at *2. Other statutory factors the court considered included a psychiatric report concluding that Kuntrell had no psychiatric impairment, and testimony by a juvenile intake officer that no rehabilitation program existed for Kuntrell if convicted of capital murder. *Id.* at *1; *see also Miller*, 132 S. Ct. at 2461. Under Arkansas law, a circuit court's decision as to whether to transfer a juvenile is reversed only for clear error. *Jackson*, 2003 WL 193412, at *1-2.

64. *See Jackson*, 2003 WL 193412, at *1.

65. *Miller*, 132 S. Ct. at 2461.

66. ARK. CODE ANN. § 5-10-101(a)(1)(B) (2011).

67. *Id.*; *see also Jackson v. State*, 194 S.W.3d 757, 760 (Ark. 2004).

68. *Miller*, 132 S. Ct. at 2468; *Jackson*, 194 S.W.3d at 760. In his concurring opinion in *Miller*, Justice Breyer points out that the State was not required even to prove that Kuntrell acted with "extreme indifference," but only that either one of his accomplices acted with extreme

evidence that could have suggested that Kuntrell had any intent to participate in the murder was the disputed statement Kuntrell made before Shields shot the clerk.⁶⁹ Had the state been required to prove Kuntrell's intent to participate in the killing, this evidence would almost certainly have been insufficient to prove this element beyond a reasonable doubt. Based instead on his role in the attempted robbery, Kuntrell was convicted of capital murder, and under the Arkansas statute⁷⁰ the judge had no choice but to sentence him to life imprisonment without parole.⁷¹ Neither the fact that he was fourteen years old nor the fact that he did not kill the victim could be considered as mitigating circumstances to change this unduly harsh outcome.⁷² The Arkansas Supreme Court refused to extend *Graham's* holding to Kuntrell's case and affirmed his sentence.⁷³ Before the Supreme Court intervened in *Miller*, it appeared that Kuntrell's decision to rob a video store with two older boys at the age of fourteen left him without any foreseeable future; he had been decided forever irredeemable by the State of Arkansas.

Yet it is difficult to argue that Kuntrell Jackson is any more culpable than Terrence Graham, who received the same sentence for breaking the terms of his parole and committing an armed burglary.⁷⁴ In that incident, Graham had forcibly entered the victim's home with two older accomplices.⁷⁵ Inside, he held a pistol to the victim's chest, and all three boys barricaded the victim and his friend inside a closet before leaving and

indifference to the value of human life. 132 S. Ct. at 2477 (Breyer, J., concurring).

69. See *supra* note 59 and accompanying text; *Miller*, 132 S. Ct. at 2477 (Breyer, J., concurring). The Arkansas statute provides an affirmative offense for capital felony murder if the defendant can prove that he did not commit the homicide "or in any way solicit, command, induce, procure, counsel, or aid in its commission." *Id.* (majority opinion) (quoting ARK. CODE ANN. § 5-10-101(b) (Repl.1997)). The jury did not grant Kuntrell this affirmative offense, apparently crediting Booker's pretrial statement over the testimony at trial. See *Jackson*, 194 S.W.3d at 760.

70. The statute reads in relevant part:

However, if the state waives the death penalty, stipulates that no aggravating circumstance exists, or stipulates that mitigating circumstances outweigh aggravating circumstances, then: (i) No hearing under subdivision (3)(A) of this section is required; and (ii) The trial court shall sentence the defendant to life imprisonment without parole.

ARK. CODE ANN. § 5-4-602(3)(B) (Repl. 2006).

71. See *Jackson v. Norris*, 378 S.W.3d 103, 107 (2011) (Brown, J., concurring) (citing ARK. CODE ANN. § 5-4-602(3)(B) (Repl. 2006), *cert. granted*, 132 S. Ct. 548 (2011), *rev'd and remanded sub nom.*, *Miller v. Alabama*, 132 S. Ct. 2455 (2012). Because the Supreme Court banned the death penalty for juveniles in *Roper v. Simmons*, 543 U.S. 551, 578 (2005), life imprisonment without parole was statutorily mandated by Kuntrell's conviction in Alabama.

72. *Jackson*, 378 S.W.3d at 106–07 (Brown, J., concurring).

73. *Id.* at 106.

74. *Graham v. Florida*, 130 S. Ct. 2011, 2019–20 (2010).

75. *Id.* at 2018.

allegedly attempting a second robbery where one of his accomplices was shot.⁷⁶ If anything, Kuntrell is less culpable than Graham. Unlike Graham, he did not hold a gun or any other weapon during the attempted robbery; nor was he aware that his accomplice carried a gun until moments before the robbery.⁷⁷ And he did not use any violence against the video store clerk.⁷⁸ When compared to Graham's case and the Supreme Court's holding that Graham can *never* be condemned to die in prison for a violent crime he committed days before his eighteenth birthday,⁷⁹ the possibility that Kuntrell Jackson should ever be sentenced to life without the possibility of parole makes little sense. The facts of Kuntrell's case—including his troubled background and the fact that he was fourteen years old when he committed his crime—show that he is not “among the worst offenders.”⁸⁰ How then, did he receive the most severe punishment available to juvenile defendants—a punishment intended for dangerous adult offenders and one that reflects a complete departure from the goals of the juvenile justice system?

II. REDEMPTION OR RETRIBUTION? THE EVOLUTION OF JUVENILE PUNISHMENT

Until the late nineteenth century, child offenders in the United States over the age of fifteen were tried as adults,⁸¹ and children twelve and younger were subjected to criminal prosecutions resembling those for adults.⁸² Much like children tried in the adult system today, child offenders faced all of the penalties that adult offenders faced.⁸³ This Part sketches the evolution of the juvenile justice system in the United States from one intended to end the practice of treating juveniles as adults in order to rehabilitate them, to one that allows children like Kuntrell Jackson to be tried as adults and condemned to die in prison.

76. *Id.* at 2018–19. Although the judge did not explicitly sentence Graham to life imprisonment without parole, his sentence of life was statutorily mandated because Florida had abolished parole. *Id.* at 2020 (citing FLA. STAT. § 921.002(1)(e) (2003)). At oral argument, Justice Ruth Bader Ginsburg suggested that this sentence was particularly shocking because “it was far beyond what the prosecutor recommended.” Transcript of Oral Argument at 33–34, *Graham v. Florida*, 130 S. Ct. 2011 (2010) (No. 08–7412).

77. *Miller v. Alabama*, 132 S. Ct. 2455, 2461 (2012).

78. *Id.*

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

80. *Id.* at 2025.

81. THE REST OF THEIR LIVES, *supra* note 13, at 14.

82. Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL'Y REV. 143, 145 (2003).

83. *Id.*

A. *Recognizing that Juveniles are Different: Reform in the Progressive Era*

By the end of the nineteenth century, social reformers inspired by the Progressive movement⁸⁴ advocated a more enlightened approach to juvenile justice⁸⁵ premised on the notion that children's great potential for rehabilitation should guide any system holding them accountable for criminal acts.⁸⁶ This new paradigm was founded on an understanding that juvenile offenders lacked the developmental maturity to make informed judgments and to distinguish right from wrong, undermining the retributive and deterrence justifications for traditional punishment.⁸⁷ Although scholars have pointed out that this view of children tended to be overly simplistic,⁸⁸ reformers' contention that juveniles were "more likely to benefit from treatment and intervention" than from harsh punishment and long incarceration⁸⁹ is supported by modern empirical research.⁹⁰

By the first quarter of the twentieth century, all but two states had established separate juvenile courts.⁹¹ The objective of the juvenile system was to develop "open-ended, informal, and highly flexible policies" aimed at rehabilitating juveniles to become productive citizens.⁹² In this way, juvenile courts were developed as a clear alternative to adult, retributive justice.⁹³ What emerged was a system for child offenders based on the

84. See, e.g., Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed?*, 34 N. KY. L. REV. 189, 193 (2007) [hereinafter *A Century of Juvenile Justice*].

85. *Id.* at 191–93.

86. See, e.g., THE REST OF THEIR LIVES, *supra* note 13, at 14; Elizabeth Cauffman, et al., *Justice for Juveniles: New Perspectives on Adolescents' Competence and Culpability*, 18 Q.L.R. 403, 403 (1999); Christopher Slobogin & Mark R. Fondacaro, *Juvenile Justice: The Fourth Option*, 95 IOWA L. REV. 1, 8 (2009) ("The rehabilitative vision strongly informed the very first juvenile court."); Taylor-Thompson, *supra* note 82, at 146.

87. See Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 143–44 (1998).

88. See, e.g., Slobogin & Fondacaro, *supra* note 86, at 3; Taylor-Thompson, *supra* note 82, at 146 (explaining that the "persuasive power" of reformers' "strategy seemed to depend on selectively invoking images that emphasized—and at times exaggerated—the child-like characteristics of young offenders").

89. Taylor-Thompson, *supra* note 82, at 146.

90. Six empirical studies show that juveniles convicted of violent offenses in criminal court have significantly higher recidivism rates as compared to similar offenders adjudicated in juvenile court. RICHARD E. REDDING, U.S. DEP'T OF JUSTICE, *JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY?* 4 (2010), available at <https://www.ncjrs.gov/pdffiles/ojdp1220595.pdf>.

91. THE REST OF THEIR LIVES, *supra* note 13, at 14.

92. *Id.* at 14 (quoting Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 CRIM. L. & CRIMINOLOGY 474 (1987)).

93. *A Century of Juvenile Justice*, *supra* note 84, at 189, 193; Timothy J. Pillari, *Rethinking Juvenile Justice: Catholic Social Thought as a Vehicle for Reform*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 167, 167–68 (2008).

notion of *parens patriae*.⁹⁴ the state's role in addressing delinquent children was not to punish them for past acts, but to protect them and mold them with each child's best interests in mind, a determination to be made at the court's discretion.⁹⁵

For the next fifty years, most juvenile courts had exclusive jurisdiction of child offenders under the age of eighteen.⁹⁶ This system turned out to have significant shortcomings. First, because these courts were understood to function according to the best interests of any child under their jurisdiction, substantive standards and procedural protections—including due process—were seen as unnecessary.⁹⁷ Second, while most child offenders were kept out of the adult system, they could be transferred to adult court if a judge determined that it was in the “best interests” of both the public and the child to do so.⁹⁸ This gave judges wide authority to intervene in the lives of juvenile offenders' in inconsistent and often intrusive ways.⁹⁹

B. Return to Retribution

1. *Gault*, the Implementation of Due Process, and the Return to an Adult Model of Retributive Justice

Public concern over abuse of wide judicial discretion in juvenile courts led the Supreme Court to intervene in the 1960s by requiring more formal procedure within the juvenile system.¹⁰⁰ In the landmark case *In re Gault*,¹⁰¹ the Court rejected the doctrine of *parens patriae* as valid justification for the denial of due process and implemented many procedural rights previously regarded as unnecessary for the juvenile system.¹⁰² In poignant language, the majority stated that “[u]nder our

94. *A Century of Juvenile Justice*, *supra* note 84, at 189; Slobogin & Fondacaro, *supra* note 86, at 9.

95. *A Century of Juvenile Justice*, *supra* note 84, at 189.

96. HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 94 (2006).

97. *Id.* at 96.

98. *Id.* at 94. *See also* THE REST OF THEIR LIVES, *supra* note 13, at 14.

99. *See* Judge Jay D. Blitzman, *Gault's Promise*, 9 BARRY L. REV. 67, 69 & n.17, 79–80 (2007).

100. SNYDER & SICKMUND, *supra* note 96, at 96. Judge Blitzman explains that “[s]helters and houses of refuge [for juvenile defendants] had ‘devolved’ in many jurisdictions into locked training schools and places of detention.” Blitzman, *supra* note 99, at 69.

101. 387 U.S. 1, 7–8 (1967). The defendant in *Gault* was judged delinquent in juvenile court for making “lewd remarks” in a prank call, *id.* at 4. In a hearing devoid of procedure or reference to substantive law, he was committed to a reformatory institution until the age of 21. *Id.*

102. *Id.* at 17–21. The Court noted that an adult facing similar charges would have faced a fine of \$5 to \$50 and “imprisonment in jail for not more than 2 months.” *Id.* at 69. The Court held that Due Process requirements attach to juvenile proceedings and that *Gault's* proceedings clearly offended these standards. *Id.* at 4, 13. Specifically, it held that in proceedings in which a juvenile is judged delinquent and which may result in commitment to a state institution, *id.* at 13, a juvenile

Constitution, the condition of being a boy does not justify a kangaroo court.”¹⁰³ The Court explained that “[t]he absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment,” the primary objectives of the juvenile system, but instead that “[d]epartures from established principles of due process have frequently resulted . . . in arbitrariness.”¹⁰⁴

Professor Kim Taylor-Thompson, of the New York University School of Law, has aptly pointed out that in implementing procedures formerly reserved for adult offenders, the Supreme Court did *not* seek to “re-orient the therapeutic bent of the juvenile justice system to match the punitive goals of the adult system.”¹⁰⁵ Rather, the majority in *Gault* applauded the separate juvenile system’s objectives to treat, rehabilitate, and care for juvenile offenders as an alternative to harsh, adult punishment.¹⁰⁶ As such, the Court explained that it did not intend to undermine these “commendable principles” by requiring procedural protections within that system.¹⁰⁷

Unfortunately, as Professor Taylor-Thompson has argued and other scholars have suggested, “*Gault*’s legacy may be more complicated than the Court ever appreciated.”¹⁰⁸ *Gault* marked the beginning of an ironic shift in juvenile justice: it was intended to protect the integrity of a separate juvenile system by borrowing necessary procedural safeguards from the adult system.¹⁰⁹ But the more the juvenile system has taken on elements of the adult system, the more it has synthesized with it, and “the more difficult the task has become to distinguish between adolescents and adults in any meaningful way or to justify the continued existence of a separate system of adjudication for youths.”¹¹⁰ In this way, *Gault* opened the door to treating juveniles like adults.¹¹¹ This synthesis has resulted in what the Supreme Court described in *Gault* as “the worst of both worlds,” where the “child [offender] . . . gets neither the protections accorded to adults nor the

has the right to notice, *id.* at 33, to counsel, *id.* at 41, to protection against self-incrimination, *id.* at 55, to question witnesses, *id.* at 57, and to appellate review, *id.* at 58.

103. *Id.* at 28.

104. *Id.* at 18–19.

105. Taylor-Thompson, *supra* note 82, at 147.

106. *Id.*

107. *Id.* at 15–16, 27. Specifically, it commended the separate juvenile system’s objective to treat, rehabilitate, and care for juvenile offenders as an alternative to harsh, adult punishment. *Id.*

108. *Id.* at 147. *See also, e.g.*, Blitzman, *supra* note 99, at 67–68.

109. *See In re Gault*, 387 U.S. at 18–19.

110. Taylor-Thompson, *supra* note 82, at 147.

111. *Id.* (“Extension of adult-like constitutional status may have contributed to the perception that courts *could* treat adolescents as adults. That courts *should* treat adolescents as adults then deceptively seemed only a small step. Particularly given the common perception that violent crime warrants more severe sanctions than would likely issue in juvenile court, distinctions between juvenile and adult sentencing have come to appear anachronistic.”).

solicitous care and regenerative treatment postulated for children.”¹¹²

2. The 1980s and the Myth of the Juvenile Super-Predator

While *Gault* inadvertently suggested a departure from rehabilitative ideals, public fear over the steep increase in violent juvenile crime in the 1980s explicitly accelerated this departure.¹¹³ Gun homicides by adolescents rose sharply in the mid 1980s, fell after 1993, and then stabilized.¹¹⁴ Although this increase in juvenile crime did not last, it was met with widespread public panic, coinciding with the escalation of the “War on Drugs” and a political climate of increased criminalization.¹¹⁵ Policy makers flooded the public discourse with dire predictions of juvenile crime sprees and the imminent proliferation of delinquent juvenile criminals—in particular, juvenile criminals of color.¹¹⁶ Then Princeton University Professor John DiIulio popularized the term “super-predator,” spinning a lurid, racially-colored image in countless national publications of inner-city streets crawling with these remorseless, amoral juveniles.¹¹⁷ DiIulio made a dramatic forecast that “by the year 2010, there will be

112. *In re Gault*, 387 U.S. at 18 n.23 (citing *Kent v. United States*, 383 U.S. 541, 556 (1966)). Ironically, this is due in part to the Court’s own decision in *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971), just four years after *Gault*, in which it held that jury trials are not constitutionally required in juvenile courts (although states are authorized to implement them). Thirty-one states have since passed laws proscribing any right to a jury trial in juvenile proceedings. NAT’L CTR. FOR JUVENILE JUSTICE, JUVENILE DELINQUENTS’ RIGHT TO A JURY TRIAL 1 (2007), available at http://www.njdc.info/pdf/2008_right_to_jury_snapshot.pdf.

113. See, e.g., THE REST OF THEIR LIVES, *supra* note 13, at 15; Taylor-Thompson, *supra* note 82, at 148.

114. BUREAU OF JUSTICE STATISTICS CRIME DATA BRIEF, HOMICIDE TRENDS IN THE UNITED STATES: 2002 UPDATE 2 (2002), available at <http://www.bjs.gov/content/pub/pdf/htus02.pdf>. In 1984, there were just under 1,000 arrests for juvenile homicide. *Id.* This number peaked with 3,284 arrests in 1993, declined to 919 arrests by 1999, and stabilized with 956 arrests in 2006. UNIV. OF VA., CURRY SCHOOL OF EDUC., YOUTH VIOLENCE PROJECT: SCHOOL VIOLENCE MYTHS, <http://curry.virginia.edu/research/projects/violence-in-schools/school-violence-myths> (last visited Mar. 13, 2013).

115. See SNYDER & SICKMUND, *supra* note 96, at 96. In 1983, then President Ronald Reagan signed the Anti-Drug Abuse Act of 1986, 21 U.S.C.A. § 801 (1986), appropriating \$1.7 billion to fight the drug war, and creating mandatory minimum penalties for drug offenses.

116. See Taylor-Thompson, *supra* note 82, at 148.

117. See, e.g., John J. DiIulio, Jr., *My Black Crime Problem, and Ours*, CITY J., Spring 1996, available at http://www.city-journal.org/html/6_2_my_black.html (“[N]ot only is the number of young black criminals likely to surge, but also the black crime rate . . . is increasing, so that as many as half of these juvenile super-predators could be young black males.”); John J. DiIulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 1, available at <http://cooley.libarts.wsu.edu/schwartzj/criminology/dilulio.pdf> (“On the horizon . . . are tens of thousands of severely morally impoverished juvenile super-predators. They are perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons. . . . They live by the meanest code . . . that reinforces rather than restrains their violent, hair-trigger mentality [F]or as long as their youthful energies hold out, they will do what comes ‘naturally’: murder, rape, rob, assault, burglarize, deal deadly drugs, and get high.”).

270,000 more juvenile super-predators on the streets than there were in 1990.”¹¹⁸ This widespread, sensationalist discourse painted a vivid picture in the public’s mind of delinquent children so dangerous and wayward that traditional notions of juveniles as inherently less culpable and more amenable to rehabilitation were no longer palatable.¹¹⁹

Today it is clear that this panic was unfounded.¹²⁰ John DiIulio himself, as one of the amici who submitted a brief on behalf of Kuntrell Jackson,¹²¹ has discredited his super-predator discourse as a myth and “expressed regret, acknowledging that the prediction was never fulfilled.”¹²² Still, public fear of juvenile crime propelled a monumental shift in this nation’s approach to juvenile justice, and has resulted in the increasingly punitive adjudication of children that fails to differentiate them from their adult counterparts. This shift has all but vitiated the fundamental principle of rehabilitation underlying a separate system of juvenile justice.¹²³

C. *Beyond Redemption: Sending “Throwaway” Children into the Adult Criminal Justice System*

*“You say the sanctity of human life, but you’re dealing with a 14-year-old being sentenced to life in prison, so he will die in prison without any hope. I mean, essentially, you’re making a 14-year-old throwaway person.”*¹²⁴

1. Adjudicating Children in Adult Court

The increase in juvenile crime beginning in the 1980s and the resulting panic sparked an unprecedented legislative response from almost all fifty states in the 1990s.¹²⁵ The public abandoned its previous concern over the abuse of discretion and arbitrary treatment within juvenile courts pre-

118. John DiIulio, *How to Stop the Coming Crime Wave*, 1 (New York: Manhattan Institute, 1996).

119. See Taylor-Thompson, *supra* note 82, at 148–49. As Professor Taylor-Thompson points out, racial stigmatization of young black males was particularly contagious. *Id.* Beginning in the early 1980s, a dramatic disparity grew between the relative percentage of black and white juveniles admitted to adult prisons. See THE REST OF THEIR LIVES, *supra* note 13, at 15.

120. See *infra* note 148 and accompanying text.

121. Brief of Jeffrey Fagan, et al., as Amici Curiae in Support of Petitioners Jackson and Miller at 19, 30, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (No. 10-9646), ECF No. 29 (the amici argue that the super-predator myth has turned out to be completely unsubstantiated by scientific and empirical evidence, and that empirical studies show that the increasing incarceration and ratcheted sentences that followed are “not causally responsible for the decline in juvenile homicide rates.”)

122. *Id.* at 19.

123. See SNYDER & SICKMUND, *supra* note 96, at 96.

124. Transcript of Oral Argument, *Jackson v. Hobbs*, 132 S. Ct. 548 (2012) (No. 10–9647) (Justice Ruth Bader Ginsberg).

125. *Id.*

Gault,¹²⁶ and replaced it with the sentiment that existing criminal laws for juveniles were too lenient.¹²⁷ Incited by the public's moral panic, legislators capitalized on phrases such as "adult time for adult crime."¹²⁸

States began a decades-long trend of vastly expanding juvenile transfer laws.¹²⁹ These laws enable states to try juveniles in adult court,¹³⁰ and to sentence juveniles beyond the upper age of juvenile court jurisdiction, which is set at twenty-one in most states.¹³¹ By 1997, forty-seven states had adopted transfer laws.¹³² Currently, every state has at least one form of juvenile transfer, and most states have multiple ways of imposing adult sanctions on juvenile offenders.¹³³ There are three main mechanisms for transferring juveniles to adult court,¹³⁴ and forty-four states impose some form of mandatory waiver.¹³⁵ Many of these laws have "shift[ed] decisionmaking authority from judges to prosecutors, and replace[d] individualized discretion with automatic and categorical mechanisms."¹³⁶ The Supreme Court in *Miller* noted that of the twenty-nine jurisdictions that impose mandatory life without parole on juveniles, "about half" have mandatory transfer laws that "place at least some juvenile homicide offenders in adult court automatically, with no apparent opportunity to seek transfer [back] to juvenile court."¹³⁷ Juveniles are therefore often

126. See *supra* Part II.B.

127. Taylor-Thompson, *supra* note 82, at 147.

128. See THE REST OF THEIR LIVES, *supra* note 13, at 2, 16. See also THE LIVES OF JUVENILE LIFERS, *supra* note 14, at 6.

129. U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 8 (2011) [hereinafter STATE TRANSFER LAWS].

130. *Id.* at 8.

131. SNYDER & SICKMUND, *supra* note 96, at 103.

132. THE REST OF THEIR LIVES, *supra* note 13, at 16–17. According to SNYDER & SICKMUND, *supra* note 96, at 96–97, between 1992 and 1997 forty-five states changed their laws to enable the transfer of juvenile offenders to adult court; thirteen states adopted or modified statutes that imposed mandatory periods of incarceration for juveniles convicted of certain crimes; forty-seven states changed confidentiality provisions making records more widely available to the public; and twenty-two states passed laws increasing victims' rights in juvenile crimes.

133. STATE TRANSFER LAWS, *supra* note 129, at 2.

134. SNYDER & SICKMUND, *supra* note 96, at 110. First, judicial waiver is common to the most states and gives judges authority to waive juvenile jurisdiction on a case-by-case basis. *Id.* at 110. Second, mandatory statutory exclusion provisions require that juveniles of a certain age or charged with certain offenses—including those tried with felony murder—be tried in adult court. *Id.* at 113–14. This is the most commonly used form of transfer. *Id.* Finally, direct file or prosecutorial discretion provisions like the Arkansas statute in Kuntrell's case, allow prosecutors to file juvenile cases in either juvenile or adult court. *Id.* at 110.

135. STATE TRANSFER LAWS, *supra* note 129, at 2–3. The three forms of mandatory waiver are mandatory judicial waiver, statutory exclusion, and once an adult, always an adult laws, which require criminal prosecution of any juvenile who has previously been tried as an adult. *Id.*

136. *Id.* at 9.

137. *Miller v. Alabama*, 132 S. Ct. 2455, 2474 (2012).

transferred to adult court with little or no consideration of their child status or the mitigating circumstances surrounding their offense.¹³⁸

Regardless of the mechanism, once a child is transferred to criminal court, “the features that distinguish [children] from adults . . . put[s] the child] at a significant disadvantage in criminal proceedings.”¹³⁹ Children often “mistrust adults and have limited understandings of the criminal justice system,”¹⁴⁰ and are ill-equipped to “deal with police officers or prosecutors (including on a plea agreement),” or to aid their lawyers in their own defense.¹⁴¹ Once convicted in adult court, mandatory sentencing laws proscribe age and other mitigating factors from weighing in the determination of a child offender’s punishment, resulting in the sentencing of children such as Kuntrell Jackson to life in prison without the possibility of parole. This outcome “ignores that [these children] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth.”¹⁴²

2. A Misguided Approach

*“In uncertainty I am certain that underneath their topmost layers of frailty men want to be good and want to be loved. Indeed, most of their vices are attempted short cuts to love. When a man comes to die, no matter what his talents and influence and genius, if he dies unloved his life must be a failure to him and his dying a cold horror.”*¹⁴³

It is unfortunate that society has deviated so far in its treatment of child offenders that thousands of children who commit criminal acts are no longer deemed worthy of empathy, compassion, or redemption. Although there has been a steady decline in juvenile crime since 1994, there has been no measurable attempt among states to reconsider the draconian shift in juvenile adjudication.¹⁴⁴ While research shows that the public generally supports prosecuting juveniles in adult court, the public “does not favor giving juveniles full adult sentences, placing them in adult correctional facilities, or abandoning rehabilitative goals.”¹⁴⁵ This may be because

138. The *Miller* majority noted that “[e]ven when States give transfer-stage discretion to judges, it has limited utility,” because “the decisionmaker typically will have only partial information at this early, pretrial stage about either the child or the circumstances of his offense” and “the question at transfer hearings may differ dramatically from the issue at post-trial sentencing.” *Id.*

139. *Graham v. Florida*, 130 S. Ct. 2011, 2032 (2010).

140. *Id.* at 2032.

141. *Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012).

142. *Id.*

143. JOHN STEINBECK, *EAST OF EDEN* 412–13 (John Steinbeck Centennial ed. 1902–2002, Penguin Books 1952).

144. STATE TRANSFER LAWS, *supra* note 129, at 9.

145. See Erin Flynn, *Dismantling the Felony-Murder Rule: Juvenile Deterrence and Retribution Post-Roper v. Simmons*, 156 U. PA. L. REV. 1049, 1059 (2008) (citing DAVID L.

many people believe that some children should be punished more harshly than juvenile jurisdiction allows, but do not realize that there is little middle ground, and that states have created an all-or-nothing system: those juveniles prosecuted in adult court are often sentenced and incarcerated without any consideration of their juvenile status.

Still, proponents of harsh sanctions might be tempted to argue that the decline in juvenile crime since the 1990s is a direct result of draconian penological treatment and increased incarceration of juveniles since the 1980s.¹⁴⁶ However, criminologists caution that it is incorrect to assume that changes in the crime rate are a direct correlation of changes in penal policy or punishment.¹⁴⁷ More concretely, empirical studies suggest that the sweeping legislative changes and accompanying increases in juvenile incapacitation “were not casually responsible for the decline in juvenile homicide rates” or other serious crime that occurred in the mid 1990s.¹⁴⁸

Moreover, research suggests that public safety is not served by the permanent incapacitation of child offenders. Neuroscience shows that they will grow and mature in ways that will increase their ability to make reasoned decisions and to regulate their impulse control,¹⁴⁹ and numerous longitudinal studies show that as a result of this process the majority of

MEYERS, BOYS AMONG MEN: TRYING AND SENTENCING JUVENILES AS ADULTS 4, 9–10, 127 (2005)).

146. Elizabeth S. Scott & Laurence Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, 71 LA. L. REV. 35, 51 (2010).

147. *Id.*

148. Brief of Jeffrey Fagan, et al., as Amici Curiae in Support of Petitioners, *supra* note 121, at 30–34 (citing RICHARD A. MENDEL, ANNIE E. CASEY FOUNDATION, NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 26 (2011)); David McDowall & Simon I. Singer, *Criminalizing Delinquency: The Deterrent Effects of the New York Juvenile Offender Law*, 22 LAW AND SOC’Y REV. 521 (1988); Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 CRIME AND DELINQ. 96 (1994)). The authors explain that empirical studies show that jurisdictions with higher juvenile incarceration rates have not had greater decreases in juvenile crime, and that jurisdictions that have greatly reduced their juvenile incarceration rates have not had increases in juvenile crime. *Id.* Similarly, the rate at which states imposed juvenile life without parole has not shown any correlation to juvenile homicide rates during the 1980s and 1990s, which was consistent across the states. *Id.* at 32–33.

149. See Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 459, 466 (2009). Steinberg explains that “risky behavior in adolescence is the product of the interaction between two distinct neurobiological systems,” a “socioemotional system” in the limbic and paralimbic areas of the brain, and a “cognitive control system,” in the lateral prefrontal and parietal cortices. *Id.* Adolescence is marked “by a rapid and dramatic increase in dopaminergic activity within the socioemotional system around the time of puberty, which is presumed to lead to increases in reward seeking.” *Id.* Unlike adults, however, adolescents do not yet have “the structural maturation of the cognitive control system and its connections to areas of the socioemotional system,” or the ability to exercise judgment to temper this heightened degree of risk-taking. *Id.* Steinberg explains that this is “a maturational process that is gradual, unfolds over the course of adolescence, and permits more advanced self-regulation and impulse control.” *Id.* This gap in development “creates a period of heightened vulnerability to risk taking during middle adolescence.” *Id.* One writer has characterized this process as similar to “starting the engines without a skilled driver behind the wheel.” *Id.* (internal citations omitted).

child offenders will desist all criminal behavior.¹⁵⁰ As the sobering process of maturation inevitably occurs,¹⁵¹ these individuals will likely feel deep regret for what they did and attempt to redefine themselves not by their painful adolescent transgressions, but by their potential as mature, discerning adults.¹⁵² And even though almost any rational person can recognize the illogic of defining someone by their worst adolescent decisions and acts, a sentence of life without parole means that none of these considerations matter.¹⁵³

Although the Court in *Miller* declined to categorically prohibit a sentence of life without parole for juveniles, *Miller* does prohibit a sentencer from failing to consider a juvenile's child status "in imposing a State's harshest penalties."¹⁵⁴ The majority explained that in light of "children's diminished culpability and heightened capacity for change . . . appropriate occasions for sentencing juveniles" to life without the possibility of parole "will be uncommon."¹⁵⁵ Therefore, even if states continue to adjudicate certain juvenile offenders in adult court in order to punish them more harshly than the juvenile system permits, current Eighth Amendment jurisprudence demands that the majority of these children be given a second chance. Part III sketches this jurisprudence to show how the Court has interpreted the Eighth Amendment's ban on cruel and unusual punishment to scale back the adult punishment of children.

III. JUVENILE PUNISHMENT AND CURRENT EIGHTH AMENDMENT JURISPRUDENCE

A. *The Eighth Amendment Framework*

The Eighth Amendment's prohibition on cruel and unusual punishment protects individuals from excessive sanctions by ensuring that punishment for a crime is proportionate to both the offense committed and the

150. See, e.g., *id.* at 478 (explaining that according to most studies only 5%–10% of child offenders become chronic offenders); Taylor-Thompson, *supra* note 82, at 156 (citing John H. Laub & Robert J. Sampson, *Understanding Desistance from Crime*, 28 CRIME & JUST. 1 (2001); Terrie E. Moffitt, *Adolescent-Limited and Life-Course Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 675–77 (1993); Neal Shover & Carol Y. Thompson, *Age, Differential Expectations, and Crime Desistance*, 30 CRIMINOLOGY 89 (1992)).

151. See *supra* note 146.

152. See *Graham v. Florida*, 130 S. Ct. 2011, 2032 (2010) ("Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and re-habilitation."); see also *Miller v. Alabama*, 132 S. Ct. 2455, 2465 ("Deciding that a 'juvenile offender will forever be a danger to society' would require 'making a judgment that he is incorrigible—but 'incorrigibility is inconsistent with youth.'") (internal quotation marks omitted).

153. Tragically, the sentence also eliminates any incentive for these children to transform themselves into responsible, productive individuals, because they know they have no hope of reentering society. See *Graham*, 130 S. Ct. at 2032.

154. *Id.* at 2468.

155. *Id.* at 2469.

characteristics of the offender.¹⁵⁶ The Court views this concept of proportionality not through “a historical prism” but “according to the evolving standards of decency that mark the progress of a maturing society.”¹⁵⁷ The Court has used two approaches to review the proportionality of sentences to determine whether they constitute cruel and unusual punishment.¹⁵⁸ The first approach is a narrow proportionality review, or an as-applied challenge to the length of a term of years.¹⁵⁹

The second approach is the use of categorical bans, which includes two lines of precedent addressing the proportionality of punishment.¹⁶⁰ The first line of precedent involves categorical bans on sentences that are disproportionate because of the nature of the offense or the characteristics of the offender.¹⁶¹ The Court has banned the imposition of the death penalty on those convicted of nonhomicide crimes,¹⁶² on mentally retarded defendants,¹⁶³ and on children.¹⁶⁴ Also included in this line of cases is *Graham*, in which the Court likened juvenile life without parole to a sentence of death.¹⁶⁵ The second line of precedent involves those cases in which the Court has prohibited the mandatory imposition of capital punishment, and required that a sentencer—in deciding whether to impose death—consider any mitigating evidence a defendant presents regarding

156. *Id.* at 2463.

157. *Id.* at 2464 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) and *Trop v. Dulles*, 356 U.S. 86, 101 (1958)). Chief Justice Earl Warren first articulated this standard in *Trop v. Dulles*: “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” 356 U.S. at 100–01.

158. *Graham*, 130 S. Ct. at 2021.

159. *Id.* The Supreme Court has rarely invalidated individual sentences on this “narrow proportionality principle,” which “forbids only extreme sentences . . . ‘grossly disproportionate’ to the crime.” *See id.* at 2022 (citing *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991), in which the Court upheld a sentence of life without parole for a defendant convicted of possession of cocaine).

160. *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012).

161. *Graham*, 130 S. Ct. at 2022.

162. *Id.* (citing *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2660 (2008) (holding that the Eighth Amendment forbids capital punishment “for the rape of a child where the crime did not result, and was not intended to result, in the death of the victim”); *Enmund v. Florida*, 458 U.S. 782 (1982) (holding that the Eighth Amendment forbids capital punishment for felony murder where the defendant “does not himself kill, attempt to kill, or intend that a killing take place”); and *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that capital punishment is “grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment . . .”).

163. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). In *Roper v. Simmons*, 543 U.S. 551, 574 (2005), the Court relied heavily on its reasoning in *Atkins* and concluded that juveniles, like those with diminished mental capacity, are never among the most culpable offenders and are therefore less deserving of the harshest punishment.

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

165. *Graham*, 130 S. Ct. at 2046.

his characteristics and the circumstances surrounding his offense.¹⁶⁶ This rule is meant to ensure that death is reserved for “the most culpable defendants” who commit “the most serious offenses.”¹⁶⁷ *Miller* is based on both of these strands of precedent.¹⁶⁸

Once it establishes that the adoption of a categorical rule is at issue, the Court employs an analysis of “evolving standards of decency” to determine whether the punishment is cruel and unusual.¹⁶⁹ This is a two-part test.¹⁷⁰ First, the Court “considers objective indicia of society’s standards, as expressed in legislative enactments and state practice to determine whether there is a national consensus against the sentencing practice at issue.”¹⁷¹ Next, “guided by the ‘standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning and purpose,’”¹⁷² the Court must “determine in the exercise of its own independent judgment whether the punishment in question” is cruel or unusual.¹⁷³ This is largely a proportionality inquiry requiring 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.”¹⁷⁴ A fundamental aspect of the Court’s inquiry is its analysis of “whether the challenged sentencing practice serves penological goals.”¹⁷⁵ “A sentence lacking any legitimate

166. *Miller v. Alabama*, 132 S. Ct. 2455, 2463–64 (2012) (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion) and *Lockett v. Ohio*, 438 U.S. 586 (1978)).

167. *Miller*, 132 S. Ct. at 2467.

168. *Id.* at 2463–64.

169. *Graham*, 130 S. Ct. at 2022.

170. *Id.*

171. *Id.* (internal quotation marks omitted). This is the “unusual” aspect of the analysis. *See Miller*, 132 S. Ct. at 2477 (Roberts, C.J., dissenting). Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito each wrote dissenting opinions in *Miller*, in which they criticized the majority for dispensing with objective indicia and deciding *Miller* solely on their own views of what is proportionate. *See id.* at 2477–78 (“Today, the Court invokes [the Eighth Amendment] to ban a punishment that the Court does not itself characterize as unusual, and that could not plausibly be described as such.”); *id.* at 2486 (Thomas, J., dissenting); *id.* at 2490 (Alito, J., dissenting) (“What today’s decision shows is that our Eighth Amendment cases are no longer tied to any objective indicia of society’s standards.”).

172. *Graham*, 130 S. Ct. at 2022 (quoting *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650 (2008)).

173. *Id.* (citing *Roper v. Simmons*, 543 U.S. 551, 572 (2005)).

174. *Id.* (citing *Roper*, 543 U.S. at 568). Although the Supreme Court has recited both steps as necessary to its proportionality review, *see id.*, it has not clarified whether any particular weight should be given to either, stating only that “[c]ommunity consensus, while ‘entitled to great weight,’ is not itself determinative of whether a punishment is cruel and unusual.” *Id.* at 2026 (citing *Kennedy*, 128 S. Ct. at 2658). *Contra* Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA L. REV. 99, 113 (asserting that the Supreme Court “has not clarified whether one or both prongs must be met before finding the sentence unconstitutional”).

175. *Graham*, 130 S. Ct. at 2032.

penological justification is by its nature disproportionate.”¹⁷⁶ This Note focuses on the second part of the Court’s analysis—the proportionality inquiry—to explain how the Court has interpreted the Eighth Amendment to limit the adult punishment of children.¹⁷⁷

B. *Roper v. Simmons and Graham v. Florida: Death Is Different, But Children Are Too*

In *Roper* and *Graham*, the Supreme Court considered the proportionality of adult punishment on juvenile offenders, and established that juveniles are categorically less culpable than adults and “cannot with reliability be classified among the worst offenders.”¹⁷⁸ In both cases, the Court stated that developmental differences in juveniles make them “less deserving of the most severe punishments.”¹⁷⁹ The Court relied on neuroscientific research mapping adolescent brain structure, as well as social science, to articulate three primary reasons for juveniles’ lessened culpability.¹⁸⁰ First, juveniles “lack maturity” and possess “underdeveloped responsibility,” leading to “impetuous and ill-considered actions and decisions.”¹⁸¹ Second, juveniles “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” and “lack the freedom that adults have to extricate themselves from a criminogenic setting.”¹⁸² Third, juveniles have characters that are “not as well formed” and possess traits (inhibiting their maturity and judgment) that are more “transitory and less fixed.”¹⁸³ The Court concluded that all of these characteristics show that juveniles have a great capacity for change and rehabilitation.¹⁸⁴

In *Roper*, the Court set aside Christopher Simmons’ death sentence for the burglary and cold-blooded murder of an older woman, a crime it described as “outrageously and wantonly vile, horrible and inhuman.”¹⁸⁵ By choosing to grant certiorari in Simmons’ case, the Supreme Court made

176. *Id.* at 2028.

177. The dissenting opinions in *Miller*, *see supra* note 171, show how four justices of the current Court take issue with this interpretation of the Eighth Amendment. For example, Justices Clarence Thomas and Antonin Scalia believe that the Eighth Amendment should be interpreted according to its “original understanding,” which they believe does not include a “proportionality principle” of punishment. *Miller v. Alabama*, 132 S. Ct. 2455, 2483–84 (2012) (Thomas, J., dissenting). Justice Thomas suggests that any punishment that was not considered cruel and unusual at the time the Bill of Rights was adopted, should not be so considered now. *See id.* at n.2.

178. *Graham*, 130 S. Ct. at 2026 (quoting *Roper*, 543 U.S. at 569).

179. *Id.*

180. *Id.*

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

182. *Id.*

183. *Id.*

184. *Graham*, 130 S. Ct. at 2026.

185. *Roper*, 543 U.S. at 556.

a resolute statement that child offenders are fundamentally different from adults in ways that bear so profoundly on their culpability that no matter how heinous their crime, they can never be considered among the most culpable offenders.¹⁸⁶ It accordingly imposed a categorical ban, in the case of juvenile offenders, on death—the most severe punishment for any offender.¹⁸⁷

In *Graham*, the Court stopped short of fully extending *Roper*'s logic when it drew a line between the culpability of juvenile homicide and nonhomicide offenders and imposed a categorical ban on life without parole only for the latter.¹⁸⁸ The Court found that those juveniles who “do not kill or intend to kill ha[ve] a twice diminished moral culpability.”¹⁸⁹ Next, the Court drew parallels between a sentence of life without parole for a juvenile offender—the harshest penalty available to a juvenile—and a sentence of death.¹⁹⁰ It explained that although “a death sentence is unique in its severity and irrevocability,” a sentence of “life without parole share[s] some characteristics with . . . death . . . that [is] shared by no other sentence.”¹⁹¹ It recognized that in light of the fundamental differences between juveniles and adults enumerated in *Roper*,¹⁹² life without parole is “an especially harsh punishment for a juvenile,” because on average it causes a juvenile to serve a greater percentage of his life in prison than an adult; and its complete denial of any hope of redemption is infinitely harsher in the case of a juvenile.¹⁹³ Finally, in applying its proportionality review, the Court found that life without parole does not serve any of the legitimate penological goals for juvenile nonhomicide offenders—retribution, deterrence, incapacitation, and rehabilitation.¹⁹⁴ It therefore concluded that the sentence for juveniles convicted of a nonhomicide offense is “by its nature disproportionate,”¹⁹⁵ and is cruel and unusual under the Eighth Amendment.¹⁹⁶

186. See Flynn, *supra* note 145, at 1054; *Roper*, 543 U.S. at 569.

187. *Roper*, 543 U.S. at 575. The Court explained that “[c]apital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution.” *Id.* at 568. *Roper* abrogated *Stanford v. Kentucky*, 492 U.S. 361 (1988), which held that the death penalty could be imposed on juvenile offenders between the ages of sixteen and seventeen.

188. See *Graham*, 130 S. Ct. at 2030. In his article *Clemency for Our Children*, 32 CARDOZO L. REV. 2641, 2645 (2011), Professor Anthony C. Thompson argued that the Court in *Graham* missed the fundamental point of its conclusion that juveniles are *categorically* less culpable than adults when it limited its ban on life without parole to those convicted of nonhomicide offenses.

189. *Graham*, 130 S. Ct. at 2027.

190. *Id.* at 2027.

191. *Id.*

192. See *supra* notes 180–83 and accompanying text.

193. *Id.*

194. *Id.* at 2028–30.

195. *Id.* at 2028.

196. *Id.* at 2030.

Despite *Graham*'s failure to recognize that constitutional differences between juveniles and adults are not isolated to those juveniles who commit nonhomicide offenses, it broke Eighth Amendment ground by creating the first categorical rule prohibiting a sentence other than death.¹⁹⁷ In addition to establishing that death is different for purposes of the Eighth Amendment and sentencing, the Court in *Graham* soundly established that children are different too.

C. *Miller v. Alabama: Child-Status and the Death of Mandatory Death-in-Prison Sentences for Children*

Just as *Graham* extended Eighth Amendment categorical bans beyond the context of capital punishment,¹⁹⁸ *Miller* extends Eighth Amendment challenges to yet another category of punishment: mandatory sentences involving a punishment less than death.¹⁹⁹ In ruling that sentences of mandatory life without parole for juvenile homicide offenders are unconstitutional,²⁰⁰ the Court in *Miller* recognized that “none of what it said [in *Graham*] about children—about their distinctive (and transitory mental) traits and environmental vulnerabilities—is crime specific.”²⁰¹ At its core, *Miller* recognizes that denying *any* child a chance for rehabilitation and redemption without consideration of the mitigating factors attendant to his or her child status, is fundamentally unfair and is likely to result in disproportionate punishment.²⁰²

As noted in Part III.A, to reach its holding, the *Miller* Court relied on two lines of Eighth Amendment precedent.²⁰³ First, it relied on *Roper* and *Graham*, where the Court applied its Eighth Amendment framework for categorical bans based on the characteristics of the offender or the nature of the offense.²⁰⁴ The Court explained that although *Graham*'s “flat ban” against juvenile life without parole was explicitly confined to nonhomicide offenders, the characteristics that make juveniles less culpable than adults are “evident in the same way, and to the same degree,” when a juvenile commits a homicide offense, and “*Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile.”²⁰⁵ *Miller* summarized

197. See *id.* at 2046 (Thomas, J., dissenting) (arguing that *Graham* “eviscerate[d]” the distinction that “[d]eath is different,” because until *Graham* “the Court ha[d] based its categorical proportionality rulings on the notion that the Constitution gives special protection to capital defendants because the death penalty is a uniquely severe punishment that must be reserved for only those who are ‘most notably deserving of execution’”).

198. *Graham*, 130 S. Ct. at 2046.

199. See *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012).

200. *Id.* at 2461.

201. *Id.* at 2465.

202. See *id.* at 2465–69.

203. *Id.* at 2463.

204. *Id.* at 2463–64.

205. *Id.* at 2465.

Roper and *Graham* as having established “that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.”²⁰⁶ It concluded that mandatory life without parole for juveniles “contravenes *Graham*’s (and also *Roper*’s) foundational principle: that imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.”²⁰⁷

Because *Graham* likened juvenile parole to a sentence of death, *Miller* also relied on the Court’s Eighth Amendment precedent requiring individualized sentencing when imposing capital punishment.²⁰⁸ In particular, it emphasized that in those cases the Court “insisted . . . that a sentencer have the ability to consider the ‘mitigating qualities of youth,’” including the age, background, and mental and emotional development of child offenders.²⁰⁹ The Court summarized the constitutional shortcomings of mandatory life without parole:

[It] precludes consideration of [a child’s] 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 [a child]—and from which he cannot usually extricate himself—not matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.²¹⁰

Miller mandates that a sentencer “take into account . . . how th[e]se differences counsel against irrevocably sentencing [children] to a lifetime

206. *Id.* at 2465. See also *id.* at 2467 (discussing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982), in which the Court invalidated a death sentence for the 16-year-old defendant “because the judge did not consider evidence of [the defendant’s] neglectful and violent family background . . . and his emotional disturbance”).

207. *Id.* at 2466.

208. *Id.* at 2467.

209. *Id.* (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993); *Eddings*, 455 U.S. at 116).

210. *Id.* at 2468 (citations omitted).

in prison.”²¹¹ The Court noted that “given all [it has] said in *Roper*, *Graham*, and [*Miller*] about children’s diminished culpability and heightened capacity for change . . . appropriate occasions for sentencing juveniles to the harshest penalty will be uncommon.”²¹² If life without parole should be “uncommon” for child offenders, and reserved only for the most culpable of these offenders if it is to be used at all, it follows that the sentence should never be imposed on juveniles such as Kuntrell Jackson, who are convicted of accessory felony murder and do not kill or intend to kill.

IV. PUNISHING JUVENILES FOR ACCESSORIAL FELONY MURDER

A. *Twice Diminished Culpability*

In drawing a line between homicide and nonhomicide, the Court in *Graham* relied on Eighth Amendment precedent that “defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.”²¹³ The *Graham* majority explained:

Although an offense like robbery or rape is a “serious crime deserving serious punishment,” those crimes differ from homicide crimes in a moral sense. *It follows that, when compared to an adult murderer, a juvenile offender who does not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.*²¹⁴

Justice Stephen Breyer, in his concurring opinion in *Miller* joined by Justice Sonia Sotomayor, argued that “the Eighth Amendment as interpreted in *Graham* forbids sentencing [Kuntrell] Jackson to [life without parole], regardless of whether its application is mandatory or discretionary under state law.”²¹⁵ Justice Breyer explained that “given *Graham*’s reasoning, the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim,” because “[q]uite simply,” he “lacks ‘twice diminished’ responsibility.”²¹⁶

211. *Id.* at 2469.

212. *Id.*

213. *Graham v. Florida*, 130 S. Ct. 2011, 2027 (citing *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2659–60 (2008); *Enmund v. Florida*, 458 U.S. 782, 799 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987); *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

214. *Id.* at 2027 (emphasis added) (quoting *Enmund*, 458 U.S. at 797).

215. *Miller*, 132 S. Ct. at 2475 (Breyer, J., concurring).

216. *Id.* at 2475–76.

Indeed, this language from *Graham* tracks the Court's language in *Enmund v. Florida*,²¹⁷ in which it held that the Eighth Amendment forbids capital punishment for a defendant who "aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."²¹⁸ In *Enmund*, the Court concluded that the death penalty should be reserved for the most culpable offenders (those who intentionally take a human life), and that a defendant convicted of felony murder who does not kill or intend to kill does not fall within this category.²¹⁹ By the Court's own logic, if adults who do not kill or intend to kill are not morally deserving of the harshest sentence available to adults,²²⁰ then it follows that juveniles who do not kill or intend to kill are not morally deserving of the harshest sentence available to juveniles.

217. 458 U.S. 782 (1982). The defendant, Earl Enmund, was the driver of the getaway car for a robbery in which two people were killed by his accomplice. *Id.* at 784, 788.

218. *Id.* at 797.

219. See *Enmund*, 458 U.S. at 798, 801. Five years later in *Tison v. Arizona*, 481 U.S. 135, 158 (1987), the Court allowed the death penalty to be applied to two aiders and abettors who were "actively involved in every element of the kidnapping-robbery" underlying their felony murder conviction, and showed "reckless indifference to human life" through their participation in this crime. The petitioners in *Tison* were two brothers who brought guns into a prison and armed and freed their father and his prison mate, both of whom were previously convicted of murder. *Id.* at 139. In the subsequent escape, they assisted their father and his prison mate in flagging down a passing car; robbed the passengers; held them at gunpoint while their father decided what to do with them; and stood by while their father and his prison mate shot them. *Id.* at 151–52. One of the brothers also admitted that "he was prepared to kill in furtherance of the prison break." *Id.* at 152. The Court narrowed the rule in *Enmund* by holding that some accomplices convicted of felony murder who do not kill or intend to kill, but who exhibit reckless disregard for human life through their active involvement in the underlying felony, may be culpable enough to justify the death penalty. In doing so, the Court at best muddied what was a clear rule in *Enmund* and at worst undermined *Enmund*'s reasoning. However, as Justice Breyer pointed out in *Miller*, 132 S. Ct. at 2476, "even juveniles who meet the *Tison* standard of 'reckless disregard'" should not be sentenced to life without parole because the Court in *Graham* specifically stated that juveniles "who do not kill or intend to kill ha[ve] twice diminished moral culpability." *Graham*, 130 S. Ct. at 2027. The Court in *Graham* did not qualify this statement with a reference to the heightened culpability of those juveniles who exhibit reckless disregard for human life. See *id.* *Graham* therefore "dictates a clear rule" prohibiting the imposition of life without parole on these juveniles. See *Miller*, 132 S. Ct. at 2476.

220. See Rosen, *supra* note 43, at 1116–17 ("[T]he possibility always exists that, with the felony murder rule as a basis for a capital sentence, some minimally culpable felony murder defendants, like accidental killers or attenuated accomplices to the felony, will be sentenced to die, even while many cold-blooded premeditated killers will be allowed to live. This possibility hardly reflects the proportionality—the reservation of the death penalty for the worst murderers—that underlies the Court's entire eighth amendment venture.").

B. *The Doctrine of Felony Murder*

The fundamental differences between juveniles and adults discussed in *Roper*, *Graham*, and *Miller*²²¹ call into question the propriety of ever applying the felony-murder rule to juveniles.²²² But assuming that states continue to prosecute juvenile offenders for felony murder, *Graham* makes clear that the Eighth Amendment forbids sentencing them to life in prison without the possibility of parole.

1. Homicide Without the Necessary Mental State

Felony murder is a form of strict liability at its most extreme. Strict liability imposes criminal liability for an action without proof of intent—or *mens rea*—to commit the action.²²³ The doctrine of felony murder imposes liability for murder where a defendant engages in a felonious act or attempts to engage in a felonious act and someone dies as a result.²²⁴ Unlike other homicide offenses, there is no independent *mens rea* requirement for accessorial felony murder. Instead, the intent to commit the underlying felony satisfies the requisite intent to kill, and a defendant can be charged with and convicted of murder even if he did not kill or intend to kill the victim.²²⁵ This is often referred to as “transferred intent.”²²⁶ Felony murder therefore ignores the fundamental principle of criminal justice: that “a culpable mental state . . . is a necessary component of moral blameworthiness, and thus, a requirement for criminal punishment.”²²⁷

221. See *supra* Part IV.

222. See Flynn, *supra* note 145, at 1053–54 (arguing that the justification for felony murder “runs afoul” of the Court’s conclusions about juveniles’ lessened culpability in *Roper*, and that felony murder charges “should be categorically excluded as applied to juveniles”).

223. See Assaf Hamdani, *Mens Rea and the Cost of Ignorance*, 93 VA. L. REV. 415, 416 (2007).

224. Rudolph J. Gerber, *The Felony Murder Rule: Conundrum Without Principle*, 31 ARIZ. ST. L.J. 763, 763 (1999). The common example of felony murder is Kuntrell Jackson’s case, where the underlying felony is robbery during which an accomplice causes the victim’s death. See *supra* Part I.

225. See Steven A. Drizin & Allison McGown Keegan, *Abolishing the Use of the Felony-Murder Rule When the Defendant Is a Teenager*, 28 NOVA L. REV. 507, 527 (2004); Gerber, *supra* note 224, at 770–71 (“[T]he rule ignores the felon’s true state of mind and, in its place, concocts a homicidal mental state from evidence of a felonious mental state less culpable than homicide. [It] transfers the intent to commit a felony to the death even if the death is accidental and unanticipated.”).

226. See, e.g., *Miller v. Alabama*, 132 S. Ct. 2455, 2476 (Breyer, J., concurring); Nelson E. Roth & Scott E. Sundby, *The Felony Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 453 (1985).

227. See Michael L. Seigel, *Bringing Coherence to Mens Rea Analysis for Securities-Related Offenses*, 2006 WIS. L. REV. 1563, 1564 (2006). Professor Seigel explains that the drafters of the Model Penal Code “cut through [a] legacy of incoherence” surrounding the application of *mens rea* when they established four rules for its application. *Id.* at 1565. One of these is that “an element of mens rea . . . ‘attaches’ to each of the . . . material elements of any given crime—the actus reii and

Justification for the felony-murder rule rests on theories of deterrence and retribution.²²⁸ Ultimately, the doctrine promotes the idea that someone who decides to partake in a potentially dangerous felony should reasonably anticipate any resulting injury and should therefore be held liable when such injury in fact occurs.²²⁹ Knowledge of accessorial liability and its potentially harsh punishment is intended to deter potential offenders by compelling them to act with extreme caution in committing the felony or to abandon its commission outright.²³⁰ The retributive aspect seeks to impose greater punishment where greater harm has been caused (death), regardless of whether the defendant intended such harm.²³¹ Scholars have suggested that this notion of “just deserts” is justified by a normative assumption that people who commit felonies have generally deficient characters.²³² In other words, the decision to engage in criminal acts demonstrates inherent moral impairment that renders such offenders culpable for any unintended consequences.

2. Perversion of the Justifications for Punishment

“Few legal doctrines have been as maligned and yet have shown as great a resiliency as the felony-murder rule. Criticism of the rule constitutes a lexicon of everything that scholars and jurists can find wrong with a legal doctrine: it has been described as ‘astonishing’ and ‘monstrous,’ an unsupportable ‘legal fiction,’ ‘an unsightly wart on the skin of the criminal law,’ and as an ‘anachronistic remnant’ that has ‘no logical or practical basis for existence in modern law.’”²³³

Because of its egregious disregard of some of the most basic principles of criminal justice, it is an understatement to say that the felony-murder rule “is a much-condemned doctrine.”²³⁴ Among its most compelling

attendant circumstances—and the requisite mens rea for each of these elements may in fact be different.” *Id.* Felony murder is a blatant perversion of this rule. It substitutes *mens rea* that should attach to the *actus reus* of murder with the *mens rea* that attaches to the *actus reus* of the underlying felony.

228. See Flynn, *supra* note 145, at 1063 (citing JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 31.06[B], at 516–19 (3d ed. 2001)); see also Kevin Cole, *Killings During Crime: Toward a Discriminating Theory of Strict Liability*, 28 AM. CRIM. L. REV. 73, 74–78 (1990).

229. See Cole, *supra* note 228, at 106.

230. Flynn, *supra* note 145, at 1063. See also Cole, *supra* note 228, at 102.

231. See Roth & Sundby, *supra* note 226, at 457–58.

232. See, e.g., Cole, *supra* note 228, at 99, 101 (“[I]n the felony-murder context, some of our normal reluctance to make generalizations based on character are absent.”); Roth & Sundby, *supra* note 226, at 457–58 (explaining that the rule is justified in part by the “evil mind” theory that “one who does bad acts cannot complain about being punished for their consequences, no matter how unexpected”).

233. Roth & Sundby, *supra* note 226, at 446.

234. See, e.g., Drizin & Keegan, *supra* note 225, at 528; George P. Fletcher, *Reflections on Felony Murder*, 12 SW. U. L. REV. 413, 427–28 (1981) (arguing that the principle behind felony

criticisms are the arguments that both its deterrent and retributive justifications fail, and that because it seeks to punish an offender for harm he did not intend, it inevitably results in disproportionate punishment.²³⁵ And yet almost every state prosecutes both children and adults for felony murder.²³⁶

The Supreme Court has explicitly recognized these criticisms. The argument that the deterrent objective of felony murder fails is that unintended or unforeseen acts (the resulting death) cannot logically be deterred.²³⁷ In *Enmund*, the Court explained that when “a person does not intend that life be taken . . . the possibility that the death penalty will be imposed for vicarious felony murder will not ‘enter into the cold calculus that precedes the decision to act.’”²³⁸ The Court in *Enmund* also noted a lack of empirical evidence showing that the felony murder rule in fact deters deaths.²³⁹ Additionally, critics of the rule argue that “a felony-murder rule is unnecessary to deter underlying felonies because those felonies are deterred simply by increasing punishments for the intentional felony offenses.”²⁴⁰

The retributive justification for felony murder—that punishment should be determined in accordance with harm caused rather than harm intended—has also been heavily criticized. That justification “fails to capture a wrongdoer’s culpability properly,”²⁴¹ because culpability should be based on an individual defendant’s criminal intent and accompanying actions, and not simply on harm caused in the commission of a crime.²⁴²

murder violates “a basic principle of just punishment” since “[p]unishment must be proportional to wrongdoing. When the felony-murder rule converts an accidental death into first-degree murder . . . punishment is rendered disproportionate to the wrong for which the offender is personally responsible.”); Gerber, *supra*, note 224, at 770 (“The doctrine contradicts our most basic conception of proportionality.”); Roth & Sundby, *supra* note 226, at 446.

235. See *supra* note 234.

236. Flynn, *supra* note 145, at 1063 (citing DRESSLER, *supra* note 228 § 31.06[A], at 515 n.110, and explaining that Dressler notes “that only three states have rejected the [felony-murder] rule and that a fourth state has imposed a mens rea requirement for felony-murder convictions”).

237. *Id.* at 1064 (citing DRESSLER, *supra* note 228 § 31.06[B][2], at 516–17); Roth & Sundby, *supra* note 226, at 451.

238. *Enmund v. Florida*, 458 U.S. 782, 799 (1982) (quoting *Gregg v. Georgia*, 428 U.S. 153, 186 (1976)). For deterrence to have any effect “the penalty must enter into the defendant’s contemplation; thus, by definition, deterrence is inapplicable whenever an unintentional killing occurs.” Roth & Sundby, *supra* note 226, at 485 (citing *Enmund*, 458 U.S. at 800).

239. *Enmund*, 458 U.S. at 799 (“Competent observers have concluded that there is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself.”).

240. Flynn, *supra* note 145, at 1064; Roth & Sundby, *supra* note 226, at 452.

241. See Flynn, *supra* note 145, at 1065 (citing H.L.A. HART, *Intention and Punishment, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 113, 130–31 (1968)).

242. See *supra* note 227 and accompanying text; Steven F. Shatz, *The Eighth Amendment, The Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study*, 59 FLA. L.

Again, the Supreme Court adopted this reasoning in *Enmund* when it stated that “[i]t is fundamental that ‘causing harm intentionally must be punished more severely than causing the same harm unintentionally.’”²⁴³ To fail to distinguish between the intentional murderer and the robber who has no murderous intent and takes no murderous action undermines the entire thrust of retribution—it renders punishment for both less legitimate by making any notion of proportionality moot.

C. *Cruel and Unusual: Sentencing Juveniles Convicted of Felony Murder to Life Without Parole*

*“Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to a determination of a State’s duty toward children.”*²⁴⁴

The serious theoretical shortcomings of felony murder liability apply with exponentially greater force to juveniles.²⁴⁵ Sentencing a juvenile who did not kill or intend to kill to life without parole serves neither deterrence nor retribution—the “penological goals”²⁴⁶ presumably advanced by punishing those guilty of felony murder—and the sentence therefore violates the Eighth Amendment.²⁴⁷ As *Roper, Graham, and Miller* implicitly suggest, the rationale underlying felony murder is utterly incompatible with our modern understanding of juveniles.²⁴⁸

Justice Breyer explained in *Miller* that “the ability to consider the full consequences of a course of action and to adjust one’s conduct accordingly is precisely what we know juveniles lack capacity to do effectively.”²⁴⁹ This means that a juvenile is much less likely than an adult to recognize that his participation in a robbery or other felony could potentially result in

REV. 719, 766 (2007) (“With respect to retribution, the Court has made clear that [it] must be calibrated to the defendant’s culpability, which in turn depends on his mental state with regard to the crime.”).

243. *Enmund*, 458 U.S. at 798 (quoting H.L.A. HART, *Punishment and the Elimination of Responsibility*, in PUNISHMENT AND RESPONSIBILITY 158, 162 (1968)). The *Enmund* Court explained that when using retribution as a justification for imposing the harshest possible penalty, “very much depends on the degree of [the defendant’s] culpability,” including his “intentions, expectations, and actions.” *Id.* at 800.

244. *Miller v. Alabama*, 132 S. Ct. 2455, 2476 (2012) (Breyer, J., concurring) (quoting *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring) (internal quotation marks omitted)).

245. Drizin & Keegan, *supra* note 225, at 531; Flynn, *supra* note 145, at 1065; *Miller v. Alabama*, 132 S. Ct. 2455, 2476 (2012) (Breyer, J., concurring) (“Given *Graham*, [*Enmund*’s] holding applies to juveniles sentences of life without parole *a fortiori*.”).

246. *Jackson Petition*, *supra* note 48, at 29 (citing *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010)).

247. *See Graham*, 130 S. Ct. at 2028.

248. *See supra* Part IV.

249. *Miller v. Alabama*, 132 S. Ct. 2455, 2476 (2012) (Breyer, J., concurring).

death or injury.²⁵⁰ Likewise, juveniles' increased susceptibility to negative peer influence "inhibit[s] their ability to withdraw from potentially deadly situations when they are encouraged into wrongdoing by others."²⁵¹ Because adolescents "are less likely to foresee the consequences of their actions and process the potential effects of their actions on others," they are less likely to be deterred by the specter of even the most severe punishment.²⁵² The gravity of a harsh sentence has little significance for juveniles before it is imposed, and is a weak deterrent to their reckless behavior. This is particularly true for life without parole, a sentence that stretches indefinitely into a future children have not yet begun to comprehend.²⁵³ Case studies show that juvenile offenders do not realize the true finality of this sentence until many years after they have been committed to prison.²⁵⁴ One individual articulated his understanding of his sentence in an interview with Human Rights Watch:

It was very emotional and I broke out crying in court. I don't know if I fully understood but I kinda understood when they just said, "guilty, guilty, guilty" and "life" y'know? As time went on, I'm really starting to realize how serious it is. I was young, I wasn't really too educated. When I got locked up, I was in the Eighth grade. All my education has come through . . . being incarcerated."²⁵⁵

For these reasons, the deterrence rationale—which is problematic as it applies to adults punished for felony murder—has little plausibility when applied to juveniles.

The retribution rationale for felony murder is similarly weakened in the case of juveniles. At "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."²⁵⁶ As a starting point, the Court established in *Roper*

250. *Id.* at 29–30 (citing B. LUNA, *The Maturation of Cognitive Control and the Adolescent Brain*, in FROM ATTENTION TO GOAL-DIRECTED BEHAVIOR 249, 252–56 (F. Aboitiz & D. Cosmelli eds., 2009)). See also Flynn, *supra* note 145, at 1055 n.31 (citing Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, CRIM. JUST. Summer 2000, at 26, 27).

251. Jackson Petition, *supra* note 48, at 30 (citing *Graham*, 130 S. Ct. at 2026).

252. Flynn, *supra* note 145, at 1055.

253. Taylor-Thompson, *supra* note 82, at 154 (explaining that, "[a]dolescents, more than adults, tend to discount the future and to afford greater weight to short-term consequences of decisions," and that "in part because adolescents have had less experience, considering the meaning of a consequence that will only be realized ten or more years in the future may prove exceedingly difficult.").

254. THE REST OF THEIR LIVES, *supra* note 13, at 54.

255. *Id.*

256. *Graham*, 130 S. Ct. at 2028 (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)) (internal quotation marks omitted). As explained in Section IV.B above, the personal culpability of a defendant is based on his intent (or state of mind) and his actions in committing a crime. See *supra* notes 223–227 and accompanying text.

that “[w]hether viewed as 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.”²⁵⁷ In *Graham*, the Court explained that “[t]he case becomes even weaker with respect to a juvenile who did not commit homicide.”²⁵⁸ Although children convicted of accessorial felony murder are technically homicide offenders, the Court in *Graham* clearly stated that as a result of their child status and lack of any homicidal intent, those juveniles “who [do] not kill or intend to kill [have] a twice diminished moral culpability.”²⁵⁹ Therefore, despite their technical conviction for homicide, children convicted of felony murder who do not kill or intend to kill can never be among the most culpable juvenile (homicide) offenders.²⁶⁰ It follows that they do not deserve life imprisonment without parole, the harshest punishment available for them.²⁶¹ Simply put, because juveniles who do not kill or intend to kill can never be among the most culpable juvenile offenders, this most ultimate condemnation²⁶² is necessarily excessive. *Graham* therefore requires that each of these individuals be given a “meaningful opportunity for release,”²⁶³ and an “opportunity to achieve maturity of judgment and self-recognition of human worth and potential.”²⁶⁴

None of this reasoning changes whether applied to Terrence Graham or Kuntrell Jackson. Both were juveniles when they committed their crimes, and neither exhibited the kind of criminal intent that merits the most severe punishment. It is starkly incongruent with the logic of *Graham* to say that life without parole is a cruel and unusual sentence for Terrence Graham, who himself inflicted violence on his robbery victim but was fortunate enough that no one was killed during its commission,²⁶⁵ but is not cruel and unusual for Kuntrell Jackson, who inflicted no violence on his robbery victim but whose accomplice made the poor choice to pull the trigger.²⁶⁶ As Justice Breyer concluded, if, upon remand, the trial court finds that Kuntrell Jackson did not intend to kill the clerk, then “the Eighth Amendment simply forbids imposition of a life term without the possibility

257. *Graham*, 130 S. Ct. at 2028 (quoting *Roper v. Simmons*, 453 U.S. 551, 571 (2005)).

258. *Id.*

259. *Id.* at 2016.

260. *See id.* at 2027.

261. *See id.* at 2028 (“The considerations underlying [Roper’s] holding support as well the conclusion that retribution does not justify imposing the second most severe penalty on the less culpable juvenile nonhomicide offender.”).

262. *See id.* at 2027. Like death, “the sentence alters the [child’s] life by a forfeiture that is irrevocable,” by depriving the child “of the most basic liberties without . . . hope of restoration.” *Id.*

263. *Id.* at 2033

264. *Id.* at 2032.

265. *See supra* notes 75–76 and accompanying text.

266. *See supra* notes 77–78 and accompanying text.

of parole.”²⁶⁷

It is unfortunate that only Justices Breyer and Sotomayor in *Miller* were willing to recognize that the Eighth Amendment, as interpreted by *Graham*, requires a categorical rule against life without parole for juveniles who do not kill or intend to kill.²⁶⁸ Such a rule is the only way to ensure that these individuals do not receive this unconstitutional and excessive punishment. However, even if the trial court in Kuntrell’s case does not find that *Graham*’s reasoning categorically prohibits resentencing Kuntrell to life without parole, a faithful application of *Miller* should preclude the sentence. In conducting individualized sentencing, lower courts should recognize that Kuntrell Jackson and others like him are not among the worst juvenile offenders. Courts should accordingly give these individuals “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation” when resentencing them.²⁶⁹

With these considerations in mind, Part V briefly addresses the implementation of *Miller* by lower courts. First, it argues that lower courts should follow *Miller*’s mandate of individualized sentencing by looking to Supreme Court precedent on individualized sentencing in the capital context. Second, it argues that in doing so, lower courts should recognize that juveniles who did not kill or intend to kill cannot be among the most culpable juvenile offenders, and should accordingly sentence these individuals to something less than life without parole.

V. ATONING FOR OUR SINS AND THEIRS—GIVING OUR CHILDREN A SECOND CHANCE WITH *MILLER V. ALABAMA*

“Then came Peter to him, and said, Lord, how oft shall my brother sin against me, and I forgive him? till seven times? Jesus saith unto him, I say not unto thee, Until seven times: but, Until seventy times seven.” “Then Peter came up and said to him, ‘Lord, how often shall my brother sin against me, and I forgive him? As many as seven times?’ Jesus said to him, ‘I do not say to you seven times, but seventy times seven.’”²⁷⁰

Going forward, *Miller* provides a chance at resentencing for the roughly 2,000 individuals who were mandatorily sentenced to life without parole as juveniles.²⁷¹ It also requires individualized sentencing for juvenile

267. *Miller v. Alabama*, 132 S. Ct. 2455, 2477 (2012) (Breyer, J., concurring).

268. *Id.* at 2475–76.

269. *See Graham*, 130 S. Ct. at 2016.

270. *Matthew* 18:21 (King James). <http://www.biblegateway.com/passage/?search=Matthew+18%3A21-22&version=ESV>.

271. *See Miller*, 132 S. Ct. at 2477 (Roberts, C.J., dissenting). The Court in *Miller* retroactively applied its holding to Kuntrell Jackson’s case, which was on collateral review at the time, *see id.* at 2461, and remanded it for resentencing. *Id.* at 2475. This suggests that the Supreme Court fully intended for *Miller* to apply retroactively to and require resentencing in all cases in which a juvenile was mandatorily sentenced to life without parole. Still, the Court failed to clarify

offenders currently facing imposition of that “harshest possible penalty for juveniles.”²⁷² In all of these cases, courts must ensure that the sentencer (whether it be the judge or the jury) “take into account how children are different”²⁷³ and “have the opportunity to consider [any other] mitigating circumstances before imposing the harshest possible penalty for juveniles.”²⁷⁴

This is no small task. The Court in *Miller* did not prescribe how states should implement this individualized sentencing. However, because *Miller*’s rule is based on Eighth Amendment precedent requiring individualized sentencing in the context of capital punishment,²⁷⁵ it follows that lower courts (and practitioners) should look to these cases to determine what constitutes mitigation, and how it should be presented and considered at the trial level.

First, courts will ultimately need to conduct new sentencing hearings to allow the sentencer to properly consider any mitigating qualities of youth or of the circumstances of the offense.²⁷⁶ The opportunity to present mitigating evidence in the capital context is meant to ensure that “the death penalty is reserved only for the most culpable defendants committing the most serious offenses.”²⁷⁷ Similarly, the opportunity to present mitigation for juveniles facing life without parole is to ensure that only the most culpable juvenile offender—or “the rare juvenile offender whose crime reflects irreparable corruption”—may receive this most severe sentence.²⁷⁸ To this end, *Miller* requires the sentencer “to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”²⁷⁹

this directly, and lower courts are now split on the issue. For example, in *People v. Williams*, 2012 IL App 1st 111145 at *13–14, the First District Appellate Court of Illinois applied the standards for retroactivity established by the Supreme Court in *Teague v. Lane*, 489 U.S. 288 (1989) and as interpreted by the Illinois Supreme Court, and held that *Miller* should be applied retroactively because “it is a rule that requires the observance of those procedures that are implicit in the concept of ordered liberty.” *Id.* (internal citations omitted). Alternatively, in an unpublished opinion, the Third District Court of Appeal in Florida applied the Florida Supreme Court’s test for retroactivity and held that *Miller* is not retroactive because it is a procedural change in the law and does not “constitute a development of fundamental significance.” *Geter v. State*, No. 3D12–76, 2012 WL 4448860, at *3 (Fla. 3d Dist. Ct. App. Sept. 27, 2012).

272. *Miller*, 132 S. Ct. at 2475. It is worth noting that the Court did not explicitly refer to “life without parole” in its final holding. This ostensibly leaves open to principled attack other mandatory sentences for juveniles.

273. *Id.* at 2469.

274. *Id.* at 2475.

275. *Id.*

276. *See id.* at 2467–68. Such a sentencing hearing would not be unlike the penalty phase in the bifurcated trial of a capital case, which was first required by the Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 189–92 (1976).

277. *Miller*, 132 S. Ct. at 2467.

278. *Id.* at 2469.

279. *Id.*

At a minimum, the mitigating evidence that a sentencer must consider under *Miller* includes an offender's age at the time of the offense; the extent of the offender's participation in the offense and "the way familial and peer pressures may have affected" this participation; the offender's "mental and emotional development"; the offender's background, including "family and home environment" and any abuse or trauma or exposure to violence; and any evidence of the offender's capacity for change and rehabilitation.²⁸⁰ This list of mitigating factors in *Miller* is not necessarily exhaustive, however. The Supreme Court has explained that an individualized sentencing determination requires "a broad inquiry into all relevant mitigating evidence,"²⁸¹ and that "virtually no limits are placed" on what this includes.²⁸² As an example, extrapolating from precedent in the capital context suggests that evidence of a juvenile offender's capacity to change may include his or her *post-offense* behavior.²⁸³

As to the presentation of mitigating evidence, the defense should be prepared to put on, and trial courts should be prepared to hear, mitigation experts at the sentencing hearings. An effective mitigation defense requires the skillful collection and presentation of sensitive personal information about a defendant's background—skills in which most lawyers are not well-versed—and as such, competent representation will most often require a mitigation expert or specialist.²⁸⁴ Additionally, trial courts should conduct these sentencing hearings with the understanding that "full consideration" of evidence that mitigates against life without parole should be considered by the sentencing body so that it may "give a reasoned *moral* response to the defendant's background, character, and crime."²⁸⁵ This means that trial courts conducting sentencing hearings under *Miller* should ensure that the sentencer "have the ability to consider the mitigating qualities of youth" and other circumstances of the offense so that the sentencer may legitimately extend mercy to all but the most culpable juvenile offenders.²⁸⁶

280. *See id.*

281. *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998).

282. *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (citing *Payne v. Tennessee*, 501 U.S. 808, 822 (1991) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982))).

283. *See Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (holding that post-offense evidence of the defendant's good behavior during seventh months in jail awaiting trial constituted relevant mitigating evidence).

284. *See* Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J.L. & SOC. CHANGE 237, pt. IV (2008).

285. *See id.* at 243–44 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989), in which the Court "reaffirm[ed] the principle that punishment should be directly related to the personal culpability of the criminal defendant in capital cases") (internal quotation marks omitted). Stetler, a renowned mitigation practitioner and scholar, explains that the jury's fact-finding responsibility in the sentencing phase of capital trials is a "*moral*" one "based on an ethic of caring, compassion, and mercy." *Id.*

286. *See Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012).

Ultimately, when weighing mitigating evidence at sentencing, the sentencer should begin with an understanding that “given all [the Supreme Court] ha[s] said in *Roper*, *Graham*, and [*Miller*] about children’s diminished culpability and heightened capacity for change...appropriate occasions for sentencing juveniles to [life without parole] will be uncommon.”²⁸⁷ In *Miller* the Court explained that one of the reasons this sentence should be rare “is...because of the great difficulty” in distinguishing between those juvenile offenders who are incorrigible—or “whose crime reflects irreparable corruption”—and those who are not.²⁸⁸ It cautioned that considering what we know about youthful offenders’ great capacity for transformation, a sentencer should refrain from making this judgment in the majority of cases.²⁸⁹ Moreover, a sentencer should recognize that this is particularly true in the case of many individuals serving juvenile life without parole because their childhoods were replete with trauma. The Sentencing Project’s recent national survey on juveniles sentenced to life without parole illustrates this point: it provides empirical evidence that many of these individuals had “childhoods...marked by frequent exposure to domestic and community-level violence, problems in school, engagement with delinquent peers, and familial incarceration.”²⁹⁰ Significantly, a staggering 79% of them witnessed violence in their own homes before committing their crimes.²⁹¹ Under *Miller*, this kind of dysfunctional upbringing bears directly on a sentencer’s determination of an offender’s culpability in committing his offense.²⁹² For all of these reasons, lower courts and juries properly resentencing individuals under *Miller* should provide a second chance for many of them outside the walls of adult prison.

Nowhere is this more clear than in the case of individuals like Kuntrell Jackson. Regardless of other possible mitigating circumstances such as a troubled childhood, those juveniles convicted of homicide offenses who did not kill or intend to kill have not shown “irreparable corruption”²⁹³ and are not among the most culpable juvenile homicide offenders.²⁹⁴ *Graham* made clear that a juvenile who lacks homicidal intent has “twice diminished moral culpability.”²⁹⁵ So even without the benefit of a categorical rule—which would properly ensure that no juvenile offender who did not kill or intend to kill is unconstitutionally sentenced to life without parole—courts resentencing individuals like Kuntrell Jackson

287. *Id.*

288. *Id.* at 2469.

289. *Id.*

290. See THE LIVES OF JUVENILE LIFERS, *supra* note 14, at 8.

291. *Id.* at 10.

292. *Miller*, 132 S. Ct. at 2468.

293. See *id.*

294. See *supra* Section IV.C.

295. *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010).

should give them some meaningful opportunity for release.²⁹⁶

The *Miller* Court's discussion of how the mitigating circumstances surrounding Kuntrell Jackson's case should bear on his culpability provide an illustration of this point.²⁹⁷ The Court referred to the circumstances of his case as those that "most suggest" a possibility for rehabilitation.²⁹⁸ It noted that Kuntrell did not himself kill the clerk; the state did not argue that he intended her to die; and the appellate court affirmed the verdict rejecting Kuntrell's affirmative defense only because the jury could have believed that he warned the clerk that "we ain't playin'" rather than told his codefendants that "I thought you all was playin'".²⁹⁹ The Court also explained that although Kuntrell learned that his codefendant Shields had a gun on the way to rob the video store, "his age could well have affected his calculation of the risk that posed, as well as his willingness to walk away at that point."³⁰⁰ In addition, the Court clarified that Kuntrell's "family background and immersion in violence"—in particular the fact that "both his mother and grandmother had previously shot other individuals"—bear on "[his] culpability for the offense."³⁰¹

To be clear: not all of the mitigating circumstances that apply to Kuntrell are necessary for finding that life without parole is an excessive punishment for a juvenile who does not kill or intend to kill.³⁰² For example, suppose a juvenile in Kuntrell's position knew that his accomplice was carrying a gun, or was present for the entire robbery. Or suppose instead that this hypothetical juvenile participated in the robbery to the same extent that Kuntrell did, but did not have his troubled background. A sentencer would likely find such an individual to be more culpable than Kuntrell Jackson, and accordingly sentence him to a longer term of years. Such a determination would be appropriate. But a sentencer would *not* be justified in making the determination that this individual is among the *most* culpable juvenile homicide offenders, because of the

296. Some lower courts have already taken this course. In *Rocker v. State*, No. 2D10-5060, 2012 WL 5499975, at *2, 4 (Fla. 2nd Dist. Ct. App. Nov. 14, 2012), the Second District Court of Appeal in Florida applied *Miller* and reversed the sentence of life without parole for Corey Rocker, who was convicted of felony murder after his accomplice shot the victim of an attempted robbery. In remanding to the trial court for resentencing, the court noted that "based on the reasoning in *Miller*, a sentence of life without the possibility of parole would not be appropriate in this case where there was no evidence that Rocker was the person who shot the victim or that he intended that the victim be killed." *Id.* at *4. See also *Walling v. State*, No. 1D11-4434, 2013 WL 335929, at *1, 3 (Fla. 1st Dist. Ct. App. Jan. 30, 2013) (reversing the defendant's mandatory sentence of life without parole for felony murder where the defendant did not kill the victim but helped plan the robbery and secure the gun, and remanding for resentencing in accordance with *Miller*).

297. *Miller*, 132 S. Ct. at 2468-69.

298. *Id.* at 2468.

299. *Id.* See *supra* note 58 and accompanying text.

300. *Miller*, 132 S. Ct. at 2468.

301. *Id.*

302. See *supra* Section IV.C.

simple fact that the offender did not himself kill or intend to kill.³⁰³ Under *Miller*, sentencing courts—including Kuntrell’s—should give these children a chance to transform and redeem themselves, and a meaningful opportunity to one day create a life outside of prison.³⁰⁴

CONCLUSION

Over 2,500 individuals have been condemned to occupy the cold walls of adult prisons for crimes they committed as children, and to remain there until they die.³⁰⁵ Many of these children committed acts that deserve significant punishment. However, “[l]ife without parole is an especially harsh punishment for a juvenile.”³⁰⁶ It is indisputable that “[u]nder this sentence a juvenile . . . will on average serve more years and a greater percentage of his life in prison than an adult. . . .”³⁰⁷ This most ultimate condemnation “gives no chance for fulfillment outside prison walls, no chance for reconciliation with society,” and ultimately “no hope” for child offenders. And yet we know that even children who commit terrible crimes have the capacity to transform and redeem themselves in profound ways.³⁰⁸ Turning our backs on these children is a shameful departure from the rehabilitative ideals that informed the creation of a separate juvenile system,³⁰⁹ and from basic precepts of humanity, mercy, and compassion.

Kuntrell Jackson’s story highlights the extreme consequences that have resulted from adjudicating and sentencing children as if they are adults. In *Roper*, *Graham*, and now *Miller*, the Supreme Court has recognized that the Eighth Amendment limits the adult punishment of juvenile offenders in significant ways because of their “diminished culpability and heightened capacity for change.”³¹⁰ While the Court stopped short in *Miller* when it declined to extend *Graham*’s categorical rule against life without parole to juveniles who do not kill or intend to kill, *Miller* does provide the possibility of a second chance for at least 2,000 of the individuals serving this sentence.³¹¹ Most significantly, a sentencer must now consider all of the mitigating qualities of youth in deciding whether to impose that “harshest possible penalty” on a juvenile.³¹² The Court in *Miller* suggested that this should preclude the vast majority of children from being

303. See *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010).

304. See *supra* notes 263–64 and accompanying text.

305. See *supra* note 13 and accompanying text.

306. *Graham v. Florida*, 130 S. Ct. 2011, 2028 (2010).

307. *Id.* (explaining that “a 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only).

308. See *supra* notes 149–52 and accompanying text.

309. See *supra* Section II.A.

310. *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

311. *Id.* at 2477 (Roberts, C.J., dissenting).

312. *Id.* at 2469 (majority opinion).

condemned to die in prison, regardless of their crime.³¹³ It also suggested that children like Kuntrell Jackson, who do not kill or intend to kill, are not deserving of this sentence. Lower courts should, and hopefully will, recognize this as well.

313. *See id.* (“But given all we have said in *Roper*, *Graham*, and this decision about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”).