JUVENILE SENTENCING REFORM IN A CONSTITUTIONAL FRAMEWORK*

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INTRODUCTION

In the past decade, the Supreme Court has transformed the constitutional landscape of juvenile crime regulation. In three strongly worded opinions, the Court held that imposing harsh criminal sentences on juvenile offenders violates the Eighth Amendment prohibition against cruel and unusual punishment. *Roper v Simmons* in 2005 prohibited the imposition of the death penalty for a crime committed by a juvenile.[1] Five years later, *Graham v. Florida* held that no juvenile could be sentenced to life without the possibility of parole (LWOP) for a nonhomicide offense.[2] Then in 2012, *Miller v. Alabama* struck down statutes that required courts to sentence juveniles convicted of murder to LWOP.[3] The three decisions present a remarkably coherent and consistent account; indeed, the Court's analysis and rationale are virtually identical across the opinions. In combination, these cases create a special status for juveniles under Eighth Amendment doctrine as a category of offenders whose culpability is mitigated by their youth and immaturity, even for the most serious offenses. The Court also emphasized that juveniles are more likely to reform than adult offenders, and that most should be given a meaningful opportunity to demonstrate that they have done so. In short, because of young offenders' developmental immaturity, harsh sentences that may be suitable for adult criminals are seldom appropriate for juveniles.

These opinions announce a powerful constitutional principle—that "children are different"[4] for purposes of criminal punishment.[5] In articulating

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1. Roper v. Simmons, 543 U.S. 551 (2005).
2. Graham v. Florida, 560 U.S. 48 (2010).
3. Miller v. Alabama, 132 S. Ct. 2455 (2012).
4. *See id.* at 2470.

this principle, the Supreme Court also provided general guidance to courts sentencing juveniles and to lawmakers charged with implementing the rulings. At the same time, the Court did not directly address the specifics of implementation, and it left many questions unanswered about the implications of the opinions for juvenile sentencing regulation. In the years since *Roper*, *Graham*, and *Miller*, courts and legislatures have struggled to interpret the opinions and to create procedures and policies that are compatible with constitutional principles and doctrine. Some reforms were straightforward; states have abolished the juvenile death penalty and restricted the use of LWOP as directed by the Court. But lawmakers sometimes have disagreed about what reforms are required and about how broadly the Court's vision of justice for juvenile offenders should extend in shaping youth sentencing policies.

The impact and reach of these developments in Eighth Amendment doctrine are particularly important because punitive law reforms in the 1990s brought into the adult justice system many youths who previously would have been processed in the separate, more lenient juvenile system.[6] At the same time, adult sentencing and parole regulation generally became much harsher. Not only did LWOP, including mandatory LWOP, become more available as a sentence for serious crimes, but many jurisdictions adopted lengthy mandatory minimum terms for a range of offenses. Further, some states abolished parole altogether for many felonies.[7] Although these policies have been moderated somewhat, juveniles who are convicted of serious felonies risk lengthy mandatory prison terms in many states. Against this backdrop, many lawmakers have concluded that the analysis and principles at the heart of the Supreme Court's constitutional framework have important implications for juvenile sentencing and parole regulation beyond the death penalty and LWOP.

This Article addresses the key issues facing courts and legislatures under this new constitutional regime and provides guidance based on the Supreme Court's Eighth Amendment analysis and on the principles the Court has articulated. Section I begins with the constitutional sentencing framework, grounded in the opinions and embodying the key elements of the Court's analysis. It then explains the underlying developmental knowledge that supports the constitutional framework and the "children are different" principle. As the Court noted, but did not explain fully, its conclusion that juveniles are less culpable and have a greater potential for reform than their adult counterparts is

5. In 2011, the Court also ruled in *J.D.B v. North Carolina*, 131 S. Ct. 2394 (2011), that a child's age must be taken into account during a police interrogation for the purposes of determining whether or not the child is "in custody" and, accordingly, must be given warnings under *Miranda v. Arizona*, 384 U.S. 436 (1966). *J.D.B* relied on the same assumptions about the immaturity of juveniles that informed the juvenile sentencing decisions. 131 S. Ct. at 2403–04.

6. ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 1, 94–117 (2008) [hereinafter SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE].

7. *See* PAULA M. DITTON & DORIS JAMES WILSON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, NCJ 170032, TRUTH IN SENTENCING IN STATE PRISONS 1 (1999) [hereinafter BUREAU OF JUSTICE STATISTICS, TRUTH IN SENTENCING] (discussing increased severity in sentencing in the 1990s).

supported by developmental evidence from both psychology and neuroscience.[8]

Section II examines how courts and legislatures have responded to the Eighth Amendment opinions through reforms of state laws regulating juvenile LWOP (JLWOP). While some state lawmakers appear to ignore or subvert the Supreme Court's holdings, others have embraced the principles underlying *Miller* and *Graham*. A complex, and much-litigated, question was whether *Miller* should be applied retroactively to offenders sentenced before the Court's decision. In a recent opinion that resoundingly endorsed the principles of *Miller* and *Graham*, the Supreme Court resolved this issue. In *Montgomery v. Louisiana*, the Court held that *Miller* applies retroactively because it established a substantive rule of criminal law.[9] Other key issues raised by *Miller* include how to incorporate into the sentencing decision the required mitigating evidence of an offender's youth and immaturity, as well as how the state can negate the empirical assumption of youthful immaturity. These issues are critically important whenever a sentence of LWOP is considered, of course, but they are also relevant when juveniles face other harsh sentences.

Section III translates *Miller*'s directive that specific factors be considered in making individualized sentencing decisions. Our aim is to guide courts in structuring sentencing hearings that incorporate sound developmental research and other evidence supporting or negating mitigation, without going beyond the limits of science. Section IV explores the broader implications of the Supreme Court's developmental framework for juvenile sentencing and parole proceedings, implications that have already sparked law reforms beyond the relatively narrow holdings of *Graham* and *Miller*. Finally, the Article ends on a cautionary note, pointing to evidence that constitutionally sound, developmentally based policies may be vulnerable to political and other pressures. Aside from mandates in the holdings themselves, reforms can be dismantled or discounted if conditions change. Measures to sustain the current trend in law reform are discussed.

I. FAIR JUVENILE SENTENCING IN A DEVELOPMENTAL FRAMEWORK

Although the Supreme Court has not produced a detailed blueprint for courts and lawmakers to guide the sentencing of juvenile offenders, it has provided a coherent framework grounded in conventional criminal law principles and scientific research on adolescence. To be sure, both the principles and the scientific foundation of the developmental framework require some elaboration. But the juvenile sentencing opinions contain several clearly elaborated themes and offer compelling lessons that can inform a fair sentencing regime for juveniles. Indeed, the Court's consistent analysis across the three opinions provides a robust developmental framework that already has had

8. See *infra* Part I.A.1 for a discussion of developmental science and adolescent immaturity. *See also* Laurence Steinberg, *The Influence of Neuroscience on U.S. Supreme Court Decisions About Adolescents' Criminal Culpability*, 14 NATURE REVS. NEUROSCIENCE 513, 515–16 (2013) [hereinafter Steinberg, *Influence of Neuroscience*].

9. 136 S. Ct. 718, 736 (2016); *see infra* notes 77–86 and accompanying text.

far-reaching effects.[10]

A. The Key Themes in the Court's Sentencing Opinions

Several themes combine to form the Court's developmental framework. First, juveniles, because of their developmental immaturity, are less culpable in their offending than their adult counterparts; therefore the harsh sentences rejected by the Court were disproportionate. Second, juveniles have a greater potential to reform than do adult criminals, and most juveniles should be given the opportunity to do so. Third, juveniles are less able to navigate the justice process than are adults, and a juvenile's reduced competence may be a factor leading to a harsh sentence.

1. The Reduced Culpability of Juveniles

The most important lesson for lawmakers (and the heart of the Court's analysis) is that the criminal choices of juveniles are influenced by developmental factors and therefore most young offenders are less culpable than are their adult counterparts.[11] For this reason, the challenged sentencing statutes violated proportionality, a bedrock principle of criminal law, because the statutes required or allowed harsh adult sentences to be imposed on juveniles. Proportionality holds that criminal punishment should be based not only on the harm caused by the crime, but also on the culpability of the offender.[12] The Court did not question that juvenile offenders are responsible for their criminal conduct. Instead, its developmental model recognizes that adolescent offenders can and should be held accountable for their crimes. However, because of their developmental immaturity, juveniles deserve less punishment than their adult counterparts, even when they commit murder—the crime involving the greatest harm.

The Court's proportionality analysis was firmly grounded in conventional sources of mitigation in criminal law,[13] although this point was not made explicit in the opinions.[14] Three dimensions of adolescence mitigate blameworthiness in young offenders. First, the culpability of youths is reduced because developmental factors characteristic of adolescence limit their decision-making capacities in ways that influence their criminal choices. The Court pointed to an

10. The Court powerfully reaffirmed the developmental framework and the "children are different" principle in *Montgomery v. Louisiana* in 2016, *id.*

11. SCOTT & STEINBERG, RETHINKING JUVENILE JUSTICE, *supra* note 6, at 118–48.

12. *Id.* at 123–24.

13. *See* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1010–11 (2003) [hereinafter Steinberg & Scott, *Less Guilty by Reason of Adolescence*].

14. Two authors of this Article first offered the culpability analysis adopted by the Court. *See* Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV 799, 821–29 (2003) [hereinafter Scott & Steinberg, *Blaming Youth*]; *see also* Steinberg & Scott, *Less Guilty by Reason of Adolescence*, *supra* note 13, at 1010.

"inability to assess consequences"[15] and to the "recklessness, impulsivity, and heedless risk-taking" that contribute to an "underdeveloped sense of responsibility"[16] in adolescents. These factors mitigate youthful culpability under long-established doctrine holding that individuals with reduced decision-making capacity are deemed less culpable than other criminals.[17] Second, mitigation also applies to crimes committed in response to external pressure or coercion; the criminal law defense of duress is an example of this kind of reduced culpability. This is relevant to juvenile offending because, as the Court explained, adolescents are vulnerable to negative pressures and influences, including peer pressure; moreover, teenagers, as legal minors, have limited control over their environment or ability to extricate themselves from their homes and other settings (such as their neighborhoods and schools) that can contribute to their criminal activity.[18] Finally, the Court pointed to the unformed nature of adolescents' character, observing that because much juvenile offending is the product of "transient immaturity,"[19] it is less likely than an adult's to be "evidence of irretrievabl[e] deprav[ity]."[20] Again, the Court's analysis tracked conventional mitigation doctrine: some criminal sentencing statutes allow defendants to introduce mitigating evidence to show that their criminal activity was "out of character," or, put another way, was not the product of bad character.[21] Similarly, the crimes of most juveniles are the product of immaturity and not of bad character. Together these rationales strongly support a response to juvenile crime that is based on mitigation and a sentencing regime that is more lenient than that which is applied to adult criminals.

2. An Opportunity to Reform

The second prominent theme in the opinions is grounded in the criminal law's goal of reducing crime and promoting public safety. Juveniles should not automatically be sentenced to LWOP because they are more likely to reform than are adult criminals. Juveniles have a greater potential for reform for two reasons. First, adolescent brains are more malleable than are those of adults and thus juveniles are more likely to respond positively to rehabilitative efforts.[22] And second, because the offending of most teenagers is the product of "unfortunate yet transient immaturity,"[23] juveniles are likely to desist from involvement in criminal activity as they mature into adulthood. The likelihood that most youths will mature out of their criminal tendencies means that the

15. Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012).

16. *Id.* at 2458 (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).

17. *Id*. at 2465–66.

18. *Id*. at 2464; Steinberg & Scott, *Less Guilty by Reason of Adolescence*, *supra* note 13, at 1014.

19. *Miller*, 132 S. Ct. at 2469.

20. *Id.* at 2458 (citing *Roper*, 543 U.S. at 570).

21. Scott & Steinberg, *Blaming Youth*, *supra* note 14, at 826.

22. LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 45 (2014) [hereinafter STEINBERG, AGE OF OPPORTUNITY].

23. *Miller*, 132 S. Ct. at 2469 (quoting *Roper*, 543 U.S. at 573).

need for public protection usually cannot justify long criminal sentences. In other words, lengthy incarceration of juveniles seldom serves the preventive purposes of the criminal law. In both *Graham* and *Miller,* the Court reiterated forcefully that LWOP completely denies young offenders a meaningful *opportunity* to reform;[24] in most youths, the Court assumed, reform will in fact occur through rehabilitation and with maturation.

3. Reduced Trial Competence

The Court also emphasized in *Graham* and *Miller* that severe sentences might result from juvenile defendants' relative incapacity to deal effectively with the police, execute plea agreements, or participate competently in their trials.[25] The issue of "developmental" incompetence has become very salient in the past generation. As more juveniles were transferred to criminal court and tried as adults in the 1990s, reformers raised the concern that juveniles, due to developmental immaturity, might not meet adult standards for competence to stand trial.[26] This is important because defendants' trial competence is required under the Due Process Clause of the Fourteenth Amendment to ensure fair criminal proceedings.[27] In response to this concern, reformers proposed legislative reforms creating special procedures to evaluate developmental competence in juveniles.[28] In the Eighth Amendment opinions, the Supreme Court's attention to juveniles' reduced procedural competence (as opposed to their lesser culpability) was directed specifically at how teenage defendants' immature capabilities might lead to harsh sentences. This might be due to an impulsive confession, a rash rejection of a plea offer, or an inability to assist counsel by challenging witnesses or pointing to relevant exculpatory or mitigating evidence; it might also result because immature teenage defendants in court may create negative impressions, to their detriment.[29] In general, the Court's view was that a juvenile may simply be less able than an adult to navigate a high-stakes encounter with the police and a criminal proceeding in which his entire future life is on the line.

A general point is worth noting. A core problem with the mandatory LWOP sentence under consideration in *Miller* was that juveniles were *automatically* subject to the same harsh sentences as adult counterparts. Thus,

24. *Id.* at 2465; Graham v. Florida, 60 U.S. 48, 50 (2010).

25. *Miller*, 132 S. Ct. at 2468; *Graham*, 560 U.S. at 68.

26. *See generally* Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793 (2005) (analyzing developmental competence and its emergence as an issue in the 1990s, as well as possible legal responses).

27. Dusky v. United States, 362 U.S. 402, 402 (1960).

28. KIMBERLY LARSON, THOMAS GRISSO & NAT'L YOUTH SCREENING & ASSESSMENT PROJECT, DEVELOPING STATUTES FOR COMPETENCE TO STAND TRIAL IN JUVENILE DELINQUENCY PROCEEDINGS: A GUIDE FOR LAWMAKERS 21–26 (2011), http://escholarship.umassmed.edu/cgi/viewcontent.cgi?article=1530&context=psych_cmhsr.

29. In *Tate v. State*, a Florida appellate court reversed the murder conviction of thirteen-year-old Lionel Tate because his competence to stand trial was questionable and not evaluated during the proceeding. 864 So. 2d 44, 51 (Fla. Dist. Ct. App. 2003).

the sentencing court had no opportunity or ability to consider the mitigating factors that usually reduce youthful culpability, indicate the juvenile's potential to reform, or impede effective participation in the justice system. Since most juveniles do not deserve to be punished as severely as adults, the mandatory imposition of LWOP amounted to a routine violation of proportionality and, in most cases, an unjust punishment.

4. Two Final Lessons

The Court underscored two key points about its developmentally based sentencing framework that are important in interpreting the opinions and implementing justice policy in accordance with constitutional principles. First, in *Miller*, the Court emphasized that "none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific."[30] In other words, mitigation applies not just to nonhomicide offenses (as in *Graham*), but also to murder (as in *Miller*). Here, the Court explicitly rejected the view implicitly held by many prosecutors and some courts that juveniles who cause the grave harm of murder warrant adult punishment simply on that basis. But the implication of the Court's statement is broader than it explicitly recognized. As Justice Roberts pointed out in his *Miller* dissent, the Court, in emphasizing that "children are different," announced a general principle of reduced culpability that applies not only to the crimes at issue in the cases but generally to the criminal conduct of young offenders.[31] In other words, the same developmental factors that mitigate culpability for murder and armed robbery also influence adolescents committing less serious crimes.

The second point is just as important: the Court recognized that developmental variation exists in adolescence, suggesting that occasional juvenile offenders might be sufficiently mature to deserve harsh adult sentencing, but it insisted emphatically that the offending of *most* adolescents is driven by developmental influences. A statute that imposed LWOP on a mandatory basis (even for homicide) categorically excluded evidence about the defendant's youthful immaturity that, in most cases, would mitigate culpability and justify a reduced sentence. Thus, although *Miller* allows a juvenile to receive a sentence of LWOP on a discretionary basis, the Court predicted that LWOP would be "uncommon," given the reduced culpability of youth.[32] This word choice is noteworthy, as Justice Roberts noted in dissent, because it is indistinguishable from the prohibition of "unusual" sentences in the Eighth Amendment itself.[33] Moreover, the Court repeatedly underscored that it was extraordinarily difficult to distinguish in adolescence the typical youth whose crime was the product of "transient immaturity" from the "rare" juvenile whose crime reflected "irreparable corruption."[34] This potential for error, which is

30. *Miller*, 132 S. Ct. at 2465.

31. *Id*. at 2482 (Roberts, C.J., dissenting).

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

33. *Id*. at 2481 (Roberts, C.J., dissenting).

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

likely to be exacerbated in the wake of a brutal crime, led the Court to categorically prohibit the death penalty and JLWOP (for nonhomicide offenses) in *Roper* and *Graham*, and to warn that JLWOP should be rarely imposed, even for homicide, in *Miller*. As discussed below, the Court's insistence that most juveniles are less culpable than are their adult counterparts, and that the sentence of JLWOP should be uncommon, suggests that the state carries a substantial burden when it seeks to demonstrate that LWOP is an appropriate sentence for a juvenile.[35]

The Supreme Court has clearly delineated a special status for juvenile offenders under Eighth Amendment doctrine and provided a coherent framework for lawmakers and sentencing courts going forward. The Court's opinions defining new Eighth Amendment protections for juveniles on the basis of their reduced culpability and potential for reform dealt only with the youths facing the harshest sentences. However, the Court made clear that the principles that form its developmental framework apply generally to juvenile offenders and to a broad range of criminal offenses.

B. Developmental Science and Adolescent Immaturity

In its juvenile sentencing decisions, the Supreme Court has increasingly relied on findings from studies of behavioral and brain development to support the position that adolescents are less mature than adults in ways that mitigate their criminal culpability and indicate their potential for reform. Although the Court had previously acknowledged that adolescents and adults are different in legally relevant ways,[36] these opinions were the first to look to science for confirmation of what "any parent knows."[37] As described above, the Court pointed to three characteristics of adolescence that distinguish youths from adults—immature and impetuous decision making with little regard for consequences, vulnerability to external coercion (particularly by peers), and unformed character—which make it difficult to judge an adolescent's crime as "irretrievably depraved." In support of this analysis, first offered in *Roper*, the Court increasingly relied on developmental science, and particularly on neuroscience. The body of adolescent brain research has expanded dramatically in the past decade. During this period, references to neuroscience in the Court's opinions analyzing adolescent culpability have become more frequent,

35. Some courts have determined that the Supreme Court has effectively created a presumption against JLWOP. *E.g.*, State v. Riley, 110 A.3d 1205, 1214 (Conn. 2015). See *infra* notes 64–68 and accompanying text for a discussion of the presumption against JLWOP. Moreover, in *Montgomery v. Louisiana*, which held that *Miller* applies retroactively, the Court underscored that the sentence of LWOP was reserved for the "rare juvenile offender whose crime reflects irreparable corruption." 136 S. Ct. 718, 734 (2016) (quoting *Miller*, 132 S. Ct. at 2469). Justice Roberts joined the majority in *Montgomery*. See *infra* Part II.B for further discussion on *Montgomery*.

36. In *Bellotti v. Baird*, the Court pointed to the immaturity of many pregnant minors in permitting restrictions on minors' access to abortion. 443 U.S. 622, 642–44 (1979) (indicating that a hearing to determine a minor's maturity is appropriate to determine whether a pregnant minor could obtain an abortion without parental consent).

37. *Miller*, 132 S. Ct. at 2464 (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).

and neuroscience has generally become more influential in legal policy and criminal practice.[38]

From a psychological perspective, adolescents' involvement in criminal activity is a specific instance of a more general propensity for risk-taking; thus, the science on which the Court relied in these opinions situates criminal behavior within the broader context of adolescent risk-taking. Patterns of age differences in criminal activity are similar to those of many other types of risky behavior—including those that have nothing to do with crime, such as self-inflicted injury or accidental drowning—and many of the hallmarks of juvenile offending are similar to those that characterize adolescent recklessness more generally. Most juvenile crimes, like most forms of adolescent risk-taking, are impulsive acts that are committed without full consideration of their possible long-term consequences.

Developmental research on age differences in risk-taking is extensive and consistent. Many studies have found that adolescents and individuals in their early twenties are more likely than either children or somewhat older adults to engage in risky behavior; most forms of risk-taking follow an inverted U-shaped curve with age, increasing between childhood and adolescence, peaking in either mid or late adolescence, and declining thereafter.[39] The peak age varies depending on the specific type of risky activity; thus the peak for criminal involvement is age eighteen,[40] while the peak for binge drinking is age twenty-two.[41] Involvement in both violent and nonviolent crime follows this pattern and is referred to as the "age-crime curve." This relationship between age and crime is robust and has been found in many different countries and over historical time.[42]

In recent years, psychologists have theorized that the relationship between age and risk-taking is best understood by considering the contrasting

38. Steinberg, *Influence of Neuroscience*, *supra* note 8, at 513. The evolution of the Court's use of adolescent brain science to support its reasoning is worthy of comment. Before *Roper*, neuroscience played no part in decisions about developmental differences between adolescents and adults. This is not surprising, since little published research existed on adolescent brain development before 2000. In *Roper*, adolescent brain development was mentioned during oral arguments, and presented to the Court through amici, but it was not referenced in the Court's opinions, which instead emphasized behavioral differences between adolescents and adults. *Roper*, 543 U.S. at 569–70. *Graham* alluded to adolescent brain development—but only in remarking on the maturation in late adolescence of brain regions important for "behavior control." 560 U.S. 48, 68 (2010). But in *Miller,* neuroscience was front and center. The Court underscored that its conclusions in the earlier opinions continued to be strengthened by neuroscience research, pointing to adolescent immaturity in "higher-order executive functions such as impulse control, planning ahead, and risk avoidance." *Miller*, 132 S. Ct. at 2464–65 n.5 (quoting Brief for the American Psychological Association, American Psychiatric Association, and National Association of Social Workers as Amici Curiae in Support of Petitioners at 3, Miller v. Alabama, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647), 2012 WL 174239).

39. Steinberg, *Influence of Neuroscience*, *supra* note 8, at 515.

40. *Id.*

41. U.S. DEP'T OF HEALTH & HUMAN SERVS., REPORT TO CONGRESS ON THE PREVENTION AND REDUCTION OF UNDERAGE DRINKING 6 (2012), http://store.samhsa.gov/shin/content/SMA11-4645/SMA11-4645.pdf.

42. Alex R. Piquero, *Taking Stock of Developmental Trajectories of Criminal Activity over the Life Course*, *in* THE LONG VIEW OF CRIME: A SYNTHESIS OF LONGITUDINAL RESEARCH 23, 49 (Akiva M. Liberman ed., 2008).

developmental trajectories of sensation seeking and impulse control.[43] Sensation seeking—the tendency to pursue novel, exciting, and rewarding experiences—increases substantially around the time of puberty and remains high well into the early twenties, when it begins to decline. In contrast, performance on measures of what psychologists refer to as "executive functions," such as planning, thinking ahead, and self-regulation, is low during childhood and improves gradually over the course of adolescence and early adulthood; individuals do not evince adult levels of impulse control until their early or midtwenties. Mid-adolescence, therefore, is a time of high sensation seeking but still immature ability to control impulses—a combination that predisposes individuals toward risky behavior and that distinguishes adolescents' decision making from that of adults. Before adolescence, individuals are typically impulsive, but they are not especially prone toward sensation seeking. In young adulthood, sensation seeking is still relatively high, but by then individuals have developed more mature levels of impulse control. By the midtwenties, both sensation seeking and impulsivity are much lower, which accounts for the steep drop-off in criminal activity that generally occurs at this age.

Scientific data supporting this account influenced the Court's characterization of adolescents in *Roper*, and consistent research findings were even more extensive by the time *Graham* and *Miller* were decided. Numerous self-report and behavioral studies have shown that, compared with adults, adolescents are more impulsive, less likely to consider the future consequences of their actions, more likely to engage in sensation seeking, and more likely to attend to the potential rewards of a risky decision rather than to the potential costs.[44] Other studies have provided support for the contention that adolescents are more vulnerable to coercive pressure than adults and that the presence of peers increases risky decision making among adolescents but not older individuals.

The evidence with respect to the relatively unformed character of adolescents is more limited, although numerous reviews have been published showing that more than ninety percent of all juvenile offenders desist from crime by their midtwenties and that the prediction of future violence from adolescent criminal behavior, even serious criminal behavior, is unreliable and prone to error.[45] Moreover, longitudinal studies of personality development have found that personality becomes increasingly stable during late adolescence, especially with respect to qualities such as self-control and responsibility.[46] This research supports the Court's conclusion that juvenile offenders have a greater potential for reform than do adults.

The biological and psychological factors discussed by the Court that can

43. Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEVELOPMENTAL REV. 78, 99 (2008) [hereinafter Steinberg, *Social Neuroscience Perspective*].

44. *Id.* at 88.

45. Terrie E. Moffitt, *Life-Course-Persistent and Adolescence-Limited Antisocial Behavior: A 10-Year Research Review and a Research Agenda*, *in* CAUSES OF CONDUCT DISORDER AND JUVENILE DELINQUENCY 49, 49–75 (Benjamin B. Lahey et al. eds., 2003).

46. Robert R. McCrae & Paul T. Costa Jr., *The Stability of Personality: Observations and Evaluations*, CURRENT DIRECTIONS PSYCHOL. SCI., Dec. 1994, at 173, 173–75.

contribute to teenage offending are normative, that is, typical of adolescence as a developmental stage. This does not mean, of course, that all adolescents will be inclined to commit crimes due to these developmental influences. Many other factors influence teenage offending, including, most importantly, social context, a factor indirectly alluded to by the Court.[47]

Findings from developmental neuroscience align well with those from behavioral and psychological studies of age differences in traits like sensation seeking and impulsivity. Neuroscientists have described a maturational imbalance during adolescence that is characterized by relative immaturity in brain systems that are involved in self-regulation during a time of relatively heightened neural responsiveness to appetitive, emotional, and social stimuli.[48] With respect to self-regulation, structural imaging studies using diffusion tensor imaging (DTI) indicate immaturity in neural connections within a fronto-parietal-striatal brain system (localized primarily in the lateral prefrontal cortex, inferior parietal lobe, and anterior cingulate cortex) that supports various aspects of executive function.[49] These connections become stronger over the course of adolescence as a result of both maturation and experience, and the strength of these connections is positively correlated with impulse control. Maturation of the structural connectivity (i.e., the physical connections between brain structures) in this brain system is paralleled by increases in functional connectivity (i.e., concurrent activation of multiple brain regions) and by changes with age in patterns of activation during tasks that measure aspects of "executive function," including working memory, planning, and response inhibition (all of which are important for impulse control and thinking ahead), as revealed by functional magnetic resonance imaging (fMRI).[50]

By contrast, numerous fMRI studies show relatively greater neural activity during adolescence than in childhood or adulthood in a brain system that is located mainly in the ventral striatum and ventromedial prefrontal cortex.[51] This system is known to have an important role in the processing of emotional and social information and in the valuation and prediction of reward and punishment. According to what has been referred to as a "dual systems model," the heightened responsiveness of this socio-emotional, incentive-processing system is thought to overwhelm or, at the very least, tax the capacities of the self-regulatory system, compromising adolescents' abilities to temper strong positive and negative emotions and inclining them toward sensation seeking, risk-taking, and impulsive

47. The Court alluded to the inability of youths to extricate themselves from environments that may contribute to their offending. Miller v. Alabama, 132 S. Ct. 2455, 2468 (2012). Family influence was also noted as potentially a mitigating factor in *Miller*. *Id.*

48. B.J. Casey, Sarah Getz & Adriana Galvan, *The Adolescent Brain*, 28 DEVELOPMENTAL REV. 62, 66 (2008).

49. Steinberg, *Influence of Neuroscience*, *supra* note 8, at 516.

50. Beatriz Luna, Aarthi Padmanabhan & Kirsten O'Hearn, *What Has fMRI Told Us About the Development of Cognitive Control Through Adolescence?*, 72 BRAIN & COGNITION 101, 110 (2010).

51. *E.g.*, Monica Luciana & Paul F. Collins, *Incentive Motivation, Cognitive Control, and the Adolescent Brain: Is It Time for a Paradigm Shift?*, 6 CHILD DEV. PERSP. 392, 392 (2012).

antisocial acts.[52] Although it is less well developed, a growing literature on the development of the "social brain," which was presented to the Court in *Miller*, provides evidence of functional changes that are consistent with heightened attention to the opinions of others, which may be linked to adolescents' greater susceptibility to peer influence, one of the hallmark characteristics of this age group that was highlighted by the Court in the sentencing opinions.[53]

To date, the relevant science on brain and behavioral development has been used primarily to bolster arguments about adolescents' diminished responsibility relative to adults. And it is clear that the scientific research described above supports the Court's description of adolescence as a period of great developmental change, in which individuals are impulsive decision makers with weak behavioral controls who are highly sensitive to their peers. But in recent years, findings indicating that adolescence is a second period of heightened neuroplasticity (the first such period includes infancy and early childhood) support the view that juveniles not only are less culpable than adults, but also are likely to be better candidates for rehabilitation. Neuroplasticity refers to the capacity of the brain to change in response to experience. Although the brain is always plastic to some degree (learning would not be possible if the brain were not malleable), it is far more so in adolescence than in adulthood. Recent studies point to the impact of sex hormones at puberty on fundamental processes that contribute to changes in the brain's anatomy, including synaptogenesis (the development of new connections between neurons), synaptic pruning (the elimination of unused neural connections), and myelination (the growth of white matter sheathes around neural circuits), all of which improve the brain's efficiency and effectiveness.[54]

Of particular importance is the finding that brain regions that comprise the self-regulatory brain system described earlier are especially plastic in adolescence.[55] This has two important implications for the justice system's response to juvenile offending. First, in light of the well-established link between poor self-control and recidivism,[56] the fact that brain systems that support self-regulation are still changing in adolescence supports the conclusion that most adolescents are likely to mature out of antisocial behavior as the functioning of these systems continues to improve. Thus the brain research sheds light on studies showing that very few juvenile offenders become hardened adult criminals and that, in the aggregate, crime declines sharply during the decade of the twenties.[57] This research also supports the

52. Steinberg, *Influence of Neuroscience*, *supra* note 8, at 516.

53. Stephanie Burnett et al., *The Social Brain in Adolescence: Evidence from Functional Magnetic Resonance Imaging and Behavioral Studies*, 35 NEUROSCIENCE & BIOBEHAVIORAL REVS. 1654, 1655 (2011); *see* Steinberg, *Influence of Neuroscience*, *supra* note 8, at 513.

54. Steinberg, *Social Neuroscience Perspective*, *supra* note 43, at 94.

55. *Id.* at 83.

56. Kathryn C. Monahan et al., *Trajectories of Antisocial Behavior and Psychosocial Maturity from Adolescence to Young Adulthood*, 45 DEVELOPMENTAL PSYCHOL. 1654, 1655 (2009).

57. Piquero, *supra* note 42, at 44–45.

Court's insistence that, with maturity, juvenile offenders are likely to reform.

Second, because the heightened neuroplasticity characteristic of adolescence makes the brain susceptible to both positive and negative influences, the correctional setting in which juvenile offenders are placed as a result of sentencing takes on special significance. Neuroscientists are fond of saying that plasticity cuts both ways. Developmentally appropriate interventions and placements that are designed to strengthen adolescents' self-regulation can take advantage of the malleability of the relevant brain systems during adolescence and their susceptibility to positive influence. On the other hand, programs and settings that do not support the development of self-regulation can actually stunt its development and may contribute to recidivism by impeding the normal maturation of impulse control. In one recent study that tracked the behavior of serious juvenile offenders over seven years, the strongest psychological predictor of continued offending was failure to show the gains in impulse control that typically occur in mid to late adolescence.[58] In contrast, the offenders who evinced the most significant improvements in impulse control during the course of the study were most likely to desist from crime.[59] This research, on the links between normative psychological development and recidivism, can inform the implementation of the Supreme Court's mandate that juvenile offenders be given an opportunity to reform because not all correctional environments will likely provide the opportunity for the sort of psychological maturation that will lead to desistence from crime.

II. LWOP IN THE POST-*MILLER* ERA

The three Supreme Court sentencing opinions have generated a wave of law reform that has dramatically altered the landscape of juvenile sentencing. Some legal changes were directly mandated by the constitutional rulings; all states that had allowed the death penalty or JLWOP for nonhomicide offenses abolished those laws, and JLWOP can no longer be mandatory even for homicide. But some courts and legislatures have taken further steps, adopting reforms not explicitly ordered in the opinions, but implied in the Supreme Court's analysis and firmly grounded in its constitutional framework. To be sure, the responses have not been uniform: the California legislature[60] and the Supreme Court of Iowa,[61] for example, have embraced the Court's framework, while other lawmakers have interpreted the opinions narrowly, implicitly (or explicitly) challenging the developmental principles on which the opinions rest. This Section examines the sentencing reforms undertaken in the wake of the Court's rulings. It first focuses on the post-*Miller* status of LWOP for juveniles and then

58. Monahan et al., *supra* note 56, at 1665–66.

59. *Id.* at 1666.

60. See *infra* notes 72–73 and accompanying text for a discussion of the California juvenile parole statute enacted in the wake of *Graham*.

61. See *infra* notes 99–100, 132–33, and accompanying text for an instance in which the Iowa Supreme Court rejected the imposition of adult mandatory minimum sentences on children pursuant to its application of *Miller*.

explains the complex issue, resolved by the Supreme Court in 2016 in *Montgomery*, of whether *Miller* applies retroactively to prisoners whose LWOP sentences were finalized before *Miller* was decided.[62] The final set of issues involves reforms to lengthy term-of-years sentencing schemes directly in response to the Eighth Amendment rulings.

A. State Responses—Interpreting Miller

Miller did not require states to abolish the sentence of LWOP for juveniles convicted of homicide. But the Court made clear that this sentence is seldom acceptable—and only after full consideration of the juvenile's age, immaturity, and other mitigating factors, together with an assessment of the impact of those factors on his offending.[63]

Several states have drawn from the Supreme Court's analysis the lesson that LWOP is inherently problematic under the Eighth Amendment. Since *Roper* was decided, many states have abolished LWOP altogether for juveniles, often explicitly in response to the Supreme Court opinions.[64] In Massachusetts, the state's highest court relied heavily on *Miller* in abolishing LWOP under its state constitution as a disproportionate sentence for juveniles due to their reduced culpability.[65] LWOP is constitutionally flawed as well, the Massachusetts court insisted, because it categorically denies the juvenile the opportunity to reform, as most youths would do with maturity. This court pointed to research showing that the adolescent brain is not fully developed, either structurally or functionally, in concluding that a court in an individualized hearing could *never*, with sufficient certainty, find a youth to be possessed of an irretrievably depraved character, so as to deserve the harsh sentence of LWOP.

Miller suggested that courts, in fact, may be able to make this judgment. However, to conform to the Court's ruling, jurisdictions that retain the sentence of LWOP for juveniles convicted of homicide will need to adopt reforms that go beyond simply converting LWOP to a discretionary sentence. Procedures and guidelines are essential to assure that the mitigating factors that reduce the culpability of juveniles and make them more likely to reform are considered in the sentencing decision. *Miller* specified several factors, all linked to youthful immaturity and the sources of mitigation discussed above:

1. The juvenile's "age and its hallmark features" including "immaturity, impetuosity, and [a] failure to appreciate consequences";

62. See *infra* Part II.B for a discussion of *Montgomery* and *Miller*'s retroactivity.

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

64. *E.g.*, COLO. REV. STAT. ANN. § 18-1.3-401(4)(b) (West 2016); HAW. REV. STAT. ANN. §§ 706-656, 706-657 (West 2016); KAN. STAT. ANN. § 21-6618 (West 2015); KY. REV. STAT. ANN. § 640.040 (West 2016); MASS. GEN. LAWS ANN. ch. 265, § 2(b) (West 2016); MONT. CODE ANN. § 46-18-222(1) (West 2015); TEX. PENAL CODE ANN. § 12.31 (West 2015); W. VA. CODE ANN. § 61-11-23 (West 2016); WYO. STAT. ANN. § 6-2-101(b) (West 2015). In Hawaii, the commentary to the statute expressly points to *Miller* for the idea that children are different from adults. *See* HAW. REV. STAT. ANN. § 706-656 cmt.

65. Diatchenko v. Dist. Att'y, 1 N.E.3d 270, 276 (Mass. 2013).

2. Family and home environment, from which the youth "cannot extricate himself";
3. The circumstances of the offense, including the role of the juvenile and the extent to which peer pressure was involved;
4. The "incompetencies" of the youth that may have disadvantaged him in dealing with the police or participating in the criminal proceedings;
5. The youth's potential for rehabilitation.[66]

But *Miller* goes beyond simply directing that mitigating evidence be considered. Two elements of the Court's analysis are key to implementing its direction to sentencing courts—its conclusion that the sentence of LWOP will be "uncommon" because most juveniles, due to their developmental immaturity, are less culpable than are adults, and its emphasis on the risk of an erroneous LWOP sentence. Together, these points effectively create a presumption of immaturity.[67] To be sure, *Miller* did not formally create a legal presumption against the sentence of JLWOP. But a fair reading of the opinion supports the conclusion that the state bears the substantial burden of demonstrating that the convicted juvenile is one of the rare youths who deserves this sentence—even for the grave offense of murder.[68] We postpone to Section III a discussion of juvenile sentencing evaluations and hearings, including the type of evidence the state appropriately might bring to support an LWOP sentence, as well as the kind of evidence that supports mitigation.

For present purposes, it should be noted that there is substantial variation in the extent to which lawmakers have provided the kind of guidance that the Supreme Court indicated is needed. Some courts and legislatures have minimized the importance of the mitigating factors, casually directing sentencing courts to consider "*Miller* factors," or factors in mitigation, with little elaboration or description.[69] But other courts and legislatures have sought to ensure that the

66. *See Miller*, 132 S. Ct. at 2468.

67. State v. Riley, 110 A.3d 1205, 1214 (Conn. 2015) ("[*Miller*] suggests that the mitigating factors of youth establish, in effect, a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances.").

68. See *infra* note 102 for examples of courts and legislatures that have recognized the state's burden.

69. *E.g.*, MICH. COMP. LAWS ANN. § 769.25(6) (West 2016) (stating that, at a hearing on the motion to sentence an individual under the age of eighteen at the time of the crime to life imprisonment without parole, "the trial court shall consider the factors listed in *Miller v. Alabama*"); S.D. CODIFIED LAWS § 23A-27-1 (2016) (establishing that at a presentence hearing for a juvenile, the defendant shall have the opportunity "to present any information in mitigation of punishment"); Jackson v. Norris, 426 S.W.3d 906, 907, 910 (Ark. 2013) (instructing that a sentencing hearing be held where Jackson may present evidence of his "'age, age-related characteristics, and the nature of' his crime" (quoting Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012)); State v. Riley, 58 A.3d 304, 314–16 (Conn. App. Ct. 2013) (holding that trial courts have broad discretion in what factors to consider, and as long as defendants have the opportunity to present mitigating factors, courts do not need to explicitly consider "juvenile deficiencies"), *rev'd*, 110 A.3d 1205 (Conn. 2015); People v. Woolfolk, 848 N.W.2d 169, 200 (Mich. Ct. App. 2014) ("We therefore hold that *Miller* applies to this case and that resentencing is required . . . . and remand for resentencing in accordance with *Miller*." (footnote omitted)); Parker v. State, 119 So.3d 987, 998 (Miss. 2013) (reversing a sentence and remanding for a

mitigating evidence that the Supreme Court found so important is considered by the sentencing judge by providing a comprehensive list of factors based on those described in *Miller*.[70] Particularly helpful is the guidance provided by the California Supreme Court in *People v. Gutierrez*, a case that rejected an earlier decision adopting a judicial presumption favoring JLWOP for homicide.[71] *Gutierrez* provided a substantive analysis of the five mitigating factors described in *Miller* and directed sentencing courts to give each factor full consideration. But little attention has been directed toward issues of burden of proof or toward the scope of the state's evidence that might negate the implicit presumption of immaturity. Sentencing courts need guidance in executing the Court's mandate; state laws that allow unstructured discretion create a high risk that judges will impose sentences that fail to recognize that the reduced culpability of youthful offenders applies even to the crime of murder.

California has retained JLWOP, but provides a statutory mechanism to correct erroneous decisions by sentencing courts. Youths sentenced to LWOP can petition for resentencing after serving fifteen years.[72] This statute preceded *Miller*, but it reflects the concern voiced by the Supreme Court in *Graham* that LWOP might be imposed erroneously on a juvenile.[73] The risk is that retributive impulses might drive the sentencing decision, when the crime is a violent killing, with little weight assigned to the mitigating factors associated with immaturity. This response, although it is understandable, may well result in a disproportionately harsh sentence. Thus, the California statute directs a resentencing court to take a "second look"; it must consider *retrospectively* mitigating factors that may have influenced the juvenile at the time of the offense (committed at least fifteen years earlier), as well as evidence that he or she has subsequently been rehabilitated.

Some jurisdictions have recognized that mitigating factors associated with youth and immaturity should be considered, not only when LWOP is an option, but also when a youth faces a life sentence *with* the possibility of parole or other harsh adult sentences. For example, the new Florida statute (which applies to juveniles facing a life sentence with the possibility of parole for homicide) includes multiple factors that require an inquiry into psychological immaturity and its impact on the youth's involvement in the offense.[74] Further, as discussed below, a few states have adopted special parole guidelines for juveniles convicted of serious crimes. Lawmakers emphasize that these regulations are grounded in

hearing where the trial court "is required to consider the *Miller* factors before determining sentence" (footnote omitted)).

70. Alabama directs sentencing courts to consider fourteen factors, including the "hallmark features of youth," the juvenile's diminished culpability, emotional maturity, past exposure to violence, and ability to deal with the police and others. *Ex parte* Henderson, 144 So. 3d 1262, 1284 (Ala. 2013).

71. People v. Gutierrez, 324 P.3d 245, 249 (Cal. 2014).

72. CAL. PENAL CODE § 1170(d)(2)(A)(i) (West 2016). Some prisoners are excluded under the statute. *Id.* § 1170(d)(2)(A)(ii).

73. Graham v. Florida, 560 U.S. 48, 79 (2010).

74. FLA. STAT. ANN. §§ 921.1401–921.1402 (West 2016).

the developmental framework established by *Miller* and *Graham*.

B. Should Miller *Be Applied Retroactively?*

At the time *Miller* was decided, there were over two thousand prisoners serving mandatory LWOP terms for homicide who had been sentenced as juveniles before the Supreme Court ruled that the sentences were unconstitutional, and others whose cases were on appeal. For those whose cases were still on direct appeal, *Miller* rendered their sentences unconstitutional, resulting in new sentencing proceedings. But for prisoners who had exhausted their appeals, the question arose of whether *Miller* applied retroactively to their sentences. A flood of JLWOP prisoners, some having been incarcerated for decades, petitioned state and federal courts on collateral review, arguing that the Court's ruling must be applied retroactively to their cases. If *Miller* applied retroactively, these prisoners' mandatory LWOP sentences should be set aside and they should be resentenced (or eligible for parole). Across the country, courts addressed this issue—with a majority finding that *Miller* should be retroactively applied;[75] a minority of courts, however, rejected this conclusion, holding that *Miller* offered no relief for prisoners sentenced as juveniles under mandatory LWOP statutes who had exhausted their appeals before the case was decided.[76]

The Supreme Court resolved this issue in 2016, holding in *Montgomery v. Louisiana* that *Miller* applied retroactively to prisoners whose sentences were final before the case was decided.[77] The Court based this conclusion on a test adopted in a 1989 opinion, *Teague v. Lane*,[78] to determine whether a constitutional ruling by the Supreme Court applies retroactively.[79] Under the *Teague* test, a decision that establishes a new rule of *substantive* constitutional law is applied retroactively, while a new procedural rule is not, *unless* it constitutes a watershed rule of criminal procedure implicating fundamental fairness or the accuracy of the proceeding (an example of a case creating a watershed procedural rule is *Gideon v. Wainwright*, which established the right to an attorney for indigent criminal defendants[80]). Most procedural rules "regulate only the manner of determining the defendant's culpability."[81] In contrast, a new substantive rule either prohibits criminal punishment for particular conduct or prohibits a particular sentence from being imposed on a category of offenders. On this ground, courts have ruled that *Roper* and *Graham*

75. *E.g.*, People v. Davis, 6 N.E.3d 709 (Ill. 2014); State v. Ragland, 836 N.W.2d 107 (Iowa 2013); Diatchenko v. Dist. Att'y., 1 N.E.3d 270 (Mass. 2013); Jones v. Mississippi, 122 So.3d 698 (Miss. 2013); *Ex parte* Maxwell, 424 S.W.3d 66 (Tex. Crim. App. 2014).

76. *E.g.*, State v. Tate, 130 So. 3d 829 (La. 2013); People v. Carp, 496 Mich. 440 (Mich. 2014); Chambers v. State, 831 N.W.2d 311 (Minn. 2013); Commonwealth v. Cunningham, 81 A.3d 1 (Pa. 2013).

77. Montgomery v. Louisiana, 136 S. Ct. 718, 736–37 (2016).

78. Teague v. Lane, 489 U.S. 288 (1989).

79. *Montgomery*, 136 S. Ct. at 729.

80. Gideon v. Wainwright, 372 U.S. 335, 339–44 (1963).

81. Schriro v. Summerlin, 542 U.S. 348, 353 (2004).

should be applied retroactively: each prohibited a particular sentence (death and LWOP for nonhomicide offenses) for a category of offenders (juveniles).[82] Prisoners receiving these sentences as juveniles were entitled to new sentencing hearings or parole, because those sentences were constitutionally prohibited for juveniles.

Montgomery held that *Miller* also created a new substantive rule of constitutional law and not a procedural rule. The Court underscored that *Miller*, like *Roper* and *Graham*, was grounded in the substantive principle that "children are different"; certain punishments were disproportionate for juveniles (and therefore violated the Eighth Amendment), because juveniles are less culpable than adult offenders and more likely to reform. The Court conceded that a "rare juvenile offender whose crime reflects irreparable corruption"[83] might deserve the sentence of LWOP, but it emphasized that the "vast majority"[84] of young homicide offenders should not receive this sentence because their crimes are the product of immaturity. Thus, like *Roper* and *Graham*, *Miller* prohibited a particular sentence (LWOP) for a category of offenders (the "vast majority"[85] of juveniles convicted of homicide whose crimes were the product of transient immaturity). The Court acknowledged that the holding included a procedural component; the sentence of LWOP could be ordered on the basis of a hearing in which the court considered mitigating factors associated with immaturity. But the purpose of the required procedure was not simply a means to determine the defendant's culpability, but instead was a mechanism for evaluating whether the defendant was one of the "rare juvenile[s]" who should be excluded from the category of immature juveniles to which the substantive constitutional protection applied.[86] In other words, the "process" required under *Miller* was intended as a means to give full effect to the Court's substantive rule.

The Court's ruling that *Miller* must be applied retroactively may produce a challenge. Courts have provided little guidance about the basis for resentencing or the evidence to be considered at these hearings. In theory, the resentencing hearing should result in the same sentence the offender would have received if sentenced appropriately at the time of the crime. But a retrospective judgment about a prisoner's immaturity at the time of an offense that may have occurred decades earlier may be fraught with difficulty. In Kuntrell Jackson's case, the Arkansas Supreme Court directed that Jackson be allowed to present evidence of his "age, age-related characteristics and the nature" of his crime.[87] These

82. *E.g.*, *In re* Moss, 703 F.3d 1301, 1302–03 (11th Cir. 2013) (holding that *Graham* is retroactive as a new substantive rule of law); *In re* Sparks, 657 F.3d 258, 262 (5th Cir. 2011) (holding that *Graham* announced a substantive rule under *Teague* and therefore applies retroactively); Little v. Dretke, 407 F. Supp. 2d 819, 823 (W.D. Tex. 2005) (holding that the right recognized in *Roper* is substantive).

83. *Montgomery*, 136 S. Ct. at 724 (quoting Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012)).

84. *Id.*

85. *Id.*

86. The Court pointed out that the prohibition against the execution of mentally disabled offenders was implemented through a similar procedure to determine if the defendant was in the protected category. *Id.* at 735 (citing Atkins v. Virginia, 536 U.S. 304, 317 (2002)).

87. Jackson v. Norris, 426 S.W.3d 906, 907 (Ark. 2013).

challenges are considered in Section III below.

In *Montgomery*, the Supreme Court recognized the challenges of resentencing, but suggested another remedy for states reluctant to resentence prisoners serving mandatory LWOP sentences; these prisoners can simply be subject to ordinary rules of parole eligibility. Effectively this response converts LWOP to life with parole, avoiding the need for retrospective evaluation of an older prisoner to determine if LWOP was an appropriate sanction at the time of sentencing. The Court's solution to the resentencing problem led Justice Scalia, in dissent, to lament: "This whole exercise . . . is just a devious way of eliminating life without parole for juvenile offenders."[88]

C. Term-of-Years Sentencing and Parole Eligibility after Graham *and* Miller

The Supreme Court, in its emphatic statement that "children are different" from adult offenders, indirectly raised the question of whether lengthy adult sentences that are not specifically prohibited by *Graham* and *Miller* might nonetheless also violate the constitutional principles on which the decisions are based. In response to the opinions, some lawmakers have sought to retain harsh sentences not specifically prohibited by the Court. Others, however, have revised their laws by moderating term-of-years sentences for juveniles. These reforms are grounded firmly in the new constitutional framework with its insistence that juveniles are less culpable than adult criminals and should be given a meaningful opportunity to reform.

A key distinction between states that have embraced the lessons of *Graham* and *Miller* and those that have responded grudgingly is evident in the approach to mandatory minimum terms of imprisonment. Since the 1990s, many juveniles, in fact, have received long mandatory sentences. This is due in part to punitive criminal sentencing reforms in many states during that period, aimed at increasing the harshness of sanctions and limiting judicial sentencing discretion.[89] Many states abolished parole altogether (one reason that LWOP became more prevalent), or made it contingent on serving a long prison term. This trend was also a response to the federal truth-in-sentencing laws that tied states' eligibility for certain federal grants to a requirement that prisoners serve eighty-five percent of announced sentences.[90]

Some states have responded to *Miller*'s prohibition of mandatory JLWOP by adopting lengthy term-of-year sentences to be imposed on offenders either when LWOP is not deemed appropriate or instead of LWOP. Some states that do not impose LWOP on juveniles mandate long minimum sentences for youths convicted of murder. For example, all Texas juveniles convicted of murder are sentenced to forty-year minimum sentences.[91] Even a state such as Massachusetts, where the highest court found JLWOP to be unconstitutional,

88. *Montgomery*, 136 S. Ct. at 744 (Scalia, J., dissenting).

89. KEVIN REITZ, *Sentencing*, *in* CRIME AND PUBLIC POLICY 467, 469 (James Q. Wilson & Joan Petersilia eds., 2011).

90. BUREAU OF JUSTICE STATISTICS, TRUTH IN SENTENCING, *supra* note 7, at 3.

91. TEX. GOV'T CODE ANN. § 508.145 (West 2015).

has substituted a minimum twenty-year sentence for these young offenders.[92] Thus the abolition of mandatory LWOP, or even the abolition of this sentence altogether, does not signify a policy of leniency toward juveniles who commit homicide. Given the seriousness of the crime, these statutes are likely to pass constitutional muster, but only if the mandatory term-of-years sentences provide a meaningful opportunity to reform.[93]

The punitive sentencing reforms of the 1990s have sometimes resulted in mandatory sentences of juveniles that predictably would extend beyond or through the individual's expected life span. Appellate courts have been asked to review these sentences in both homicide and nonhomicide cases under *Graham* and *Miller*. Petitioners in such cases have argued that lengthy mandatory adult sentences imposed on juveniles are the functional equivalent of LWOP and that they violate or subvert constitutional principles in two ways.[94] First, the duration can effectively deny the young offender an opportunity to reform, because release from prison in the future is either biologically foreclosed or unlikely to happen at a time when the reformed prisoner can rejoin society in a meaningful way. Second, the mandatory nature of the sentence precludes the introduction of mitigating evidence on youth and immaturity that indicates that the youth deserves a lesser sentence than an adult counterpart or than a more culpable juvenile.

Courts have divided on the question of whether these long sentences are acceptable under constitutional sentencing principles. Some courts have allowed lengthy, mandatory sentences for juveniles to the extent not explicitly prohibited by the Supreme Court. Terms of fifty, seventy, and ninety years for nonhomicide offenses have been upheld by courts that read *Graham* literally to prohibit only the sentence of LWOP.[95] Other courts, however, have rejected excessively long sentences as the equivalent of LWOP and contrary to *Graham* and *Miller*.[96] These courts have emphasized that a sentence that, at best, anticipates release from incarceration when the young offender is advanced in age is an implicit rejection of *Graham* and *Miller,* because it fails to recognize the reduced culpability of juvenile offenders or to provide them with a meaningful opportunity for release when their sentences are completed. Most offensive, of course, is the sentence that extends beyond the juvenile offender's life

92. MASS. GEN. LAWS ANN. ch. 279, § 24 (West 2016).

93. As some courts have found, long *consecutive* sentences may effectively constitute LWOP. *See, e.g.*, People v. Caballero, 282 P.3d 291, 295 (Cal. 2012); *see also infra* note 96.

94. *E.g.*, Bunch v. Smith, 685 F.3d 546, 547 (6th Cir. 2012) (recounting defendant's argument that an eighty-nine-year sentence violated the Eighth Amendment because it is the "functional equivalent" of LWOP).

95. *E.g.*, *id.* at 551 (upholding eighty-nine-year sentence after determining *Graham* did not require a different result).

96. *E.g.*, *Caballero*, 282 P.3d at 295; State v. Ragland, 836 N.W.2d 107, 121–22 (Iowa 2013); Bear Cloud v. State, 334 P.3d 132, 142 (Wyo. 2014). Recently, the Florida Supreme Court reversed a lower court decision and found that a seventy-year sentence for a nonhomicide offense provided no opportunity for reform and was therefore unconstitutional. Gridine v. State, 175 So. 3d 672, 674–75 (Fla. 2015).

expectancy. Such lengthy punishment is the functional equivalent of LWOP and violates any sensible reading of the constitutional limits on punishment of juveniles. The California Supreme Court reached this conclusion in *People v. Caballero*, in striking down a juvenile's sentence of 110 years in a nonhomicide case on Eighth Amendment grounds.[97] Under *Graham*, the court held, the state may not deprive a youth of a meaningful opportunity to demonstrate his rehabilitation and fitness to reenter society in the future.[98]

The Iowa Supreme Court has offered the most comprehensive rationale for rejecting lengthy mandatory sentences as inconsistent with the principles of *Graham* and *Miller*. This court struck down an order by Iowa's governor, who, after *Miller*, commuted the sentences of all juveniles serving LWOP to life with parole eligibility after sixty years.[99] The court held that this executive act violated *Miller* because it amounted to the equivalent of LWOP for a sixteen-year-old, imposed automatically with no consideration of the important mitigating factors associated with youth. A year later, the same court, in *State v. Lyle*, found all mandatory minimum adult sentences to be unconstitutional for juveniles.[100] This case and other reforms of mandatory sentences for juveniles are discussed in Section IV.

III. EVALUATING MITIGATION IN A CONSTITUTIONAL FRAMEWORK: THE *MILLER* FACTORS

Jurisdictions that retain the sentence of LWOP for juveniles convicted of homicide must conduct a sentencing hearing to consider the five mitigating factors described by the Supreme Court in *Miller*.[101] These hearings involve expert testimony by clinicians for defendants and for the state; indeed, a clear implication of the Court's mandate is that a juvenile facing LWOP has a right to a psychological assessment in connection with sentencing. Because the *Miller* factors are based on developmental constructs, expert assessments by forensic child clinical psychologists or psychiatrists are required to inform courts making sentencing decisions. General forensic mental health professionals who evaluate adults for criminal courts are usually not qualified to undertake these assessments. This Section translates each *Miller* factor into terms and concepts that can be examined objectively and discusses relevant and reliable clinical information about those factors. Its aim is to inform both clinicians and sentencing courts on the appropriate scope of expert testimony in juvenile LWOP cases.

Miller assumed that adolescents as a class have developmental characteristics (embodied in the five factors) that weigh in favor of mitigation, even for homicide; this is clear from the prediction that LWOP will be "uncommon." Yet, by requiring individualized sentencing decisions, *Miller*

97. *Caballero*, 282 P.3d at 295.

98. *Id*. at 296.

99. *Ragland*, 836 N.W.2d. at 122.

100. 854 N.W.2d 378, 400 (Iowa 2014).

101. See *infra* Part III.A for a discussion of each of the five *Miller* factors.

recognized that some youths, despite their status as adolescents, may be different from adolescent developmental norms. Thus, defendants' evidence in mitigation will aim to demonstrate that the offender conforms to developmental norms, while the prosecutor must persuade the judge that the youth is more adultlike than the norm, and that his crime is *not* the product of transient developmental influences. Given the background principle embraced by the Supreme Court that most youths are immature, the prosecutor carries a substantial burden.[102]

A. The Miller *Factors and Their Application in Sentencing*

Miller described five factors (listed in Section II) for courts to consider in deciding whether to impose a LWOP sentence on a juvenile. This Part analyzes how each factor can best be evaluated by a forensic mental health (FMH) expert to provide evidence for a court considering the sentence of JLWOP.

1. Decisional Factor

The first factor refers to juveniles' age and immaturity, "impetuosity," and compromised capacity to consider future consequences. These are all characteristics of adolescent decision making and are linked to the typical sensation seeking and impulsiveness of this developmental period (discussed in Section I). Psychological constructs representing *Miller*'s decisional factor are the capacity for abstract thinking (relevant to imagining hypothetical future consequences), the ability to delay impulsive reactions when that would be adaptive, and perceptions of risk and risk-taking. The nature of the inquiry—a sentencing hearing following a conviction of guilt—focuses attention on the youth's capacities to apply these abilities in unstructured and stressful conditions.

The FMH expert will generally follow three steps in performing *Miller* assessments of an adolescent's decisional capacity. The first step uses validated assessment methods under optimal test conditions. Several validated tools are available to assess cognitive and behavioral capacities for various aspects of decision making, including abstract reasoning, planning and foresight, capacity to delay responding when it is adaptive to do so, and abilities to process and interpret information.[103] These tests typically are standardized and offer norms that allow for comparison of the youth's performance to youth of specific ages.

A second step examines the youth's facility under real-life conditions that may reduce the ability to exercise capacities optimally. This often can be done

102. Some states have recognized the state's burden. *E.g.*, IND. CODE ANN. § 35-50-2-9(a) (West 2016) (providing that the state bears the burden of proving beyond a reasonable doubt the existence of an aggravating factor which would lead to a sentence of LWOP); Conley v. Indiana, 972 N.E.2d 864, 871 (Ind. 2012); State v. Hart, 404 S.W.3d 232, 241 (Mo. 2013) ("[A] juvenile offender cannot be sentenced to life without parole for first-degree murder unless the state persuades the sentencer beyond a reasonable doubt that this sentence is just and appropriate under all the circumstances."); *see also supra* note 35.

103. Examples include intelligence tests, such as the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V), the Wisconsin Card Sorting Test (WSCT), and the Behavior Rating Inventory of Executive Function (BRIEF).

with a comprehensive review of records of the youth's past behavior in various social situations (e.g., school, rehabilitative settings), and through skilled interviewing of the youth, and of family members, teachers, and peers who have observed the youth's functioning. Youths' capacities to exercise their decisional abilities in real-life contexts can also be impaired by certain behavioral disorders such as attention-deficit/hyperactivity disorder and post-traumatic stress disorder. FMH experts have measures[104] and clinical diagnostic abilities to detect mental disorders of childhood and adolescence.

Third, the FMH expert can use developmental and clinical knowledge and experience to integrate information from psychometric and real-life sources to describe consistencies and inconsistencies, and to characterize the degree to which the youth's decisional abilities may depart from adolescent norms. Sometimes information in descriptions of the offense will allow the expert to offer potential explanations for the youth's decision making before and during the offense.

Burgeoning interest in developmental neuroscience and its potential application to discussions of adolescent psychological development has led many practitioners and policymakers to ask about its relevance to assessments of immaturity in the sentencing context. Experts on adolescent brain development can assist sentencing courts by describing general trends in brain development and providing information about the implications of those general trends for various aspects of functioning during adolescence. But currently, it is *not* possible to use brain imaging to assess immaturity in an individual adolescent, either alone or in combination with psychological assessment. Experts who offer such opinions exceed the limits of current scientific knowledge for several reasons.

First, conclusions about the neurobiological immaturity of adolescents, relative to adults, derive from comparisons of *composite* scans that average images taken from samples of adolescents and compare these to composites created from samples of adults.[105] Just as an average derived from multiple measurements of any construct is inherently more reliable than a single measure, these composite brain scans allow for far more reliable conclusions than could be made from assessments of individuals. Assessments of individuals are helpful when gross abnormalities (e.g., brain lesions or tumors) are visible, but it is far more difficult to spot the more subtle changes in the brain that occur during development.

Second, there is not yet sufficient evidence linking age differences in specific aspects of brain structure to real-world behaviors that might mitigate adolescent culpability. It simply is not possible to point to a scan of a normally developing brain and identify a structural feature that clearly marks the brain as an "adolescent" brain rather than an "adult" brain. Moreover, different brain

104. Examples include the Child Behavior Checklist (CBCL), the Minnesota Multiphasic Personality Inventory-Adolescent (MMPI-A), the DSM-5 ADHD Symptom Child Adolescent Checklist, and the UCLA Post-traumatic Stress Disorder Reaction Index (1999).

105. Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, ISSUES SCI. & TECH., Spring 2012, at 67, 75–76 [hereinafter Steinberg, *Public Policy*].

regions mature at different rates, so that an individual's brain is likely to be more mature in some respects than in others.[106]

Finally, many of the most important changes in the brain that occur over the course of adolescence and young adulthood are changes in how the brain functions, rather than simply changes in brain anatomy or structure.[107] But the assessment of brain function requires capturing a brain image while the individual is performing a specific task designed to activate a particular brain region. Even minor modifications in how such tasks are administered, and in how imaging data are analyzed and interpreted, can have tremendous effects on the conclusions one might draw. Current knowledge about age differences in how the brain functions come from multiple studies in which multiple tasks have been administered to multiple individuals of different ages, and from which overall patterns can be discerned.

2. Dependency Factor

The second factor considers the circumstances of familial dependency and vulnerability that are part of adolescence. *Miller* commented on negative family circumstances and influences from which a juvenile "cannot usually extricate himself—no matter how brutal or dysfunctional."[108] Youths' dependence on family may vary, of course, depending on their own degree of independence and self-direction. Psychological constructs with similar focus are autonomy in making choices, as well as capacity to meet one's needs independent of external controls.

Evaluating these characteristics, the FMH expert can identify autonomy or dependency as a general characteristic for the youth using psychometric measures of those abilities. Some of those measures, called "social maturity scales," assess the youth's degree of independence and self-direction in everyday functioning according to age norms. In addition, interviews with family members and inspection of school and clinical records for a youth provide other evidence of self-directed and autonomous functioning in everyday life. Skilled clinical interviewing of the youth also will provide the FMH expert data with which to compare the youth to other adolescents.

3. Offense Context Factor

This factor requires consideration of the circumstances of the offense, with special attention to the youth's role in the events. *Miller* pointed to the potential for peer pressure because enhanced susceptibility to peer influence is a hallmark of adolescence.[109] This factor is particularly significant in offenses involving multiple youths acting as a group, wherein some youths may have been involved due to peer pressure, while others have played a more initiating role. The key

106. Steinberg, *Influence of Neuroscience*, *supra* note 8, at 516.

107. Steinberg, *Public Policy, supra* note 105, at 68, 70.

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

109. *Id.*

evidence in weighing this factor is the actual evidence of the youth's role in the offense, although evidence of the youth's tendency to be a "follower" in everyday life will also be relevant in some cases. But peer influence can play a more subtle role in adolescent behavior, as when teenagers engage in behavior that they think will win peer approval ("showing off," for example), or simply encourage one another through group interaction.

Discerning the role of peer influence typically will require a detailed forensic examination of reports of the youth's involvement in the crime. Experienced forensic experts typically have developed the ability to engage in psychological reconstruction of offenses so as to obtain the necessary information. In some cases the youth's involvement as a product of peer influence will be almost self-evident. In other cases influence will be difficult to discern, and occasionally it will not be proper even to speculate whether the youth could have extricated himself from the situation.

4. Legal Competency Factor

This factor reflects concern that juveniles may have lesser capacities than adults on average to resist police interrogations or to be competent to stand trial.[110] This general assumption is supported by empirical evidence, but some adolescents, especially older teens, may have capacities that are roughly equivalent to most young adults.[111] A number of psychological constructs may be relevant for this factor, such as cognitive and intellectual capacities, tendencies toward dependence and acquiescence, impulsiveness and shortsightedness in decision making, and general lack of knowledge about the legal process.

An inquiry into a youth's capacities during police interrogation requires a retrospective analysis based on an assessment of the youth's current capacities and a consideration of their implications for the youth's functioning under the conditions of the arrest and police interrogation. Forensic psychology and psychiatry have developed systematic ways to perform such inquiries, using standardized assessment tools for comprehension of *Miranda* rights and susceptibility to acquiescence,[112] together with guidance for applying those results to retrospective analysis of the interrogation event.[113]

Inquiry into competence to stand trial in theory should be of less relevance at sentencing because due process requires evaluating the youth's competence to stand trial if it was in question during the adjudication. But if this issue is raised

110. *Id.*

111. *See* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 356–58 (2003) (discussing findings of reduced competency among juveniles of different ages).

112. *See generally, e.g.*, 1 NAOMI GOLDSTEIN, HEATHER ZELLE & THOMAS GRISSO, MIRANDA RIGHTS COMPREHENSION INSTRUMENTS (MRCI): MANUAL FOR JUVENILE AND ADULT EVALUATIONS (2014) (description of standardized instruments for measuring *Miranda* competence); GISLI H. GUDJONSSON, GUDJONSSON SUGGESTIBILITY SCALES (1997) (description of author's suggestibility scales).

113. *See* ALAN GOLDSTEIN & NAOMI E. SEVIN GOLDSTEIN, EVALUATING CAPACITY TO WAIVE MIRANDA RIGHTS 149–61 (2010).

at sentencing, FMH experts have well-developed assessment tools for evaluating abilities specifically relevant for competence to stand trial, as well as measures mentioned above for assessing "decisional abilities" and cognitive, emotional, or developmental deficits that may impair trial participation.[114]

5. Rehabilitation Factor

Finally, the "rehabilitation factor" is perhaps the most complex. Youths' potential for rehabilitation can be interpreted in two ways.

First, as the Supreme Court recognized, maturation will usually modify the characteristics that have contributed to the youth's offending.[115] For many adolescents, offending is a consequence of transient developmental conditions. Research has demonstrated that the majority of youth involved in the juvenile justice system "desist" from delinquency as they approach adulthood.[116] Desistence occurs relatively independent of interventions to modify youths' behavior, although effective therapeutic interventions are likely to enhance the effect. However, a smaller proportion of delinquent youth do not "age out" of delinquency and continue to offend as adults. *Miller*'s intent in raising the rehabilitation factor might be to try to identify this minority of juvenile offenders.

The research evidence indicates that the seriousness of the offense (even homicide) is not a reliable predictor of future offending or rehabilitation failure.[117] Serious offending in adolescence occurs for many different reasons that may or may not reflect the character of the youth. However, research also provides FMH experts with some indicators for youth who are somewhat more likely to persist in criminal behavior into adulthood. Among these, for example, is early onset of aggression and delinquent behavior (e.g., before adolescence), together with the persistence and frequency of offending throughout adolescence. But psychological instruments, such as measures of psychopathy that can assess the character of adults who are more likely to be long-term offenders, are not useful when applied in individual cases to try to identify such persons during adolescence.[118]

114. For descriptions, see IVAN KRUH & THOMAS GRISSO, EVALUATION OF JUVENILES' COMPETENCE TO STAND TRIAL ch. 2 (2008).

115. *See* Miller v. Alabama, 132 S. Ct. 2455, 2464–65 (2012) (noting that as youths mature into adulthood, "deficiencies will be reformed").

116. Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV., 674, 675–76 (1993); Edward P. Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 DEV. & PSYCHOPATHOLOGY 453, 470–72 (2010).

117. Magda Stouthamer-Loeber et al., *Desistance from Persistent Serious Delinquency in the Transition to Adulthood*, 16 DEV. & PSYCHOPATHOLOGY 897, 906–09 (2004).

118. For example, one study found that if diagnostic scores on a measure of juvenile psychopathy were used to predict adult psychopathy, the prediction that juveniles who scored in the top twenty percent of psychopathic traits at age thirteen would be psychopathic at age twenty-four would be wrong in around eighty-two percent of cases. Donald R. Lynam et al., *Longitudinal Evidence that Psychopathy Scores in Early Adolescence Predict Adult Psychopathy*, 116 J. ABNORMAL PSYCHOL. 155, 160, 162 (2007).

Second, *Miller*'s rehabilitation factor also likely refers to the potential that interventions—whether penal or therapeutic—can decrease the likelihood of future offending. The developmental basis for this factor rests on the assumption that adolescents offer more malleable conditions than adults for modifying their abilities, perspectives, and behavior. When applied to the individual case, however, "potential for rehabilitation" does not depend simply on the characteristics of youth, but also on the availability of potential interventions in the legal system. Intervention options vary a great deal in their quality and purpose. For example, substance abuse problems are associated with reoffending and are treatable, but only if youths receive a well-designed substance abuse intervention will the risk of reoffending be reduced.[119]

Adolescents vary considerably in ways that can influence their malleability and openness to change through therapeutic interventions. Some psychological constructs are related generally to potential for change, such as degree of discomfort with one's current condition, potential for attachments to persons who offer help, and the persistence and chronicity of the youth's current adaptations to life. Other relevant conditions involve specific clinical disabilities that challenge remediation, such as intellectual deficits, mental disorders, and neurological conditions related to injury or to toxic or malnourished conditions in early childhood. The FMH literature describes systematic procedures for evaluating rehabilitation potential as well as reliable ways to assess various specific characteristics of youth noted above. Currently, however, research examining the validity of judgments about rehabilitation potential is sparse. FMH experts also can describe past rehabilitation programs that a youth has been provided, their outcomes and reasons if those efforts have failed, as well as various general characteristics that are known to be related to greater potential for change.

It is worth noting that *Miller* does not direct courts to examine specifically the juvenile's risk of future offending. To some extent, this assessment is incorporated in factors dealing with the youth's potential for rehabilitation. Beyond this, the likely duration of the sentence facing the offender, even if LWOP is not ordered, diminishes the relevance of this consideration at the time of sentencing because risk assessment is valid only for a relatively brief period.

In summary, many of the features of *Miller*'s five developmental factors can be translated into psychological constructs to anchor their use in sentencing hearings. Moreover, FMH experts have systematic and reliable ways to assess many of the developmental and psychological concepts relevant for the *Miller* factors. Their opinions based on their assessments can be useful in juvenile LWOP sentencing cases, under conditions and within the limits described. However, clinicians cannot *directly* answer the general question of whether a juvenile is mature or immature, either psychologically or neurologically. In addition, FMH experts sometimes will not be able to state with confidence whether a juvenile is likely to reform.

119. Laurie Chassin et al., *Substance Use Treatment Outcomes in a Sample of Male Serious Juvenile Offenders*, 36 J. SUBSTANCE ABUSE TREATMENT 183, 191–92 (2009).

It should be noted that assessment of the *Miller* factors and testimony by an appropriately trained child FMH expert should play a key role in other sentencing hearings involving juvenile offenders, as well as in JLWOP hearings. The clear message of *Miller* and *Graham* is that mitigation applies generally to juvenile offending (especially for all serious crimes) and not simply to homicide. Thus, whenever a juvenile offender faces a lengthy sentence, expert testimony on *Miller*'s developmental factors can guide the court.

B. Application of the Factors to Resentencing and Parole Hearings

As discussed in Section II, where *Miller* has been found to apply retroactively, many states have begun to require resentencing of offenders serving JLWOP, examining factors that were not reviewed at the time of mandatory LWOP sentencing. Resentencing requires a retrospective analysis because the original sentencing may have occurred years or decades prior to the resentencing hearing.

In resentencing hearings, FMH experts can describe the average developmental characteristics of youth of the age that the prisoner was when he or she committed the offense. This evidence can offer a developmental baseline; the defense attorney and the state can then offer evidence that the youth conformed to or departed from developmental norms on relevant *Miller* factors.

The retrospective analysis required in a resentencing hearing will restrict the FMH expert's ability to describe the individual youth's status on the five factors at the time of the offense. Assessment of an adult prisoner's intellectual, cognitive, emotional, personality, or mental health functioning typically will be of limited value for inferring those characteristics in a juvenile offender; the utility declines as the time between the offense and the resentencing increases.

In some cases, nonetheless, useful evidence may be available. First, the FMH expert's current assessment may discover disabilities (e.g., developmental disability [mental retardation], brain damage, or certain developmental disorders such as ADHD) that typically precede adulthood in their development. When this is so, there is often reason to infer that those disabilities were likely to have existed when the individual was an adolescent. Second, in some cases, evaluations may have been performed on the individual at or near the time of the offense, although it is unlikely, of course, that evaluations will have been conducted for the original mandatory LWOP sentencing (which involve no consideration of individual characteristics). Available assessments might include mental health evaluations in the community, school-based evaluations, competence to stand trial evaluations prior to adjudication, and evaluations for discretionary transfer hearings. Concerns may be raised, however, about the reliability and quality of the original assessment, and many tools available today for assessing youths' developmental abilities and legal competencies did not exist until the past decade.[120] Finally, FMH experts sometimes may be able to obtain

120. For example, specialized tools for performing developmentally relevant competence-to-stand-trial evaluations of adolescents did not exist until about 2005. *See* THOMAS GRISSO, EVALUATING JUVENILES' ADJUDICATIVE COMPETENCE: A GUIDE FOR CLINICAL PRACTICE (2005).

data from collateral sources such as school records, health and mental health records, offense data, and perhaps parents' or peers' recollections of a youth's behavior and attitudes during adolescence. In some cases, these data might lead to relatively reliable evidence related to the factors, such as mental disorders and learning disabilities.

Some states, as discussed in Section IV, provide special parole hearings for offenders serving life or other lengthy sentences. Where these regulations require consideration of *Miller* factors, the problems that impede resentencing evaluations are likely to arise. Parole hearings, however, often are more concerned with evidence of the adult inmate's current state of rehabilitation than with his potential for rehabilitation when he was a juvenile. Similarly, whether the individual as a youth would or would not have desisted from offending may be less relevant for parole boards than the individual's current likelihood of offending if released on parole. FMH experts can assist in these matters as well, using validated risk assessment instruments, but they require a different evaluation than one based on *Miller*'s developmental mitigation factors.

IV. LOOKING FORWARD: JUSTICE FOR JUVENILES IN A CONSTITUTIONAL FRAMEWORK

The three Supreme Court opinions prohibiting harsh sentences for juveniles directly affect only a narrow category of the most serious offenders. But, as many lawmakers have recognized, the Court's developmental framework applies broadly to sentencing and parole policies affecting all juveniles in the criminal justice system. Justice Roberts understood the potentially far-reaching impact of the principle that "children are different," and of the Court's insistence that those differences reduce youthful culpability regardless of the crime. He observed in his *Miller* dissent,

> The principle behind today's decision seems to be only that because juveniles are different from adults, they must be sentenced differently. There is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive.[121]

Whether or not the Supreme Court interprets the "children are different" principle as expansively as Justice Roberts feared under Eighth Amendment doctrine, the constitutional framework is likely to have a major impact as a matter of policy. This is so particularly because regulations grounded in the framework are not only fairer to juveniles but also more effective at reducing crime at lower cost than laws that punish juveniles as severely as adults. This Section explores the broader influence of the opinions on the regulation of juvenile sentencing and on other justice system reforms. The analysis offers modest predictions, on the basis of the constitutional framework described above and legal reforms that are already underway, about the direction of law reform in the decade ahead. Predictions beyond this time frame seem highly speculative.

121. Miller v. Alabama, 132 S. Ct. 2455, 2482 (2012) (Roberts, C.J., dissenting).

A. The Future of LWOP for Juveniles

Although *Miller* allowed states to retain JLWOP on a discretionary basis, the opinion opened the door to two constitutional challenges that ultimately may result in a categorical ban. First, the Court declined to abolish JLWOP for felony murder, the offense of petitioner Kuntrell Jackson. But allowing this sentence to be imposed on juveniles is inconsistent with the logic of both *Graham* and *Miller*, an anomaly likely to be corrected by future courts and legislatures. More broadly, as Justice Roberts lamented, the sentence of JLWOP itself may be unable to withstand constitutional scrutiny under the Court's analysis. This is so particularly because the prescribed regime of individualized sentencing is likely to prove unsatisfactory as a means to produce fair and accurate outcomes, given the high stakes and the cost of error.

1. JLWOP for Felony Murder

Scholars have long argued that felony murder is generally problematic on fairness grounds because it results in a conviction of first-degree murder, the most serious criminal offense, without requiring that the actor killed or intended to kill.[122] Under felony murder doctrine, a defendant can be convicted of murder when a death (even a death accidentally caused by a codefendant) occurred during the commission of a dangerous felony. This doctrine is justified under a strict liability theory which holds that the intent to commit the underlying dangerous felony can be transferred to the killing itself.[123] But, as Justice Breyer argued in his *Miller* concurrence, to allow a youth convicted of felony murder to be sentenced to LWOP, the harshest sanction available for juveniles, is doubly concerning: first, the young offender who did not kill or intend to kill is less culpable than the actor who intends to cause the victim's death; and second, the juvenile's immaturity independently mitigates culpability.[124] Moreover, the transferred intent theory is particularly dubious as applied to juveniles. The Court emphasized in *Miller* that one feature of developmental immaturity that mitigates juveniles' culpability is a reduced ability to foresee consequences. Thus, young offenders are less likely than are adults to anticipate that a death could result from an armed robbery or other felony.

The Supreme Court's refusal in *Miller* to categorically ban LWOP for felony murder surprised many observers, because this move seemed like a

122. *E.g.*, Martin R. Gardner, *The Mens Rea Enigma: Observations on the Role of Motive in the Criminal Law Past and Present*, 1993 UTAH L. REV. 635, 706–07 (critique of felony murder); Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 453–57 (1985) (criticizing felony murder for basing murder conviction on intent to commit underlying felony); Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403, 404–07 (2011) (describing the disparity between culpability and punishment when the felony-murder doctrine applies). See also State v. Hoang, 755 P.2d 7, 8, 11 (Kan. 1988), which found a Kansas law that does not require intent to kill for a felony murder charge valid.

123. RICHARD BONNIE ET AL., CRIMINAL LAW 939 (3d. ed. 2010) (describing theory of culpability for felony murder).

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

modest application of the proportionality framework embraced in the earlier opinions. *Graham* had emphasized the "twice diminished moral culpability" of young offenders convicted of nonhomicide offenses in terms similar to those invoked by Justice Breyer in his concurrence in *Miller*.[125] First, the immaturity of youth made it unlikely that the criminal act was evidence of a "depraved character." But beyond this, *Graham* emphasized that the young offender who did not kill was "categorically less deserving of the most serious forms of punishment than are murderers."[126] Justice Roberts, who concurred in *Graham*, rejected a categorical ban because he reasoned that LWOP might be appropriate for the nonhomicide offense of attempted murder where the juvenile aimed, but failed, to kill the victim.[127] Based on this reasoning, the abolition of felony murder (in cases in which there was no intent to kill) would be a straightforward application of the Court's proportionality analysis.

2. The Abolition of JLWOP

In allowing courts to continue to impose JLWOP on a discretionary basis for murder, the Supreme Court warned that the sentence should be "uncommon," because very few juveniles have the maturity and depraved character that might justify this severe sanction. The Court also admonished that the risk of an erroneous LWOP decision was great. To reduce the risk of error and to be true to the principles of *Miller*, the state should bear the burden of demonstrating that a juvenile offender deserves this sentence. But ultimately, *Miller*'s analysis supports abolishing JLWOP altogether, given the inclination to punish murderers harshly, regardless of age, and the difficulty of evaluating youthful immaturity. Indeed, in *Montgomery*, the Court implicitly offered support for abolition. In holding that *Miller* applied retroactively, Justice Kennedy suggested that courts could avoid the challenge of resentencing prisoners sentenced to JLWOP before *Miller* by subjecting those prisoners to ordinary parole procedures.[128]

Some states, as mentioned in Section II, have taken this step already, abolishing JLWOP. Further, the Model Penal Code, which has been the dominant influence on criminal law over the past fifty years, was revised by the American Law Institute in 2011 to prohibit LWOP for juveniles.[129] It seems likely that JLWOP will be subject to a strong constitutional challenge in the future.

In *Roper* and *Graham,* the Court found that only a categorical ban of the death penalty and JLWOP (for nonhomicide offenses) would protect adequately

125. Graham v. Florida, 560 U.S. 48, 69 (2010).

126. *Id.*

127. *Id.* at 93–94 (Roberts, C.J., concurring).

128. Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016). Justice Scalia argued that this proposal was simply "a devious way of eliminating life without parole for juvenile offenders." *Id.* at 744 (Scalia, J., dissenting).

129. MODEL PENAL CODE: SENTENCING § 6.11A(g) (AM. LAW INST., Tentative Draft No. 2, 2011).

against an unacceptable risk that juvenile offenders would wrongly be subject to unconstitutionally harsh sentences. *Roper* acknowledged that a "rare" juvenile might have the maturity and "irretrievably depraved character" to deserve the death penalty, but emphasized that the possibility of error was simply too great to allow youthful immaturity to be considered on an individualized basis. Further, as the Court recognized, even expert psychologists may find it difficult to evaluate maturity with sufficient accuracy to distinguish the immature youth from one whose crime demonstrates "irreparable corruption." The Court noted that under the official diagnostic manual of the American Psychiatric Association, antisocial personality disorder could not be diagnosed before age eighteen. Moreover, the distortions created by public outrage aroused by a brutal crime increase the likelihood of error. In *Graham*, the Court also noted that the risk of an erroneous decision is further increased by impairments in juveniles' ability to participate effectively as defendants in criminal proceedings.[130] Finally, *Graham* acknowledged that some juvenile offenders might never qualify for parole and should rightly spend their lives in prison, but urged that every juvenile should be given the *opportunity* to mature and reform, an opportunity foreclosed by LWOP. These arguments against discretion were decisive in *Roper* and *Graham*; their logic is just as powerful in supporting the abolition of LWOP altogether as a sentencing option for juveniles. The "children are different" principle that underlies the developmental framework points to this conclusion.

The risks associated with individualized judgments about whether a juvenile deserves this most severe sentence are even greater than the Court recognized. As indicated above, substantial evidence supports that juveniles as a group are less mature than adults in ways relevant to their criminal culpability, and that, in general, individuals mature gradually as they move from childhood through adolescence and into young adulthood. But evaluating *individual* immaturity poses substantial challenges even for skilled child forensic experts. At this point, we simply lack the tools to conclude that a particular youth has a mature or immature brain. And the challenge of discerning, at the time of the crime, the "uncommon" adolescent offender who lacks the potential to reform is simply beyond current knowledge. Thus, the concern that was articulated in *Roper* and *Graham* for avoiding error when juveniles face severe sentences supports a categorical ban of JLWOP. Moreover, some prosecutors and sentencing courts may disregard the *Miller* factors entirely, presuming that LWOP is an appropriate sentence for a violent murder, regardless of the age of the offender.[131] In this environment, and under these conditions of uncertainty, a sentence that precludes the opportunity for a young offender to attain maturity and reform his criminal inclinations undermines the core principles of fair

130. Graham v. Florida, 560 U.S. 48, 78–79 (2010).

131. The evidence on this point is anecdotal. What is clear is that prosecutors often emphasize the brutality of the crime (rather than the maturity of the offender). *See, e.g.*, Carl Hessler Jr., *Skippack Teen Tristan Stahley Sentenced to Life in Prison for Killing Julianne Siller, of Royersford,* MERCURY NEWS (Dec. 17, 2014, 5:52 PM), http://www.pottsmerc.com/general-news/20141217/skippack-teen-tristan-stahley-sentenced-to-life-in-prison-for-killing-julianne-siller-of-royersford.

punishment announced by the Supreme Court. Further, given that most juveniles will reform and cease their criminal activity, LWOP serves little social benefit.

B. Sentencing Reforms—Beyond LWOP

The principle that "children are different" has implications for sentencing of juveniles that go well beyond restrictions on the death penalty and LWOP. The principle rests on the empirical assumption that developmental factors associated with the teenage years play an important role generally in the criminal activity of most juveniles. For this reason, both the preventive and retributive justifications for long sentences are weaker as applied to juveniles. The trajectory of maturation in adolescence and its implications for criminal sentencing are as relevant to the justice system's response to other crimes and sanctions as to those severe sentences examined by the Supreme Court. Thus, the Court's developmental principle supports broader reforms that either provide juvenile offenders sentenced as adults with the opportunity to introduce mitigating evidence or that categorically impose less severe sanctions on juveniles than on their adult counterparts.

When the Court in *Miller* announced that the differences between adults and children were not "crime-specific," it meant to clarify that the principle applied to murder, the most harmful offense, as well as to nonhomicide offenses at issue in *Graham*. But juveniles' immaturity also reduces their culpability for crimes that are subject to *less* severe sanctions than those that the Supreme Court found disproportionate under the Eighth Amendment. Indeed, the differential treatment of juvenile offenders has been far less controversial for less serious crimes; for example, transfer to adult criminal court is limited to the most serious crimes. Thus, if juveniles who commit murder (a transferrable offense in all states) are less culpable than their adult counterparts, it follows that young offenders who commit less serious crimes also deserve more lenient sentences. In short, the "children are different" principle should inform policies regulating the sentencing of juveniles whenever they are dealt with in the adult system.

1. Mandatory Minimum Sentences in the Post-*Miller* Era

This conclusion implies that laws that subject juveniles to mandatory minimum sentences on the same basis as adult offenders are problematic on proportionality grounds; such laws are likely to be the focus of future reforms. As discussed above, lengthy mandatory sentences have become part of the sentencing regime in many states. But the requirement that adults and juveniles be subject to the same fixed sentences implicitly rejects the core principle that most juveniles are less culpable than their adult counterparts and deserve less punishment. Moreover, lengthy mandatory sentences for serious crimes deny young offenders the opportunity to reform and rejoin society as productive citizens. As the Iowa Supreme Court recognized in *Lyle*, mandatory adult sentences exclude the consideration of juvenile offenders' immaturity, in clear violation of the constitutional values embodied in the Supreme Court

opinions.[132] In rejecting all mandatory minimum adult sentences imposed on juveniles, *Lyle* emphasized two features of the Supreme Court's analysis in *Miller*. First the Iowa court reiterated that the reduced culpability of juvenile offenders is not "crime-specific"; mitigation applies generally to youthful criminal conduct, including the armed robbery offense at issue in the case. Second, the court found the automatic nature of the sentence, with the consequent exclusion of mitigating evidence, to constitute a grievous deficiency. In a strong denunciation of Iowa's sentencing scheme, the court stated, "[W]e conclude that the sentencing of juveniles according to statutorily required mandatory minimums does not adequately serve the legitimate penological objectives in light of the child's categorically diminished culpability. First and foremost, the time when a seventeen-year-old could seriously be considered to have adult-like culpability has passed."[133]

Not all courts are likely to interpret *Miller* as broadly as the Iowa court has, but other courts have also found constitutional flaws in long mandatory sentences for juveniles,[134] and legislatures have also begun to consider reforms. States aiming to undertake reforms consonant with the Court's developmental framework could respond in several ways. First, they could adopt a presumption against imposing lengthy minimum adult sentences on juvenile offenders, and provide individualized sentencing hearings for juveniles facing such terms; such hearings could allow for the introduction of the kind of mitigating evidence embodied in the *Miller* factors, as well state evidence favoring the imposition of the term. Under such a regime, courts could be guided by sentencing guidelines tailored to the young offender's age. A simpler alternative is a system of minimum sentences for juvenile offenders that are shorter in duration than those imposed on their adult counterparts, a regime that would likely pass constitutional muster.[135]

2. Juvenile Criminal Records and Three-Strikes Laws

Another area of likely reform under the new constitutional sentencing framework involves the collateral long-term consequences of juvenile offending. Mitigating the harmful impact of young offenders' criminal records is essential if they are to have meaningful opportunities to reform and become productive adult citizens. The stigma of a criminal record severely impedes an offender's ability to succeed in adult life, undermining the ability to obtain employment or educational services. Limiting the costly consequences for ex-offenders whose crimes were a product of youthful immaturity serves their interests and that of society—and is compatible with the Court's constitutional framework.

132. State v. Lyle, 854 N.W.2d 378, 400–02 (Iowa 2014).

133. *Id.* (citation omitted).

134. A Missouri court recently found a mandatory sentence imposed on a juvenile for committing a felony with a dangerous instrument (a knife) to be unconstitutional under *Miller*. *See* State v. Smiley, 478 S.W.3d 411, 417 (Mo. 2016) (affirming the trial court's ruling).

135. This approach was proposed by Barry Feld. *See* BARRY C. FELD, BAD KIDS: RACE AND THE TRANSFORMATION OF THE JUVENILE COURT 313–15 (1999).

Traditionally, juvenile court records have been sealed and expunged when young offenders became adults, unless their offending continued. But a recent comprehensive study found that many states do not maintain the confidentiality of juvenile records or provide procedures for expungement.[136] Although the justification for retaining adult court criminal records is more powerful on public safety grounds, the criminal records of offenders sentenced as juveniles can be subject to a special policy under which they are maintained and available only to the extent that public protection warrants. In the developmental framework, minor offenses should be expunged from young offenders' records; beyond this, a process of allowing juvenile offenders to petition for expungement of more serious offenses, after a period in which they have maintained a clean record, is consistent with research showing that juvenile offending is not predictive of adult criminality. Along these lines, many states exclude juveniles from regulations requiring public lifetime registration for sex offenders.[137] Recently, several courts have found lifetime registration requirements to violate the Eighth Amendment when applied to juveniles, citing the Supreme Court's juvenile sentencing opinions.[138]

Sentencing regulation grounded in the developmental framework will also limit the extent to which offenses committed by juveniles can count to enhance later sentences. A federal appellate court recently reversed a life sentence for a routine drug distribution offense as "unreasonable," because it relied on the offender's criminal record as a juvenile.[139] Citing *Miller*, *Graham*, and *Roper*, the court underscored the reduced culpability of juveniles in rejecting the harsh sentence. The same reasoning applies to sentencing enhancement schemes such as three-strikes laws, under which offenders are sentenced to life for a third felony conviction. Three-strikes laws have been harshly criticized as applied to adult offenders, but they are even more discordant with ideas of fair punishment when a juvenile conviction is included as a predicate offense. The likelihood that the youthful offense was the product of immaturity is too compelling to allow it to be the basis for a later draconian sentence.

3. Parole Eligibility and Hearings: The Opportunity for Reform

Parole hearings have taken on heightened importance after *Miller* and *Graham*, in light of the Court's insistence that juveniles are more likely to reform than adult criminals. Thus, statutes that either provide no opportunity for parole or prescribe long minimum sentences for offenders (both adult and juvenile) have created a major obstacle to implementing the Court's developmental

136. *New Study Reveals Majority of U.S. States Fail to Protect Juvenile Records*, JUV. L. CTR.: PURSUING JUSTICE (Nov. 13, 2014), http://www.juvenilelawcenter.org/blog/new-study-reveals-majority-us-states-fail-protect-juvenile-records.

137. The Ohio Supreme Court pointed to this pattern among states in finding a statute that imposed such a registration requirement on juveniles unconstitutional as cruel and unusual punishment. *In re* C.P., 967 N.E.2d 729, 732 (Ohio 2012).

138. *See, e.g.*, State v. Dull, 351 P.3d 641, 648–50, 660 (Kan. 2015); *C.P.*, 967 N.E.2d at 740–41; *In re* J.B., 107 A.3d 1, 18–20 (Pa. 2014).

139. United States v. Howard, 773 F.3d 519, 528 (4th Cir. 2014).

framework. In response to the Eighth Amendment cases, some states have reformed their sentencing and parole laws to incorporate consideration of juveniles' special status. For example, in states that have abolished LWOP for juveniles, youth convicted of murder are eligible for parole after serving sentences that range from fifteen to forty years.[140] Other states have created special juvenile offender parole boards or parole eligibility provisions for juvenile offenders convicted of a wide range of crimes.[141] In some jurisdictions, the parole board is directed, by statute, to focus not only on the offender's current dangerousness and the extent of rehabilitation, but also on his immaturity at the time of the offense and the circumstances surrounding the crime.[142] In the brief period since *Miller*, a substantial number of states have begun to undertake both substantive and procedural reforms of their parole regulations as applied to offenders sentenced as juveniles.

California's comprehensive juvenile parole statute, which became operative in 2014, warrants careful examination; it has already begun to influence lawmakers in other states.[143] In its preamble, the statute explicitly points to *Miller* in noting the developmental immaturity of youth, their reduced culpability, and enhanced prospects for becoming "contributing members of society."[144] It then announces the statutory purpose of providing offenders sentenced as juveniles with "a process by which growth and maturity of youthful offenders can be assessed and a meaningful opportunity for release established."[145] The statute provides expedited parole hearings for many juvenile offenders: prisoners serving determinate (not life) sentences of any duration are eligible for parole consideration after a maximum of fifteen years of incarceration.[146] Moreover, the legislature has sought to implement its commitment to providing a juvenile offender with a meaningful opportunity for reform by requiring that appropriate measures to promote rehabilitation be identified (and discussed with the prisoner) several years before she is eligible for parole consideration. At the youthful offender parole hearing, the panel is instructed by statute to "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any

140. *See* FLA. STAT. ANN. § 921.1402(2) (West 2016); MASS. GEN. LAWS ANN. ch. 265, § 2(b) (West 2016); *id.* ch. 279, § 24.

141. LEANNE FIFTAL ALARID, COMMUNITY-BASED CORRECTIONS 319–20 (10th ed. 2014) (describing juvenile offender parole boards in several states).

142. *See, e.g.,* W. VA. CODE ANN. § 62-12-13b (West 2016).

143. *See* CAL. PENAL CODE §§ 3041, 3046, 3051, 4801 (West 2016). Washington State adopted a statute somewhat similar to California's in 2014. *See* WASH. REV. CODE ANN. §10.95.030 (West 2016). Other states considering legislation that creates a special parole regime for prisoners sentenced as juveniles, such as factors related to immaturity at the time of the offense, include Vermont and Connecticut. *See* H.R. 774, 2013–2014 Gen. Assemb., Reg. Sess. (Vt. 2014); H.R. 6581, 2013 Gen. Assemb., Jan. Sess. (Conn. 2013).

144. 2013 Cal. Legis. Serv. Ch. 312 (S.B. 260) (West).

145. *Id.*

146. Prisoners serving sentences of twenty years to life are eligible after twenty years. CAL. PENAL CODE § 3051(b)(2).

subsequent growth and increased maturity of the prisoner."[147] A parole board directive also indicates that any psychological evaluations should take these factors into consideration, although it does not provide further instruction about how this should be done.[148]

The California youthful offender parole statute takes to heart the message that young criminals are likely to reform and should be given the opportunity to do so. Moreover, in directing the parole board to consider a prisoner's diminished culpability and youthful attributes at the time of the offense, the statute implicitly recognizes that sentencing courts may fail to give appropriate consideration to mitigating factors associated with youth and immaturity. In effect, as under California's LWOP resentencing statute (described in Section II), the parole board can function to correct excessively harsh sentences imposed on juveniles. The parole assessment can be undertaken in an environment in which the reduced culpability of the offender can be evaluated with less distortion than may be possible in the midst of the anger and outrage following a brutal crime. However, as discussed in Section III, retrospective assessment of immaturity poses daunting challenges for clinicians and courts.

In general, special juvenile parole statutes are premised on the prediction, endorsed by the Supreme Court, that most young offenders will mature out of their inclination to get involved in criminal activity and will be able to reenter society as noncriminal adults. Optimally, parole regulation would provide for periodic review to evaluate the offender's progress toward maturity. Other states have created special clemency boards for juvenile offenders, another way of recognizing that prisoners sentenced as juveniles should receive different treatment from those sentenced as adults.[149] These laws acknowledge the reduced culpability of juvenile offenders and provide them with a meaningful opportunity for reform.

4. Other Areas of Reform

This Article has focused on the potential impact of the Supreme Court's developmental framework on adult sentencing of juveniles and parole regulation. But the influence of the principles embodied in this framework on the regulation of juvenile crime is likely to be far broader. Three areas of emerging reform are worth noting in conclusion; in each, lawmakers have already begun to adopt legal changes inspired by *Miller*. First, laws that automatically transfer juveniles to criminal court when charged with specific serious offenses subvert the lessons of *Miller* and *Graham*. Some legislatures have restricted these laws, recognizing that most juveniles, due to their immaturity, belong in the separate juvenile system and that transfer decisions

147. *Id.* § 4801.

148. CAL. BD. OF PAROLE HEARINGS, ADMINISTRATIVE DIRECTIVE No. 2013-07, GUIDANCE ON ASSESSING THE GROWTH AND MATURITY OF YOUTH OFFENDERS AT PAROLE SUITABILITY HEARINGS (2013), http://www.cdcr.ca.gov/BOPH/docs/admin_directives/AD2013-07.pdf.

149. *E.g.*, COLO. EXECUTIVE ORDER B 009 07, JUVENILE CLEMENCY BOARD (2007), http://www.njjn.org/uploads/digital-library/coclemency.pdf.

should be made on an individualized basis that allows consideration of youthful immaturity and potential for rehabilitation.[150] Second, in the developmental framework, the importance of the content of correctional programs and the conditions under which the juvenile offender is confined become particularly salient. The science of adolescent development (discussed in Section I) makes clear that a meaningful opportunity to reform requires a correctional setting that promotes healthy psychological development. Increasingly, over the past decade, this lesson has shaped correctional policies in the juvenile system;[151] and it is likely to begin to influence the treatment of young offenders in the adult system as well. Third, developmental science indicates that older adolescents, although they are legal adults, are not fully mature and that their immaturity may contribute to their criminal activity. This does not necessarily argue for raising the age of criminal court jurisdiction above age eighteen, but it does suggest that young adults, like their younger counterparts, are less culpable and more likely to reform than older adults.[152] Justice policies that attend to their status as still-developing individuals will maximize their likelihood of reform. These areas of emerging reform, and others, clarify that the Court's constitutional framework is shaping the regulation of juvenile crime in ways that go well beyond its impact on sentencing and parole.

150. The Texas Court of Criminal Appeals has required individualized consideration of a juvenile's attributes before his transfer to an adult court. Moon v. State, 451 S.W.3d. 28, 47 (Tex. Crim. App. 2014). A substantial number of states have reformed their transfer laws and made transfer more difficult. *See, e.g.*, H.R. 12-1271, 2012 Sess., Gen. Assemb. (Colo. 2012); S.B. 200, 143d Gen. Assemb., Reg. Sess. (Del. 2005); S.B. 515, 2014 Sess., Gen. Assemb. (Md. 2014); H.R. 86, 129th Gen. Assemb., Reg. Sess. (Ohio 2011). Some states such as Missouri have created task forces to evaluate transfer laws. *See Transfer, Waiver and Raising the Age of Juvenile Jurisdiction*, NAT'L CONF. ST. LEGISLATURES (Jan. 13, 2014), http://www.ncsl.org/research/civil-and-criminal-justice/2013-juvenile-justice-state-legislation.aspx. The Campaign for Youth Justice maintains a list of statutory reforms. *See State Snapshot*, CAMPAIGN FOR YOUTH JUST., http://www.campaignforyouthjustice.org/research/state-snapshot (last visited June 1, 2016).

151. COMM. ON ASSESSING JUVENILE JUSTICE REFORM, NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 3 (Richard J. Bonnie et al. eds, 2012). The Models for Change initiative, sponsored by the John D. and Catherine T. MacArthur Foundation, applies a developmental approach and has influenced policy in thirty-five states. *Models for Change: Systems Reform in Juvenile Justice*, MODELS FOR CHANGE, http://www.modelsforchange.net/about/index.html?utm_source=%2fabout&utm_medium=web&utm_campaign=redirect (last visited June 1, 2016).

152. Some advocates favor raising the age of juvenile court jurisdiction to include young adults. *See, e.g.*, VINCENT SCHIRALDI, BRUCE WESTERN & KENDRA BRADNER, HARVARD KENNEDY SCH., NEW THINKING IN COMMUNITY CORRECTIONS: COMMUNITY-BASED RESPONSES TO JUSTICE-INVOLVED YOUNG ADULTS 3 (2015), https://www.ncjrs.gov/pdffiles1/nij/248900.pdf (recommending that young adults be dealt with in the juvenile system). Others argue that this reform is not yet supported by developmental science and is inadvisable for pragmatic reasons. *E.g.*, Elizabeth Scott, Richard Bonnie & Laurence Steinberg, *Young Adulthood as a Transitional Legal Category: Science, Social Change and Justice Policy*, 84 FORDHAM L. REV. (forthcoming 2016) (advocating reforms targeting young adults in the adult justice system).

C. *A Cautionary Note: Threats to the Constitutional Framework*

Our analysis of the Supreme Court's juvenile sentencing opinions and the influence of its developmental framework on justice policy ends on a cautionary note. Although, in many respects, the current law reform trend is both consonant with constitutional values and more effective than policies that promote lengthy incarceration, several challenges lie ahead. First, as discussed earlier, the emphasis on adolescent immaturity as a key consideration in sentencing is likely to be resisted by some prosecutors and rejected by some courts, particularly when juveniles are convicted of serious crimes. More generally, public and political attitudes toward crime are volatile and, predictably, policies based on the "children are different" principle almost certainly will come under pressure from time to time. In fact, as this Article suggests, endorsement of this principle is far from firmly established. Many punitive statutes of the 1990s are still in place; for example, although the transfer of juveniles to criminal courts has declined substantially in the past decade, few of the statutes that allow transfer for a broad range of crimes have been amended.[153] Moreover, the variation among courts in responding to the question of *Miller*'s retroactivity (before *Montgomery* settled this question) suggests that not all lawmakers accept the "children are different" principle, and some are reluctant to apply the constitutional framework.

Other more systemic forces could destabilize the current approach as well. First, crime rates have been relatively low since the mid-1990s, calming anxiety about public safety and facilitating a less punitive, more pragmatic approach to juvenile crime regulation.[154] Should violent juvenile crime rates increase substantially, tolerant public attitudes might shift in a punitive direction. The "moral panics" of the 1990s, in which young criminals were labeled as "super-predators,"[155] demonstrate how public fears can readily be aroused, often by media coverage of violent juvenile crimes.[156] These stories often have resulted in outrage directed at specific offenders and hostility toward juvenile offenders generally. In this climate, judges have felt the pressure to severely sanction offenders, and politicians, eager to demonstrate that they are "tough on crime," have been inclined to quickly enact harsh laws. Background economic issues can also influence justice policy. The budgetary impact of the punitive reforms was

153. For example, transfer rates today are low in California, but the transfer statute describes thirty transferrable offenses and has not been reformed. CAL. WELF. & INST. CODE § 707(b) (West 2016); *see* JEFFREY A. BUTTS, JOHN JAY COLL. OF CRIMINAL JUSTICE RESEARCH & EVALUATION CTR., TRANSFER OF JUVENILES TO CRIMINAL COURT IS NOT CORRELATED WITH FALLING YOUTH VIOLENCE (2012), http://johnjayresearch.org/wp-content/uploads/2012/03/databit2012_05.pdf (describing relatively low transfer rates compared to other states).

154. Elizabeth S. Scott, Miller v. Alabama *and the (Past and) Future of Juvenile Crime Regulation*, 31 LAW & INEQ. 535, 542 (2013) [hereinafter Scott, *Past and Future of Juvenile Crime Regulation*].

155. John L. DiIulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23.

156. *See The Superpredator Myth, 20 Years Later*, EQUAL JUST. INITIATIVE (Apr. 7, 2014), http://www.eji.org/node/893.

substantial; in recent years, lawmakers have moderated policies, partly in an effort to reduce the financial burden on state budgets during the recession.[157] Under these conditions, regulators have been more receptive to policies based on developmental knowledge, policies that are both less costly and generally more effective at reducing recidivism than regulation that promotes lengthy incarceration.[158] States' straitened financial circumstances could change; ironically, a return to prosperity might undermine empirically based and constitutionally sound policies.

Thus, adhering to the Court's developmental framework and limiting the impact of punitive impulses toward juvenile offenders generally poses an ongoing challenge. But as the framework becomes more firmly entrenched over time, courts and legislatures may be less inclined to abandon policies that are sound on both social welfare and constitutional grounds. The lessons of developmental science are becoming increasingly familiar to lawmakers, making it more difficult to simply ignore differences between adult and juvenile offenders. Moreover, the contemporary developmental model holds juveniles accountable and applies a mitigation principle to their crimes, but does not *excuse* young offenders from responsibility.[159] Thus it is likely more palatable on both public safety and retribution grounds than the traditional rehabilitative model of juvenile justice, which ignored the realities of adolescent development.

Some constitutionally grounded reforms can mitigate the political volatility of crime policy. For example, more restrictive transfer laws that limit the category of transferable offenses and exclude younger juveniles insulate "front-line" decision makers—prosecutors and courts—from pressure to prosecute and punish juveniles as adults. Other strategies have been invoked to make the legislative process more deliberative when politicians rush to enact tough laws. The requirement of a cost-benefit analysis, built into the legislative and regulatory process in some states, encourages regulators to calculate the predicted financial costs of proposed changes.[160] Lawmakers in the 1990s seldom considered the long-term budgetary impact of the punitive sentencing reforms, which later became a source of concern over time. Further, sometimes legislative committees considering juvenile justice reforms have required an evaluation of the likely effect of the proposed regulatory change on the trajectory of the future lives of the youths affected by the law, together with its impact on incarceration rates and duration, and on recidivism.[161] These analyses draw on developmental research and can improve regulators' decision making by promoting

157. Scott, *Past and Future of Juvenile Crime Regulation*, *supra* note 154, at 542.

158. Elizabeth S. Scott, *"Children Are Different": Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM L. 71, 91 (2013).

159. *See* COMM. ON ASSESSING JUVENILE JUSTICE REFORM, *supra* note 151, at 21, 46.

160. The Washington State Institute of Public Policy performs this function for the state legislature, issuing reports on proposed juvenile justice and other legislation. WASH. STATE INST. FOR PUB. POLICY, BENEFIT-COST RESULTS: JUVENILE JUSTICE (2016), http://www.wsipp.wa.gov/BenefitCost/WsippBenefitCost_AllPrograms.

161. See *infra* notes 162–63 and accompanying text for a discussion of California's Audrie's Law.

consideration of consequences that otherwise might be ignored; they also slow the lawmaking process, likely contributing to more deliberation. Finally, "second look" sentencing and parole statutes, discussed above, permit the retrospective examination of criminal sentences at a time when the emotional outrage surrounding the crime has dissipated.

The enactment of Audrie's Law in California provides an example of how high profile juvenile crimes can lead to precipitous legislative action—but also how regulatory procedures that encourage deliberation can mitigate the impact of punitive responses. In 2012, in response to the suicide of a teenager who had been sexually assaulted and video-recorded while intoxicated at a party, the California Assembly acted quickly to consider a bill facilitating transfer to criminal court for this offense, which previously had not fallen within the definition of forcible rape, a transferable offense.[162] The bill also provided for a mandatory minimum sentence in the juvenile system and for sentencing enhancement where the perpetrator of a sexual offense afterwards used social media communications to intimidate or humiliate the victim. Although the bill initially had substantial momentum, the enacted statute was far more limited and included *none* of these provisions (it allowed merely for public hearings and mandated sex offender treatment for convicted youth). A possible explanation lies in the work of two legislative committees. The Senate Committee on Public Safety issued a report similar to the "impact statement" suggested above that focused on adolescent brain research, the logic of the Supreme Court's framework, and evidence that long sentences were ineffective at reducing juvenile crime. The Senate Appropriations Committee analyzed the cost of the proposed bill and expressed concern about its impact on California's overcrowded prisons.[163] In combination, these reports encouraged deliberation by highlighting the long-term impact of the proposed law. Perhaps the outcome demonstrates the growing influence on lawmakers of the developmental framework, even during times of moral panic.

V. CONCLUSION

The three recent Supreme Court opinions dealing with juvenile sentencing directly affect the sentences of a small group of offenders convicted of serious crimes and subject to the harshest sanctions. But these opinions and the developmental sentencing framework offered by the Supreme Court as the basis of its Eighth Amendment analysis have already had a far broader impact on justice policy than was dictated by the Court's narrow holdings. The framework is solidly grounded in the science of adolescence and in legal and constitutional

162. Melody Gutierrez, *Audrie's Law Goes Too Far, Some Legislators Insist*, SFGATE (June 22, 2014, 12:13 PM), http://www.sfgate.com/crime/article/Audrie-s-Law-goes-too-far-some-legislators-insist-5570164.php#photo-5989649.

163. *See* CAL. S. APPROPRIATIONS COMM., FISCAL SUMMARY OF S.B. 838, at 1 (2014), http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0801-0850/sb_838_cfa_20140523_130619_sen_comm.html (describing the $210,000 to $260,000 cost per juvenile caused by the two-year minimum term in a juvenile facility).

principles. Lawmakers, including legislatures, governors, judges, and corrections agencies, increasingly accept that youthful criminal activity is driven by developmental factors, and that most juveniles will desist with maturity. In both the juvenile and adult systems, this assumption has had a growing impact on policies regulating youth crime.