

2012

Cruel and Unusual Punishment: Confining Juveniles with Adults After Graham and Miller

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Andrea Wood, *Cruel and Unusual Punishment: Confining Juveniles with Adults After Graham and Miller*, 61 Emory L. J. 1445 (2012).

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CRUEL AND UNUSUAL PUNISHMENT: CONFINING JUVENILES WITH ADULTS AFTER *GRAHAM* AND *MILLER*

ABSTRACT

*Thousands of juveniles are currently confined with adults in detention and correctional facilities throughout the United States. Juveniles confined in adult facilities face grave dangers to their safety and well-being, including significantly higher rates of physical assault, sexual abuse, and suicide than their counterparts in juvenile facilities. These dangers and other conditions of juvenile confinement with adults give rise to concerns of constitutional dimension. In its Eighth Amendment jurisprudence, the United States Supreme Court has created categorical rules prohibiting the imposition of certain punishments on entire categories of offenders as cruel and unusual punishment. The Court's 2010 decision in *Graham v. Florida*, in which it held that a sentence of life in prison without the possibility of parole violates the Eighth Amendment when applied to juveniles convicted of nonhomicide offenses, and its 2012 decision in *Miller v. Alabama*, in which it held that mandatory life-without-parole sentencing schemes violate the Eighth Amendment when applied to juveniles, open the door to challenge the constitutionality of the confinement of juveniles with adults.*

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INTRODUCTION

Standing at 5'2" and weighing 125 pounds, Rodney Hulin entered a Texas state prison at the age of 16 after being convicted of second-degree arson.¹ Rodney had set a neighborhood dumpster on fire, which resulted in less than \$500 worth of property damage.² Almost immediately after entering prison, Rodney was raped by another prisoner.³ Although he begged to be moved out of the general population, Rodney was returned to the same unit after receiving medical treatment for the first rape.⁴ As he continued to be beaten, raped, and forced to perform oral sex on other prisoners, he repeatedly requested transfer out of the general population.⁵ On one occasion, he wrote a prison official: "I'm afraid to go to sleep, to shower or just about anything else. I am afraid that when I am doing these things, I might die at any time. Please, sir, help me."⁶ After seventy-five days in prison, Rodney hanged himself in his cell.⁷

Throughout the United States, thousands of juveniles⁸ are confined with adults in adult facilities, which include jails⁹ and prisons,¹⁰ rather than in juvenile facilities, which have been designed and designated for juveniles.¹¹

¹ NAT'L PRISON RAPE ELIMINATION COMM'N, REPORT 69 (2009), available at http://nprec.us/files/pdfs/NPREC_FinalReport.PDF.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* (quoting *Testimony of Linda Bruntmeyer*, U.S. SENATE COMMITTEE ON JUDICIARY (July 31, 2002), http://www.judiciary.senate.gov/hearings/testimony.cfm?id=4f1e0899533f7680e78d03281fe329f3&wit_id=4f1e0899533f7680e78d03281fe329f3-2-1) (internal quotation marks omitted). Prison officials finally moved Rodney into a segregated unit, and his suicide occurred after this transfer. *Id.*

⁸ Although states define the legal term "juvenile" differently, for purposes of this Comment, a juvenile is any individual under the age of eighteen.

⁹ The term "jail" refers to a correctional facility that primarily holds "pretrial detainees and/or prisoners sentenced to a term of one year or less." AM. BAR ASS'N, ABA CRIMINAL JUSTICE STANDARDS ON THE TREATMENT OF PRISONERS standard 23-1.0(i), at 1 (2010), available at <http://www.abanet.org/crimjust/policy/midyear2010/102i.pdf>. A correctional facility is "any place of adult criminal detention . . . operated by or on behalf of a correctional or law enforcement agency." *Id.* standard 23-1.0(e). "The term 'correctional facility' does not include a facility that serves solely as . . . a juvenile detention facility, or a juvenile correctional facility." *Id.*

¹⁰ The term "prison" refers to a correctional facility that primarily holds prisoners who have been sentenced to at least a one-year term of incarceration. *Id.* standard 23-1.0(j).

¹¹ See TODD D. MINTON, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MIDYEAR 2009—STATISTICAL TABLES 9 tbl.6 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim09st.pdf>; HEATHER C. WEST, U.S. DEP'T OF JUSTICE, PRISON INMATES AT MIDYEAR 2009—STATISTICAL TABLES 24 tbl.21 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pim09st.pdf>. Juveniles generally enter adult facilities as a result of being charged and prosecuted in adult criminal court, rather than in the juvenile justice system. JAMES AUSTIN

Rodney's experiences highlight some of the dangers faced by juveniles confined with adults. Juveniles, who continue to develop cognitively, emotionally, and physically, are especially harmed by confinement with adults.¹² Juveniles confined in adult facilities, which are not designed to meet the special needs of juveniles and are generally staffed by individuals who have not been trained to work with juvenile populations, have less access to rehabilitative programming and educational services than their counterparts confined in juvenile facilities.¹³

Adult inmates pose some of the greatest risks to juveniles held in adult facilities. In an adult facility, a juvenile faces a far greater risk of harm, including physical and sexual assault, than a juvenile housed in a juvenile facility.¹⁴ While adult facilities in some states separate juveniles from adult inmates, many do not.¹⁵ Children as young as thirteen may be held alongside adult offenders.¹⁶ This Comment argues that confining children under the age of eighteen with adults violates the Eighth Amendment¹⁷ to the United States Constitution.¹⁸

ET AL., U.S. DEP'T OF JUSTICE, NCJ 182503, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT, at ix (2000), available at <http://www.ncjrs.gov/pdffiles1/bja/182503.pdf>. Juveniles may be transferred from juvenile court to criminal court through a waiver procedure, or states may set the age of the criminal court's original jurisdiction to be under eighteen. *Id.* at 3.

¹² See NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 1, at 142–43.

¹³ AUSTIN ET AL., *supra* note 11, at 66–67; see also Donna Bishop & Charles Frazier, *Consequences of Transfer*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 227, 256 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) (noting that correctional officers “appeared to be focused exclusively on enforcing rules, maximizing surveillance, and demonstrating their power” and that, “[b]ecause the prisons were primarily custodial facilities, most [inmates] were not engaged in programs aimed at their personal or social development”).

¹⁴ AUSTIN ET AL., *supra* note 11, at 7–8.

¹⁵ *Id.* at xi, 45.

¹⁶ *Id.* at 41.

¹⁷ U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”). Although the prohibition against cruel and unusual punishments only applies following an individual's conviction, the majority of federal circuits use an Eighth Amendment framework to assess whether conditions of pretrial confinement violate the Due Process Clauses of the Fifth or Fourteenth Amendments. See *infra* Part III.A.

¹⁸ To file a suit against a prison official alleging an Eighth Amendment violation, an individual incarcerated in a state facility may bring a civil action for deprivation of rights under 42 U.S.C. § 1983, the mechanism by which the majority of constitutional claims are brought against state prison officials. Katherine Robb, *What We Don't Know Might Hurt Us: Subjective Knowledge and the Eighth Amendment's Deliberate Indifference Standard for Sexual Abuse in Prisons*, 65 N.Y.U. ANN. SURV. AM. L. 705, 707 n.19 (2010). Specific issues relating to § 1983, including standing, immunity, and the impact of the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321-66 (1996) (codified as amended in scattered sections of 11, 18, 28, and 42 U.S.C.), are beyond the scope of this Comment. An individual

In one strand of its Eighth Amendment jurisprudence, the Supreme Court has established categorical rules banning certain sentencing practices for particular offenders or offenses.¹⁹ Prior to its decision in *Graham v. Florida*, the Court had only established categorical rules prohibiting the imposition of the death penalty on either certain offenders²⁰ or for certain offenses.²¹ In these decisions, the Court analyzed whether a national consensus existed against applying the death penalty to the categories of offenders or offenses under consideration and then exercised independent judicial discretion to assess whether the death penalty was cruel and unusual in each circumstance.²² In *Graham*, the Court expanded its jurisprudence when it applied this analytical framework to hold a noncapital punishment, life in prison without the possibility of parole, unconstitutional as applied to juveniles convicted of nonhomicide offenses.²³ In 2012, the Court relied upon this line of cases involving juveniles in its decision in *Miller v. Alabama*, in which it held that mandatory life-without-parole sentencing schemes as applied to juveniles violate the Eighth Amendment.²⁴ The Court's decision in *Graham* and its emphasis on juveniles' distinctive characteristics and diminished culpability in *Roper v. Simmons*, *Graham*, and *Miller* open the door to challenge other noncapital punishments and conditions of confinement applied to juveniles, including confinement with adults.

Part I of this Comment discusses the grave dangers arising from the confinement of juveniles with adults, including the significant risk of physical and sexual assault, high rates of suicide, and lack of access to critical services. Part II examines the developmental and legally recognized differences between juveniles and adults. Part III explores the Supreme Court's Eighth Amendment jurisprudence with a focus on the two-part analytical framework adopted by

incarcerated in a federal prison may bring a *Bivens* suit per *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Specific issues related to a *Bivens* suit are beyond the scope of this Comment.

¹⁹ See, e.g., *Graham v. Florida*, 130 S. Ct. 2011 (2010); *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

²⁰ See *Roper*, 543 U.S. at 578 (prohibiting the imposition of the death penalty on juvenile defendants); *Atkins*, 536 U.S. at 321 (prohibiting the imposition of the death penalty on mentally retarded defendants).

²¹ See *Kennedy*, 554 U.S. at 446–47 (prohibiting the imposition of the death penalty on defendants convicted of nonhomicide offenses).

²² See, e.g., *Roper*, 543 U.S. at 564 (“The beginning point [of the Eighth Amendment analysis] is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment”).

²³ *Graham*, 130 S. Ct. at 2034.

²⁴ 132 S. Ct. 2455, 2475 (2012).

the Court in its establishment of categorical rules prohibiting the imposition of certain punishments on entire categories of offenders or offenses. Part IV argues that incarcerating juveniles in adult detention and correctional facilities where they come in contact with adult offenders constitutes cruel and unusual punishment under the Eighth Amendment, and details recommendations for remedying this constitutional violation.

I. THE CONFINEMENT OF JUVENILES WITH ADULTS IN THE UNITED STATES

This Part examines the grave dangers faced by thousands of juveniles who are confined with adults in jails and prisons in the United States each year. Section A outlines the increased risks and harm that juveniles face when confined in adult facilities, rather than juvenile facilities. Section B demonstrates that, despite the continued detention and incarceration of thousands of juveniles in adult facilities each day, a national consensus against confining juveniles with adults is forming.

A. *The Dangers of Confining Juveniles with Adults*

Juveniles confined in jails and prisons face serious threats to their health and well-being. Juveniles in adult facilities face a high risk of physical and sexual abuse from guards and other inmates, and this abuse may have devastating and long-term consequences for the victimized juvenile.²⁵ Juveniles confined in adult facilities also have dramatically higher rates of suicide than do their counterparts housed in juvenile facilities.²⁶ While confined in adult facilities, juveniles lack access to services critical to their continued development and are particularly vulnerable to criminal socialization.²⁷

Juveniles face significantly higher rates of physical and sexual abuse in adult facilities than do adult inmates in the same facilities or juveniles housed in juvenile facilities.²⁸ This abuse often begins immediately, within the first

²⁵ See NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 1, at 153, 155–57.

²⁶ AUSTIN ET AL., *supra* note 11, at 7–8.

²⁷ See Bishop & Frazier, *supra* note 13, at 256–57 (noting that juveniles in prisons lack the opportunity to participate in rehabilitative programming and instead spend much of their time learning new criminal techniques from more skilled and experienced offenders).

²⁸ MICHELE DEITCH ET AL., THE UNIV. OF TEX. AT AUSTIN, FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM, at xiv (2009), available at http://www.campaignforyouthjustice.org/documents/NR_TimeOut.pdf.

forty-eight hours of a juvenile's entry into an adult facility.²⁹ Juveniles are five times more likely to be sexually assaulted in adult facilities than in juvenile facilities.³⁰ Although juveniles made up only .2% of the prison population in 2005, they made up almost 1% of the substantiated incidents of inmate-on-inmate sexual violence in prisons that year.³¹ Juveniles constituted less than 1% of the jail population in 2005, but they made up 21% of all victims of substantiated incidents of inmate-on-inmate sexual violence in jails.³² In total, juveniles made up 7.7% of all victims of substantiated acts of sexual violence in prisons and jails carried out by other inmates, even though they made up less than 1% of the total detained and incarcerated population.³³

Sexual assault and rape may result in severe physical consequences, potentially exposing the victim to HIV/AIDS, hepatitis, and other sexually transmitted infections.³⁴ Sexual activity between men, which constitutes the vast majority of prison rape, accounts for more than 50% of all new HIV infections in the United States.³⁵ Rates of HIV and confirmed AIDS are more than five times higher among those incarcerated in prisons than in the general population of the United States.³⁶

Sexual abuse has severe and long-term emotional and psychological consequences for juveniles that may last well into adulthood.³⁷ Sexual abuse can lead to major depression and posttraumatic stress disorder.³⁸ Juveniles who have been sexually abused may face problems with anger, impulse control, flashbacks, dissociative episodes, hopelessness, despair, and persistent distrust and withdrawal.³⁹ Sexual abuse can increase tendencies toward criminal

²⁹ Prison Rape Elimination Act of 2003 § 2, 42 U.S.C. § 15601(4) (2006).

³⁰ *Id.*

³¹ NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 1, at 155–56.

³² *Id.* at 155.

³³ *Id.* at 155–56.

³⁴ Zulficar Gregory Restum, Commentary, *Public Health Implications of Substandard Correctional Health Care*, 95 AM. J. PUB. HEALTH 1689, 1690 (2005).

³⁵ CTRS. FOR DISEASE CONTROL & PREVENTION, HIV IN THE UNITED STATES: AN OVERVIEW 2 (2010), available at http://www.cdc.gov/hiv/topics/surveillance/resources/factsheets/pdf/us_overview.pdf.

³⁶ J. Taussig et al., *HIV Transmission Among Male Inmates in a State Prison System—Georgia, 1992–2005*, 55 MORBIDITY & MORTALITY WKLY. REP. 421, 421 (2006), available at <http://www.cdc.gov/mmwr/PDF/wk/mm5515.pdf>.

³⁷ NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 1, at 153.

³⁸ *Id.*

³⁹ *Id.*

behavior and substance abuse in juveniles.⁴⁰ Upon release from prison, victims of prison rape are more likely to become homeless or require government assistance due to the physical and psychological impacts of rape than are those who were not raped in prison.⁴¹

Congress recognized the significant risks that juveniles face in adult facilities when it passed the Prison Rape Elimination Act of 2003 (PREA).⁴² PREA, which unanimously passed in the House of Representatives and Senate and was immediately enacted into law by President George W. Bush, sought to draw attention to and address the issues of rape⁴³ and sexual victimization of individuals in custody.⁴⁴

The findings section of PREA highlights the increased risk of rape that juveniles face: “Young first-time offenders are at increased risk of sexual victimization. Juveniles are 5 times more likely to be sexually assaulted in adult rather than juvenile facilities—often within the first 48 hours of incarceration.”⁴⁵ PREA requires prison officials to keep more thorough internal records on rape, and it created a commission to propose standards to improve prison management.⁴⁶ Although an important symbolic step, PREA has failed

⁴⁰ *Id.*; see also DEAN G. KILPATRICK ET AL., U.S. DEP’T OF JUSTICE, NCJ 194972, YOUTH VICTIMIZATION: PREVALENCE AND IMPLICATIONS 9–10 (2003), available at <http://www.ncjrs.gov/pdffiles1/nij/194972.pdf>.

⁴¹ Prison Rape Elimination Act of 2003 § 2, 42 U.S.C. § 15601(11) (2006) (“Victims of prison rape suffer severe physical and psychological effects that hinder their ability to integrate into the community and maintain stable employment upon their release from prison. They are thus more likely to become homeless and/or require government assistance.”).

⁴² Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, 117 Stat. 972 (codified as amended at 42 U.S.C. §§ 15601–15609).

⁴³ The Prison Rape Elimination Act defines “rape” as the

carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person, forcibly or against that person’s will; . . . the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person not forcibly or against the person’s will, where the victim is incapable of giving consent because of his or her youth or his or her temporary or permanent mental or physical incapacity; or . . . the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person achieved through the exploitation of the fear or threat of physical violence or bodily injury.

Id. § 15609(9).

⁴⁴ Anthony C. Thompson, *What Happens Behind Locked Doors: The Difficulty of Addressing and Eliminating Rape in Prison*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 119, 122, 167 (2009).

⁴⁵ 42 U.S.C. § 15601(4).

⁴⁶ Thompson, *supra* note 44, at 168 (citing 42 U.S.C. §§ 15603(a)(1), 15606(e)(2)(L)).

to eliminate or reduce sexual abuse in correctional facilities or to demonstrably change public attitudes toward rape in custodial settings.⁴⁷

Numerous factors contribute to why juveniles face significant dangers when confined with adults. In a Department of Justice report that described characteristics that make an individual more likely to be sexually abused while incarcerated, many of the listed characteristics are common in juveniles, including small size and inexperience with the criminal justice system.⁴⁸ Additionally, juveniles, who have not fully matured physically, cognitively, socially, or emotionally, are less capable of protecting themselves from sexual advances and assault.⁴⁹ These juveniles generally also lack the experiences to cope in predatory environments, and expressions of fear may be taken as indications of weakness.⁵⁰

Staffing differences may also contribute to the high rates of sexual abuse in adult detention and correctional facilities because juvenile facilities generally have a much higher staff-to-inmate ratio than do adult facilities.⁵¹ Juvenile detention facilities generally have a ratio of one staff member to every eight youths, while an average adult jail has a staff-to-inmate ratio of one to sixty-four.⁵² The additional staff members in juvenile facilities may provide increased supervision and may also offer assistance and support to juveniles in a more focused manner.⁵³

Incidents of sexual assault in jails and prisons are underreported,⁵⁴ and juveniles may be particularly discouraged from reporting sexual abuse as a result of developmental, emotional, and systemic barriers.⁵⁵ The ramifications of disclosure include shame, stigma, not being believed, and retaliation, which

⁴⁷ See *id.* at 122 (citing Mary Sigler, *By the Light of Virtue: Prison Rape and the Corruption of Character*, 91 IOWA L. REV. 561, 568 (2006)) (“While an important symbolic first step, the bill has occasioned far too little discussion of implementation following its enactment. As important, there has been little or no change in public perception of—and attitudes toward—rape in prison.”).

⁴⁸ STEVEN T. MCFARLAND ET AL., DEP’T OF JUSTICE, REPORT ON RAPE IN JAILS IN THE U.S. 6–8 (2008), available at http://www.ojp.usdoj.gov/reviewpanel/pdfs/prea_finalreport_081229.pdf.

⁴⁹ NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 1, at 142 (citing Telephone Interview with Charlotte Price, Correctional Planner, N.C. Dep’t of Correction (Jan. 29, 2009)).

⁵⁰ Bishop & Frazier, *supra* note 13, at 258.

⁵¹ CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES: THE DANGERS OF INCARCERATING YOUTH IN ADULT JAILS IN AMERICA 7 (2007), available at http://www.campaignforyouthjustice.org/documents/CFYJNR_JailingJuveniles.pdf.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 149 (2006).

⁵⁵ NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 1, at 150.

impact juveniles more significantly than adults.⁵⁶ Juveniles may not be willing to undergo the intense scrutiny needed to determine the accuracy of a report of sexual assault.⁵⁷ Once faced with formal interviews and investigation, juveniles may feel intimidated by the perpetrator, try to suppress the pain stemming from the abuse by denying it ever occurred, change their story, or refuse to cooperate with investigators.⁵⁸

Juveniles incarcerated in adult facilities are also at a high risk of committing suicide.⁵⁹ One study indicates that a juvenile housed in an adult jail is five times more likely to commit suicide than is a juvenile in the general population and eight times more likely to commit suicide than is a juvenile housed in a juvenile facility.⁶⁰ Other studies suggest that a juvenile's increased risk of suicide in adult jails may be far higher.⁶¹

Not designed to meet the special needs of juveniles, adult facilities may seriously compromise a juvenile's healthy development, and surveys of adult facilities indicate that they generally lack specialized or developmentally appropriate programming for juveniles.⁶² Adult facilities are generally far less equipped than juvenile facilities to meet the educational needs of juveniles.⁶³ In 95% of juvenile facilities, one teacher is employed for every fifteen inmates, in contrast to one teacher for every one hundred inmates in adult facilities.⁶⁴ Unlike in adult facilities, the educational staff members in juvenile facilities are generally full-time employees.⁶⁵ In addition to an overall higher staff-to-inmate ratio and more teachers, most juvenile facilities also include classroom spaces and do not have the same physical-space restrictions faced by many adult facilities.⁶⁶ Juveniles confined in adult facilities, especially those in

⁵⁶ See *id.*; see also *id.* at 152 ("Although trauma, fear of retaliation, and limited knowledge of legal rights and procedures discourage reporting among adults, the impact of these factors on youth is even greater.").

⁵⁷ See Thompson, *supra* note 44, at 130–31.

⁵⁸ NAT'L PRISON RAPE ELIMINATION COMM'N, *supra* note 1, at 152.

⁵⁹ AUSTIN ET AL., *supra* note 11, at 7–8.

⁶⁰ *Id.*

⁶¹ See, e.g., CAMPAIGN FOR YOUTH JUSTICE, *supra* note 51, at 4 ("Youth are 19 times more likely to commit suicide in jail than youth in the general population and 36 times more likely to commit suicide in an adult jail than in a juvenile detention facility." (endnote omitted)).

⁶² See COUNCIL OF JUVENILE CORR. ADM'RS, POSITION STATEMENT: WAIVER AND TRANSFER OF YOUTHS TO ADULT SYSTEMS (2009), available at [http://www.campaignforyouthjustice.org/documents/CJCA%20Waiver%20and%20Transfer%20\(2009\).pdf](http://www.campaignforyouthjustice.org/documents/CJCA%20Waiver%20and%20Transfer%20(2009).pdf).

⁶³ See CAMPAIGN FOR YOUTH JUSTICE, *supra* note 51, at 7.

⁶⁴ Bishop & Frazier, *supra* note 13, at 253.

⁶⁵ See CAMPAIGN FOR YOUTH JUSTICE, *supra* note 51, at 7.

⁶⁶ *Id.*

pretrial detention awaiting adjudication, face a high risk of falling more behind in their education.⁶⁷

Juvenile facilities are better able to provide developmentally appropriate healthcare, rehabilitative services, and programming than are adult facilities.⁶⁸ Adult facilities may fail to provide juveniles with the appropriate nutrition or dental and vision care, which are especially critical for developing adolescents.⁶⁹ Staff members at juvenile facilities typically receive special training to work with juveniles not generally received by the staff at adult facilities.⁷⁰ Many adult facilities fail to provide juveniles with even basic services, including prison-survival skills and counseling.⁷¹ In two-thirds of juvenile facilities, one counselor is employed for every ten juveniles, and in 85% of juvenile facilities, at least one counselor is employed for every twenty-five juveniles.⁷² A direct comparison to the number of counselors available in adult facilities is difficult because most adult facilities group all “professional and technical” personnel in one category, which includes all medical and classification staff.⁷³ This staff-to-inmate ratio is one to twenty-five.⁷⁴ Given their incomplete development, juveniles are significantly impacted by the lack of appropriate services and care in adult facilities.⁷⁵

Juveniles’ developmental stage and malleability make them particularly vulnerable to criminal socialization when incarcerated with adults.⁷⁶ Generally sensitive to peer pressure as a group, juveniles confined in adult facilities are “especially likely to engage in violent behavior and to develop identities linked to domination and control.”⁷⁷ While confined in adult facilities, juveniles lack models for building a positive identity, honing productive life skills, and solving problems and disputes.⁷⁸ Rather, juveniles may spend considerable amounts of time with experienced adult offenders, who may pass along new

⁶⁷ *Id.*

⁶⁸ Bishop & Frazier, *supra* note 13, at 252–57.

⁶⁹ See CAMPAIGN FOR YOUTH JUSTICE, *supra* note 51, at 6–7.

⁷⁰ See AUSTIN ET AL., *supra* note 11, at 66.

⁷¹ *Id.* at 66–67.

⁷² Bishop & Frazier, *supra* note 13, at 253.

⁷³ *Id.* at 253–54.

⁷⁴ *Id.* at 254.

⁷⁵ See *id.* at 252, 257–58; *infra* Part II.A.

⁷⁶ See Bishop & Frazier, *supra* note 13, at 257–58.

⁷⁷ *Id.* at 258.

⁷⁸ *Id.*

methods and techniques related to criminal activity and the avoidance of detection.⁷⁹

Juveniles may also adopt violent practices to mask their vulnerable status.⁸⁰ To survive the violence they encounter in adult facilities, juveniles have reported that they often attempt to fit in to inmate culture.⁸¹ Many juveniles can only adjust to life in adult prisons or jails by “accepting violence as a part of daily life and, thus, becoming even more violent.”⁸²

A body of evidence suggests that incarcerating juveniles in adult correctional facilities not only places the juveniles in a demonstrably more hazardous living situation but also does not fulfill commonly accepted purposes of punishment. Research indicates that incarcerating juveniles with adults, an often more experienced criminal population, may neither deter juveniles from future criminal activity nor improve public safety.⁸³ In 2007, the Task Force on Community Preventive Services, supported by the Centers for Disease Control and Prevention, systematically evaluated published studies that dealt with the effectiveness of policies that result in the transfer of juveniles to criminal court.⁸⁴ The task force scrutinized the design suitability, methodologies, execution, and outcomes of these studies.⁸⁵

In its analysis of six studies examining specific deterrence,⁸⁶ all of which controlled for selection bias, the task force noted that four studies found that transferred juveniles subsequently committed more violent and cumulative crime than their counterparts who remained in the juvenile justice system.⁸⁷

⁷⁹ *Id.* at 257. “Prisons are schools for crime; offenders learn new skills for the illegitimate labor market in prison and become more deeply enmeshed in criminal subcultures. Prison can be an embittering experience that leaves offenders more angry at the world than when they went in.” John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1738 (1999).

⁸⁰ See CAMPAIGN FOR YOUTH JUSTICE, *supra* note 51, at 7–8.

⁸¹ RICHARD E. REDDING, U.S. DEP’T OF JUSTICE, NCJ 220595, JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY? 7–8 (2010), available at <http://www.ncjrs.gov/pdffiles1/ojdp/220595.pdf>.

⁸² *Id.* at 8.

⁸³ See CAMPAIGN FOR YOUTH JUSTICE, *supra* note 51, at 5–6 (citing Angela McGowan et al., *Effects on Violence of Laws and Policies Facilitating the Transfer of Juveniles from the Juvenile Justice System to the Adult Justice System: A Systematic Review*, 32 AM. J. PREVENTIVE MED. S7, S7–28 (2007)).

⁸⁴ McGowan et al., *supra* note 83.

⁸⁵ *Id.* at S12.

⁸⁶ Specific, or special, deterrence is the goal of punishment to dissuade an individual offender from committing offenses in the future. BLACK’S LAW DICTIONARY 514 (9th ed. 2009).

⁸⁷ McGowan et al., *supra* note 83, at S14–15. One study found no effect on the recidivism of transferred juveniles, and one study found slightly lower recidivism rates for transferred juveniles who initially committed

These four studies indicate that transferred juveniles were 33.7% more likely to be re-arrested than juveniles who remained in the juvenile justice system.⁸⁸ The task force concluded that “juveniles transferred to the adult justice system have greater rates of subsequent violence than juveniles retained in the juvenile justice system” and that “[t]ransferring juveniles to the adult justice system is counterproductive as a strategy for deterring subsequent violence.”⁸⁹ This increase in recidivism may be partially attributable to confinement in adult facilities, given that juveniles are held with more experienced adult offenders and lack the rehabilitative opportunities available in juvenile facilities.⁹⁰ Some researchers have concluded that incarceration with adults may have “brutalizing effects” on juveniles, in which the violent experiences that juveniles witness and experience in adult facilities normalize violent and criminal conduct.⁹¹

Research is generally inconclusive as to whether conviction in criminal court and incarceration in adult facilities deters potential juvenile offenders.⁹² Most evidence indicates that transfer to criminal court and incarceration in adult facilities has little or no general deterrent effect.⁹³ Accordingly, an accumulating body of evidence suggests that incarcerating juveniles in adult facilities fails to demonstrably deter future crime, and perhaps even increases recidivism rates in juvenile offenders, while dramatically increasing the risk of serious harm faced by these vulnerable wards of the state.

Although some seek to justify the confinement of juveniles with adults by pointing to the need for increased criminal sanctions for certain hardened juvenile offenders, many juveniles who are convicted of criminal offenses and confined in adult facilities serve sentences comparable in length to the ones that they would have served if held in juvenile facilities.⁹⁴ Seventy-eight percent of juveniles incarcerated in adult facilities are released before they turn twenty-one; ninety-five percent are released before they turn twenty-five.⁹⁵ The average time that these juveniles serve on their sentences is two years and

property offenses, although it found higher rates of recidivism for transferred juveniles arrested for all crimes other than property offenses. *Id.* at S14.

⁸⁸ *Id.*

⁸⁹ *Id.* at S15.

⁹⁰ REDDING, *supra* note 81, at 7; McGowan et al., *supra* note 83, at S19.

⁹¹ REDDING, *supra* note 81, at 8.

⁹² *Id.* at 2.

⁹³ *Id.*

⁹⁴ *Id.* at 1–2.

⁹⁵ *Id.*

eight months.⁹⁶ Additionally, some jurisdictions have implemented systems in which a juvenile convicted in criminal court can serve his sentence in a juvenile detention facility until he reaches the age of eighteen, at which time he can be transferred to an adult facility to serve the remaining time of his sentence if necessary.⁹⁷

Juveniles housed in adult facilities face extreme risks to their health and well-being without the benefit of developmentally appropriate services and rehabilitative programming. Exposed to alarmingly high rates of physical and sexual abuse, these children face the real possibility of developing psychological and emotional disorders, contracting sexually transmitted infections, or even committing suicide. Adult facilities, with often dramatically lower staff-to-inmate ratios than juvenile facilities, are not equipped to handle the special educational, developmental, physical, and emotional needs of juveniles, and thus deprive them of critical opportunities for rehabilitation. In fact, confinement in adult facilities may foster more violent behaviors, facilitate opportunities for criminal socialization, and increase recidivism.

B. Numbers of Juveniles Confined in Adult Facilities

On any given day, thousands of juveniles are housed with adult offenders in jails and prisons.⁹⁸ The primary means by which a juvenile finds himself in an adult facility is when he is prosecuted as an adult in criminal court.⁹⁹ Throughout the 1990s, public fear of the juvenile “super-predator,”¹⁰⁰ predictions about growth among certain segments of the population, and public-safety concerns led to a movement to prosecute more juveniles in criminal court.¹⁰¹ During the 1990s, nearly every state legislature expanded its

⁹⁶ *Id.* at 2.

⁹⁷ See CAMPAIGN FOR YOUTH JUSTICE, *supra* note 51, at 24.

⁹⁸ MINTON, *supra* note 11, at 9 tbl.6; WEST, *supra* note 11, at 24 tbl.21.

⁹⁹ HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE, NCJ 212906, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 236 (2006), available at <http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf>. Approximately 250,000 juveniles are prosecuted in adult court each year. NEELUM ARYA, CAMPAIGN FOR YOUTH JUSTICE, STATE TRENDS: LEGISLATIVE VICTORIES FROM 2005 TO 2010 REMOVING YOUTH FROM THE ADULT CRIMINAL JUSTICE SYSTEM 3 (2011), available at http://www.campaignforyouthjustice.org/documents/CFYJ_State_Trends_Report.pdf.

¹⁰⁰ John DiIulio, then a professor at Princeton University, first used the term “super-predator” in 1995 to describe what some thought to be a new emerging group of hardened, predatory, and remorseless juvenile offenders. See John J. DiIulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23; see also Mark Soler et al., *Juvenile Justice—Lessons for a New Era*, 16 GEO. J. ON POVERTY L. & POL'Y 483, 486 (2009).

¹⁰¹ Soler et al., *supra* note 100, at 492.

existing transfer provisions or created new transfer mechanisms that made it easier to prosecute juveniles in criminal court.¹⁰² The number of juveniles transferred to criminal court rose in most states, which led to their placement in adult-detention and adult-correctional facilities while awaiting disposition and following conviction.¹⁰³ Between 1990 and 1999, the number of juveniles held in adult jails increased by more than 300%, while the overall adult jail inmate population only increased by 48%.¹⁰⁴ Between 1986 and 1995, the number of juveniles entering adult prisons also rose each year.¹⁰⁵

Thousands of juveniles are detained and incarcerated with adults each year. In many states, juveniles are housed with the general adult population.¹⁰⁶ On an annual one-day count in 2009, 7220 juveniles were confined in adult jails, most either awaiting disposition in criminal court or serving sentences of less than one year.¹⁰⁷ In 2009, 2778 juveniles were incarcerated in adult prisons on the annual one-day count of prison populations.¹⁰⁸ Given high turnover rates, the total number of juveniles confined in jails and prisons over the course of one year may be ten to twenty times higher than the numbers gathered in the one-day count.¹⁰⁹

National consensus, however, may be forming against confining juveniles with adults. State legislatures and prison officials are beginning to realize the dangers of confining juveniles with adults. Between 1996 and 2004, the number of juveniles incarcerated in adult prisons fell by 54%, even as prison

¹⁰² SNYDER & SICKMUND, *supra* note 99, at 113. All states have set the upper limit of original jurisdiction for juvenile court at the age of fifteen, sixteen, or seventeen. BENJAMIN ADAMS & SEAN ADDIE, U.S. DEP'T OF JUSTICE, NCJ 230167, DELINQUENCY CASES WAIVED TO CRIMINAL COURT, 2007, at 1 (2010), *available at* <http://www.ncjrs.gov/pdffiles1/ojjdp/230167.pdf>. Three types of statutes provide for the transfer of juveniles to criminal court: (i) judicial transfer laws that allow or require a judge to determine whether juvenile court jurisdiction will be waived following a court hearing, (ii) prosecutorial direct-file laws that give both juvenile and criminal courts original jurisdiction and allow the prosecutor to determine within which jurisdiction to file the case, and (iii) automatic-transfer laws that designate certain cases that must be filed in criminal court based on characteristics of the offense or juvenile. REDDING, *supra* note 81, at 2. For a comprehensive history and analysis of transfer provisions and the waiver of juveniles to adult court, see THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT (Jeffrey Fagan & Franklin E. Zimring eds., 2000).

¹⁰³ REDDING, *supra* note 81, at 1.

¹⁰⁴ SNYDER & SICKMUND, *supra* note 99, at 236.

¹⁰⁵ *Id.* at 237.

¹⁰⁶ Bishop & Frazier, *supra* note 13, at 252.

¹⁰⁷ MINTON, *supra* note 11, at 9 tbl.6. Of these juveniles, 5847 were held as adults and 1373 were held as juveniles. *Id.*

¹⁰⁸ WEST, *supra* note 11, at 24 tbl.21.

¹⁰⁹ AUSTIN ET AL., *supra* note 11, at 41; CAMPAIGN FOR YOUTH JUSTICE, *supra* note 51, at 4.

populations grew.¹¹⁰ On the day of the annual count of prison inmates in 2009, seven states did not house any juveniles in adult prisons,¹¹¹ twelve states housed between one and ten juveniles in adult prisons,¹¹² and an additional ten states housed between ten and twenty-five juveniles in adult prisons.¹¹³ By the annual one-day count of adult jail inmate populations in 2011, the number of juveniles being held in jails had declined to 5900.¹¹⁴ Furthermore, some states have taken steps to require the sight-and-sound separation of juveniles and adults when juveniles are placed in adult facilities. Of the thirty-nine states that allow juveniles to be held in adult jails while awaiting trial in criminal court, twenty states require that juveniles be separated from adults during this period.¹¹⁵ Even states that currently house higher numbers of juveniles in adult facilities, such as Pennsylvania,¹¹⁶ are beginning to take steps to decrease the number of juveniles in their adult facilities.¹¹⁷

II. JUVENILES AND ADULTS: DIFFERENT AND TREATED DIFFERENTLY

As described in Part I, juvenile offenders face significantly greater dangers when confined with adults in jails and prisons, and thousands of juveniles in the United States face these dangers on any given day. A growing body of evidence indicates that juveniles are significantly different from adults. The disparity in the dangers faced by juveniles and adults when confined in adult

¹¹⁰ SNYDER & SICKMUND, *supra* note 99, at 237.

¹¹¹ WEST, *supra* note 11, at 24 tbl.21. These states are California, Idaho, Kentucky, Maine, New Hampshire, North Dakota, and West Virginia. *Id.*

¹¹² *Id.* These states are Alaska (seven juveniles in adult prisons), Hawaii (two juveniles in adult prisons), Kansas (five juveniles in adult prisons), Massachusetts (eight juveniles in adult prisons), Montana (one juvenile in adult prisons), New Mexico (three juveniles in adult prisons), Rhode Island (one juvenile in adult prisons), South Dakota (one juvenile in adult prisons), Utah (six juveniles in adult prisons), Vermont (four juveniles in adult prisons), Washington (two juveniles in adult prisons), and Wyoming (one juvenile in adult prisons). *Id.*

¹¹³ *Id.* These states are Arkansas (seventeen juveniles in adult prisons), Iowa (thirteen juveniles in adult prisons), Louisiana (fifteen juveniles in adult prisons), Minnesota (thirteen juveniles in adult prisons), Nebraska (twenty-one juveniles in adult prisons), New Jersey (twenty-one juveniles in adult prisons), Oklahoma (nineteen juveniles in adult prisons), Oregon (thirteen juveniles in adult prisons), Tennessee (twenty-two juveniles in adult prisons), and Virginia (sixteen juveniles in adult prisons). *Id.*

¹¹⁴ See TODD D. MINTON, U.S. DEP'T OF JUSTICE, NCJ 237961, JAIL INMATES AT MIDYEAR 2011—STATISTICAL TABLES 6 tbl.6 (2012), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/jim11st.pdf>.

¹¹⁵ CAMPAIGN FOR YOUTH JUSTICE, *supra* note 51, at 14, 24.

¹¹⁶ On the day of the annual count in 2009, Pennsylvania housed sixty-one juveniles in its adult prisons. WEST, *supra* note 11, at 24 tbl.21.

¹¹⁷ See ARYA, *supra* note 99, at 26. Signed into law in October 2010, Pennsylvania Senate Bill 1169 permits a juvenile being tried in the adult criminal system to be “de-certified” and held at a juvenile facility. S.B. 1169, 2010 Gen. Assemb., Reg. Sess. (Pa. 2010).

facilities, coupled with the inherent differences between juveniles and adults, raises important constitutional issues. A punishment that passes constitutional muster when applied to adults may be unconstitutional when applied to juveniles.

This Part argues that juveniles and adults demonstrate significant differences in physical and mental development and have appropriately been treated differently under the law. Section A describes the significant developmental differences between juveniles and adults. Section B discusses the treatment of juveniles under state and federal law. Section C summarizes the Supreme Court's jurisprudence involving children, which highlights the constitutionally significant differences between juveniles and adults. Section D describes the history and purposes of the juvenile justice system, which was created to respond to the special needs of juveniles. Section E examines international norms surrounding the confinement of juveniles with adults.

A. Developmental Characteristics of Juveniles

Scientific research highlights many differences between juveniles and adults that militate against confining them together.¹¹⁸ Although some young people now experience the physical changes of puberty earlier than in the past, which may result in an appearance of maturity at an earlier age, most aspects of cognitive development, such as the development of self-regulatory capacity and skills, reasoning ability, planning, logic, and understanding the consequences of actions, increase according to biological (i.e., numerical) age and experiences, rather than according to the child's stage of physical development.¹¹⁹

The sexual abuse and lack of access to programming and treatment in adult facilities negatively affects the development of juveniles, and they are more susceptible to harm from maltreatment than adults. Magnetic resonance imaging indicates that a particular section of a juvenile's frontal lobe, which controls decision making and other advanced functions,¹²⁰ is not fully developed and continues to undergo significant change after an individual's

¹¹⁸ See, e.g., Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*, 21 J. NEUROSCIENCE 8819, 8826–28 (2001).

¹¹⁹ Ronald E. Dahl, *Adolescent Brain Development: A Period of Vulnerabilities and Opportunities*, 1021 ANNALS N.Y. ACAD. SCI. 1, 15, 18 (2004).

¹²⁰ DEITCH ET AL., *supra* note 28, at 14.

eighteenth birthday.¹²¹ In fact, research shows that the human brain continues to develop and mature well into an individual's twenties.¹²² Juveniles also have a relatively unformed character.¹²³ During adolescence, an individual's identity begins to develop and emerge, and the individual's interactions with his surroundings heavily influence this identity formation.¹²⁴

Because a juvenile's brain is still developing and his character has not been fully formed, juveniles are generally capable of change.¹²⁵ Developmental psychologists emphasize that adolescence is "a period of tremendous malleability," in which all experiences "have a great deal of influence over the course of development."¹²⁶ Given their development throughout adolescence, juveniles are more amenable to change than are adults.¹²⁷ Therefore, the rehabilitative programming available in juvenile facilities may be more effective with this malleable and responsive population.¹²⁸

B. Treatment of Juveniles Under Federal and State Law

Congress and all fifty state legislatures recognize the differences between juveniles and adults and have created laws based upon those differences. These laws acknowledge the import of a juvenile's continued development and seek to protect developing juveniles from their own immaturity and lack of responsibility.¹²⁹ In 1988, Justice Stevens noted, "[W]e assume that [children] do not yet act as adults do, and thus [society] act[s] in their interest by restricting certain choices that we feel they are not yet ready to make with full benefit of the costs and benefits attending such decisions."¹³⁰

¹²¹ *Id.*; Sowell et al., *supra* note 118, at 8826.

¹²² DEITCH ET AL., *supra* note 28, at 14.

¹²³ Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003).

¹²⁴ *See id.*

¹²⁵ EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON 7 (2007), available at <http://eji.org/eji/files/20071017cruelandunusual.pdf>.

¹²⁶ Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court, in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 9, 23 (Thomas Grisso & Robert G. Schwartz eds., 2000).

¹²⁷ McGowan et al., *supra* note 83, at 58.

¹²⁸ *See id.* at S12–20.

¹²⁹ CAMPAIGN FOR YOUTH JUSTICE, *supra* note 51, at 6.

¹³⁰ *Thompson v. Oklahoma*, 487 U.S. 815, 825 n.23 (1988) (plurality opinion). In *Thompson*, the Court held the death penalty to be an unconstitutional punishment for individuals who committed the relevant offense before the age of sixteen. *Id.* at 838.

All states have laws that treat juveniles differently from adults, which stems from the recognition of the many differences between juveniles and adults.¹³¹ Each state restricts juveniles' authority and decision making by setting the age of majority to be at least eighteen.¹³² Prior to reaching the age of majority, an individual does not have the authority to vote, serve on a jury, create a binding legal contract, purchase and possess a firearm, serve in the military, or gamble.¹³³ States have determined that, before the age of eighteen, juveniles do not have the requisite decision-making capability and autonomy to initiate and participate in these acts.

Most states also restrict a juvenile's right to engage in certain activities without parental or judicial consent, including getting an abortion,¹³⁴ getting married,¹³⁵ purchasing pornography,¹³⁶ getting a tattoo,¹³⁷ or getting a body piercing.¹³⁸ All states restrict individuals under the age of twenty-one from purchasing alcohol, and most restrict juveniles under the age of eighteen from purchasing tobacco, getting a driver's license without restrictions, or engaging in transactions with pawnbrokers.¹³⁹

A juvenile cannot personally bring a suit in court against another party.¹⁴⁰ A court has the authority to appoint a guardian ad litem to represent a juvenile and his interests in litigation.¹⁴¹ The Federal Rules of Civil Procedure group minors and incompetents together as a class that cannot sue or defend on their own behalf.¹⁴² If a minor or incompetent does not have "a duly appointed representative," such as a general guardian, a conservator, or a like fiduciary, the Rules require a next friend or a guardian ad litem "to protect a minor or

¹³¹ DEITCH ET AL., *supra* note 28, at 9.

¹³² *Id.* at 11.

¹³³ *Id.* at 10–11.

¹³⁴ In thirty-nine states, a juvenile must get parental or judicial consent to get an abortion. *Id.* at 11.

¹³⁵ In thirty-six states and the District of Columbia, a juvenile cannot get married without parental consent. *Id.*

¹³⁶ In forty-eight states, youth under the age of eighteen cannot purchase pornography either absolutely or without parental consent. *Id.*

¹³⁷ In forty-two states, a youth under eighteen is either absolutely prohibited from getting or must obtain parental consent to get a tattoo. *Id.*

¹³⁸ In thirty-three states, a youth under eighteen is either absolutely prohibited from getting or must obtain parental consent to get a body piercing. *Id.*

¹³⁹ *Id.*

¹⁴⁰ 5 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 9:25 (4th ed. 1993 & Supp. 2009).

¹⁴¹ 42 AM. JUR. 2D *Infants* § 25 (2010).

¹⁴² FED. R. CIV. P. 17(c).

incompetent person who is unrepresented in an action.”¹⁴³ A juvenile also generally cannot be compelled to specifically perform a contract while under the age of eighteen.¹⁴⁴

The federal government has recognized the differences between juveniles and adults, and the dangers inherent in confining juveniles in facilities in which they come into contact with adult offenders. The Juvenile Justice and Delinquency Prevention Act¹⁴⁵ (JJDP), enacted in 1974 and most recently reauthorized in 2002, hinges a state’s receipt of federal funding for juvenile justice initiatives on its adherence to a number of guidelines.¹⁴⁶ The JJDP prohibits the confinement of juveniles prosecuted in juvenile court in “any institution in which they have contact with adult inmates,”¹⁴⁷ which has come to be known as the sight-and-sound-separation requirement.¹⁴⁸

The JJDP creates limited exceptions that allow for the placement of a juvenile in an adult facility for a short period of time before or after a court appearance, while awaiting transfer to a juvenile facility, in a rural area without any nearby juvenile facilities, or during periods of unsafe travel conditions.¹⁴⁹ In each of these circumstances, the JJDP requires that “juveniles do not have contact with adult inmates.”¹⁵⁰ The JJDP also requires that states adopt policies mandating that those who work in penal facilities housing juveniles be “trained and certified to work with juveniles.”¹⁵¹ Even though the developmental vulnerability of juveniles tried as adults remains diminished, the JJDP does not apply to juveniles charged and tried as adults.¹⁵²

¹⁴³ *Id.*

¹⁴⁴ See WILLISTON & LORD, *supra* note 140.

¹⁴⁵ Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (codified as amended in scattered sections of 5, 18, and 42 U.S.C.).

¹⁴⁶ 42 U.S.C. § 5633(a) (2006).

¹⁴⁷ *Id.* § 5633(a)(12)(A).

¹⁴⁸ SNYDER & SICKMUND, *supra* note 99, at 97.

¹⁴⁹ 42 U.S.C. § 5633(a)(13).

¹⁵⁰ *Id.* § 5633(a)(13)(A), (B)(i)(I).

¹⁵¹ *Id.* § 5633(a)(13)(A), (B)(i)(II).

¹⁵² DEITCH ET AL., *supra* note 28, at 7; see also OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, GUIDANCE MANUAL FOR MONITORING FACILITIES UNDER THE JUVENILE JUSTICE AND DELINQUENCY PREVENTION ACT OF 2002 § 2.5, at 17 (2010), available at <http://www.ojjdp.gov/compliance/guidancemanual2010.pdf> (“A juvenile who has been transferred or waived or is otherwise under the jurisdiction of a criminal court does not have to be separated from adult criminal offenders.”).

Numerous state and federal laws recognize and enforce the differences between juveniles and adults. Through the JJDP, Congress has specifically highlighted how these differences implicate confining juveniles with adults.

C. Supreme Court Jurisprudence on Juveniles

Differences between juveniles and adults have been recognized as having both legal and scientific significance. Accordingly, the United States Supreme Court has treated and continues to treat juveniles as a class separate from adults.

The Supreme Court has repeatedly recognized juveniles as developmentally different from adults in both civil and criminal matters. Justice Frankfurter once famously noted that “[c]hildren have a very special place in life which law should reflect.”¹⁵³ He warned that “[l]egal theories . . . readily lead to fallacious reasoning if uncritically transferred to determination of a State’s duty towards children.”¹⁵⁴ Accordingly, the Court has embraced the notion that juveniles can and sometimes must be treated differently than adults throughout its jurisprudence.

In *Bellotti v. Baird*, the Court held that a state may require a pregnant minor to get either parental or judicial consent for her reproductive choices because minors often lack the capacity to independently make informed decisions.¹⁵⁵ The Court noted three reasons that justified “the conclusion that the constitutional rights of children cannot be equated with those of adults.”¹⁵⁶ The Court based its conclusion on “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”¹⁵⁷ The Court opined, “[A]lthough children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children’s vulnerability.”¹⁵⁸

In *Bellotti*, the Court noted its past holdings, in which it allowed states to “limit the freedom of children to choose for themselves in the making of

¹⁵³ *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

¹⁵⁴ *Id.*

¹⁵⁵ 443 U.S. 622, 635, 647–48 (1979) (plurality opinion).

¹⁵⁶ *Id.* at 634.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 635.

important, affirmative choices with potentially serious consequences.”¹⁵⁹ The Court characterized some of its past decisions as having been “grounded in the recognition that, during the formative years of childhood and adolescence, [juveniles] often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”¹⁶⁰

In *Prince v. Massachusetts*, the Supreme Court upheld a state’s right to restrict a minor’s work schedule.¹⁶¹ In *Prince*, an adult guardian permitted a child in her custody to sell religious literature on a public street, which violated the state’s child-labor statute.¹⁶² Even though the child had expressed a personal desire to engage in this activity, which was also an exercise of religion, the Court upheld the guardian’s conviction under the state statute because “the interests of society to protect the welfare of children” and the “opportunities for growth into free and independent well-developed men and citizens” allowed the state to enforce the statute, which would be unconstitutional if applied to adults.¹⁶³

Beginning in the 1960s, the Court expanded the due process rights of juveniles, while still emphasizing the constitutionally significant differences between juveniles and adults that supported differential treatment in the juvenile and criminal justice systems. In its 1967 decision in *In re Gault*, the Court expanded the procedural due process rights conferred upon juveniles in delinquency proceedings in juvenile court.¹⁶⁴ In its decision, the Court extended to juveniles the right to counsel, the right to notice of the charges brought against them, the right to confront and cross-examine witnesses, and the right against self-incrimination.¹⁶⁵ Even as the Court granted these rights to juveniles, it acknowledged and affirmed the value of the rehabilitative principles upon which the juvenile court system had been founded.¹⁶⁶ The Court commended the “principles relating to the processing and treatment of juveniles separately from adults” and emphasized that the procedural issues of the case did not in any way affect the separate processing and treatment of juveniles.¹⁶⁷ Juveniles who are processed in juvenile court, however, do not

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ 321 U.S. 158, 168–70 (1944).

¹⁶² *Id.* at 161–62.

¹⁶³ *See id.* at 164–65.

¹⁶⁴ 387 U.S. 1, 31–64 (1967).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 21–22.

¹⁶⁷ *Id.* at 22.

receive all the same due process protections as those processed in criminal court. For example, juveniles do not have a right to a jury trial in juvenile proceedings,¹⁶⁸ which is a constitutional right for an individual charged with a nonpetty crime in criminal court.¹⁶⁹

The Supreme Court's jurisprudence involving juveniles has emphasized the many constitutionally significant differences between juveniles and adults. The Court has explicitly stated that the Constitution may apply differently to juveniles and adults.¹⁷⁰ Even when the Court expanded constitutional due process rights for juveniles, the Court continued to recognize juveniles as a class separate from adults, and juvenile proceedings and treatment as different from adult proceedings and treatment.¹⁷¹

D. History of the Juvenile Justice System

The history of the juvenile justice system reflects the deeply rooted belief in the importance of the differences between juveniles and adults in our legal system. Since its founding, the juvenile justice system has emphasized rehabilitation, which has not been a major focus of criminal courts. First established in 1899, juvenile courts were created to deal separately and differently with juveniles who committed offenses.¹⁷² Prior to 1899, children were tried in the criminal justice system in the same manner as adult offenders.¹⁷³ Early reformers contemplated a juvenile justice system in which youthful offenders received treatment to eliminate antisocial tendencies, and

¹⁶⁸ See *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (plurality opinion) (“[T]rial by jury in the juvenile court’s adjudicative stage is not a constitutional requirement.”).

¹⁶⁹ See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (“[T]he Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment’s guarantee.”).

¹⁷⁰ See *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (“[O]ur acceptance of juvenile courts distinct from the adult criminal justice system assumes that juvenile offenders constitutionally may be treated differently from adults.”).

¹⁷¹ See *In re Gault*, 387 U.S. at 22.

¹⁷² DEITCH ET AL., *supra* note 28, at 5. The first juvenile court was established in Chicago in 1899. *Id.* The act that established this court

stressed that the court should serve a rehabilitative, rather than punitive, purpose; created a provision that juvenile court records be maintained confidentially and separately from criminal records to minimize stigma; mandated the physical separation of youths from adults when incarcerated or placed in the same institution; and included a provision barring the detention of children under the age of twelve in jails under any circumstances.

Id. at 5–6.

¹⁷³ AUSTIN ET AL., *supra* note 11, at ix.

the newly created juvenile system rejected concepts of criminal responsibility and punishment.¹⁷⁴

By 1925, forty-six states and the District of Columbia had established separate juvenile court systems.¹⁷⁵ Based on the notion that juveniles are different from adults, these courts focused on treating and rehabilitating a child with a clinical, rather than punitive, focus guiding the process from initial apprehension through institutionalization.¹⁷⁶ Juvenile courts sought to facilitate nonadversarial proceedings, during which the judge and other participants determined the best methods to rehabilitate the youthful offender.¹⁷⁷

Beginning in the 1960s, the juvenile justice system faced criticism and underwent considerable change.¹⁷⁸ Despite changes and additions to the body of due process standards applying to juvenile court proceedings,¹⁷⁹ all states continue to maintain a juvenile court system separate from the criminal justice system that provides independent courts and facilities to process juveniles.¹⁸⁰ Juvenile courts generally continue to embrace rehabilitation as a necessary response to the delinquent behavior of youthful offenders.¹⁸¹ Juvenile detention facilities generally provide more programming and treatment, with a rehabilitative focus, than adult facilities.¹⁸² Experts continue to emphasize the recent psychological and neurological studies that demonstrate the critical need to offer rehabilitative services to young offenders.¹⁸³

¹⁷⁴ Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, FUTURE CHILD., Fall 2008, at 15, 16.

¹⁷⁵ DEITCH ET AL., *supra* note 28, at 6.

¹⁷⁶ See *In re Gault*, 387 U.S. at 14–16.

¹⁷⁷ Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CALIF. L. REV. 1107, 1112 (2009).

¹⁷⁸ Scott & Steinberg, *supra* note 174, at 17.

¹⁷⁹ See *In re Winship*, 397 U.S. 358, 368 (1970); *In re Gault*, 387 U.S. at 31–64; *Kent v. United States*, 383 U.S. 541, 560–63 (1966).

¹⁸⁰ See SNYDER & SICKMUND, *supra* note 99, at 106.

¹⁸¹ Henning, *supra* note 177, at 1112. “While most [state juvenile court codes’] purpose clauses still manifest a commitment to the rehabilitation of children, those clauses now also reflect a growing concern for the interests of victims, the accountability of the offending youth, the safety of the community, and sometimes even the punishment of the child.” *Id.* at 1113–14. See, e.g., TENN. CODE ANN. § 37-1-101(a)(2) (2009) (“Consistent with the protection of the public interest, remove from children committing delinquent acts the taint of criminality and the consequences of criminal behavior and substitute . . . a program of treatment, training and rehabilitation . . .”).

¹⁸² See NAT’L PRISON RAPE ELIMINATION COMM’N, *supra* note 1, at 142.

¹⁸³ Henning, *supra* note 177, at 1118–19.

Because the majority of juveniles detained or incarcerated in adult facilities are either awaiting disposition in criminal court or serving sentences after conviction in criminal court, research focused on the challenges faced by juveniles transferred to criminal court illuminates several age-related differences that may also be relevant to incarcerating juveniles with adults. Research on juveniles tried as adults shows that juveniles face unique risks in the adult criminal justice system.¹⁸⁴ Juveniles are particularly susceptible to coercive interrogation techniques because of their diminished status in relation to the adults who interrogate them, beliefs about the need to obey authority figures, dependence on adults, and particular vulnerability to intimidation.¹⁸⁵ Accordingly, the danger that juveniles will give false confessions is higher, which seriously compromises the fact-finding process.¹⁸⁶ Juveniles have a decreased understanding of their rights, difficulties comprehending the trial process, limited language skills, and inadequate decision-making abilities, all of which may compromise their experience in and the ultimate outcome of their processing in the criminal justice system.¹⁸⁷

These age-related deficits implicate the Eighth Amendment because they render juveniles as a class more vulnerable to coercion, less capable of defending themselves against abuse, more subject to peer pressure, more vulnerable to criminal socialization, and less capable of surviving in the hostile jail and prison environments dominated by adult inmates. The United States has long recognized that the differences between juveniles and adults require separate processing and treatment for juvenile offenders. The continued existence of juvenile courts and juvenile-detention and correctional facilities underscores the widespread recognition that the developmental needs of juveniles require different and more rehabilitative treatment than adult offenders.

E. International Norms Involving the Confinement of Juveniles with Adults

Many states' allowance of the confinement of juveniles with adults deviates from international norms; both international bodies and numerous countries throughout the world eschew the incarceration of juveniles with adults.¹⁸⁸ The

¹⁸⁴ EQUAL JUSTICE INITIATIVE, *supra* note 125, at 8.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ Michelle India Baird & Mina B. Samuels, *Justice for Youth: The Betrayal of Childhood in the United States*, 5 J.L. & POL'Y 177, 180–81, 184–89 (1996).

United Nations Convention on the Rights of the Child¹⁸⁹ (CRC), the primary international document that lays out the rights of children who come into contact with the law,¹⁹⁰ recognizes that children's unique status grants them special protection.¹⁹¹ The CRC notes that "[n]o child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment."¹⁹² The CRC discourages holding children in any type of detention or correctional facility.¹⁹³ The CRC further states, "Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age."¹⁹⁴ If a period of detention does occur, the CRC emphasizes the critical importance of separating juveniles from adults.¹⁹⁵

Countries throughout the world have rejected the incarceration of juveniles with adults. Great Britain does not incarcerate children under the age of eighteen with adults.¹⁹⁶ Rather, facilities designated especially for juveniles house all children under the age of eighteen, regardless of their offense.¹⁹⁷ Following its ratification of the CRC in 1993, New Zealand prohibited the incarceration of children under the age of seventeen in adult facilities.¹⁹⁸ In Sweden, individuals under the age of twenty may not be incarcerated in adult facilities.¹⁹⁹ In its Bill of Rights, the South African constitution forbids the incarceration of any children under the age of eighteen with adults.²⁰⁰

¹⁸⁹ Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

¹⁹⁰ Baird & Samuels, *supra* note 188, at 184. The CRC was unanimously adopted by the United Nations General Assembly on November 20, 1989. *Id.* The United States has not ratified the CRC, even though both the House of Representatives and Senate passed resolutions supporting it. *Id.* at 185.

¹⁹¹ Deborah Labelle, *Bringing Human Rights Home to the World of Detention*, 40 COLUM. HUM. RTS. L. REV. 79, 118 (2008).

¹⁹² CRC, *supra* note 189, art. 37(a).

¹⁹³ *See id.* art. 37(b) ("The arrest, detention or imprisonment of a child . . . shall be used only as a measure of last resort and for the shortest appropriate period of time . . .").

¹⁹⁴ *Id.* art. 37(c).

¹⁹⁵ *See id.* ("[E]very child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so . . .").

¹⁹⁶ Anthony Bottoms & James Dignan, *Youth Justice in Great Britain*, 31 CRIME & JUST. 21, 89 (2004). Once a young offender in Britain reaches the age of twelve, he may be given a detention and training order (DTO) that may last between four and twenty-four months. *Id.* The first half of the DTO is served in custody with other juveniles, and the second half is served in the community with supervision. *Id.*

¹⁹⁷ *Id.* at 90-91.

¹⁹⁸ Allison Morris, *Youth Justice in New Zealand*, 31 CRIME & JUST. 243, 285-86 (2004).

¹⁹⁹ Carl-Gunnar Janson, *Youth Justice in Sweden*, 31 CRIME & JUST. 391, 419 (2004).

²⁰⁰ S. AFR. CONST., 1996, ch. 2, § 28(g).

A large body of scientific research demonstrates the many developmental differences between juveniles and adults. State governments, Congress, and the United States Supreme Court have consistently and traditionally recognized that these differences implicate the treatment of juveniles under the law. In fact, the existence of a juvenile court system in every jurisdiction in the United States reflects this understanding that children should generally be treated differently from adults. International norms also recognize the significant differences between juveniles and adults, and international bodies and many countries reject the confinement of juveniles with adults.

III. THE SUPREME COURT'S EIGHTH AMENDMENT JURISPRUDENCE

The previous Part considered the ways in which the law treats juveniles and adults differently and some of the underlying justifications for this differential treatment. The existence and legal recognition of these differences raise important constitutional issues with respect to whether housing juveniles with adults violates the Eighth Amendment's proscription against "cruel and unusual punishment."²⁰¹ This Part begins by describing the development of the Supreme Court's Eighth Amendment jurisprudence and then explores the Court's creation of categorical rules against specific sentencing practices as applied to certain offenders, including two types of punishment that have been found to violate the Eighth Amendment when applied to juveniles: the death penalty and life imprisonment without the possibility of parole for nonhomicide offenses. This Part then examines a recent decision in which the Court relied upon the principles in these categorical-rule cases to again conclude that juveniles' distinctive characteristics affect the constitutionality of sentencing practices as applied to them.

²⁰¹ U.S. CONST. amend. VIII. The prohibition against cruel and unusual punishment in the Eighth Amendment applies to individuals following an adjudication of guilt. *Ingraham v. Wright*, 430 U.S. 651, 664, 671 n.40 (1977). Prior to formal adjudication, the Due Process Clauses of the Fifth and Fourteenth Amendments guarantee individuals' rights in relation to the criminal justice process, including pretrial conditions of confinement. *See id.* at 671–72 n.40; *see also* *Bell v. Wolfish*, 441 U.S. 520, 535 & n.16 (1979). Pretrial detainees may not be subjected to pre-adjudicatory detention conditions that amount to punishment. *Bell*, 441 U.S. at 535. The Supreme Court has noted that pretrial detainees' substantive due process claims regarding conditions of confinement must receive at the least the same level of protection as claims brought under the Eighth Amendment. *Id.* at 545; *see also* *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983). The majority of circuits utilize Eighth Amendment standards to determine whether pretrial detainees face violation of their substantive due process rights. David C. Gorlin, Note, *Evaluating Punishment in Purgatory: The Need to Separate Pretrial Detainees' Conditions-of-Confinement Claims from Inadequate Eighth Amendment Analysis*, 108 MICH. L. REV. 417, 421–22 (2009). This Comment will use Eighth Amendment standards to consider challenges to conditions of confinement for juveniles being held before and after conviction.

The Eighth Amendment's proscriptions are incisive: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."²⁰² The Eighth Amendment is incorporated against the states through the Due Process Clause of the Fourteenth Amendment.²⁰³ Section A presents an overview of the Supreme Court's Eighth Amendment jurisprudence regarding cruel and unusual punishment. Section B examines the Court's Eighth Amendment analysis when it develops a categorical rule that prohibits a particular group from receiving a particular punishment. Section C examines how the Court has drawn upon these categorical-rule cases to further limit sentencing practices as applied to juveniles.

A. *Overview*

The Eighth Amendment prohibits "cruel and unusual punishments."²⁰⁴ At its most basic level, the Eighth Amendment forbids "the imposition of inherently barbaric punishments," such as torture, "under all circumstances."²⁰⁵ The Supreme Court has long recognized that what constitutes "cruel and unusual punishment" is "not static" and "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."²⁰⁶ This "evolving standards of decency" assessment is built on the notion that society changes, and therefore, determinations about the cruel and unusual nature of punishments also change. The Court has noted that the Eighth Amendment "embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . .,' against which we must evaluate penal measures."²⁰⁷

The reach of the Eighth Amendment extends beyond "inherently barbaric" punishments to punishments that are disproportionate to a crime.²⁰⁸ The Supreme Court has noted that "[t]he concept of proportionality is central to the Eighth Amendment."²⁰⁹ The ban on cruel and unusual punishment embodies a "precept of justice that punishment for crime should be graduated and

²⁰² U.S. CONST. amend. VIII.

²⁰³ *Robinson v. California*, 370 U.S. 660, 675 (1962) (Douglas, J., concurring).

²⁰⁴ U.S. CONST. amend. VIII.

²⁰⁵ *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010).

²⁰⁶ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

²⁰⁷ *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (alteration in original) (citation omitted) (quoting Jackson

v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)).

²⁰⁸ *Graham*, 130 S. Ct. at 2021.

²⁰⁹ *Id.*

proportioned to [the] offense.”²¹⁰ The concept of proportionality demands that criminal sanctions consider both the offender and harm.²¹¹ Cases in which the Court has examined proportionality generally fall into one of two categories: those in which it assessed a term-of-years sentence in light of all the circumstances of the case and those in which it categorically restricted certain punishments.²¹² In the first category of cases,²¹³ the Court made a threshold comparison of the offense and severity of the sentence to determine whether a specific term of years was a grossly disproportionate sentence for an individual defendant.²¹⁴ If the Court inferred gross disproportionality, it then compared imposed sentences in the same and other jurisdictions.²¹⁵ More on the second category of cases will follow.

Although the Court has generally focused on whether criminal sanctions violate the Eighth Amendment,²¹⁶ the Court has acknowledged that specific conditions of confinement may also fall under the purview of the Eighth

²¹⁰ *Weems v. United States*, 217 U.S. 349, 367 (1910).

²¹¹ *Scott & Steinberg*, *supra* note 174, at 19.

²¹² *Graham*, 130 S. Ct. at 2021.

²¹³ *See, e.g., Solem v. Helm*, 463 U.S. 277 (1983). In *Solem*, the Court held that a sentence of life in prison without the possibility of parole as applied to a defendant convicted of passing a worthless check, his seventh nonviolent offense, violated the Eighth Amendment. *Id.* at 279, 281, 303.

²¹⁴ *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

²¹⁵ *Id.*

²¹⁶ Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 884 (2009). Scholars and even Supreme Court Justices disagree on what constitutes punishment for Eighth Amendment purposes. Traditional definitions of punishment generally contemplate only the legal consequences of a criminal conviction. John Rawls offered an oft-quoted definition of punishment in 1955:

[A] person is said to suffer punishment whenever he is legally deprived of some of the normal rights of a citizen on the ground that he has violated a rule of law, the violation having been established by trial according to the due process of law, provided that the deprivation is carried out by the recognized legal authorities of the state, that the rule of law clearly specifies both the offense and the attached penalty, that the courts construe statutes strictly, and that the statute was on the books prior to the time of the offense. This definition specifies what I shall understand by punishment.

John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 10 (1955) (footnote omitted). Some scholars urge the adoption of a conception of punishment that assesses whether harm stems from the state’s response to a criminal conviction, which would encompass most conditions of confinement. *See Ristroph, supra* note 54, at 168 (“The ‘penal’ status of an act or practice should depend not on specific legislative designation or individual intent, but on whether the act or practice is a necessary element or direct consequence of the state’s response to an individual’s criminal conviction.”); *see also Dolovich, supra*, at 908 (“Any harm people experience while incarcerated should therefore be cognizable under the Eighth Amendment if it is traceable to state-created conditions of confinement.”).

Amendment.²¹⁷ Despite the use of a highly restrictive test,²¹⁸ the Court has deemed that the Eighth Amendment may not only constrain the criminal penalty but also govern prison officials' administration of otherwise constitutional penalties.²¹⁹ The Court has found that the protection afforded an inmate "against other inmates" constitutes a "conditio[n] of confinement" subject to the Eighth Amendment.²²⁰ The Court has held that denial of medical care could constitute cruel and unusual punishment because it could result in pain and suffering unrelated to penological goals.²²¹ In addition, prison conditions that "increase violence among inmates or create other conditions intolerable for prison confinement" might constitute cruel and unusual punishment.²²² The Court has also acknowledged that sexual assaults in correctional facilities may be covered by the Eighth Amendment.²²³

B. The Creation of Eighth Amendment Categorical Rules

The second category of the Supreme Court's Eighth Amendment proportionality analysis involves those cases in which the Court established categorical rules about what punishments are cruel and unusual when applied to an entire category of offenders or to certain offenses.²²⁴ In two such cases, *Roper v. Simmons* and *Graham v. Florida*, the Court utilized this analysis to

²¹⁷ The Supreme Court first acknowledged that prison conditions could constitute a violation of the Eighth Amendment in its 1976 decision in *Estelle v. Gamble*, 429 U.S. 97 (1976). Dolovich, *supra* note 216, at 889. The Court has been hesitant, however, to deem that all conditions of confinement constitute punishment for Eighth Amendment purposes. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) ("The Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'").

²¹⁸ Under the Court's two-pronged test for conditions-of-confinement cases, a prisoner must objectively establish that he suffered a "sufficiently serious" deprivation, *Wilson v. Seiter*, 501 U.S. 294, 298 (1991), which in a failure-to-prevent-harm claim requires a showing from the prisoner that his conditions of confinement "pos[ed] a substantial risk of serious harm." *Farmer*, 511 U.S. at 834. Second, the prisoner must show that prison officials acted with "deliberate indifference," *Estelle*, 429 U.S. at 104, which requires a showing of the official's actual knowledge of the risk. See *Farmer*, 511 U.S. at 837 ("[A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.").

²¹⁹ For example, the Court has held that certain means of administering the death penalty would violate the prohibition on cruel and unusual punishment, including burning on the stake, crucifixion, or breaking on the wheel. See *In re Kemmler*, 136 U.S. 436, 446 (1890); Dolovich, *supra* note 216, at 884–85.

²²⁰ *Wilson*, 501 U.S. at 303 (internal quotation marks omitted).

²²¹ *Estelle*, 429 U.S. at 103–04.

²²² See *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981).

²²³ See *Farmer*, 511 U.S. at 832–34.

²²⁴ See *Graham v. Florida*, 130 S. Ct. 2011 (2010); *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

hold that certain punishments violate the Eighth Amendment when applied to juveniles under the age of eighteen.²²⁵

1. Overview

The Court has adopted a two-part analytical framework to assess whether a punishment is cruel and unusual when applied to a certain category of offenders or to certain offenses.²²⁶ The Court first examines the “‘objective indicia of society’s standards . . . ’ to determine whether there is a national consensus against the sentencing practice at issue.”²²⁷ Then, “guided by ‘the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose,’” the Court determines if the punishment violates the Eighth Amendment through “the exercise of its own independent judgment.”²²⁸ Thus far, the Court’s own understanding and interpretation, the second prong of the analysis, has not diverged from its assessment of national consensus.²²⁹ Scholars have noted, however, that “[t]he possibility exists . . . that judicial judgment will someday diverge from public opinion concerning punishment for given crimes.”²³⁰

The Court also considers the laws of other countries and international authorities in its Eighth Amendment categorical-rule analysis. Although the Court emphasizes that international norms are not dispositive in its decision making, the Court has considered them “instructive for its interpretation of the Eighth Amendment[]”²³¹ since its decision in *Trop v. Dulles* in 1958, in which the Court held that the Eighth Amendment prohibited Congress from stripping a native-born American citizen of his citizenship after a criminal conviction.²³² In its consideration of international norms, the Court has lent particular credence to the laws of Great Britain²³³ and other Western European

²²⁵ The Court noted that the creation of categorical rules required line drawing, and it justified its selection of the age of eighteen as “the point where society draws the line for many purposes between childhood and adulthood.” *Roper*, 543 U.S. at 574.

²²⁶ *See, e.g., id.* at 564.

²²⁷ *Graham*, 130 S. Ct. at 2022 (quoting *Roper*, 543 U.S. at 563).

²²⁸ *Id.* (quoting *Kennedy*, 554 U.S. at 421).

²²⁹ William C. Heffernan, *Constitutional Historicism: An Examination of the Eighth Amendment Evolving Standards of Decency Test*, 54 AM. U. L. REV. 1355, 1380 (2005).

²³⁰ *Id.* at 1381.

²³¹ *Roper*, 543 U.S. at 575.

²³² 356 U.S. 86 (1958).

²³³ *See, e.g., Roper*, 543 U.S. at 577 (“The United Kingdom’s experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment’s own origins.”).

countries.²³⁴ In addition to considering the uniformity of other countries' laws involving certain punishments,²³⁵ the Court has considered the CRC²³⁶ and the decisions and statements of other international bodies in supporting its Eighth Amendment decisions.²³⁷

2. *Cruel and Unusual: The Death Penalty for Juveniles* (Roper v. Simmons)

In its decision in *Roper v. Simmons*, the Supreme Court categorically prohibited the imposition of the death penalty on juveniles who committed offenses while under the age of eighteen as an Eighth Amendment violation.²³⁸ The Court concluded that juvenile offenders are “categorically less culpable” than adult offenders, and therefore, the imposition of the death penalty on juveniles is disproportionate to their offenses because of their decreased culpability as a class.²³⁹ The *Roper* Court situated its decision in the line of cases that categorically prohibited certain punishments as unconstitutional when applied to certain categories of offenders or to certain offenses. The Court compared its analysis, findings, and ultimate decision to its decision in *Atkins v. Virginia*,²⁴⁰ in which the Court held that the imposition of the death penalty on mentally retarded defendants constitutes cruel and unusual punishment under the Eighth Amendment.²⁴¹

The facts of *Roper v. Simmons* are disturbing. At the age of seventeen, Christopher Simmons planned and executed the murder of a woman by tying up her hands and feet with electrical wire, wrapping her face in duct tape, and throwing her off a bridge into a river, where she subsequently drowned.²⁴²

²³⁴ See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion). In its decision in *Thompson*, the plurality looked particularly to “other nations that share our Anglo-American heritage, and . . . leading members of the Western European community.” *Id.*

²³⁵ See, e.g., *Roper*, 543 U.S. at 577 (“[O]nly seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China.”).

²³⁶ See, e.g., *id.* at 576 (noting that the CRC condemns imposing capital punishment on juveniles under the age of eighteen).

²³⁷ *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010) (citing *Roper*, 543 U.S. at 575–78; *Atkins v. Virginia*, 536 U.S. 304, 317–18 n.21 (2002); *Thompson*, 487 U.S. at 830; *Enmund v. Florida*, 458 U.S. 782, 796–97 n.22 (1982); *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977) (plurality opinion); and *Trop*, 356 U.S. at 102–03).

²³⁸ *Roper*, 543 U.S. at 568.

²³⁹ *Id.* at 561, 564–75 (quoting *Atkins*, 536 U.S. at 316) (internal quotation mark omitted).

²⁴⁰ 536 U.S. 304.

²⁴¹ See *Roper*, 543 U.S. at 563–64 (citing *Atkins*, 536 U.S. at 312–20).

²⁴² *Id.* at 556–57.

Afterwards, Simmons bragged to his friends about his actions, and following his arrest, he confessed to the murder.²⁴³ Nine months later, Simmons was tried as an adult, convicted, and sentenced to death.²⁴⁴

The Supreme Court noted that, even when a juvenile commits “a heinous crime,” such as the one committed by Christopher Simmons, “the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity.”²⁴⁵ The Court had previously held the death penalty to be an unconstitutional punishment for individuals who committed death-eligible offenses before the age of sixteen.²⁴⁶ In *Roper*, the Court extended its reasoning about culpability and proportionality to sixteen- and seventeen-year-olds, even though the facts of the murder were particularly disturbing and Simmons was nearly eighteen at the time of the offense.

In reaching its holding, the Court utilized the framework it adopted in its Eighth Amendment categorical-rule cases. First, the Court concluded that national consensus reflected a rejection of the death penalty for offenses committed prior to an individual’s eighteenth birthday.²⁴⁷ The Court focused on legislative enactments in the states, the actual imposition of the death penalty on juveniles, and the consistency in the trend toward abolishing the practice.²⁴⁸ The Court found that juveniles were excluded from receiving the death penalty in eighteen of the states that permitted the death penalty, either through “express provision or judicial interpretation.”²⁴⁹ To reach the conclusion that “[a] majority of States have rejected the imposition of the death penalty on juvenile offenders,” the Court also added the twelve states that had abolished the death penalty entirely to the eighteen states that specifically prohibited its imposition on juveniles.²⁵⁰ The Court concluded that society viewed juveniles as “categorically less culpable than the average criminal.”²⁵¹

The Court then exercised its independent judicial judgment and reasoned that the death penalty should not be applied to juvenile offenders.²⁵² In this

²⁴³ *Id.* at 557.

²⁴⁴ *Id.* at 557–58.

²⁴⁵ *Id.* at 573–74.

²⁴⁶ *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (plurality opinion).

²⁴⁷ *Roper*, 543 U.S. at 564.

²⁴⁸ *Id.* at 567.

²⁴⁹ *Id.* at 564.

²⁵⁰ *Id.* at 564, 568.

²⁵¹ *Id.* at 567 (quoting *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)) (internal quotation marks omitted).

²⁵² *Id.* at 568–75.

analysis, the Court adopted a notable view of adolescent development. The Court described three general differences between juveniles and adults, and it characterized these differences as “marked and well understood.”²⁵³ First, the Court noted that “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults” and that “[t]hese qualities often result in impetuous and ill-considered actions and decisions.”²⁵⁴ The Court pointed to laws in almost every state that prohibit children under the age of eighteen from voting, serving on juries, or getting married without parental consent as evidence of the states’ recognition of this immaturity and lack of responsibility.²⁵⁵ The Court further stated that “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”²⁵⁶ Finally, the Court asserted, “[T]he character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed.”²⁵⁷ The Court also opined, “[N]either retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders.”²⁵⁸

Although the Court noted that international norms were not controlling, it devoted an entire section of its opinion to a consideration of these norms as related to the juvenile death penalty.²⁵⁹ The Court specifically discussed the CRC’s rejection of capital punishment for juveniles, even though the United States has not ratified the treaty.²⁶⁰ The Court also lent particular weight to Great Britain’s prohibition of the juvenile death penalty “in light of the historic ties between our countries and in light of the Eighth Amendment’s own origins.”²⁶¹

The Court ultimately concluded that juveniles cannot be considered among the worst offenders and that acts committed by a juvenile are less morally reprehensible than those committed by an adult.²⁶² The Court ruled that the death penalty violated the Eighth Amendment as applied to juveniles as a class,

²⁵³ *Id.* at 572.

²⁵⁴ *Id.* at 569 (first alteration in original) (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)) (internal quotation marks omitted).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 570.

²⁵⁸ *Id.* at 572.

²⁵⁹ *Id.* at 575–78.

²⁶⁰ *See id.* at 576.

²⁶¹ *Id.* at 577.

²⁶² *Id.* at 570.

even though the punishment remained constitutional as applied to adults. Five years later, the Court expanded its Eighth Amendment categorical-rule analysis to deem a noncapital punishment unconstitutional when applied to a broad category of juvenile offenders.

3. *Cruel and Unusual: Life-Without-the-Possibility-of-Parole Sentences for Juveniles Convicted of Nonhomicide Offenses* (Graham v. Florida)

In May 2010, the Supreme Court decided *Graham v. Florida*, in which it prohibited a category of offenders, juveniles, from receiving a certain punishment, life in prison without the possibility of parole, for nonhomicide offenses.²⁶³ Noting that it was forging a new path, the Court situated the case in the line of categorical-rule cases that had previously only involved the death penalty.²⁶⁴ The *Graham* Court adopted the two-part analytical framework utilized in these cases to reach its holding that a specific term-of-years sentence violated the Eighth Amendment when applied to a juvenile convicted of a nonhomicide offense.²⁶⁵

At the age of sixteen, Terrance Jamar Graham pled guilty to armed burglary and attempted armed robbery, after he and three accomplices attempted to rob a restaurant.²⁶⁶ No money was taken, but one of Graham's accomplices hit the manager twice in the back of the head with a metal bar, for which the manager received stitches.²⁶⁷ The judge accepted Graham's guilty plea, withheld adjudication, and sentenced Graham to concurrent three-year terms of probation, the first twelve months of which Graham was supposed to spend in a county jail.²⁶⁸ Six months after being released, Graham was arrested for an armed home invasion.²⁶⁹ The trial court found Graham guilty of the earlier armed burglary and attempted armed robbery charges and sentenced him to life imprisonment plus fifteen years.²⁷⁰ Because Florida had abolished its parole system, this life sentence effectively resulted in a sentence of life in prison without the possibility of parole.²⁷¹

²⁶³ 130 S. Ct. 2011, 2034 (2010).

²⁶⁴ *Id.* at 2022.

²⁶⁵ *Id.* at 2021–22.

²⁶⁶ *Id.* at 2018.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 2018–19.

²⁷⁰ *Id.* at 2020.

²⁷¹ *Id.*

The Court noted that Graham's case "involve[d] an issue the Court ha[d] not considered previously."²⁷² The Court characterized the case, however, as one "implicat[ing] a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes."²⁷³ Therefore, the Court rejected a threshold comparison between the severity of the penalty and the gravity of the crime and adopted the method of analysis used in cases adopting a categorical approach, including *Atkins v. Virginia*, *Roper v. Simmons*, and *Kennedy v. Louisiana*, in which it considered the national consensus on the punishment and then utilized independent judicial discretion in assessing whether the punishment is cruel and unusual.²⁷⁴

The *Graham* Court first considered the objective indicia of national consensus.²⁷⁵ The Court concluded that a national consensus had developed that juveniles should not be sentenced to life in prison without the possibility of parole for nonhomicide offenses, even though the federal government and thirty-seven of fifty states permitted that punishment.²⁷⁶ The Court found national consensus by looking to actual sentencing practices, and it noted that only twelve jurisdictions actually sentenced juvenile offenders convicted of nonhomicide crimes to life in prison without the possibility of parole.²⁷⁷ The Court reasoned that those states with laws that allowed for sentences of life in prison without parole for nonhomicide juvenile offenders but rarely imposed such sentences merely failed to distinguish between juveniles and adults in their laws.²⁷⁸ At the time of the decision, 109 juveniles were serving such sentences across the country.²⁷⁹ Unlike *Atkins* and *Roper*, in which the Court considered jury-imposed capital punishment, the *Graham* Court's finding of national consensus rested on its consideration of "a modus operandi among expert officials, including sentencing commissioners, prosecutors, and judges."²⁸⁰

²⁷² *Id.* at 2021–22.

²⁷³ *Id.* at 2022–23.

²⁷⁴ *Id.* at 2023.

²⁷⁵ *Id.*

²⁷⁶ *See id.* at 2049 (Thomas, J., dissenting) ("The additional reality that 37 out of 50 States (a supermajority of 74%) permit the practice makes the claim utterly implausible. Not only is there no consensus against this penalty, there is a clear legislative consensus *in favor* of its availability.>").

²⁷⁷ *Id.* at 2024 (majority opinion).

²⁷⁸ *Id.* at 2025.

²⁷⁹ *Id.* at 2023.

²⁸⁰ Richard M. Ré, *Can Congress Overturn Graham v. Florida?*, 34 HARV. J.L. & PUB. POL'Y 367, 369 (2011).

Although the Court determined that consensus existed, it noted that “[c]ommunity consensus, while ‘entitled to great weight,’ is not itself determinative of whether a punishment is cruel and unusual.”²⁸¹ The Court then moved to the second prong of its analysis, in which it exercised its independent judicial judgment, which “require[d] consideration of the culpability of the offenders at issue in light of their crimes and characteristics.”²⁸² Some scholars suggest that the *Graham* Court “appears to have been motivated primarily by its independent judgment analysis.”²⁸³

In its exercise of judicial judgment, the Court repeatedly cited *Roper* and emphasized the many differences between juveniles and adults. The *Graham* Court characterized a key concept in *Roper* as being “that because juveniles have lessened culpability they are less deserving of the most severe punishments.”²⁸⁴ The Court restated and affirmed its conclusions about adolescent development and culpability from *Roper*: “No recent data provide reason to reconsider the Court’s observations in *Roper* about the nature of juveniles.”²⁸⁵ The Court further stated that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”²⁸⁶ The Court noted that a juvenile “should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential.”²⁸⁷

The Court also considered the penological justifications for sentencing a juvenile to life in prison without the possibility of parole. The Court noted that “[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.”²⁸⁸ The Court concluded that none of the legitimate penological justifications, including retribution, deterrence, incapacitation, and rehabilitation, provided an “adequate” justification for the sentence of life in prison without the possibility of parole for nonhomicide juvenile offenders.²⁸⁹ In its discussion of rehabilitation, the Court stated that juvenile offenders are “most in need of and receptive to rehabilitation” and that

²⁸¹ *Graham*, 130 S. Ct. at 2026 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 434 (2008)).

²⁸² *Id.*

²⁸³ *See, e.g., Ré*, *supra* note 280, at 370.

²⁸⁴ *Graham*, 130 S. Ct. at 2026.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.* at 2032.

²⁸⁸ *Id.* at 2028.

²⁸⁹ *Id.*

“the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.”²⁹⁰

Like in *Roper*, the *Graham* Court devoted an entire section to a consideration of international norms surrounding the sentencing practice in question.²⁹¹ Although the Court emphasized that the decisions of other countries “are not dispositive as to the meaning of the Eighth Amendment,” it stressed the relevance of international consensus against the sentencing practice being considered.²⁹² The Court found only eleven countries that allowed for the possibility of life in prison without parole for juvenile offenders and that only the United States and Israel actually imposed the punishment.²⁹³ The Court also took note of the values espoused in the CRC, which forbids life imprisonment without the possibility of parole for juvenile offenders.²⁹⁴

In *Roper* and *Graham*, the Supreme Court utilized a two-part analytical framework to determine that certain punishments violate the Eighth Amendment as applied to juveniles. In both decisions, the Court relied heavily on scientific and psychological evidence that demonstrates the fundamental differences between juveniles and adults. The Court deemed juveniles categorically less culpable and held that certain punishments were unconstitutional when applied to juvenile offenders.

C. Relying on Categorical-Rule Cases to Hold Mandatory Life-Without-Parole Sentencing Schemes Unconstitutional for Juveniles (Miller v. Alabama)

In June 2012, the Supreme Court decided *Miller v. Alabama*,²⁹⁵ in which it held that mandatory life-without-parole sentencing schemes violate the Eighth Amendment when applied to juveniles.²⁹⁶ Although the Court did not opt to use its two-part analytical framework and decide the case by adopting a

²⁹⁰ *Id.* at 2030.

²⁹¹ *See id.* at 2033–34.

²⁹² *Id.* at 2033.

²⁹³ *Id.*

²⁹⁴ *Id.* at 2034.

²⁹⁵ 132 S. Ct. 2455 (2012).

²⁹⁶ *Id.* at 2475. The cases before the Court involved two fourteen-year-old defendants who were sentenced to life imprisonment without the possibility of parole following convictions for murder under mandatory sentencing schemes in Alabama and Arkansas. *Id.* at 2460–63. Under each of these sentencing schemes, the sentencing authority lacked the ability to make any individualized determination regarding the sentence. *Id.*

categorical ban, its decision heavily drew upon the analysis and fundamental principles in its categorical-rule cases, especially *Roper* and *Graham*.²⁹⁷ In fact, the *Miller* Court declared that the majority's reasoning in *Graham* served as "the foundation stone of [its] analysis."²⁹⁸ The Court's decision ultimately rested on this line of categorical-rule cases and another line of precedent in which the Court required individualized sentencing for defendants facing the death penalty.²⁹⁹

In assessing its categorical-rule cases, the *Miller* Court focused on those cases involving juvenile offenders. Throughout its opinion, the Court repeatedly referenced *Roper* and *Graham* and emphasized the reasoning in those cases, especially as it pertained to the distinctive characteristics of juveniles. In fact, the Court concluded that the science and social science that supported its decisions in *Roper* and *Graham* had become stronger since it reached those decisions.³⁰⁰ The Court reiterated many of its previous conclusions regarding juvenile development, including juveniles' capacity for positive change and decreased culpability.³⁰¹ The Court's assessment that *Roper* and *Graham* established that "children are constitutionally different from adults for purposes of sentencing" appeared to be at the heart of its reasoning.³⁰²

The Court also explicitly separated its prior decisions that contemplated juveniles from those decisions that did not.³⁰³ The Court seemed to suggest that any prior decisions that did not specifically contemplate juveniles would not necessarily apply to them.³⁰⁴ In responding to arguments that its holding in *Harmelin v. Michigan*³⁰⁵ precluded its holding in *Miller*, the Court asserted that "*Harmelin* had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders."³⁰⁶ The Court stressed that it

²⁹⁷ *Id.* at 2460–69.

²⁹⁸ *Id.* at 2464 n.4.

²⁹⁹ *Id.* at 2463–64 (citing *Lockett v. Ohio*, 438 U.S. 586 (1978); and *Woodson v. North Carolina*, 428 U.S. 280 (1976)).

³⁰⁰ *Id.* at 2464 n.5.

³⁰¹ *Id.* at 2464–65.

³⁰² *Id.* at 2464.

³⁰³ *See id.* 2469–70.

³⁰⁴ *See id.*

³⁰⁵ 501 U.S. 957 (1991). In its consideration of a mandatory sentence of life in prison without the possibility of parole for possession of 650 grams of cocaine, the *Harmelin* Court concluded that "a sentence which is not otherwise cruel and unusual [does not] become[] so simply because it is 'mandatory.'" *Id.* at 995.

³⁰⁶ *Miller*, 132 S. Ct. at 2470.

had “now held on multiple occasions that a sentencing rule permissible for adults may not be so for children.”³⁰⁷

The Court refused to limit its reasoning in *Roper* or *Graham* regarding the specific characteristics of juveniles to particular crimes: “[N]one of what [the Court] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific.”³⁰⁸ The Court stressed that youth “is a moment and ‘condition of life when a person may be most susceptible to influence and to psychological damage.’”³⁰⁹

In its analysis, the Court also emphasized the importance of assessing whether the imposition of a particular punishment on a juvenile fulfills any purpose of punishment.³¹⁰ The Court considered retribution, deterrence, incapacitation, and rehabilitation in turn and concluded that none supported life-without-parole sentences for juveniles.³¹¹ The Court again emphasized the importance of the possibility of rehabilitation for juvenile offenders in light of children’s “capacity for change.”³¹² The Court used the stated differences between juveniles and adults to stress that juveniles “are less deserving of the most severe punishments.”³¹³ The Court summarized much of its reasoning by concluding: “Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.”³¹⁴

Although not necessary to the Court’s analysis, as it would have been if the Court had adopted a categorical rule, the *Miller* Court considered the states’ legislative enactments regarding life-without-parole sentencing schemes.³¹⁵ At the time *Miller* was decided, twenty-eight states and the federal government permitted at least some juveniles to be sentenced to mandatory life without parole.³¹⁶ The Court concluded that these numbers constituted a weaker case

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 2465.

³⁰⁹ *Id.* at 2467 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

³¹⁰ *See id.* at 2465 (“*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.”).

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.* at 2464 (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010)) (internal quotation mark omitted).

³¹⁴ *Id.* at 2468.

³¹⁵ *Id.* at 2469–73.

³¹⁶ *Id.* at 2471.

than the numbers presented in *Graham*, where the Court “prohibited life-without-parole terms for juveniles committing nonhomicide offenses even though 39 jurisdictions permitted that sentence.”³¹⁷ The Court also pointed to the categorical-rule decisions involving capital punishment, including *Atkins*, *Roper*, and *Thompson*, in which it categorically prohibited the death penalty in situations where less than 50% of the states that allowed capital punishment did so.³¹⁸ In addition, the Court noted that it was “impossible to say whether a legislature had endorsed a given penalty for children (or would do so if presented with the choice)” when the application of at least two entirely different statutory provisions resulted in the sentencing practice in question.³¹⁹

The Court left the door open to a future decision that might adopt a categorical rule banning life-without-parole sentences for juveniles. The Court noted that it did not even “consider . . . [the] alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles,” because the mandatory sentencing schemes before the Court disregarded “youth (and all that accompanies it) . . . [, which] poses too great a risk of disproportionate punishment.”³²⁰ The Court’s decision in *Miller* reaffirms the Court’s commitment to considering a defendant’s youth and the purposes of punishment in determining the constitutionality of sentencing schemes as applied to juveniles. In short, the Court’s decision in *Miller* emphasizes that youth matters in sentencing.

IV. CRUEL AND UNUSUAL: CONFINING JUVENILES WITH ADULTS

The Supreme Court’s Eighth Amendment categorical-rule cases provide an analytical framework for assessing the constitutionality of the confinement of juveniles with adults, which implicates “a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes.”³²¹ When assessing whether the confinement of juveniles with adults violates the Eighth Amendment, the Court should adopt the method of analysis used in these categorical-rule cases, because its decision would require determining the constitutionality of the application of a certain punishment—confinement with adults—on a certain category of offenders—juveniles. The Court’s 2010 decision in *Graham* opens the door to the use of this analytical

³¹⁷ *Id.*

³¹⁸ *Id.* at 2471–72.

³¹⁹ *Id.* at 2472.

³²⁰ *Id.* at 2469.

³²¹ *Graham v. Florida*, 130 S. Ct. 2011, 2022–23 (2010).

framework in the consideration of punishments other than the death penalty. Like in *Graham*, the Court's evaluation of confinement with adults would evaluate the practices of expert officials and sentencing commissioners, rather than jury decisions. The Court's reasoning in *Miller* further supports that youth and its associated characteristics are critical to evaluating the constitutionality of sentencing schemes as applied to juveniles.

Under the analytical framework utilized in the Court's categorical-rule cases, which takes into consideration the fact that a maturing society has evolving standards of decency,³²² the Court would first consider the objective indicia of national consensus.³²³ An evaluation of the objective indicia of consensus indicates that states are moving away from confining juveniles with adults.

The number of juveniles being held in prisons and jails nationally has declined since 2000. On the annual one-day count of prison inmates in 2000, 3896 juveniles were incarcerated in state prisons throughout the United States.³²⁴ On the day of the 2009 count, the number of juveniles incarcerated in state prisons had decreased to 2778.³²⁵ In 2000, 7615 juveniles were held in jails throughout the country on the annual one-day count of jail inmate populations.³²⁶ On the annual one-day count in 2011, the number of juveniles being held in adult jails had declined to 5900.³²⁷ Those states that currently house higher numbers of juveniles in adult facilities, such as Pennsylvania,³²⁸ have recently started taking steps to decrease the juvenile population in their adult facilities. Pennsylvania Senate Bill 1169, signed into law in October of 2010, permits a juvenile being tried in the adult criminal system to be "de-certified" and held in a juvenile facility.³²⁹

In determining whether a majority of states reject the confinement of juveniles with adults, the Court should evaluate the number of states that prohibit confining juveniles and adults in the same facility along with the number of states that require sight-and-sound separation between all juvenile

³²² See *Roper v. Simmons*, 543 U.S. 551, 561 (2005).

³²³ See *supra* Part III.B.1.

³²⁴ WILLIAM J. SABOL ET AL., U.S. DEP'T OF JUSTICE, NCJ 217675, PRISON AND JAIL INMATES AT MIDYEAR 2006, at 4 tbl.7 (2008), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/pjim06.pdf>.

³²⁵ WEST, *supra* note 11, at 24 tbl.21.

³²⁶ See MINTON, *supra* note 114, at 6 tbl.6.

³²⁷ *Id.*

³²⁸ Pennsylvania housed sixty-one juveniles in adult prisons in 2009. WEST, *supra* note 11, at 24 tbl.21.

³²⁹ ARYA, *supra* note 99, at 26.

and adult inmates confined in the same facility.³³⁰ In 2009, seven states did not house any juveniles in adult prisons,³³¹ twelve states housed ten or fewer juveniles in adult prisons,³³² and ten states housed fewer than twenty-five juveniles in adult prisons.³³³ Among the states that continue to confine juveniles in adult facilities, some require sight-and-sound separation between the juveniles and adults.³³⁴ Of the thirty-nine states that allow juveniles to be held in adult jails while awaiting trial in criminal court, twenty require that juveniles be separated from adults during this period.³³⁵ National consensus against confining juveniles with adults in prisons and jails continues to grow, and a majority of states now appear to reject this punishment.

After its consideration of the national consensus, the Court would then move to the next step in the categorical-rule analysis and exercise independent judicial discretion to assess whether confining juveniles alongside adults constitutes cruel and unusual punishment.³³⁶ Juveniles face significant dangers to their safety and well-being, including alarmingly high rates of physical abuse, sexual assault, and suicide, when confined with adults in jails and prisons.³³⁷ The many physical, developmental, and psychological differences between juveniles and adults, already recognized by the Supreme Court in numerous decisions, make incarceration with adults an unconstitutional punishment for children under the age of eighteen.³³⁸ Adult facilities are generally not equipped to handle the special developmental needs of juveniles,

³³⁰ Further research is necessary to determine the nature of the state laws that govern the confinement of children in adult facilities. In *Miller*, the Court emphasized the difficulty of determining legislative intent for a particular sentencing scheme when the application of at least two entirely different statutory provisions result in the sentencing practice in question. *Miller v. Alabama*, 132 S. Ct. 2455, 2472–73 (2012). In fact, the *Miller* Court noted that “most States do not have separate penalty provisions for . . . juvenile offenders.” *Id.* at 2473. In some states, the confinement of juveniles in adult facilities may result from the policies and practices of prison officials, rather than legislation, making it virtually impossible to know whether the legislature deliberately and expressly endorses the confinement of children with adults. In passing certain legislation, the State may not intend to subject juvenile offenders to this punishment.

³³¹ WEST, *supra* note 11, at 24 tbl.21. These states are California, Idaho, Kentucky, Maine, New Hampshire, North Dakota, and West Virginia. *Id.*

³³² *Id.* These states are Alaska, Hawaii, Kansas, Massachusetts, Montana, New Mexico, Rhode Island, South Dakota, Utah, Vermont, Washington, and Wyoming. *Id.*

³³³ *Id.* These states are Arkansas, Iowa, Louisiana, Minnesota, Nebraska, New Jersey, Oklahoma, Oregon, Tennessee, and Virginia. *Id.*

³³⁴ CAMPAIGN FOR YOUTH JUSTICE, *supra* note 51, at 14, 24.

³³⁵ *Id.*

³³⁶ *See supra* Part III.B.1.

³³⁷ *See supra* Part I.A.

³³⁸ *See supra* Part II.A.

including those related to their physical, emotional, and educational well-being.³³⁹

Any legitimate penological goals of confining juveniles with adults do not adequately justify the punishment. Confinement with adults may actually increase recidivism for juveniles, and evidence of any general deterrence is lacking.³⁴⁰ The Supreme Court's statements in *Graham*, that juvenile offenders "are most in need of and receptive to rehabilitation" and that "the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident," are particularly relevant when examining the confinement of juveniles with adults, given the stark differences between adult and juvenile facilities.³⁴¹

An examination of international norms supports the conclusion that the confinement of juveniles with adults constitutes cruel and unusual punishment.³⁴² The CRC, the standards of which the Supreme Court considered in *Roper v. Simmons* and *Graham v. Florida*, discourages the incarceration of children³⁴³ and notes the critical importance of separating juveniles from adults during any periods of confinement that do occur.³⁴⁴ Article 37(c) of the CRC states, "[E]very child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so."³⁴⁵ European countries, including Great Britain and Sweden, do not incarcerate children under the age of eighteen with adults.³⁴⁶ Other countries, including South Africa and New Zealand, also prohibit the confinement of juveniles with adults under any circumstances.³⁴⁷ Based on the weight of the scientific evidence and international sources of law, two factors the Court has relied upon in past cases to formulate its own independent judgment on a punishment, the Court is likely to find that confining juveniles with adults violates the Eighth Amendment under the second prong of its analysis.

Using the analytical framework laid out in its Eighth Amendment categorical-rule cases, including *Roper* and *Graham*, and the fundamental

³³⁹ See *supra* Part I.A.

³⁴⁰ See *supra* Part I.A.

³⁴¹ *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010); see also *supra* Part I.A.

³⁴² See *supra* Part II.E.

³⁴³ CRC, *supra* note 189, art. 37(b).

³⁴⁴ *Id.* art. 37(c).

³⁴⁵ *Id.*

³⁴⁶ Bottoms & Dignan, *supra* note 196, at 91; Janson, *supra* note 199, at 419.

³⁴⁷ S. AFR. CONST., 1996, ch. 2, § 28(g); Morris, *supra* note 198, at 286.

principles laid out in *Miller v. Alabama*, the United States Supreme Court should hold that incarcerating juveniles with adults violates the Eighth Amendment. To correct the constitutional violations that occur upon incarcerating juveniles with adults and remedy the dangers inherent in such an arrangement, children under the age of eighteen should be confined only in facilities designated exclusively for juveniles, regardless of whether their cases are heard in juvenile or criminal court.³⁴⁸

States may deal with the confinement of youthful offenders in a variety of ways. Some jurisdictions have adopted a form of blended sentencing that allows a juvenile adjudicated delinquent in juvenile court to continue his sentence even after aging out of the juvenile court's jurisdiction.³⁴⁹ In some states, juveniles who are convicted in criminal court serve their sentences in juvenile facilities until the age of eighteen, at which time a hearing is held to determine their optimal placement, which may continue to be the juvenile facility or may be an adult facility.³⁵⁰

When a separate juvenile facility is not available for a juvenile that must be confined, juveniles placed in adult facilities must be separated from adult inmates, such that adults and juveniles can neither see nor hear one another.³⁵¹ If a state does not currently have space to adequately house juveniles in facilities designated solely for them, a state must ensure that juveniles remain completely separated from the adult population. This option, however, is not ideal and may result in many negative outcomes for juveniles.³⁵²

³⁴⁸ Although housing juveniles in juvenile-detention and juvenile-correctional facilities is a necessary step to ensure compliance with the Eighth Amendment, it is not sufficient to ensure that the constitutional rights of juveniles are being upheld. Studies of the conditions of confinement in juvenile facilities have uncovered problems and deficiencies that must also be addressed. *See, e.g.*, DALE G. PARENT ET AL., U.S. DEP'T OF JUSTICE, CONDITIONS OF CONFINEMENT: JUVENILE DETENTION AND CORRECTIONS FACILITIES (1994), available at <https://www.ncjrs.gov/pdffiles1/ojdp/1FrontMat.pdf>.

³⁴⁹ *See* Richard E. Redding & James C. Howell, *Blended Sentencing in American Juvenile Courts*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT, *supra* note 102, at 145. Blended sentencing allows for the combination of the juvenile justice system's rehabilitative focus with the criminal justice system's focus on criminal sanctions. *Id.* at 146. Blended sentencing may "provide[] a solution to the correctional programming problem of an influx of juveniles into adult correctional systems ill equipped to handle their special needs." *Id.* at 147.

³⁵⁰ CAMPAIGN FOR YOUTH JUSTICE, *supra* note 51, at 24.

³⁵¹ The JJDPa requires sight-and-sound separation for all juveniles with cases pending or adjudicated in juvenile court. *See supra* Part II.B.

³⁵² CAMPAIGN FOR YOUTH JUSTICE, *supra* note 51, at 4, 7. Juveniles in adult facilities may be housed in isolation, without any meaningful human contact, which can have devastating psychological and emotional consequences. *Id.* at 4. Juveniles in isolation also may not be able to take advantage of even the limited programming offered in an adult facility. *Id.* at 7; *see also* Bishop & Frazier, *supra* note 13, at 258.

CONCLUSION

Confining juveniles with adults violates the Eighth Amendment's prohibition against cruel and unusual punishment. Juveniles, recognized by the Supreme Court as being developmentally different from adults and having diminished culpability, face grave dangers when confined with adults in prisons and jails. In *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*, the Court expounded upon the many differences between juveniles and adults. In *Roper* and *Graham*, the Court held that juveniles' diminished culpability as a class warranted the establishment of bright-line rules against capital punishment and life in prison without the possibility of parole for the nonhomicide conviction of a juvenile, respectively. Similarly, juveniles' diminished culpability, along with the unfulfilled penological goal of deterrence, merits a bright-line rule preventing the confinement of juveniles with adults in prisons and jails. Given the significant and known dangers faced by juveniles confined in adult facilities, the confinement of juveniles with adults violates the Eighth Amendment.

Although this Comment does not argue for the elimination of the transfer of juveniles to criminal court, it does assert that even when juveniles are tried in criminal court, the Constitution prohibits the confinement of juveniles with adults. Although sight-and-sound separation from adults in prisons and jails would be less likely to violate the Eighth Amendment, it is not an ideal solution and still presents significant risks, especially stemming from the dangers of solitary confinement for juveniles.³⁵³

Accordingly, whenever possible, juveniles should be housed in juvenile facilities at least until they reach the age of eighteen. States should begin to prepare for increased numbers of juveniles that will need to be confined in juvenile facilities if the Supreme Court holds the confinement of juveniles with adults to be unconstitutional. The ultimate solution, however, will be for states to adopt policies and programs that decrease the confinement of juveniles in all

³⁵³ See CAMPAIGN FOR YOUTH JUSTICE, *supra* note 51, at 4.

detention and correctional facilities, and that promote nonresidential supervision, programs, and intervention whenever appropriate.³⁵⁴

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³⁵⁴ Such nonresidential options might include evidence-based family-intervention models, such as multisystemic therapy or functional family therapy; career preparation and vocational training programs, such as YouthBuild; mentoring programs; cognitive-behavioral-skills trainings; or focused mental health and substance-abuse-treatment programs. See RICHARD A. MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 16–19, 30 (2011), available at http://www.aecf.org/~media/Pubs/Topics/Juvenile%20Justice/Detention%20Reform/NoPlaceForKids/JJ_NoPlaceForKids_Full.pdf.

* Articles Editor, *Emory Law Journal*; J.D., Emory University School of Law (2012); B.A., Davidson College (2007). I thank Professor Barbara Woodhouse for her feedback, encouragement, and kind words throughout the process of drafting and writing this Comment. I am inspired by her commitment to working on issues of critical importance to children. Many thanks to Niji Jain, Alan White, Taylor Dudley, and Andrew McKinley for their helpful comments and critiques on prior drafts of this Comment. I also thank the staff members of the *Emory Law Journal*, with deep thanks to Amy Dehnel and Danny Reach for their keen eyes and thoughtful suggestions. Finally, I am enormously grateful for the love and support of my family, with special thanks to my sister, Caroline, who generously supplied advice and encouragement throughout this journey.