Juvenile Empiricism: Approaches to Juvenile Sentencing in Light of *Graham* and *Miller*

CHARLES GARABEDIAN*

 Charles Garabedian is a recent graduate of the University of Florida–Levin College of Law. During law school, he was a member of his school's Law Review and its Latino Law Student Association, and earned the Book Award in Federal Criminal Law. He is currently a law clerk at the Fifteenth Judicial Circuit of Florida, located in West Palm Beach. He lives in Miami, Florida.

Abstract

In *Graham v. Florida*, the Supreme Court held that the Eighth Amendment prohibits states from sentencing juveniles to life without the possibility of parole for non-homicide crimes. Later, in *Miller v. Alabama*, the Court held that the Eighth Amendment prohibits *mandatory* life without parole sentences from being imposed upon juveniles for homicides. As a result of the Court's recent juvenile jurisprudence, states have altered their approaches to juvenile sentencing. This article argues that states should adopt juvenile sentencing schemes, similar to Florida's, that allow for courts to re-examine and possibly modify lengthy sentences imposed upon juveniles. This article argues that empirical research highlighting the developmental differences between juvenile and adult criminal offenders warrants this statutory approach. Further, by adopting similar sentencing schemes to Florida's, states will be adhering to the penological principles that underlie the American criminal justice system. Lastly, this article analyzes United States Supreme Court case law that recognizes the inherent differences between juvenile and adult criminal offenders.

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Introduction

In 2010, the Supreme Court confronted the constitutionality of juvenile life without parole sentences for non-homicide crimes in *Graham v. Florida*.[1] In particular, the Court held that such sentencing schemes violate the Eighth Amendment's Cruel and Unusual Punishment Clause.[2] Two years after deciding *Graham*, the Supreme Court was again faced with considering the constitutionality of juvenile life without parole sentences in *Miller v. Alabama*.[3] However, unlike in *Graham*, *Miller* involved a sentence resulting from a homicide.[4] Consequently, the Court analyzed the constitutionality of *mandatory* life without parole sentences imposed upon juveniles.[5] Because "children are different," the Court held that mandatory life without parole sentences imposed upon juveniles violate the Cruel and Unusual Punishment Clause.[6] Importantly, the Court in *Miller* noted that its holding was limited to sentencing schemes that required *mandatory* life without parole sentences to juveniles, and that there may be situations where a juvenile's life without parole sentence may be deservedly imposed.[7]

In response to *Graham* and *Miller*, Florida has altered its juvenile sentencing scheme. This article argues that Florida's approach—which allows for judges to revisit and potentially modify the sentences imposed upon juveniles—correctly respects the constitutional rights of juveniles while serving the penological principles[8] that underlie the American criminal justice system and the holdings of *Graham* and *Miller*.[9]

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[1] Graham v. Florida, 560 U.S. 48 (2010).

[2] *Id.* at 82.

[3] 132 S. Ct. 2455, 2463 (2012).

[4] *Id.* at 2460.

[5] *Id.*

[6] *Id.* at 2465.

[7] *Id.* This distinction gives rise to this article. Since states, in order to comply with *Miller*, need only consider mitigating factors before sentencing a juvenile to life without parole, juvenile life without parole sentences are far from being an anachronism in American criminal justice. By complying with the procedural safeguards mandated by *Miller*, courts may still sentence juveniles to prison for their life's entirety — without any kind of re-visitation or modification.

[8] *See infra* Part II and accompanying text.

[9] For a further discussion on sentence modification, *see generally* E. Lea Johnston, *Smoke and Mirrors: Model Penal Code § 305.7 and Compassionate Release*, 4 WAKE FOREST J.L. & POL'Y 49, 83 (2014) ("[T]he template of judicial sentence modification would be flexible enough to allow states to focus on the principle of parsimony and the goal that sentences be no more severe than necessary to achieve utilitarian aims within the range of proportionate punishment.").

I. Florida's Approach to Juvenile Sentencing

In 2014, Florida passed legislation that allows juveniles convicted of certain crimes to have their sentences revisited.[10] In relevant part, section 775.082 of the Florida Statutes provides that:

> (b) 1. A person who actually killed, intended to kill, or attempted to kill the victim and who is convicted under § 782.04 of a capital felony, or an offense that was reclassified as a capital felony, which was committed before the person attained 18 years of age shall be punished by a term of imprisonment for life if, after a sentencing hearing conducted by the court in accordance with § 921.1401, the court finds that life imprisonment is an appropriate sentence. If the court finds that life imprisonment is not an appropriate sentence, such person shall be punished by a term of imprisonment of at least 40 years. A person sentenced pursuant to this subparagraph is entitled to a review of his or her sentence in accordance with § 921.1402(2)(a).
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> 2. A person who did not actually kill, intend to kill, or attempt to kill the victim and who is convicted under § 782.04 of a capital felony, or an offense that was reclassified as a capital felony, which was committed before the person attained 18 years of age may be punished by a term of imprisonment for life or by a term of years equal to life if, after a sentencing hearing conducted by the court in accordance with § 921.1401, the court finds that life imprisonment is an appropriate sentence. A person who is sentenced to a term of imprisonment of more than 15 years is entitled to a review of his or her sentence in accordance with § 921.1402(2)(c).11

Moreover, in accordance with *Miller*, Florida's legislation provides a list of non-exhaustive factors for the court to consider when determining whether "life imprisonment or a term of years equal to life imprisonment is an appropriate sentence."[12] Importantly, Florida courts are to consider "[t]he effect, if any, of immaturity, impetuosity, or failure to appreciate the

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[10] H.B. 7035, 2014 Leg., Reg. Sess. (Fla. 2014) (codified as amended at FLA. STAT. § 775.082 (2014)).

[11] *Id.*

[12] FLA. STAT. § 775.082.

risks and consequences on the defendant's participation in the offense."[13]

The factors judges are to consider, and the revisiting of juveniles' sentences, not only adhere to the holdings of *Graham* and *Miller*, but also, of great import, serve the underlying penological justifications of the criminal justice system. Such penological principles, embraced by the Model Penal Code's sentencing policies, are aimed to serve forward-thinking, utilitarian goals.[14] As detailed *infra*, these forward-thinking principles should guide juvenile sentencing legislation.

II. Mounting Evidence Highlights the Inherent Differences Between Juvenile and Adult Criminal Activity

This Part examines the notable differences between juvenile and adult criminal offenders. Particularly, this Part analyzes the scientific data and Supreme Court case law that support the notion that less culpability is attributable to a crime committed by a juvenile.

A. Graham and Miller

In *Graham v. Florida*, Terrance Graham, a troubled youth that began abusing drugs as a young child, received a life sentence for armed burglary.[15] Prior to sentencing, the trial judge noted that, in light of Graham's criminal history, Graham's future criminal activity could not be deterred.[16] Consequently, the trial judge sentenced Graham to the maximum possible sentence for his conviction.[17]

In reviewing the constitutionality of Graham's sentence, the Supreme Court noted that "[t]he judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. . . the Court also considers whether the challenged sentencing practice serves legitimate penological goals."[18] The Court then alluded to language in *Roper v. Simmons*,[19] which established that "because juveniles have lessened culpability they are less deserving of the most severe punishments."[20] Thus, in light of the developing mind of a juvenile, the

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[13] *Id.*

[14] MODEL PENAL CODE § 1.02(2) (2012).

[15] 560 U.S. 48, 53-54 (2010).

[16] *Id.*

[17] *Id.* at 55-58. Graham was sentenced to life without the possibility of parole.

[18] *Id.* at 67.

[19] 543 U.S. 551 (2005).

[20] *Graham*, 560 U.S. at 68.

Court noted that "life without parole is an especially harsh punishment for a juvenile."[21] Further, the Court reasoned that the penological justifications for sentencing impositions did not support Graham's punishment.[22] In particular, per the Court, a juvenile's diminished moral capacity outweighed any deterrent effect and would not justify such a harsh sentence as a means of retribution.[23]

The Court further reasoned that, "the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence."[24] Moreover, juveniles' lack of maturity and responsibility make it "less likely that juveniles will take possible punishments into consideration" when making decisions to engage in certain criminal activity.[25] Thus, the Court appeared to reason that although a punishment may validly serve a penological goal in the broad sense, when applied specifically in the context of juveniles, its justification may not apply proportionately.[26]

Similar to *Graham*, *Miller v. Alabama* involved a severely troubled youth convicted of a serious crime.[27] Fourteen-year old defendant Miller lived in foster care, when he was not living with his alcoholic mother and abusive stepfather.[28] Miller abused drugs at a young age and attempted suicide four times—his first attempt being at the alarmingly young age of six.[29] One night, Miller and an accomplice attempted to rob their drug dealer, Cannon, as he was passed out.[30] When Cannon awoke, Miller and his accomplice severely assaulted Cannon and left him to die, after lighting Cannon's trailer on fire to cover up any evidence left behind.[31] Miller was subsequently convicted of homicide and sentenced to the mandatory minimum punishment of life without parole.[32]

In analyzing the constitutionality of Miller's sentence under the

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[21] *Id.* at 70.
[22] *Id.* at 74.
[23] *Id.* at 72-74.
[24] *Roper*, 543 U.S. at 571.
[25] *Graham*, 560 U.S. at 74; *see also* Johnson v. Texas, 509 U.S. 350, 367 (1993) (noting that juveniles' "lack of maturity and an underdeveloped sense of responsibility . . . often result in impetuous and ill considered actions and decisions").
[26] *See generally Graham*, 560 U.S. at 74-82.
[27] *Miller*, 132 S. Ct. at 2462.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 2462-63.

Eighth Amendment's Cruel and Unusual Punishment Clause, the Court relied heavily on the inherent differences between juveniles and adults.[33] In particular, the Court highlighted the fact that juveniles are "less deserving of the most severe punishments,"[34] because of their "diminished culpability and greater prospects for reform."[35] Moreover, the Court reasoned, as a result of juveniles' lower levels of maturity and responsibility, juveniles are more likely to engage in impulsive and reckless behavior.[36] The Court additionally analyzed juveniles' inherent vulnerability to externalities. Notably, per Justice Kagan, children are more susceptible to "negative influences" and, as a result of their age, lack the ability to remove themselves from crime-inhibiting environments.[37] In holding that Miller's sentence violated the Eighth Amendment, the Court alluded to the fact that a child's character is not as solidified as an adult's.[38] Specifically, as a child's mind and decision-making skills are developing, a child's actions are less likely to be "evidence of irretrievabl[e] deprav[ity]."[39]

B. Empirical Evidence Explains the Developmental Differences in Juveniles that Influence Involvement in Criminal Activity

Social scientific research seems to confirm statements by the Court regarding the developmental differences between juveniles and adults. It is widely known that reasoning abilities improve and become more fully developed as children reach adolescence.[40] Further, a significant difference exists between the cognitive abilities of young teens and adults.[41] As adolescents reach adulthood, their reasoning abilities improve as the result of life experiences, educational knowledge, increased informational-processing abilities, and improved attention spans.[42]

While teenagers at the mid-adolescent stage of development are

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[33] *Id.* at 2464.

[34] *Id.* (quoting *Graham*, 560 U.S. at 68).

[35] *Id.*

[36] *Id.*

[37] *Id.* at 2458.

[38] *Id.*

[39] *Id.*

[40] Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1011 (2003).

[41] Daniel P. Keating, *Adolescent Thinking*, AT THE THRESHOLD: THE DEVELOPING ADOLESCENT 54-89 (S. Shirley Feldman & Glen R. Elliott eds., 1993).

[42] *See* ROBERT S. SIEGLER, CHILDREN'S THINKING (3d ed. 1997).

roughly equal in "understanding and reasoning in making decisions" to adults, the nuances of juveniles' decision-making processes are not adequately captured in the laboratory setting.[43] Generally, in laboratory settings, adolescents are confronted with hypothetical predicaments, without the accompanying stress and "emotional arousal" present in real-world settings.[44] Thus, such evidence indicating that juvenile decision-making abilities are nearly equal to adults does not take into consideration the unstructured dilemmas that arise outside of the laboratory. For example, crimes committed by juveniles are generally committed in groups and under heightened emotional stress—factors not adequately replicated in the laboratories.[45]

Moreover, "while teenagers' cognitive capacities come close to those of adults," a significant gap in judgment still exists between adolescents and adults.[46] Such a disparity is likely the result of immaturity—specifically "psychosocial immaturity."[47] Four factors in particular seem to explain the "psychosocial immaturity" of juveniles (and appear to be directly relevant to decision making)—"susceptibility to peer influence, attitudes toward and perception of risk, future orientation, and the capacity for self-management."[48] Thus, the psychosocial immaturity of juveniles arguably explains why juvenile decision-making is often deficient, despite a juvenile's generally advanced cognitive capabilities.[49]

Evidence indicates that adolescents are much more influenced by their peers than adults are.[50] This finding is illustrated by studies that present teenagers with an antisocial behavioral decision presented by their peers and a "prosocial" behavioral activity presented by adults.[51] In these

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[43] Steinberg & Scott, *supra* note 40.

[44] *Id.* at 1012.

[45] *Id.*

[46] *Id. See generally* Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741 (2000); Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 L. & HUM. BEHAV. 221 (1996); Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence: Psychosocial Factors in Adolescent Decision Making*, 20 L. & HUM. BEHAV. 249 (1996).

[47] Steinberg & Scott, *supra* note 40, at 1012.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id. See generally* Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEVELOPMENTAL PSYCHOL. 608 (1979); Laurence Steinberg & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 CHILD DEV. 841 (1986).

studies, juveniles tend to prefer the antisocial option introduced by a peer over the "prosocial" option presented by an adult.[52] Moreover, while such studies note the direct influence peer pressure has on juveniles, juveniles' decision-making may oftentimes be affected indirectly.[53] For example, juveniles' "desire for peer approval—and fear of rejection—affects their choices, even without direct coercion."[54]

A considerable change in future orientation occurs as adolescents reach adulthood.[55] Studies where persons are asked to picture themselves and their situations in the future indicate that adults are notably more forward-looking, and "project out their visions over a significantly longer time frame than do adolescents."[56] Similarly, studies have shown that adolescents rely far less heavily on long-term negative results when engaging in decision-making than adults do.[57] Unlike adults, adolescents tend to disregard the long-term effects a decision may produce.[58] One theory explaining this discrepancy is the difference in life experiences between adults and juveniles.[59] Essentially, as adolescents have experienced far less in their lives, an occurrence years into the future may seem so far removed from reality that adolescents view short-term consequences as being much more relevant to their lives.[60]

Moreover, studies indicate that adolescents assess and consider risk far differently than adults do.[61] Generally, when engaging in the risk-to-reward analysis that decisions may entail, adolescents place significantly less emphasis on the risks, in relation to rewards.[62] Adults

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[52] *Id.*

[53] Steinberg & Scott, *supra* note 40, at 1012.

[54] *Id.*

[55] *Id.*

[56] *Id.*; *see also* A.L. Greene, *Future-Time Perspective in Adolescence: The Present of Things Future Revisited*, 15 J. of YOUTH & ADOLESCENCE 99 (1986); Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 DEVELOPMENTAL REV. 1 (1991).

[57] Steinberg & Scott, *supra* note 40, at 1012; *see also* William Gardner & Janna Herman, *Adolescents' AIDS Risk Taking: A Rational Choice Perspective*, NEW DIRECTIONS FOR CHILD AND ADOLESCENT DEVELOPMENT 17, 17-34 (1991); Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. APPLIED DEVELOPMENTAL PSYCHOL. 257, 263-67 (2001).

[58] Steinberg & Scott, *supra* note 40, at 1012.

[59] *Id.*

[60] *Id.*; *see also* William Gardner, *A Life-Span Rational-Choice Theory of Risk Taking*, ADOLESCENT RISK TAKING 66, 66-83 (1993).

[61] Steinberg & Scott, *supra* note 40, at 1012.

[62] *Id. See generally* Halpern & Cauffman, *supra* note 57.

also tend to be more cognizant of the general risks present in decision-making than adolescents.[63]

While much of the research illustrating how juveniles are different relies on differences in behaviors and life experiences, "mounting evidence suggests that at least some of the differences between adults and adolescents have neuropsychological and neurobiological underpinnings."[64] Importantly, brain developmental studies focusing on the difference "in patterns of brain activation between adolescents and adults" note that "the most important" adolescent developments occur in parts of the brain that directly affect decision-making.[65] In particular, these brain regions are associated with "long-term planning, the regulation of emotion, impulse control, and the evaluation of risk and reward."[66] One study found that changes in the frontal lobe of the brain in adolescents—the part of the brain that "[is] essential for such functions as response inhibition, emotional regulation, planning and organization"—indicate that such characteristics continue to develop well into adulthood.[67] While the evidence does not conclusively link the differences in decision-making between adults and adolescents to neurobiology, the results of psychological studies seem to corroborate the neuroscience hypotheses.[68]

In sum, in addition to the common-sense contrived notion that children think differently than adults, scientific data indicates that juveniles' brains operate differently than adults'. In particular, studies suggest that, in association with decision-making, juveniles view risks and rewards differently than adults. Moreover, juveniles tend to act with greater impulsivity than do adults and are much more influenced by the approval of their peers. Additionally, neurobiological studies suggest that the differences between the decision-making processes employed by juveniles and that of adults are the results of organic brain differences. In light of the data presented, it is intuitively clear that juveniles' psychosocial immaturity may lead to involvement in criminal activity. Further, as the inherent differences between juvenile and adult decision-making may contribute to juveniles' involvement in crime, in such instances, juveniles are less morally culpable than an adult counterpart that

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[63] Steinberg & Scott, *supra* note 40, at 1013.

[64] *Id.*

[65] *Id.*

[66] *Id; see also* L.P. Spear, *The Adolescent Brain and Age-related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REV. 417 (2000).

[67] Elizabeth R. Sowell et al., *In Vivo Evidence For Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE 859, 860 (1999).

[68] Steinberg & Scott, *supra* note 40, at 1013.

commits the same crime. Thus, sentencing statutes should reflect this reality by allowing for the revisiting and possible modification of juvenile sentences.

C. Additional Supreme Court Remarks Highlighting the Lessened Culpability of Juvenile Offenders

Aside from *Graham* and *Miller*, the Supreme Court has, on many other occasions, commented on the differences between adult and juvenile decision-making and noted that juvenile offenders are oftentimes less morally culpable for their offenses. In *Thompson v. Oklahoma*, the Court analyzed whether the death penalty imposed upon a 15-year old for a first-degree murder conviction violated the Eighth Amendment's Cruel and Unusual Punishment Clause.[69] In explaining the "obvious" conclusion that less culpability is attached to a crime committed by a juvenile than an adult, Justice Stevens alluded to juveniles' "[i]nexperience, less education, and less intelligence."[70] According to Stevens, such characteristics lessen a juvenile's ability to aptly evaluate the repercussions of his or her actions.[71] Additionally, per Stevens, a juvenile's immaturity results in a greater susceptibility to being motivated by emotion or influenced by peers.[72]

While factually distinguishable, the underlying rationale in Supreme Court cases involving the sentencing of the mentally handicapped is relevant to understanding the culpability of juveniles. In *Atkins v. Virginia*, the Court held that sentencing the mentally retarded to death is cruel and unusual punishment prohibited by the Eight Amendment.[73] The Court held that, because of mentally retarded individuals' deficiencies and diminished capacities, their culpability for crimes is lessened.[74] However, the Court noted that while their culpability for crimes may be lessened, they are still responsible for their criminal actions.[75] Specifically, the Court reasoned that "[t]heir deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability."[76] While this Note focuses on juvenile offenders of average cognitive abilities, the Court's analysis in *Atkins* is relevant and

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[69] 487 U.S. 815, 818-19 (1988).
[70] *Id.* at 835.
[71] *Id.* at 836-38.
[72] *Id.* at 834.
[73] 536 U.S. 304, 306-07 (2002).
[74] *Id.* at 318.
[75] *Id.*
[76] *Id.*

supports the assertion that all states should revisit juveniles' sentences. First, according to Steinberg and Scott, "like offenders who are mentally retarded, there is good reason to believe that the deficiencies of adolescent judgment are organic in nature."[77] Additionally, much like mentally retarded offenders (though certainly to a different degree), juvenile offenders' actions are often the result of impulsivity.[78] Accordingly, juveniles should not be held similarly culpable as an adult. However, of course, as *Atkins* makes explicitly clear, that is not to say that juveniles that commit crimes are not deserving of criminal sanctions. Rather, their punishments should be delivered with the understanding that a lessened degree of culpability attaches to juvenile offenders' actions.[79]

The factor of diminished capacity is also of great importance to the Court's holding in *Atkins*—a quality that is also present in juveniles (to a varying degree).[80] Particularly, "[t]he psychosocial immaturity of adolescents contributes to their diminished capacity."[81] Such immaturity, as noted previously, leads to juveniles' increased susceptibility to coercion and other outside influences. As the prominent developmental psychologist Erik H. Erikson found in many of his empirical studies, juvenile psychosocial immaturity leads to experimentation, as adolescents attempt to define their self-identify—a phenomenon Erikson coined the "identity crisis."[82] Oftentimes, for juveniles, resolving this crisis may involve risky experimentation, such as criminal involvement and illegal activities.[83] However, in the vast majority of cases, such antisocial activity generally subsides with time.[84] In fact, "only a relatively small proportion of adolescents" engaged in criminal activity actually "develop entrenched patterns of problem behavior."[85] Thus, the adolescent youth that engages in criminal activity does not necessarily represent an individual devoid of moral values and on a path towards enduring crime. Rather, in many instances, juveniles briefly engage in "adolescence-limited delinquency."[86] Certainly, juveniles engaged in brief stints of delinquency

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[77] Steinberg & Scott, *supra* note 40, at 1014.

[78] *Id.*

[79] *Atkins*, 536 U.S. at 318.

[80] *See generally id.* at 315-18.

[81] Steinberg & Scott, *supra* note 40, at 1014.

[82] *Id.*; *see also* ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS (W. W. Norton & Co. 1968).

[83] *Id.*

[84] Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 677 (1993).

[85] Steinberg & Scott, *supra* note 40, at 1014.

[86] Moffitt, *supra* note 84 at 685.

must be held accountable for their actions. However, this Note advances that such repercussions imposed upon juveniles must be served with the understanding that juvenile offenders are different from adult offenders in both obvious and unobvious ways. Accordingly, states should adopt sentencing schemes that account for such intuitive and empirical evidence.

D. Judicial Re-Visiting of Juvenile Offenders' Sentences Serves Penological Ends

The re-visiting of juvenile offenders' lengthy sentences takes into account the vast empirical evidence previously noted and would correctly serve the goals of justice. Such a sentencing scheme would be a codification of the fact that only a small percentage of juvenile offenders continue to lead a life of crime into adulthood. Terrie E. Moffitt's work analyzing different categories of juvenile offenders sheds light on the striking rarity of "life-course-persistent offenders."[87] Unlike adolescent-limited delinquency, which results from a combination of internal and external factors, life-course-persistent offender syndrome "has a biological basis in subtle dysfunctions of the nervous system."[88] Thus, states that adopt similar sentencing statutes to Florida's would effectively engage in a sentencing scheme that would properly sentence juvenile offenders, because only a few juveniles qualify as "life-course-persistent offenders."

Moreover, the revisiting of criminal sanctions does not necessarily mean that an offender's sentence will be modified. There may certainly be juvenile offenders that did not engage in crime as a result of psychosocial immaturity, but rather knowingly and maturely made their choices. Sentence re-visitation would not necessarily affect such offenders' sentences. Rather, a sentencing scheme that provides courts with discretion to modify the sentences of juvenile offenders who *did* succumb to psychosocial immaturity would allow courts to adhere to the penological justifications of criminal punishment.

Incapacitation, one of the utilitarian penological goals of the criminal justice system, is not served by adhering to a static juvenile sentencing scheme. In essence, incapacitation is the idea that, by imprisoning offenders, society is safer because an imprisoned criminal is not able to continue to commit crimes that affect the public.[89] Additionally, incapacitation, in theory, combats the "serious risk to public

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[87] *Id.* at 679.

[88] *Id.* at 685.

[89] ARTHUR CAMPBELL, LAW OF SENTENCING § 2:3 (3d ed. 2004).

safety" that recidivism poses.[90] However, one important premise that supports the rationale of incapacitation is the notion that an offender will continue to engage in criminal activity in the future.

As previously noted, scientific evidence suggests that only a small minority of juveniles continue to engage in delinquency past the adolescent stage of maturity.[91] Thus, the goal of incapacitation is not served when juveniles are sentenced without regard for this fact. In *Graham*, the Court, in holding that juvenile life without parole sentences for nonhomicide crimes are unconstitutional, noted that incapacitation was not a sufficient justification for such sentences.[92] In reaching its conclusion, the Court focused on the developmental stage of juveniles.[93] The Court reasoned that in order to justify the aforementioned sentence under a theory of incapacitation would require "the sentencer to make a judgment that the juvenile is incorrigible."[94] Importantly, the Court stated that "[t]he characteristics of juveniles make that judgment questionable."[95]

Relevantly, in *Roper*, the Court held that sentencing juveniles to death violates the Eighth and Fourteenth Amendments of the Constitution.[96] The Court's analysis highlights the ever-changing maturity of juveniles and cautions how the theory of incapacitation should be applied warily in the juvenile context. In reaching its conclusion, the Court noted that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[97] Accordingly, as it is the "rare juvenile offender"[98] that presents a grave danger to society, states, in formulating their sentencing schemes, should skeptically view incapacitation as a justification to impose lengthy sentences upon juveniles without the opportunity for possible modification.

General deterrence is the notion that the imposition of a particular sentence will prevent the public from engaging in similar criminal conduct proscribed by statute.[99] For instance, general deterrence can be reached by

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[90] *Graham*, 560 U.S. at 72.
[91] Moffitt, *supra* note 84, at 677.
[92] *Graham*, 560 U.S. at 72-74.
[93] *Id.*
[94] *Id.* at 72.
[95] *Id.* at 72-73.
[96] *Roper*, 543 U.S. at 578-79.
[97] *Id.* at 573.
[98] *Id.*
[99] CAMPBELL, *supra* note 89, § 2:2.

preventing individuals from committing crime due to the fear of punishment.[100] Additionally, general deterrence can be achieved by reinforcing the public's moral opposition to criminal activity.[101] That is, criminal sanctions imposed upon a convicted individual may reinforce "the righteous indignation of those able to keep their criminal tendencies in check."[102] Whichever way one views the theory of general deterrence, because "children are different," neither view is served when a juvenile is sentenced lengthily without the opportunity to have their punishment revisited. This conclusion is logically reached when considering that juveniles are particularly susceptible to negative influences, and that long-term consequential effects are not fully ingrained in the juvenile mind.

Additionally, the penological goal of rehabilitation is not a valid justification for the sentencing scheme that this Note criticizes. "Rehabilitation aims to prevent criminal behavior by sentencing offenders to programs designed to eliminate or substantially reduce their criminal propensities."[103] In a way, under the rehabilitation rationale, involvement in criminal activity is viewed as analogous to a disease that requires treatment.[104] Thus, under this theory, criminal sanctions "attempt to cure or at least treat this disease."[105] Similar to the underlying rationales of deterrence and incapacitation, the end goal of rehabilitation is to prevent future crime.[106]

Sentencing schemes intended to rehabilitate offenders are premised upon the notion that an offender can effectively be "cured." Intuitively, then, such a sentencing scheme should require that an offender's progress be monitored and the sentence altered if necessary to achieve its objective. Thus, particularly for the reasons noted *supra*, juveniles' sentences should be re-visited to determine whether a juvenile offender has been rehabilitated. For instance, a sentence intended to "cure" a juvenile offender should require the sentence be re-visited, even if no change results, to assess whether developmental factors that led to criminal activity have improved with maturity.[107] Because children's brains develop rapidly in ways that affect decision-making, sentence re-visitation is especially imperative when attempting to rehabilitate juvenile

[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] CAMPBELL, *supra* note 89, § 2:4.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *See supra* Part II.B.

offenders.[108]

Even under a retributivist sentencing rationale, juvenile sentence re-visitation is imperative. Retribution, as a penological goal of criminal justice, is predicated upon the notion that "inflicting punishment on willful offenders will restore some abstract balance of right and wrong to the social order."[109] Central to this theory's modern application is the concept of just deserts—the idea that "punishment [is allocated] according to a proportionality equation involving culpability, seriousness of harm, and severity of penalty."[110] Particularly, according to Professor E. Lea Johnston, "[a] chief aim of desert theory is to translate retributivism's general call for just punishment into a workable scheme to guide sentencing policy and individual sentencing decisions."[111] Thus, since this penological principle's justification relies heavily upon an offender's culpability, it seems intuitive that a juvenile criminal offender's sentence should be re-visited to ensure that their sentence constitutes a just desert. That is, since juveniles' decision-making processes are not fully developed—often leading to involvement in criminal activity—culpability and just deserts are hard to measure adequately until a juvenile has reached developmental and cognitive maturity. Judicial sentence re-visitation and possible modification—which would take into account a juvenile offender's personal growth and, thus, his or her degree of culpability—would be a practical and empirically-driven solution to this issue.

E. Montgomery v. Louisiana

In 2016 in *Montgomery v. Louisiana*, the Supreme Court held that *Miller* established a substantive rule that therefore must be applied retroactively.[112] As the Court noted, a substantive—as opposed to a procedural—rule prohibits "criminal punishment of certain primary conduct . . . [or the imposition of] a certain category of punishment for a class of defendants because of their status or offense."[113] Within this framework, the Court held *Miller* created a substantive rule because it prohibits certain sentencing schemes against juveniles as a class.[114]

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[108] *Id.*

[109] CAMPBELL, *supra* note 89, § 2:5.

[110] E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147, 185-86 (2013).

[111] *Id.* at 186.

[112] 136 S. Ct. 718, 732 (2016).

[113] *Id.* at 732.

[114] *Id.* at 734.

Central to the Court's analysis in *Montgomery* are the redeemable qualities of juvenile offenders.[115] That is, the Court relied on the "starting premise [and] principle established in *Roper* and *Graham* that 'children are constitutionally different from adults for purposes of sentencing.'"[116] In fact, as this Note proposes *supra*, the Court highlighted the penological justifications for treating juveniles distinctly from adults.[117] "Because *Miller* determined that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption,'" the Court held *Miller* prohibited punishments against a class of defendants and therefore applies retroactively.[118]

In reaching its holding, the Court rejected the State of Louisiana's argument that *Miller* did not prohibit certain punishments against juveniles as a class because "it instead required sentencing courts to take children's age into account before condemning them to die in prison."[119] In dismissing Louisiana's contention, the Court noted that "*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility"—a small fraction, because most juvenile offenders' "crimes reflect transient immaturity and . . . rare[ly] . . . reflect irreparable corruption."[120]

From a practical perspective, the Court rejected any bureaucratic dismay that would result from its holding.[121] Rather, employing a similar line of logic as this Note does in arguing for juveniles' sentence re-visitation, the Court noted "prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for release will be afforded to those who demonstrate the truth of *Miller's* central intuition—that children who commit even heinous crimes are capable of change."[122]

The Court concluded its analysis that *Miller* created a substantive rule warranting retroactive effect in powerfully poetic terms:

Petitioner has discussed in his submissions to this Court his

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[115] *Id.* at 732-34.

[116] *Id.* at 733 (quoting *Roper*, 543 U.S. at 569-70).

[117] "Miller, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" *Id.* at 734 (quoting *Roper*, 543 U.S. at 573).

[118] *Id.* at 734.

[119] *Id.*

[120] *Id.*

[121] *Id.* at 735-36.

[122] *Id.* at 736.

> evolution from a troubled, misguided youth to a model member of the prison community. Petitioner states that he helped establish an inmate boxing team, of which he later became a trainer and coach. He alleges that he has contributed his time and labor to the prison's silkscreen department and that he strives to offer advice and serve as a role model to other inmates. These claims have not been tested or even addressed by the State, so the Court does not confirm their accuracy. The petitioner's submissions are relevant, however, as an example of one kind of evidence that prisoners might use to demonstrate rehabilitation.
>
> Henry Montgomery has spent each day of the past 46 years knowing he was condemned to die in prison. Perhaps it can be established that, due to exceptional circumstances, this fate was a just and proportionate punishment for the crime he committed as a 17-year-old boy. In light of what this Court has said in *Roper*, *Graham*, and *Miller* about how children are constitutionally different from adults in their level of culpability, however, prisoners like Montgomery must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored.[123]

Henry Montgomery demonstrates that, perhaps, even the severely misguided juvenile offender can be rehabilitated.

Conclusion

In sum, in *Graham* and *Miller*, the Supreme Court explicitly endorsed the notion that juvenile offenders are inherently different from adult offenders. Thus, the Court reasoned that the law, particularly through sentencing statutes, must treat juvenile offenders differently from their adult counterparts. In light of *Graham* and *Miller*, states have adopted different approaches to juvenile sentencing law. While all states are now required to take mitigating circumstances into consideration before sentencing a juvenile to life without parole, states such as Florida have taken their juvenile sentencing schemes further than *Graham* and *Miller* mandate. Particularly, Florida's new juvenile sentencing statute allows for courts to re-consider the lengthy sentences imposed upon a juvenile, after

[123] *Id.* at 736-37.

a requisite amount of prison time has been served.

Further, empirical evidence makes it abundantly clear that more states should enact legislation similar to Florida's. Notably, numerous studies indicate that the decision-making processes of juveniles are markedly different from those of adults. As a result of the developmental differences between juveniles and adults, juveniles are more easily influenced by internal and external factors that may lead to criminal activity. In addition to data gathered from behavioral studies, neurobiological research seems to indicate that the differences in juvenile and adult decision-making may be organic in nature. Research involving brain scans illustrate that the parts of the brain responsible for decision-making undergo significant developmental changes during the adolescent stage. In light of this empirical evidence, states should allow the possibility of future sentence modification, when imposing lengthy sentences upon juveniles. Such an approach to juvenile sentencing would be a statutory codification of scientific evidence that seems to explain why only small minorities of juveniles continue to commit crimes in the future. Moreover, by taking empirical evidence into account when drafting juvenile sentencing legislation, states will be adhering to the penological principles that underlie their criminal codes.