EIGHTH AMENDMENT PARADIGM SHIFT:  
EXPANDING THE EVOLVING CONSTITUTIONAL RIGHTS OF JUVENILES  
TO ADULTS IN THE MASS INCARCERATION ERA

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As America faced mass incarceration on a scale virtually unprecedented in global history, a slim majority of Supreme Court Justices insisted for three decades that the Eighth Amendment’s bar on “cruel and unusual punishment” essentially does not cover draconian prison terms. Yet the Court ultimately limited the scope of life imprisonment for juveniles in Graham v. Florida (2010), Miller v. Alabama (2012), and Montgomery v. Louisiana (2016). While scholars have primarily identified these decisions as stepping stones toward expanding juveniles’ rights, I address an original issue: whether the evolving constitutional rights of juveniles may be expanded to adult prisoners.

The focus on the differences between juveniles and adults in the aftermath of these landmark decisions has obscured how they recognized key sentencing principles that are hardly age-dependent: dignity, proportionality, legitimacy, and rehabilitation. Dissenting Justices and lower courts previously advanced these principles in cases involving adults facing draconian prison terms. My research reveals that in Graham and its progeny the Court strikingly adopted multiple sentencing principles that it once rejected—and that have become the norm in other Western democracies. The Court’s evolution appears consistent with the changing judicial philosophy of Justice Anthony Kennedy, who distanced himself from his own past opinions interpreting the meaning of “cruel and unusual punishment” very narrowly.

This paradigm shift in Eighth Amendment jurisprudence paralleled another intriguing development. The law has historically evolved from children having no constitutional rights under the traditional parens patriae system, to juveniles gaining practically the same constitutional rights as adults under the seminal In re Gault decision (1967), to juveniles now having far more constitutional rights than adults at sentencing following the Graham line of cases. This historic reversal suggests that one cannot exclude another paradigm shift leading adult prisoners to gain the same constitutional rights as juveniles under the Eighth Amendment.

All of these reasons caution against a new “juveniles are different” doctrine that may prove as rigid as the “death is different” doctrine that formerly made the Eighth Amendment a dead letter except in capital cases. Tellingly, the Justices have relied on neurological and behavioral science establishing that juveniles are more impulsive than adults. This same body of research shows that the brain does not fully mature until the early twenties and that the crime rate drops considerably with age, beginning to flatten by the fifties—calling into question the constitutionality of extremely lengthy prison terms for adults.

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INTRODUCTION

Supreme Court decisions restricting draconian punishments for juveniles have become part of a quiet revolution in Eighth Amendment jurisprudence. After abolishing the juvenile death penalty in *Roper v. Simmons*,1 the Justices limited the scope of life imprisonment for juveniles in *Graham v. Florida*,2 *Miller v. Alabama*,3 and *Montgomery v. Louisiana*.4 These developments inspired groundbreaking court decisions and legislative reforms regarding juvenile sentencing in multiple states, from Iowa to Texas and beyond.5 While scholars and proponents of criminal justice reform have welcomed these social changes, they have mainly identified them as stepping stones toward expanding juveniles’ rights.6 This Article examines a broader hypothesis: may the quiet revolution in children’s constitutional rights provide guidance to restrict draconian prison terms for adults in the age of mass incarceration?

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1 *Roper v. Simmons*, 543 U.S. 551, 572-73 (2005) (reasoning that “[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability”).


4 *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016) (holding that Miller established a substantive constitutional rule that should apply retroactively to teenagers mandatorily sentenced to life without parole).

5 See generally *Iowa v. Sweet*, 879 N.W.2d 811 (Iowa 2016) (abolishing life without parole for juveniles under the Iowa Constitution); *Campaign for the Fair Sentencing of Youth, Righting Wrongs: The Five-Year Groundswell of State Bans on Life Without Parole for Children* (2016) (indicating that seventeen states ban life imprisonment without parole for juveniles following a nationwide reform movement); Editorial, *Juvenile Sentences That Defy the Law*, N.Y. Times, Sept. 11, 2016, at SR10 (“In the last five years, 12 states—including Texas, Nevada, Wyoming and West Virginia—have banned life-without-parole sentences for juveniles in all cases, for a total of 17 . . . .”).

For three decades before its 2010 *Graham* decision, a divided Supreme Court repeatedly held that the Eighth Amendment offers no protection to persons receiving life sentences for relatively minor offenses.7 Even as America faced mass incarceration on a scale nearly unprecedented in global history,8 a narrow majority of Justices insisted that a sentence need not be proportional to the crime except in a capital case—a doctrine known as “death is different.”9 *Harmelin v. Michigan*, a controversial 1991 plurality opinion, was particularly influential in concluding that draconian prison terms are essentially outside the scope of “cruel and unusual punishment.” 10 Yet, in *Graham* and its progeny, the Justices ultimately engaged in proportionality review of prison sentences by limiting the applicability of life imprisonment to juveniles.

In doing so, the Supreme Court may have taken a step toward an interpretation of the Eighth Amendment that would call into question mass incarceration and merciless sentences for all persons, whether teenagers or adults. Indeed, juvenile sentencing principles recognized in *Graham, Miller, and Montgomery* were not new arguments in Supreme Court opinions. Several of these principles are identifiable in the opinions of Justices who vigorously dissented during the three decades when the Court deemed that the Eighth Amendment offered no protection.

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9 *See generally* Harmelin, 501 U.S. at 995-96 (noting that solely death sentences require individualized review under the Eighth Amendment given the “qualitative difference between death and all other penalties”).

against draconian prison terms.¹¹ Four core principles stand out: i) punishments must not violate human dignity; ii) punishments must be proportional to culpability; iii) punishments are constitutionally suspect if they serve no legitimate penological purpose; and iv) punishments should generally provide an opportunity for rehabilitation and release. These fundamental sentencing principles are usually the norm elsewhere in the modern Western world.¹² The way that American jurists increasingly think of juveniles’ rights parallels the way that jurists in other Western democracies tend to think of the rights of both juveniles and adults. In other words, Graham and its progeny may illuminate a path toward an Eighth Amendment paradigm shift in the United States.

First, this Article explores the Eighth Amendment’s evolution. Between 1983 and 2010, the Supreme Court never found a prison term “cruel and unusual punishment.”¹³ Its extremely narrow interpretation of this constitutional safeguard not only led to pushback from dissenting Justices, but also from lower courts and prominent experts.¹⁴ The Justices finally changed course in Graham and ensuing juvenile decisions. I trace this development partly to the evolving judicial philosophy of Justice Anthony Kennedy, who went from interpreting the Eighth Amendment extremely narrowly to seeing it as a means to protect prisoners’ human dignity against degrading aspects of mass incarceration.

¹³ See supra note 7.
¹⁴ Hutto, 454 U.S. at 375 (scolding the Fourth Circuit Court of Appeals and a District Court for not following the U.S. Supreme Court’s interpretation of the Eighth Amendment); People v. Bullock, 485 N.W.2d 866, 870 (Mich. 1992) (emphasizing that the bar on “cruel or unusual punishment” in the Michigan Constitution has a broader scope than the Eighth Amendment of the U.S. Constitution as interpreted by the Supreme Court); Nilsen, supra note 7, at 165 n.262 (discussing the Michigan Supreme Court’s pushback against the U.S. Supreme Court in Bullock). See also generally Michael J. Zydney Mannheimer, Cruel and Unusual Federal Punishments, 98 IOWA L. REV. 69, 71 (2012) (describing how 163 experts, including former federal judges, prosecutors, and U.S. Attorneys General, filed an amicus brief in support of a petty offender challenging the constitutionality of his fifty-five-year sentence, to no avail).
Second, I analyze the intriguing historical evolution of juveniles’ constitutional rights. The law has ironically evolved from children having drastically fewer rights than adults under the traditional *parens patriae* system, to children having theoretically the same fundamental rights as adults under the seminal *In re Gault* decision of 1967,\(^\text{15}\) to children now having far more constitutional rights than adults following *Roper, Graham, Miller,* and *Montgomery*.

Third, I argue that adults should have virtually the same constitutional rights as juveniles under the Eighth Amendment. Questioning the strict dichotomy dividing juvenile from adult offenders, I present the hypothesis that numerous constitutional, policy, normative, and scientific principles advanced in *Roper* and subsequent cases remain relevant once people enter adulthood. In particular, the Court has reasoned that juveniles should be treated with dignity, should receive sentences proportional to their wrongdoing, should be treated consistently with legitimate penological goals, and should not be branded as irredeemable persons unfit to reenter society, irrespective of their rehabilitation. If these principles are also largely applicable to adult offenders, they would seem to caution against a narrowly-framed “juveniles are different” doctrine that may prove as rigid as the “death is different” doctrine that previously made the Eighth Amendment a dead letter except in capital cases. For instance, the Court has relied upon neurological and behavioral science demonstrating that juveniles are more impetuous and reckless than adults because the part of their brains managing impulse control, the prefrontal cortex, has not finished developing.\(^\text{16}\) The very same body of research additionally shows that this section of the brain does not completely mature until the early twenties and that the crime

\(^{15}\) *In re Gault*, 387 U.S. 1 (1967).

rate drops considerably with age, beginning to flatten by the fifties—calling into doubt the constitutionality of extremely lengthy prison terms for adults.  

Finally, I explain why this gradual paradigm shift could help overcome hurdles to ending mass incarceration. Experts generally agree that the reform proposals that have received the most public attention and support, such as decriminalizing marijuana and ending the “War on Drugs,” will not end mass incarceration, despite public misconceptions to the contrary. And even though reforms to specifically address institutional racism would likely be indispensable to lasting criminal justice reform, the Supreme Court has effectively closed the door to such systemic constitutional challenges. Yet the Eighth Amendment’s reinvigoration could restrict sentences that disproportionately harm racial and ethnic minorities, as well as socioeconomically disadvantaged whites. The reasoning of *Graham*, *Miller*, and *Montgomery* may thus provide guidance to ensure that all persons receive humane sentences. This reasoning is already commonplace in other Western democracies, where the principles of dignity, human rights, and rehabilitation play a greater role in sentencing. Although U.S. juvenile justice remains harsh by international standards, it is the sphere of American justice where these sentencing principles

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17 Id. at 515. *See also* sources discussed *infra* Section III.D.
18 *See generally* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 24-25 (2012) (emphasizing that mass incarceration is not “exclusively (or overwhelmingly) a result of the War on Drugs,” as “drug offenders constitute only a quarter of our nation’s prisoners, while violent offenders make up a much larger share: one-half”). *See also* U.S. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2015 (2016), 14 (indicating that 52.9 percent of state prisoners were convicted for violent crimes).
21 Id. at 194, 201-02.
have gained the most traction. From juvenile justice, they may penetrate the broader penal system and precipitate a paradigm shift in the Eighth Amendment.

I. THE EIGHTH AMENDMENT’S EVOLUTION IN THE AGE OF MASS INCARCERATION

The United States is home to five percent of the world’s population but a quarter of its prisoners.22 Leaving aside Stalinist Russia, there are few historical examples of mass incarceration on such a colossal scale.23 As of 2017, America had the highest incarceration rate worldwide after the Seychelles.24 Simply considering incarceration rates may nonetheless obscure the magnitude and nature of mass incarceration in the United States. The Seychelles are a small developing nation with merely 96,000 people25 and approximately 735 prisoners total.26 By contrast, the United States has over 2.1 million prisoners.27 Mass incarceration in America is even more striking if one parses the “astronomical” incarceration rate for African Americans.28 The peculiar nature of mass incarceration further comes to light when comparing the United States to the rest of the Western world: Europe, Canada, Australia, and New Zealand.29

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23 HARTNEY, supra note 8, at 3 (comparing the incarceration rate in modern America and the Soviet Union in 1950).
28 WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 47-48 (2013) (“If the general imprisonment rate is high, the rate of black incarceration can fairly be called astronomical,” as in the year 2000 it “exceed[ed] by one-fourth the imprisonment rate in the Soviet Union in 1950—near the end of Stalin’s reign, the time when the population of the Soviet camps peaked”).
29 Legal and political scholars typically favor comparing the United States to other Western nations sharing democratic political systems, industrialized economies, and relatively similar cultural roots. On the comparison of
America’s incarceration rate is five to ten times higher than those of other modern Western democracies. In the words of David Garland, mass incarceration “is an unprecedented event in the history of the USA and, more generally, in the history of liberal democracy.”

The Supreme Court’s remarkably narrow interpretation of the Eighth Amendment is among the multiple factors having shaped the mass incarceration phenomenon. The nation’s state prisoner population exploded by over 700 percent from the 1970s to the 2010s. Even as the United States reached world-record imprisonment levels, the Supreme Court repeatedly held that extremely punitive prison terms do not violate the Eighth Amendment’s bar on “cruel and unusual punishment.”

In Rummel v. Estelle, a 1980 decision, the Court reasoned that the Eighth Amendment offers essentially no protection against draconian prison terms lacking proportionality to culpability. It thus affirmed the life sentence that a defendant received under Texas’s “three strikes” statute for several minor nonviolent offenses: fraudulently using a credit card to obtain

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30 See WORLD PRISON BRIEF, PRISON POPULATION RATE, supra note 24.
32 Scholars have advanced diverse theories about the roots and ramifications of mass incarceration. See generally MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012) (describing mass incarceration as primarily the product of institutional racism); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2002) (arguing that various social factors shaped harsher attitudes toward crime and contributed to mass incarceration); BERNARD HARcourt, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF THE NATURAL ORDER (2011) (analyzing the interrelated evolution of capitalism and penitentiary systems since the nineteenth century); Jouet, supra note 12, at 195 (arguing that mass incarceration is the product of a “poisonous cocktail blending multiple peculiar ingredients,” including atypical institutions, a shift in judicial philosophy, limited socioeconomic solidarity, racial discrimination, religious traditionalism, anti-intellectualism, sensationalized media coverage of crime, conservative populism, a subculture of violence, a narrow conception of human dignity, and skepticism of international human rights standards); Stuntz, supra note 28 (identifying a broad range of institutional, legal, and social factors behind mass incarceration); John F. Pfaff, The Micro and Macro Causes of Prison Growth, 28 GA. ST. U. L. REV. 1239, 1241 (2012) (providing data suggesting that prosecutors were particularly instrumental in driving mass incarceration because of their increased tendency to file felony charges).
34 Rummel, 445 U.S. at 263.
$80 worth of goods or services, passing a forged check for $28.36, and obtaining $120.75 by false pretenses. Over the dissenting opinion of four Justices, the majority announced: “one could argue without fear of contradiction by any decision of this Court that . . . the length of the sentence actually imposed [for a felony] is purely a matter of legislative prerogative.” Put otherwise, the Court notified state authorities that it would not preclude them from imposing life sentences on any convicted felons. It added that Eighth Amendment challenges should succeed only in “exceedingly rare” situations.

Two years later, Hutto v. Davis, a succinct per curiam decision, found no constitutional violation with a forty-year sentence for possession and distribution of nine ounces of marijuana. The Court reiterated its “reluctan[ce] to review legislatively mandated terms of imprisonment.” In a revealing twist of events, the Justices also reprimanded both the Fourth Circuit Court of Appeals and a District Court for their unwillingness to follow Rummel’s narrow interpretation of the Eighth Amendment, as these lower courts had found the forty-year sentence in Hutto unconstitutional notwithstanding Rummel. “[U]nless we wish anarchy to prevail within the federal judicial system,” the majority wrote, “a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.”

Justice Lewis Powell grudgingly concurred with the Hutto majority, feeling bound by Rummel despite his belief that the forty-year sentence was “unjust and disproportionate to the

35 Id. at 266.
36 Id. at 274.
37 The majority provided a minor caveat by stating in a footnote that “a proportionality principle” might apply “if a legislature made overtime parking a felony punishable by life imprisonment.” Id. at 274 n.11.
38 Id. at 272.
39 Hutto, 454 U.S. at 370.
40 Id. at 374 (quoting Rummel, 445 U.S. at 274).
41 Id. at 375. See also Davis v. Zahradnick, 432 F. Supp. 444, 449 (W.D. Va. 1977), aff’d per curiam sub nom., Davis v. Davis, 646 F.2d 123 (4th Cir. 1981), rev’d sub nom., Hutto, 454 U.S. at 370.
42 Hutto, 454 U.S. at 375.
offense” of possessing and distributing marijuana “said to have a street value of about $200.”  

Three other Justices, led by William Brennan, dissented in strong language denouncing the majority’s decision to issue a *per curiam* opinion “[w]ith the benefit of neither full briefing nor oral argument” in this important case.  

In their view, the majority had moved toward “the complete abdication of our responsibility to enforce the Eighth Amendment.”

In 1983, however, the Court moved away from *Rummel* and *Hutto*’s narrow understanding of prisoners’ rights. It therefore held in *Solem v. Helm* that inflicting life without parole on a petty recidivist who had issued a no account check for $100 was “cruel and unusual punishment.” The main reason for the Court’s change of direction appears to be the evolving judicial philosophy of Justice Harry Blackmun. After being in the majority in *Rummel*, Blackmun joined the four Justices who had dissented in that precedent to form a new 5-4 majority in *Solem*. The *Solem* majority notably reasoned that the Eighth Amendment encompasses a “general principle of proportionality.” It identified three factors to determine whether a prison sentence is disproportional: i) “the gravity of the offense and harshness of the penalty;” ii) sentences imposed “in the same jurisdiction;” and iii) sentences for “the same crime in other jurisdictions.”

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43 *Hutto*, 454 U.S. at 375 (Powell, J., concurring in the judgment).
44 *Id.* at 381 (Brennan, J., dissenting).
45 *Id.* at 383.
46 *Solem*, 463 U.S. at 277. The Supreme Court has historically found Eighth Amendment violations in few other noncapital cases. See *Estelle v. Gamble*, 429 U.S. 97 (1976) (holding that deliberate indifference to prisoners’ serious medical needs does not comport with the Eighth Amendment); *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion) (holding that depriving a military deserter of his U.S. citizenship violated the Eighth Amendment); *Weems v. United States*, 217 U.S. 349 (1910) (holding that sentencing a defendant to hard labor for falsifying an official document violated the Eighth Amendment).
47 Justice Blackmun’s judicial philosophy particularly evolved on the death penalty during his time on the Supreme Court. In his last year on the bench, he famously declared “I will no longer tinker with the machinery of death.” *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).
50 *Id.* at 291-92.
The Court revisited the issue in 1991 but proved even less able to find common ground. In *Harmelin v. Michigan*, a plurality decision, the Court rejected the *Solem* standard and concluded that the Eighth Amendment’s bar on “cruel and unusual punishment” does not require that a prison sentence be “proportional” to the crime. The defendant in *Harmelin* had no prior felony convictions. He received a mandatory sentence after being convicted of possessing 672 grams of cocaine, a substantial quantity sufficient to create between 32,500 and 65,000 doses. The mandatory life sentence precluded him from advancing any mitigating evidence at sentencing. Justice Antonin Scalia wrote the principal opinion of the plurality judgment declaring: “Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation’s history.” In a separate section of his opinion that was solely joined by Chief Justice William Rehnquist, Justice Scalia argued that the Eighth Amendment was originally meant to “outlaw particular modes of punishment,” such as torture, rather than “disproportionate or excessive sentences.” Scalia asserted that “*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee.”

Anthony Kennedy, joined by Sandra Day O’Connor and David Souter, authored *Harmelin*’s controlling concurring opinion. Unlike Scalia, Kennedy considered that the Eighth Amendment “encompasses a narrow proportionality principle.” Yet Kennedy found that this principle was not violated by the first-time felon’s life sentence for drug possession.

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51 *Harmelin*, 501 U.S. at 994.
52 *Id.*
53 *Id.* at 961.
54 *Id.* at 1002 (Kennedy, J., concurring).
55 *Id.* at 965 (noting that “mandatory sentences abounded in our first Penal Code”).
56 *Harmelin*, 501 U.S. at 975-85 (emphasis in original).
57 *Id.* at 994-95.
58 *Id.* at 997 (Kennedy, J., concurring).
59 *Id.* at 1009.
By contrast, the four dissenting Justices in *Harmelin* stood united in concluding that the Eighth Amendment bars disproportional prison sentences. Disputing the conclusions of Justice Scalia’s originalist analysis, they advanced historical evidence that the original meaning of “cruel and unusual punishment” either encompassed a review of disproportional prison sentences or did not prohibit it. The dissenters further stressed that the Eighth Amendment’s language is ambiguous; and that the Court had recognized that the meaning of “cruel and unusual punishment” depends on the “‘evolving standards of decency that mark the progress of a maturing society.’” Drawing upon *stare decisis*, the four Justices concluded that the plurality had failed to provide a reasonable basis to depart from the proportionality standard established in *Solem*.

The *Harmelin* plurality’s narrow conception of prisoners’ rights proved controversial. Tellingly, the Michigan Supreme Court distanced itself from it the following year. Even though the U.S. Supreme Court had found no Eighth Amendment violation with the sentence that the Michigan defendant had received in *Harmelin*, the Michigan Supreme Court emphasized that *Harmelin* “is only persuasive authority for purposes of this Court’s interpretation and application of the Michigan Constitution,” and that “we may in some cases find more persuasive, and choose to rely upon, the reasoning of the dissenting justices of [the United States Supreme Court].”

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61 *Id.* at 1009-12 (White, J., dissenting).
62 *Id.* at 1011.
63 *Id.* at 1015 (quoting Trop, 356 U.S. at 101).
64 *Id.* at 1021 (White, J., dissenting).
65 *See generally Nilsen, supra note 7, at 113, 148, 169.
66 Bullock, 485 N.W.2d at 875. See also Nilsen, *supra* note 7, at 165 n.262 (discussing *Bullock* and Michigan state reform efforts following *Harmelin*).
67 Bullock, 485 N.W.2d at 870.
The Michigan Supreme Court accordingly held that mandatory life without parole was a
disproportionately harsh punishment for cocaine possession under the Michigan Constitution.\(^68\)

_Harmelin_ may nonetheless be the most significant precedent regarding the intersection of
mass incarceration and constitutional law. Despite being a plurality opinion, the Supreme Court
and lower courts proved highly deferential to its rationale that a prison sentence need not be
remotely proportional to culpability to pass muster under the Eighth Amendment.\(^69\)

As mass incarceration reached historic levels, the Court heard more challenges to
extremely punitive prison terms. In 2003, _Ewing v. California_, another plurality found no
constitutional violation with a sentence of twenty-five-years-to-life imposed on a man who had
shoplifted golf clubs worth approximately $1,200—his “third strike” under California law.\(^70\) The
_Ewing_ plurality comprised of Justices Kennedy, O’Connor, and Rehnquist followed Kennedy’s
_Harmelin_ concurrence by concluding that the Eighth Amendment “forbids only extreme
sentences that are ‘grossly disproportionate’ to the crime.”\(^71\) It additionally reasoned that three
strikes laws aim to punish, deter or incapacitate career criminals, thereby reflecting “a rational
legislative judgment, entitled to deference.”\(^72\) Justices Scalia and Thomas concurred in the
judgment but asserted that the Eighth Amendment lacks any proportionality principle at all.\(^73\)

In _Lockyer v. Andrade_, a _habeas corpus_ case decided on the same day as _Ewing_, the
Court held that the Eighth Amendment likewise offered no protection to Leandro Andrade, a
petty, nonviolent recidivist who received a fifty-year-to-life sentence under California’s three

\(^{68}\) _Id._ at 877. Moreover, “[i]n 1998, the Michigan legislature moved to an optional rather than a mandatory life
sentence and, in 2002, raised the triggering quantity from 650 to 1000 grams.” Elizabeth Napier Dewar, Comment,
_The Inadequacy of Fiscal Constraints as a Substitute for Proportionality Review_, 114 _YALE L.J._ 1177, 1180 n.18
(2005).

\(^{69}\) Barkow, _supra_ note 7, at 49-50; Nilsen, _supra_ note 7, at 113, 148, 169.

\(^{70}\) _Id._ at 28.

\(^{71}\) _Ewing_, 538 U.S. at 23 (quoting Harmelin, 501 U.S. at 1001 (Kennedy, J., concurring)).

\(^{72}\) _Id._ at 30. _See also id._ at 24-28.

\(^{73}\) _Id._ at 31 (Scalia, J., concurring in the judgment); _id._ at 32 (Thomas, J., concurring in the judgment).
strikes statute after shoplifting videotapes worth $153. Compared to Ewing, who had previously been convicted of robbery at knifepoint and several other felonies, Andrade had a minor criminal record consisting of convictions for theft, burglary, and marijuana transportation. That did not change the equation. Writing for a 5-4 majority, Justice O’Connor reasoned that “[t]he gross disproportionality principle reserves a constitutional violation for only the extraordinary case.” Andrade, then thirty-seven years old, was thus condemned to die in prison for stealing videotapes. The dissenting Justices declared that “[i]f Andrade’s sentence is not grossly disproportionate, the principle has no meaning.”

In sum, a majority of Justices reasoned for three decades that a punishment can hardly be “cruel and unusual” so long as a state legislature deems it appropriate. A majority of Justices essentially took at face value claims that draconian prison terms were justified—not requiring states to concretely establish that these sentences genuinely and rationally satisfied legitimate penological goals like deterrence. These Justices’ views ranged between two similar positions: i) the Eighth Amendment simply does not cover claims that prison sentences are disproportional to culpability; or ii) the Eighth Amendment protects only against “gross disproportionality.” From either angle, inflicting life sentences on petty offenders is not “cruel and unusual punishment.” Certain lower courts pushed back, but most summarily rejected Eighth Amendment claims by deferring to the Supreme Court.

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74 Lockyer, 538 U.S. at 63.
75 Ewing, 538 U.S. at 18-19.
76 Lockyer, 538 U.S. at 66-67.
77 Id. at 77.
78 Id. at 79 (Souter, J., dissenting).
79 Id. at 83.
80 Nilsen, supra note 7, at 150.
81 Ewing, 538 U.S. at 31 (Scalia, J., concurring in the judgment); id. at 32 (Thomas, J., concurring in the judgment); Harmelin, 501 U.S. at 975-85.
82 Ewing, 538 U.S. at 23; Harmelin, 501 U.S. at 1005 (Kennedy, J., concurring).
83 See supra notes 41-42, 66-68 and accompanying text.
84 See generally Melissa Hamilton, Extreme Prison Sentences: Legal and Normative Consequences, 38 CARDOZO L.
However, one of the Justices who had reasoned that the Eighth Amendment barely protects defendants from ruthless prison terms eventually showed growing concern about mass incarceration’s human toll. Anthony Kennedy denounced mass incarceration in a prominent 2003 speech at the American Bar Association (ABA). Proclaiming that criminal punishments in modern America are “too severe” and “too long” by both U.S. historical standards and international standards, Kennedy emphatically called for legislative reform: “It is a grave mistake to retain a policy just because a court finds it constitutional. . . . A court decision does not excuse the political branches or the public from the responsibility for unjust laws.”

Kennedy’s remarks suggested a realization that mass incarceration may not reflect legitimate penological goals, as illustrated by his reference to James Whitman’s scholarly book *Harsh Justice*. “Professor Whitman concludes that the goal of the American corrections system is to degrade and demean the prisoner,” Kennedy observed. “That is a grave and serious charge. A purpose to degrade or demean individuals is not acceptable in a society founded on respect for the inalienable rights of the people.” Kennedy’s speech led to the creation of an ABA commission that bore his name and that was tasked with investigating solutions to mass incarceration. The Justice Kennedy Commission presented its recommendations to the ABA the following year.

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85 Anthony Kennedy, Associate Justice, U.S. Supreme Court, Address at the American Bar Association Annual Meeting (Aug. 9, 2003).
86 Id.
88 Kennedy, Address at the American Bar Association Annual Meeting, supra note 85.
89 Id.
level in the aftermath of his speech and the commission’s report, it is plausible that Kennedy came to see a greater role for the Eighth Amendment in addressing mass incarceration.

Beginning in 2010, the Supreme Court expanded the Eighth Amendment’s scope in three juvenile cases: *Graham v. Florida, Miller v. Alabama,* and *Montgomery v. Louisiana.* Kennedy not only was in the majority in all of these cases, he authored the *Graham* decision that departed from the rigid reasoning of his own influential plurality opinion in *Harmelin,* which had concluded that the Eighth Amendment hardly protects defendants against draconian prison terms.\(^{92}\) *Graham* effectively circumvented *Harmelin* by distinguishing it as follows: “The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence [i.e. life without parole for a juvenile in a nonmurder case].”\(^{93}\) Kennedy also remarkably wrote: “The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution’s ban on cruel and unusual punishments is the ‘precept of justice that punishment for crime should be graduated and proportioned to [the] offense.’”\(^{94}\) *Graham* consequently held that life imprisonment without parole is “cruel and unusual punishment” for minors convicted of nonhomicide offenses. The dissenters protested that the majority had disregarded the *Harmelin* standard and *stare decisis.*\(^{95}\)

*Harmelin* was again at issue in *Miller,* the subsequent challenge to mandatory life without parole sentences for juveniles. In the course of oral arguments, Justice Sonia Sotomayor asked

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92 See Barkow, supra note 7, at 49 (discussing *Graham*’s historical significance as the first decision to depart from *Harmelin*’s logic).

93 *Graham,* 560 U.S. at 61. Based on this language, one interpretation of *Graham* may be that “whether the stringent threshold test from *Harmelin* is applied will depend on whether a defendant frames his challenge in categorical or case-specific terms.” Barkow, supra note 7, at 49-50. Yet the Court framed its subsequent reasoning in *Miller* differently: “Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham.* Instead, it mandates only that a sentencer follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.” *Miller,* 132 S. Ct. at 2471. In *Montgomery,* the Court appeared to further distance itself from this narrow focus on whether an Eighth Amendment challenge is framed categorically, emphasizing that “*Miller* did bar life without parole [] for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility.” *Montgomery,* 136 S. Ct. at 734.

94 Id. at 59 (quoting *Weems v. United States,* 217 U.S. 349, 367 (1910) (alteration in original)).

95 Id. at 99-100, 103-05 (Thomas, J., dissenting).
Bryan Stevenson, the prominent human rights attorney who represented Evan Miller, “how do you deal with Harmelin . . . if Harmelin says we don’t look at individualized sentencing?”

Stevenson tellingly responded “It’s a challenge, and I concede that,” before suggesting that the Court follow the Graham standard. As Harmelin would indeed have posed an obstacle to the juvenile’s claim, John C. Neiman, Jr., who appeared on behalf of Alabama, urged the Court to follow that precedent during his oral argument: “Harmelin effectively sets a bright line here such [] that individualized sentencing is only required in [] a death penalty case.”

Justice Elena Kagan’s majority opinion in Miller ultimately dismissed as “myopic” the claim that Harmelin barred relief under the Eighth Amendment: “Harmelin had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders. . . . a sentencing rule permissible for adults may not be so for children.”

Miller held that life without parole cannot be a mandatory sentence for a murder perpetrated by a juvenile. Four years later, in Montgomery v. Louisiana, the Justices found that Miller had announced a substantive constitutional rule that should apply retroactively, opening the door for numerous juveniles serving mandatory life terms to seek resentencing.

Graham, Miller, and Montgomery were partly the fruit of the Court’s abolition of the juvenile death penalty in Roper v. Simmons, a 2005 precedent. Roper was itself predicated on Atkins v. Virginia, a 2003 decision abolishing the death penalty for the mentally retarded. Atkins and Roper both held that capital punishment should be reserved for the most culpable offenders, a category excluding juveniles and the mentally disabled. Atkins and Roper initially

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97 Id.
98 Id. at 38:30.
99 Miller, 132 S. Ct. at 2470.
100 Id. at 2475.
102 Roper, 543 U.S. at 551.
appeared to confirm the enduring principle that the death penalty is the only type of punishment that must be proportional to culpability under the Eighth Amendment, as death is “qualitatively” different from incarceration.  

Nevertheless, *Graham, Miller, and Montgomery* established that “death is not different,” at least with regard to lifelong incarceration for juveniles. The Court analogized life without parole to the death penalty given that both punishments condemn people to die in prison without any hope of release. Citing neurological and behavioral science demonstrating that teenagers’ brains are not fully developed, the Court reasoned that the diminished decision-making ability of juveniles mitigates their culpability compared to adults. In *Graham* and its progeny, “death is different” may thus have given way to a new principle: “juveniles are different.” Justice Kennedy’s controlling opinion in *Harmelin* had argued that “we lack clear objective standards to distinguish between sentences for different terms of years.” Kennedy eventually distanced himself from this point of view in juvenile cases. Yet the evolution of Justice Kennedy’s judicial philosophy suggests that this changing perspective may not be narrowly limited to juvenile justice. Kennedy has shown a growing interest in the constitutional principle of dignity in diverse areas, from gay rights to abortion.

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104 Harmelin, 501 U.S. at 995-96. In practice, “death is different” has not been synonymous with a thorough review of each death row prisoner’s culpability and mitigating circumstances. The Supreme Court and lower appellate courts have been disinclined to overturn death sentences, instead deferring to state authorities’ efforts to impose capital punishment. See DAVID GARLAND, PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION 267 (2010) (describing how in the mid-1990s “the Court made it clear that it would no longer examine case-specific proportionality, review capital sentencing patterns for evidence of disparity, nor require state appellate courts to conduct comparative proportionality review”).

105 See generally *id.* at 2464-65; Steinberg, *supra* note 16, at 513.

106 Harmelin, 501 U.S. at 1001 (Kennedy, J., concurring).


108 Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion) (reasoning that abortion is a constitutional right, under certain conditions, partly because it reflects “choices central to dignity and
and conditions of incarceration. In particular, Kennedy authored the Supreme Court’s landmark opinion in *Brown v. Plata* ordering California to reduce prison overcrowding because “[a] prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity.” That decision contributed to reducing California’s incarceration rate. Alongside the *Graham* line of cases, *Brown v. Plata* seems to confirm Kennedy’s concern about the tension between human dignity and harsh prison sentences, which he had previously signaled in his 2003 speech about mass incarceration at the American Bar Association and endorsement of the ABA commission on criminal justice reform.

Kennedy was not the lone conservative-leaning member of the Court willing to expand the Eighth Amendment’s scope. Strikingly, Chief Justice John Roberts concurred with the judgment in *Graham* and was in the majority in *Montgomery*, although he dissented in *Miller*. These circumstances further suggest that juvenile justice led certain Justices to circumvent *Harmelin*’s stringent standard by approaching the Eighth Amendment from another angle.

Accordingly, *Graham, Miller, and Montgomery* may not merely represent the notion that “juveniles are different,” but also that “draconian prison terms are different.” This issue has been mostly overlooked, as scholars have mainly focused on how this trend could lead to other

101 Id. at 511.
103 Kennedy, Address at the American Bar Association Annual Meeting, supra note 85.
105 Graham, 560 U.S. at 86 (Roberts, C.J., concurring in the judgment).
106 Montgomery, 136 S. Ct. at 725.
107 Miller, 132 S. Ct. at 2477 (Roberts, C.J., dissenting).
breakthroughs in juvenile justice. However, before examining how these cases may provide guidance to interpret the Eighth Amendment as it applies to adults, a closer look at the evolution of juvenile justice is instructive.

II. **Toward a Sentencing Model: The Historic Reversal of Juvenile Justice**

Juveniles nowadays have arguably the broadest Eighth Amendment rights, including more balanced sentencing proceedings (i.e., life without parole cannot be a mandatory sentence) and a categorical protection from certain punishments (i.e., the death penalty *per se* and life without parole for nonmurder convictions), which reflect the least deference to state authorities’ claims that harsh punishments are warranted. It was not always so. Historically, children accused of crimes had far fewer constitutional rights than adults, both substantively and procedurally.

**A. The Traditional Parens Patriae System Deprived Children of Constitutional Rights**

Children’s rights in the United States largely find their roots in British law, as is generally the case for American criminal law. In pre-modern Britain, the monarch was considered responsible for protecting orphans and otherwise dependent children under the principle of *parens patriae* ("father / parent of the nation"). Chancery courts thus had the power to decide what was in the best interest of the child or the nation. "[L]egal procedures that might hamper the court in its beneficial actions were either circumvented or ignored."

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118 See *supra* note 6 and accompanying text.
120 *Id.*
121 *Id.* See also Gault, 387 U.S. at 16 (explaining that in British chancery practice the phrase “*parens patriae*” defined “the power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child”).
By the early nineteenth century, *parens patriae* had come to play an influential role in the United States. Public efforts to discipline delinquent and wayward children gave limited consideration to the law, as “[a]ny overreach of the legal rights of the children was excused under the concept of *parens patriae*.”

This approach facilitated the development of American reform schools, which were partly modeled on British institutions. The founders of the reform school movement aimed to discipline and educate a diverse cast of youthful delinquents and vagrants, from children who “had already been convicted of criminal acts” to others who had never been convicted of a crime but “whose life chances were so circumscribed by poverty and bad example that it would be an act of charity (in the founders’ view) to incarcerate them and prevent a lifetime of poverty and crime.” The maxim that a child has a right “not to liberty but to custody” came to exemplify *parens patriae*’s rationale.

In *Ex Parte Crouse*, an emblematic 1839 decision, the Pennsylvania Supreme Court heard the case of a teenage girl committed to a reform institution at the request of her mother, who had complained of her “vicious conduct.” Her father filed a *habeas corpus* petition to free her, arguing that his daughter’s commitment violated her constitutional right to trial. The Pennsylvania Supreme Court held that *parens patriae* empowered the state to “supersede[]” the authority of parents who fail to discipline their children; and that sending the teenager to a reformatory was not a “punishment” so that the constitutional rights afforded to adults did not apply. The court reasoned that her detention was a benevolent act, as she was “snatched from a

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123 Id. at 18.
125 Id. at 365.
126 Gault, 387 U.S. at 17.
127 Ex Parte Crouse, 4 Whart. 9, 9 (Pa. 1839). For a discussion of this precedent’s historical significance, see Schlossman, *supra* note 124, at 366.
128 Crouse, 4 Whart. at 9.
129 Id. at 11.
course which must have ended in confirmed depravity” and “it would have been an act of extreme cruelty to release her from it.”\(^{130}\)

Reform schools for such children vastly differed from the definition of “schools” as we understand it today. “Schooling received more attention than in adult prisons, but it was subordinated to work.”\(^{131}\) Moreover, schooling “rarely went beyond the elementary level, and the teachers usually lacked qualifications for the task.”\(^{132}\)

In the late nineteenth century, rising concern about delinquency and the predicament of wayward youths convinced reformers that juveniles should not merely be punished separately from adults, but judged differently as well.\(^{133}\) In 1899, the Illinois Juvenile Court Act led to the creation of the nation’s first juvenile court in Chicago.\(^{134}\) By 1919, juvenile courts existed in all but three states and, by 1945, in every state.\(^{135}\) Advocating a therapeutic conception of the law, the juvenile court movement sought to distance itself from the repressive approach of the traditional penal system. To avoid the stigma associated with criminal court, juvenile courts deployed a new vocabulary, such as replacing “sentence” with “disposition,” “conviction” with “adjudication,” and “prison” with “industrial school.”\(^{136}\)

As reformers defined juvenile court proceedings as civil and nonadversarial, children were deprived of constitutional rights provided to adults in criminal court, including the privilege against self-incrimination and right to counsel.\(^{137}\) Authorities tended to perceive defense counsel as a hindrance to these informal proceedings, which could indeed result in forgiving dispositions.

\(^{130}\) Id. at 11-12.
\(^{131}\) Schlossman, supra note 124, at 369.
\(^{132}\) Id.
\(^{133}\) SIMONSEN, supra note 119, at 18-24.
\(^{134}\) Id. at 29; Sanford J. Fox, Juvenile Justice Reform: An Historical Perspective, 22 STAN. L. REV. 1187, 1207 (1970).
\(^{135}\) SIMONSEN, supra note 119, at 29.
\(^{136}\) Id. at 32-33, 228.
\(^{137}\) Id. at 47, 256.
for youth who had engaged in antisocial conduct.\textsuperscript{138} Under these conditions, juvenile proceedings could also be cursory and arbitrary, as judges enjoyed extensive discretion.\textsuperscript{139} States defended these practices on the ground that, under \textit{parens patriae}, they had plenary authority to decide what was in children’s best interest.\textsuperscript{140} In this regard, the newly founded juvenile justice systems were partly a rebranding of traditional approaches to discipline delinquents.\textsuperscript{141}

Notwithstanding their therapeutic mission, juvenile justice systems nationwide did not necessarily provide children with adequate rehabilitative services.\textsuperscript{142} On one hand, the mid-twentieth century saw a renewed confidence in the potential of reform schools to serve as diagnostic and treatment centers for juveniles.\textsuperscript{143} This reflected a broader expansion of the rehabilitative model in the United States penal system, which increasingly became “the territory of probation officers, social workers, psychologists, psychiatrists, child-guidance experts, educationalists, and social reformers of all kinds.”\textsuperscript{144} On the other hand, many juvenile facilities had long failed to meet these therapeutic standards due to scant resources, mismanagement, or the tendency to favor inmate labor over schooling.\textsuperscript{145} Certain institutions became notorious as shabbily-equipped dumping grounds where children were neglected or brutalized by correctional staff, such as New York City’s Youth House and Arizona’s Fort Grant.\textsuperscript{146} Besides, radically

\begin{itemize}
\item \textsuperscript{138} See id. at 228.
\item \textsuperscript{139} See, e.g., Gault, 387 U.S. at 1 (reversing decision to adjudicate and incarcerate adolescent following a perfunctory juvenile court proceeding).
\item \textsuperscript{140} SIMONSEN, supra note 119, at 47.
\item \textsuperscript{141} According to Sanford J. Fox, “[r]ather than a significant reform, the Illinois Juvenile Court Act of 1899 was essentially a continuation of both the major goals and the means of the predelinquency program initiated in New York more than 70 years earlier.” Sanford, supra note 134, at 1207. Antecedents to the post-1899 juvenile justice systems also include a special judicial tribunal for children established in Massachusetts in 1874. SIMONSEN, supra note 119, at 228.
\item \textsuperscript{142} Id. at 35.
\item \textsuperscript{143} Schlossman, supra note 124, at 385.
\item \textsuperscript{144} GARLAND, CULTURE OF CONTROL, supra note 32, at 36. Since the 1970s, the gradual emergence of the “tough on crime” movement and its merciless punishments supplanted the rehabilitative model in the United States. See id. at 53 passim; JOUET, supra note 12, at 198-203.
\item \textsuperscript{145} Schlossman, supra note 124, at 375-76, 383.
\item \textsuperscript{146} See generally SIMONSEN, supra note 119, at 35-36; DAVID S. TANENHAUS, THE CONSTITUTIONAL RIGHTS OF CHILDREN: IN RE GAUL AND JUVENILE JUSTICE 3, 8-11 (2011).
\end{itemize}
different conceptions of how to fulfill juvenile justice’s therapeutic mandate existed, as in Arizona, where officials clashed about whether to emphasize mental treatment or corporal punishment.\textsuperscript{147} Arizona authorized staff to beat juveniles until 1969.\textsuperscript{148} Due to social inequities and double standards, juvenile justice particularly failed destitute children, racial and ethnic minorities, as well as teenage girls, some of whom were incarcerated primarily for out-of-wedlock sexual activity.\textsuperscript{149} Hence, the expansion of the juvenile justice system had hardly remedied the type of situation that the teenage defendant had faced over a century earlier in \textit{Ex Parte Crouse}—receiving a harsh punishment following a cursory proceeding.\textsuperscript{150}

In 1966, the Supreme Court entered the picture by observing in \textit{Kent v. United States} that “[t]here may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children.”\textsuperscript{151} Irrespective of “the original laudable purpose of juvenile courts,” the Warren Court underlined that “studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose.”\textsuperscript{152} \textit{Kent} was not a constitutional decision, as it concerned the construction of the District of Columbia’s Juvenile Court Act, which the Justices found to require a hearing before a judge may transfer a child to criminal court.\textsuperscript{153} \textit{Kent} nonetheless paved the way for \textit{In re Gault}, the most significant decision on children’s constitutional rights before \textit{Roper} and \textit{Graham}.

\textbf{B. In re Gault Gave Children Essentially the Same Constitutional Rights as Adults}

\textsuperscript{147} TANENHAUS, \textit{supra} note 146, at 9, 12, 15, 22-23.
\textsuperscript{148} \textit{Id.} at 22-23.
\textsuperscript{149} Schlossman, \textit{supra} note 124, at 375-76, 382-83; TANENHAUS, \textit{supra} note 146, at 13-14.
\textsuperscript{150} Crouse, 4 Whart. at 9.
\textsuperscript{152} \textit{Id.} at 555.
\textsuperscript{153} \textit{Id.} at 561.
In 1964, fifteen year-old Gerald Gault was accused of making a lewd or prank phone call.\textsuperscript{154} He was subsequently committed to the authority of Arizona’s industrial school system until the age of twenty-one.\textsuperscript{155} Had he been an adult, the longest sentence he could have received would have been two months in jail.\textsuperscript{156}

As Gault’s parents were not officially notified of his arrest, they had to find out through their own devices that he was in Arizona’s juvenile court system.\textsuperscript{157} Gault was not served with a notice of the charges.\textsuperscript{158} He lacked a lawyer.\textsuperscript{159} Because the juvenile court did not keep a transcript of the proceedings, the allegations and Gault’s culpability were unclear.\textsuperscript{160} The complainant never appeared in court.\textsuperscript{161} The judge did not see a need to question her, as he relied on the unsworn testimony of a probation officer, who had solely spoken to her over the phone.\textsuperscript{162} The judge further questioned Gault without any warning that he may have a constitutional privilege against self-incrimination.\textsuperscript{163} The judge then committed Gault to the State Industrial School—a euphemism for the juvenile prison system—so that he may be detained until the age of twenty-one, unless the system exercised its broad discretion to release him earlier.\textsuperscript{164} Arizona did not permit appeals in juvenile cases.\textsuperscript{165} Gault’s parents filed for\textit{ habeas corpus}.\textsuperscript{166}

The case eventually reached the United States Supreme Court, which considered whether Arizona had deprived Gault of his liberty in violation of the rights to due process provided under

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\textsuperscript{154} Gault, 387 U.S. at 4, 9.  \\
\textsuperscript{155} \textit{Id.} at 7-8.  \\
\textsuperscript{156} \textit{Id.} at 29.  \\
\textsuperscript{157} \textit{Id.} at 5.  \\
\textsuperscript{158} \textit{Id.}  \\
\textsuperscript{159} \textit{Id.} at 41-42.  \\
\textsuperscript{160} \textit{Id.} at 5-6.  \\
\textsuperscript{161} \textit{Id.} at 6.  \\
\textsuperscript{162} \textit{Id.} at 7, 56.  \\
\textsuperscript{163} \textit{Id.} at 43-44.  \\
\textsuperscript{164} \textit{Id.} at 7-8, 27.  \\
\textsuperscript{165} \textit{Id.} at 8.  \\
\textsuperscript{166} \textit{Id.}
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the Fifth and Fourteenth Amendments of the U.S. Constitution. Gault’s counsel argued that children should essentially have the same constitutional right to due process afforded to adults in criminal cases—protections good for adults are good for children.  

Arizona countered that children lack these constitutional rights because juvenile court proceedings are neither criminal nor adversarial in nature. Rather, Arizona insisted that juvenile justice has a therapeutic mission since the state acts as *parens patriae*, deciding like a benevolent parent whether children should be detained for their own good.

During oral arguments, skeptical Justices pressed the Arizona Assistant Attorney General to explain how a state could dispense with constitutional rights by categorizing juvenile proceedings as noncriminal and juvenile correctional facilities as nonprisons. The Justices were equally unconvinced by the oral arguments from counsel for the Ohio Association of Juvenile Court Judges, which had embraced Arizona’s position. In particular, Justice Abe Fortas observed that the Court cannot “solve these problems in terms of the use of a word like ‘crime’ or ‘not crime.’” If juveniles are in custody, he noted, “you can call it ‘a crime’ or you can call it ‘a horse,’ but it still deprives the liberty.”

The Warren Court ruled in Gault’s favor in an 8-1 vote. Writing for the majority, Justice Fortas stressed that, “[u]nder our Constitution, the condition of being a boy does not

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169 *Id.* at 8, 12-14, 17, 29.
171 *Id.* at 1:44:50. See also Brief of the Ohio Association of Juvenile Court Judges as *Amicus Curiae*, Gault, 387 U.S. at 1 (No. 116), 1966 WL 100788, at 3 (“The basic right of a juvenile is not to liberty but to custody. This fact has been recognized in our law for over a century, and the arguments of appellants here only raise again issues long decided [that demonstrate] their failure to recognize that children are not adults.”).
173 *Id.*
174 The tally includes a concurrence by John M. Harlan II. Gault, 387 U.S. at 65 (Harlan, J., concurring in part and dissenting in part).

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justify a kangaroo court.”\textsuperscript{175} The history of juvenile courts had “demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.”\textsuperscript{176} The Justices also cited empirical data indicating that juvenile systems commonly failed to rehabilitate teenagers in spite of their therapeutic mission.\textsuperscript{177} In fact, the Arizona juvenile court judge had conducted no inquiry into Gault’s family environment, mitigating circumstances, and potential for rehabilitation before deciding to incarcerate him.\textsuperscript{178}

\textit{In re Gault} revolutionized juvenile justice, as children nationwide gained essentially the same constitutional protections as adults with regard to criminal procedure, including the formal notice of charges, the right to counsel, the privilege against self-incrimination, and the right to confront and cross-examine witnesses.\textsuperscript{179} The main exception was set out in a subsequent case holding that children in juvenile court have a constitutional right to trial, albeit by a judge, not a jury.\textsuperscript{180} \textit{Gault} did not put an end to \textit{parens patriae} but restricted its reach. While Arizona argued that \textit{parens patriae} trumps the Constitution, the Justices reemphasized that the Constitution is the supreme law of the land.

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\textbf{C. Roper, Graham, Miller, and Montgomery Granted Children Far More Constitutional Rights Than Adults at Sentencing}
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\textsuperscript{175} \textit{Id.} at 28.
\textsuperscript{176} \textit{Id.} at 18.
\textsuperscript{177} \textit{Id.} at 22.
\textsuperscript{178} \textit{Id.} at 28-29.
\textsuperscript{179} \textit{Id.} at 31-57. \textit{See also} SIMONSEN, supra note 119, at 245, 248-49 (describing how state juvenile court systems became more procedurally rigorous in \textit{Gault}'s aftermath); TANENHAUS, supra note 146, at xv-xvi (discussing \textit{Gault}'s historical importance). Building on \textit{Gault}, the Court thereafter concluded that the constitutional standard of proof to convict a juvenile of a crime is beyond a reasonable doubt, not the mere preponderance of evidence used in civil proceedings. \textit{In re Winship}, 397 U.S. 358 (1970).
If children gained virtually the same constitutional rights as adults under *Gault*, they have now gained far more rights at sentencing since *Roper, Graham, Miller*, and *Montgomery* expanded the Eighth Amendment’s scope. As discussed above, capital punishment is off the table for minors.\(^{181}\) So is life imprisonment without parole for juvenile nonhomicide convictions.\(^{182}\) And in juvenile homicide cases it cannot be a mandatory sentence.\(^{183}\)

Moreover, the Justices “required that sentencing courts consider a child’s ‘diminished culpability and heightened capacity for change’ before condemning him or her to die in prison,” as “lifetime in prison is a disproportionate sentence for all but the rarest of children.”\(^{184}\) Except in capital cases, the Court has not suggested that lower courts should carefully evaluate mitigating circumstances for adult offenders, who may consequently receive life without parole after cursory sentencing hearings.

These developments should not obscure evidence that American juvenile justice remains exceptionally harsh by international standards.\(^{185}\) “[T]he gulf in incarceration rates between America and other Western democracies nowadays is even worse for children than for adults.”\(^{186}\) For example, the overall incarceration rate in the United States is respectively nine times and thirteen times higher than for Germany and Sweden.\(^{187}\) But the U.S. juvenile incarceration rate is respectively fourteen times and eighty-four times higher than for these nations.\(^{188}\) The rest of the

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\(^{181}\) Roper, 543 U.S. at 551.

\(^{182}\) Graham, 560 U.S. at 48.

\(^{183}\) Miller, 132 S. Ct. at 2455.

\(^{184}\) Montgomery, 136 S. Ct. at 726 (quoting Miller, 132 S. Ct. at 2469).

\(^{185}\) “[M]any juvenile justice advocates and scholars” view America as “a problematic case not to be followed due to its more punitive approach to juvenile cases.” Franklin E. Zimring and Máximo Langer, One Theme or Many? The Search for a Deep Structure in Global Juvenile Justice, in JUVENILE JUSTICE IN GLOBAL PERSPECTIVE 383, 401 (Zimring, Langer & David S. Tanenhaus eds., 2015).

\(^{186}\) JOUET, supra note 12, at 201.

\(^{187}\) WORLD PRISON BRIEF, PRISON POPULATION RATE, supra note 24.

\(^{188}\) NEAL HAZEL, CROSS-NATIONAL COMPARISON OF YOUTH JUSTICE, YOUTH JUSTICE BOARD FOR ENGLAND AND WALES 59 (2008).
Western world bans life sentences and other draconian prison terms for juveniles.\(^{189}\) By comparison, the United States Supreme Court has taken a limited step in that direction. In *Miller*, the Justices notably declined to categorically abolish life without parole for juveniles.\(^{190}\) Beside (nonmandatory) life without parole in murder cases, adolescents can still receive ordinary life sentences (with the possibility of parole) or extremely lengthy prison terms (say twenty to fifty years) for other types of convictions.\(^{191}\) Nevertheless, the *Graham* line of cases marked a striking evolution by U.S. historical standards, as for three decades beforehand the Supreme Court had systematically upheld draconian prison terms.\(^{192}\)

*Graham*, *Miller*, and *Montgomery* bolstered a national reform movement leading the number of states banning life imprisonment without parole for juveniles to triple between 2011 and 2016.\(^{193}\) As of late 2016, seventeen states banned the practice.\(^{194}\) They include predominantly liberal states like Connecticut, Massachusetts, and Vermont, as well as predominantly conservative ones like Texas, Utah, and Wyoming.\(^{195}\) Sim Gill, the District Attorney for Salt Lake County, Utah, illustratively declared that these Supreme Court decisions “represent a major paradigm shift in how the state can and will pursue just outcomes in cases involving juveniles who commit serious crimes.”\(^{196}\) He thus embraced the Utah state legislature’s decision to eliminate life without the possibility of parole for minors, finding it a “sound policy” because, “given time, juveniles can outgrow antisocial adolescent behavior.”\(^{197}\)

\(^{189}\) Jouet, *supra* note 12, at 218-19.

\(^{190}\) Miller, 132 S. Ct. at 2475.


\(^{192}\) See *supra* section I.


\(^{194}\) Id.

\(^{195}\) Id.

\(^{196}\) Id. at 11.

\(^{197}\) Id. Similarly, California amended its statute on the transfer of juveniles to criminal court by stipulating that judges may consider mitigating circumstances regarding teenage impetuosity and mental development, as the U.S. Supreme Court recognized in *Miller*. S. Rules Comm., B. Analysis, S.B. 382, 2015-16 Reg. Sess. (Cal. Aug. 13, 2015).
Several state courts have drawn upon the Supreme Court’s Eighth Amendment analysis as persuasive authority to find broader rights for juveniles under their state constitutions. In the words of the Iowa Supreme Court, “[w]e have generally accepted the principles enunciated by the United States Supreme Court in the Roper–Graham–Miller trilogy in our interpretation of article I, section 17 of the Iowa Constitution,” which also forbids “cruel and unusual punishment.” In 2016, it held that inflicting life without parole sentences on juveniles was unconstitutional per se under the Iowa Constitution.

In sum, an overview of the history of juvenile justice reveals a full reversal. Children went from having effectively no constitutional rights under the traditional parens patriae system, to gaining nearly the same constitutional rights as adults under In re Gault, to having substantially more constitutional rights than adults at sentencing. Judges, practitioners, and academics may now take for granted the notion that juveniles deserve far greater constitutional protections than adults. A generation ago many assumed the opposite.

III. EXPANDING THE EIGHTH AMENDMENT RIGHTS OF JUVENILES TO ADULTS

Courts may be tempted to move toward a strict dichotomy separating juveniles from adults with regard to the Eighth Amendment. In particular, “social science data about the reduced

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198 For a broader discussion of state court decisions spurred by the U.S. Supreme Court’s Graham line of cases, see Sarah French Russell & Tracy L. Denholtz, Procedures for Proportionate Sentences: The Next Wave of Eighth Amendment Noncapital Litigation, 48 CONN. L. REV. 1121 (2016).
199 Sweet, 879 N.W.2d at 833-34.
200 IOWA CONST. art. I, § 17.
201 Sweet, 879 N.W.2d at 811.
202 See generally Miller, 132 S. Ct. at 2470 (“We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children.”); CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, supra note 5, at 1 passim (documenting experts and public officials’ views that juveniles deserve greater protections than adults at sentencing, including under the Eighth Amendment).
culpability of juveniles” may have “tipped the scales” in *Graham* and *Miller*. \(^{203}\) “Without similar data about the capacity for change in adults, it is unlikely that the Supreme Court will want to take the same categorical leap” in cases involving adults sentenced to life without parole, including for “violent and brutal” offenses. \(^{204}\) However, data indicate that juveniles do not have a monopoly on rehabilitation. \(^{205}\) An appreciable proportion of adults become law-abiding after being released from prison. \(^{206}\)

Overall, key constitutional, policy, normative, and scientific principles advanced in *Roper, Graham, Miller,* and *Montgomery* appear relevant to the sentencing of adults, including:

a) the protection of human dignity; b) the requirement that a punishment be proportional to culpability; c) the heightened review of punishments that serve no legitimate penological purpose; and d) the need to ensure that prisoners have an opportunity for release in light of their potential for rehabilitation. As we will see below, these principles are identifiable in the opinions of dissenting judges in precedents addressing the rights of adults. They are additionally the norm in other modern Western democracies: European nations, Canada, Australia, and New Zealand. \(^{207}\)

**A. Human Dignity**

Dignity has emerged as an increasingly influential principle in American constitutional law, \(^{208}\) although it has distant historical roots. \(^{209}\) While it is a multifaceted concept with

\(^{203}\) See Barkow, *supra* note 7, at 51.

\(^{204}\) Id.

\(^{205}\) See sources discussed *infra* Section III.D.

\(^{206}\) Id.


competing definitions,\textsuperscript{210} one salient understanding of human dignity rests on the intrinsic worth of the person.\textsuperscript{211} As Neomi Rao describes, “the dignity that arises from one’s humanity is the most universal and open understanding of the term. This dignity indicates that worth and regard arise in each individual simply by virtue of being human.”\textsuperscript{212}

Criminal punishments negating the value of prisoners’ lives may therefore negate the principle of human dignity. All modern Western democracies, except the United States, have abolished the death penalty and identify it as an inherent human rights violation.\textsuperscript{213} In their view, killing incapacitated prisoners who could be imprisoned is an affront to human dignity.\textsuperscript{214} They refuse to extradite arrestees to countries retaining the death penalty, including America, unless they receive assurances that extraditees will not face capital punishment.\textsuperscript{215}

By the same token, mass incarceration is an exclusively American phenomenon within the West,\textsuperscript{216} as other Western democracies are far less inclined to resort to draconian prison terms, partly on the ground that such treatment is dehumanizing.\textsuperscript{217} In particular, prisoners in

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\textsuperscript{209} See generally Simon, supra note 6, at 287 (discussing the diverse roots of dignity in Enlightenment philosophy, Greco-Roman antiquity, and Abrahamic religious traditions).

\textsuperscript{210} See generally GEORGE KATEB, HUMAN DIGNITY ix (2011) (acknowledging the difficulty with defining the concept of dignity); Meltzer Henry, supra note 208, at 169 (2011) (noting that the principle of dignity is invoked by both liberal and conservative Supreme Court Justices); Neomi Rao, \textit{Three Concepts of Dignity in Constitutional Law}, 86 NOTRE DAME L. REV. 183 (2011) (describing conflicting definitions of dignity).

\textsuperscript{211} See, e.g., KATEB, supra note 210, at ix; Simon, supra note 6, at 287-88; Rao, supra note 210, at 196.

\textsuperscript{212} Rao, supra note 210, at 196.


\textsuperscript{214} Id.


\textsuperscript{216} See WORLD PRISON BRIEF, PRISON POPULATION RATE, supra note 24.

\textsuperscript{217} See JOUET, supra note 12, at 195-96, 218-21.
Western Europe are not routinely condemned to die in prison.\(^{218}\) And when they do face life imprisonment, their sentences typically have a realistic possibility of parole or executive pardon.\(^{219}\) In the 2013 *Vinter* case, the European Court of Human Rights ruled by a 16-1 vote that member states cannot sentence prisoners to lifelong incarceration without a genuine possibility of release because it would violate their dignity and fundamental human rights, running afoul of Article 3 of the European Convention on Human Rights:\(^{220}\) “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”\(^{221}\)

Additionally, certain European nations bar life sentences *per se*, such as Spain, where the longest possible sentence is forty years in prison.\(^{222}\) Exemplifying this relative consensus, the German Constitutional Court barred mandatory life sentences because that punishment “strikes at the very heart of human dignity . . . without regard to the development of [the prisoner’s] personality.”\(^{223}\)

In contrast, life without parole sentences are an ordinary facet of contemporary American criminal justice. The number of prisoners receiving this punishment has grown exponentially to approximately 40,000 people, a record level in U.S. history.\(^{224}\) Life without parole may appear relatively atypical considering that the United States has 2.1 million prisoners,\(^{225}\) but it is the tip of the iceberg in a penal system where merciless punishments have become normalized. Jonathan

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\(^{218}\) Simon, *supra* note 6, at 285.

\(^{219}\) Case of Vinter and Others v. the United Kingdom, 66069/09, 130/10, and 3896/10, Eur. Ct. H.R. (2013), at ¶ 68 (discussing the state of the law in European nations); Simon, *supra* note 6, at 285 (same).

\(^{220}\) Vinter, at ¶¶ 119-22, 139.


\(^{222}\) Vinter, at ¶ 68 (discussing Spanish law). The longest possible sentence under Spanish law is forty years, yet it may amount to a *de facto* life sentence, depending on the age when the prisoner was convicted. See Carmen López Peregrin, *La Pena de Prisión en España Tras las Reformas de 2003 y los Fines de la Pena*, https://www.upo.es/export/portal/com/bin/portal/upo/profesores/mclopper/profesor/1213878047702_la pena de prision en espaxa.pdf.


\(^{225}\) WORLD PRISON BRIEF, UNITED STATES, *supra* note 27.
Simon has argued that this practice stands in profound tension with evolving norms of human dignity: “[Life without parole] defines the logic of contemporary [American] penalty . . . in its embrace of a totalizing promise of prison incapacitation extended to the very limits of life, and unmediated by any further consideration of the prisoner as a distinct human being.”

The Supreme Court has nonetheless proved increasingly able to identify with juveniles and recognize their humanity. In 1989, during the same time period as when it summarily affirmed the constitutionality of extreme prison terms, the Court held by a 5-4 vote that it was constitutional to execute juveniles. Justice Kennedy was in the majority. Conversely, his 2005 majority opinion abolishing the juvenile death penalty in Roper underscored that, “[b]y protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.” He added that the United States’ Constitution purpose is “to secure individual freedom and preserve human dignity.” Although Graham, Miller, and Montgomery did not specifically use the term “dignity,” these decisions restricting the applicability of life without parole are also premised on the intrinsic worth of children’s lives. In all of these cases, the Court described the defendants’ personal backgrounds and mitigating circumstances to demonstrate that lower courts had discounted these aspects of their humanity when sentencing them to die in prison.

Yet human dignity is not age-dependent. A person does not forfeit her dignity by turning eighteen years old and entering adulthood. The jurisprudence of dignity that the Court applied in juvenile cases may therefore be logically extended to those of adult prisoners. Jonathan Simon

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226 Simon, supra note 6, at 282.
227 See supra Section I.
229 Id.
230 Roper, 543 U.S. at 560.
231 Id. at 578.
232 See Montgomery, 136 S. Ct. at 725-26, 736-37; Miller, 132 S. Ct. at 2468-69; Graham, 560 U.S. at 53, 79.
has indeed posited that the Court’s juvenile decisions may have broader implications in developing “dignity as a value in our public law.” 233 Acknowledging that “[t]he road from *Graham* to any eventual abolition of [life without parole] may be a long one,” Simon advanced that this paradigm shift may depend on “the ability of criminal justice officials, criminologists, and lawyers to promote a commitment to dignity within penality itself.” 234 Other scholars have similarly suggested that enhancing the value of dignity in American justice may be a necessary step to move away from draconian punishments. 235

**B. Proportionality of Punishment to Culpability**

A court can hardly assess whether a punishment is “cruel and unusual” in the abstract and without any frame of reference. Proportionality has historically been a key consideration in theories of punishment examining whether a given sentence fits the crime. 236 Under these circumstances, eviscerating the principle of proportionality from the Eighth Amendment may amount to practically eviscerating the amendment from the Constitution itself. It is no coincidence that the Eighth Amendment became a dead letter regarding prison sentences precisely during the three decades when the Court reasoned that no proportionality requirement effectively exists except in capital cases. 237 In all likelihood, the Court would have rejected the juveniles’ claims in *Graham, Miller,* and *Montgomery* if it had not circumvented the “death is

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233 *Id.* at 285-86.
234 *Id.*
235 *See, e.g.*, WHITMAN, *supra* note 87 (identifying the greater weight of dignity in continental Europe as a key factor behind its more moderate penal systems).
237 *See supra* Section I.
different” doctrine and reinvigorated the proportionality principle that it had last applied in *Solem* back in 1983.\(^{238}\)

It may now be time for the Court to further distance itself from its “death is different” doctrine. While the doctrine rests on the notion that executions differ “qualitatively” from imprisonment,\(^{239}\) dissenting Justices and scholars have criticized it for arbitrarily excluding ruthless prison terms from the definition of “cruel and unusual punishment.”\(^{240}\) It is well established that lifetime incarceration can cause acute mental hardship.\(^{241}\) In fact, the Court ultimately recognized in its juvenile cases that life without parole is highly analogous to the death penalty because both punishments condemn people to die in prison, which factored in its decision to review the sentences’ proportionality.\(^{242}\)

Efforts to exclude disproportional prison sentences from the Eighth Amendment’s purview reflect double standards. As Justice White’s dissent in *Harmelin* observed, “Justice Scalia’s position that the Eighth Amendment addresses only modes or methods of punishment is quite inconsistent with our capital punishment cases, which do not outlaw death as a mode or method of punishment, but instead put limits on its application.”\(^{243}\) Moreover, it would be “anomalous” to “suggest that the [text of the] Eighth Amendment makes proportionality review applicable in the context of bail and fines but not in the context of other forms of punishment, such as imprisonment.”\(^{244}\)

\(^{238}\) *Solem*, 463 U.S. at 277. *See also* *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion) (recognizing that “a punishment is ‘excessive’ and unconstitutional if it . . . is grossly out of proportion to the severity of the crime”).

\(^{239}\) *Harmelin*, 501 U.S. at 995-96.

\(^{240}\) *See generally* *Harmelin*, 501 U.S. at 1018 (White, J., dissenting); *Josh Bowers*, *Mandatory Life and the Death of Equitable Discretion*, in *LIFE WITHOUT PAROLE*, *supra* note 6, at 25, 42-45.

\(^{241}\) *See generally* *Bowers*, *supra* note 240, at 42-45.

\(^{242}\) *See generally* *Miller*, 132 S. Ct. at 2466.

\(^{243}\) *Harmelin*, 501 U.S. at 1018 (White, J., dissenting).

\(^{244}\) *Ewing*, 538 U.S. at 33 (Souter, J., dissenting) (quoting *Solem*, 463 U.S. at 289). *See also* *Harmelin*, 501 U.S. at 1009 (White, J., dissenting) (“The language of the Amendment does not refer to proportionality in so many words, but it does forbid ‘excessive’ fines, a restraint that suggests that a determination of excessiveness should be based at least in part on whether the fine imposed is disproportionate to the crime committed.”).
Strictly drawing the line for proportionality review of draconian prison terms at eighteen years old would also be questionable. Even though a claim of disproportionality may be more compelling in a case involving an immature adolescent facing lengthy incarceration, examples of adults facing grossly disproportionate sentences abound, as shown by the predicament of the petty offenders in *Rummel, Harmelin, Ewing, Lockyer*, and other precedents.\textsuperscript{245}

In the absence of a proportionality principle applying to adult prisoners, their sentences may continue to dramatically exceed culpability. Alongside life without parole, mass incarceration has led to the normalization of “virtual life” sentences, namely prison terms that stretch far beyond the convicted person’s life expectancy.\textsuperscript{246} Federal courts have thus inflicted sentences spanning hundreds of years, as in the case of a defendant who received 290 years in prison for robberies that had netted him approximately $3,000.\textsuperscript{247}

Supreme Court decisions upholding the constitutionality of draconian prison terms inflicted on adults have reasoned that assessing the proportionality of these sentences would be intractable and arbitrary. For instance, the *per curiam* opinion in *Hutto* stated that “the excessiveness of one prison term as compared to another is invariably a subjective determination, there being no clear way to make ‘any constitutional distinction between one term of years and a shorter or longer term of years.’”\textsuperscript{248}

Nevertheless, assessing whether a draconian prison term is proportional to culpability under the Eighth Amendment is scarcely more intractable than other aspects of constitutional analysis, such as interpreting the nature of “an establishment of religion” under the First Amendment, “due process” under the Fifth Amendment, or “equal protection” under the

\textsuperscript{245} *Id.*

\textsuperscript{246} *Hamilton, supra* note 84, at 107.

\textsuperscript{247} *Id.* at 110-11, 117.

\textsuperscript{248} *Hutto*, 454 U.S. at 373 (quoting *Rummel*, 445 U.S. at 725).
Fourteenth Amendment. Nor is the Eighth Amendment more vulnerable to the specter of judicial activism that certain Justices have invoked to avoid reviewing the constitutionality of draconian prison terms.249 Proportionality review of draconian prison terms in adult cases would not necessarily lead courts to routinely overturn sentences on appeal. For eight years, the proportionality standard that the Court adopted in Solem in 1983 led merely four prison sentences nationwide to be found “cruel and unusual punishment.”250 Even a more vigorous application of the Eighth Amendment in prison cases may not result in a host of reversals. Indeed, Supreme Court decisions set the tone under stare decisis. If the Court were to overturn draconian punishments imposed on several petty adult offenders, it would plausibly recalibrate sentencing practices nationwide by dissuading state legislatures and trial judges from ruthless sentencing practices. Supreme Court decisions have the ability to help reshape the national debate, as demonstrated by how Graham, Miller, and Montgomery encouraged state reforms broadening juveniles’ rights.251

C. Heightened Review of Punishments Serving No Legitimate Penal Purpose

The Graham line of cases reaffirmed a longstanding principle: harsh punishments that serve no legitimate penological purpose are suspect. This principle is tied to the proportionality of punishment, yet adds another analytical dimension by assessing whether the state’s goal is to oppress the prisoner by inflicting a ruthless punishment. Cesare Beccaria, the Italian Enlightenment philosopher, prioritized this principle in his magnum opus On Crimes and Punishment, a trailblazing work in criminology that America’s Founding Fathers and other

249 See id.
250 Solem, 463 U.S. at 1015 n.2.
251 See supra Section II.C.
prominent thinkers read.\textsuperscript{252} “[E]very act of authority between one man and another that does not derive from absolute necessity is tyrannical,” Beccaria wrote, cautioning governments against resorting to draconian punishments.\textsuperscript{253}

The Supreme Court has now restricted the scope of life without parole for juveniles on the ground that such harsh punishments lack an acceptable policy rationale. Firstly, the traditional penal objective of deterrence has diminished weight in juvenile cases in light of neurological and behavioral science showing that juveniles are less capable than adults to grasp the consequences of their actions, leading to impetuous criminal behavior that cannot be readily deterred.\textsuperscript{254} Secondly, the traditional penal objective of retribution also has diminished legitimacy in juvenile cases because it “relates to an offender’s blameworthiness,” which the “immaturity, recklessness, and impetuosity” of youth tend to mitigate.\textsuperscript{255} Thirdly, permanent incapacitation—a modern sentencing rationale at the heart of America’s mass incarceration phenomenon\textsuperscript{256}—cannot support life without parole sentences for juveniles in nonhomicide cases or mandatory life without parole sentences in homicide cases, given evidence that juveniles have significant potential for rehabilitation.\textsuperscript{257} Under these circumstances, the Supreme Court reasoned that summarily inflicting these harsh punishments on juveniles effectively degraded the value of their lives.\textsuperscript{258}

While the penological objectives of deterrence, retribution, and incapacitation are more justifiable in adult cases than juvenile ones, they also cannot legitimately justify extreme

\begin{footnotes}
\item[253] \textsc{Cesare Beccaria}, \textsc{On Crimes And Punishments} 8 (David Young trans., 1986).
\item[254] \textit{See} Miller, 132 S. Ct. at 2465.
\item[255] \textit{Id.}
\item[256] Simon, \textit{supra} note 6, at 282.
\item[257] \textit{See} Miller, 132 S. Ct. at 2465.
\item[258] The Justices especially made clear that state sentencing authorities had improperly disregarded the mitigating circumstances of the juvenile defendants before deciding to permanently cast them away from society. Montgomery, 136 S. Ct. at 725-26, 736-37; Miller, 132 S. Ct. at 2468-69; Graham, 560 U.S. at 53, 79.
\end{footnotes}
punishments for adults, such as the fifty-year-to-life sentence that Leandro Andrade received for shoplifting videotapes worth $153. A sentence imposed on an adult may reasonably be harsher than for an adolescent convicted of the same crime, yet that sentence must still fit the crime.

Experts typically agree that three strikes laws and other draconian sentencing schemes primarily targeting adults are not reasonably tailored to deter crime. Empirical evidence indicates that far shorter sentences can achieve both general and specific deterrence. Similarly, lengthy prison terms inflicted on adults routinely lack a reasonable relationship to moral culpability and dangerousness, thereby failing to legitimately satisfy the goals of retribution and incapacitation. Expert criticism of excessive punitiveness has been instrumental in persuading certain states to reduce their prison populations. But criminal justice reform has been relatively limited. Harsh justice remain commonplace, as America’s colossal incarceration rate demonstrates.

The Supreme Court countenanced states to adopt such sentencing laws bearing no reasonable relationship to legitimate penological goals. As we saw above, it announced in 1980 that “one could argue without fear of contradiction by any decision of this Court that . . . the length of the sentence actually imposed [for a felony] is purely a matter of legislative prerogative.” For three decades until Graham, the Court showed extraordinary deference to states’ claims that draconian punishments are warranted.

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259 Lockyer, 538 U.S. at 63.
262 These states include California, which partly amended the three strikes law that led to the draconian prison terms in Lockyer and Ewing. See SENTENCING PROJECT, FEWER PRISONERS, LESS CRIME: A TALE OF THREE STATES 1, 2, 8 (2014).
263 See JOUET, supra note 12, at 204-07.
264 See WORLD PRISON BRIEF, PRISON POPULATION RATE, supra note 24.
265 Rummel, 445 U.S. at 274.
266 Nilsen, supra note 7, at 150.
However, dissenting Justices objected that a sentence that “makes no measurable contribution to acceptable goals of punishment . . . is nothing more than the purposeless and needless imposition of pain and suffering.” For instance, Justice David Souter’s dissent in *Lockyer* emphasized that a state cannot genuinely defend in the name of public safety a policy resulting in decades of incarceration for a nonviolent shoplifter. Justice John Paul Stevens’s dissent in *Harmelin* likewise concluded that no legitimate public policy justified the mandatory life without parole sentence meted out to the first-time felon convicted of cocaine possession: “[T]he sentence must rest on a rational determination that the punished ‘criminal conduct is so atrocious that society’s interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator.’”

The presumption of unconstitutionality against harsh practices lacking legitimate policy goals is not limited to criminal punishment. This principle has equally shaped Supreme Court and state court decisions on gay rights. In particular, moral objections to homosexuality, a driving factor behind laws banning same-sex marriages and civil unions, are protected by the First Amendment yet cannot legitimately justify these harsh practices. As Justice Kennedy’s majority opinion in *Obergefell v. Hodges* noted, the marriages of consenting same-sex adults “pose no risk of harm to themselves or third parties.” Banning same-sex marriages therefore serves no legitimate policy goal, but rather “demeans or stigmatizes” gay people.

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267 *Harmelin*, 501 U.S. at 1013 (White, J., dissenting).
268 *Lockyer*, 538 U.S. at 81-82 (Souter, J., dissenting).
269 *Harmelin*, 501 U.S. at 1028 (Stevens, J., dissenting) (quoting *Furman v. Georgia*, 408 U.S. 238, 307 (1972) (per curiam) (Stewart, J., concurring)).
270 Simon, *supra* note 6, at 302-04.
271 *Obergefell*, 135 S. Ct. at 2602 (“Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises . . . .”). *See also Jouet, supra* note 12, at 134-38 (analyzing moral objections to gay rights).
272 *Obergefell*, 135 S. Ct. at 2607.
273 *Id.*
274 *Id.* at 2602.
By the same token, moral support for retribution cannot provide a legitimate constitutional justification for draconian criminal punishments. Justice Kennedy had acknowledged this concern in his aforesaid 2003 speech at the American Bar Association, which suggested awareness that a social desire “to degrade and demean the prisoner” may drive mass incarceration. 275 His majority opinion in *Graham* ultimately echoed the views of former dissenting Justices when he recognized that “[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.” 276 Announcing a principle relevant to both juvenile and adult cases, Kennedy added that “[c]riminal punishment can have different goals, and choosing among them is within a legislature’s discretion. . . . It does not follow, however, that the purposes and effects of penal sanctions are irrelevant to the determination of Eighth Amendment restrictions.” 277

**D. Hope for Rehabilitation and Release**

In Dante’s *Inferno*, the entrance to hell is marked by an ominous warning: “Abandon every hope, all you who enter.” 278 The narrator shudders, observing that “these words I see are cruel.” 279 The hopelessness of modern American prisoners condemned to die behind bars concretely illustrates Dante’s age-old allegory. Certain inmates facing life without parole indicate that they would prefer to be executed. 280 While some lifers are resilient, acute psychological distress is an ordinary aspect of their existence. 281

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275 Kennedy, Address at the American Bar Association Annual Meeting, *supra* note 85.
276 *Graham*, 560 U.S. at 71.
277 *Id.*
278 DANTE ALIGHIERI, THE DIVINE COMEDY, VOLUME 1: INFERNO 89 (Mark Musa trans., 2002).
279 *Id.*
281 Marie Gottschalk, *No Way Out?, in id.* at 227, 234; Paul H. Robinson, *Life without Parole under Modern*
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The Supreme Court recognized this bleak reality in *Graham*, as it explicitly held that thrusting the juvenile prisoner into an hopeless predicament was “cruel and unusual” punishment: “The State has denied him any chance to [] demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit.”282 Such treatment “deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence.”283 The sentence simply offered “no hope” to Terrance Graham, “no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes.”284

Hopelessness again was at issue during the oral arguments for *Jackson v. Hobbs*, a companion case to *Miller* that concerned life without parole for an Arkansas teenager convicted of felony murder.285 Justin Ruth Bader Ginsburg told the Arkansas Assistant Attorney General “you’re dealing with a 14-year-old being sentenced to life in prison, so he will die in prison without any hope.”286 Justice Sonia Sotomayor pressed on this point by asking: “What hope does he have?”287 The Assistant Attorney General claimed that the juvenile was not deprived of hope because he could apply for executive clemency.288 The Justices were unconvinced given the

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282 *Graham*, 560 U.S. at 79.
283 *Id.* at 69-70.
284 *Id.* at 79.
285 Miller, 132 S. Ct. at 2461.
287 *Id.* at 37:30.
288 *Id.* at 37:57.
rarity of clemency in Arkansas, which Bryan Stevenson, the juvenile’s attorney, emphasized in his rebuttal.\textsuperscript{289}

The Court’s ensuing decision in \textit{Miller} did not bar life without parole categorically for juvenile homicides, although it found that it cannot be a mandatory sentence partly because that approach would entail hopelessness by “disregard\[ing\] the possibility of rehabilitation.”\textsuperscript{290} The Court later held in \textit{Montgomery} that the aging petitioner had a constitutional right to seek resentencing because, after being mandatorily sentenced to life without parole as a juvenile, he had “spent each day of the past 46 years knowing he was condemned to die in prison.”\textsuperscript{291} In the Court’s view, such juvenile convicts “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.”\textsuperscript{292}

Accordingly, \textit{Graham}, \textit{Miller}, and \textit{Montgomery} advanced a principle with potentially profound ramifications: prison sentences inflicted on juveniles cannot negate the principle of rehabilitation and possibility of release. As with dignity, proportionality, and legitimacy, the principle of rehabilitation is far from being solely relevant in juvenile cases.

On this point too, Justice Kennedy seemed to embrace the views of Justices who had dissented against his prior interpretation of the Eighth Amendment. Kennedy’s controlling opinion in \textit{Harmelin} had given short shrift to the principle of rehabilitation, stressing that “the Eighth Amendment does not mandate adoption of any one penological theory.”\textsuperscript{293} When reviewing the \textit{Graham} sentence, however, he wrote that “[t]he penalty forswears altogether the

\begin{footnotesize}
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  \item \textsuperscript{289} \textit{Id.} at 43:47.
  \item \textsuperscript{290} \textit{Miller}, 132 S. Ct. at 2468.
  \item \textsuperscript{291} \textit{Montgomery}, 136 S. Ct. at 736.
  \item \textsuperscript{292} \textit{Id.} at 736-37.
  \item \textsuperscript{293} \textit{Harmelin}, 501 U.S. at 999 (Kennedy, J., concurring).
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rehabilitative ideal.” 294 This mirrored Justice Stevens’s dissent in *Harmelin*, which underlined that sentencing an adult to mandatory life imprisonment without parole for cocaine possession “does not even purport to serve a rehabilitative function;” and that it is “irrational” to assert that such adult offenders are “wholly incorrigible.” 295

The *Lockyer* dissenters reached the same conclusion, arguing that the nonviolent shoplifter’s draconian sentence left him no hope of paying his debt to society: “an 87-year-old man released after 50 years behind bars will have no real life left, if he survives to be released at all.” 296 As the defendant had received consecutive twenty-five-year-to-life sentences, the dissenters concluded it was “irrational” to claim that, following his first lengthy sentence, the defendant still “would be so dangerous” that he would need to spend a second stretch of twenty-five years in prison before being eligible for parole. 297

Like these dissenting Justices, other Western democracies have determined that rehabilitation is a fundamental sentencing principle at the heart of all prisoners’ rights, whether adults or juveniles. As early as 1977, the German Constitutional Court proclaimed that the government violates a prisoner’s fundamental rights if it “strips him of all hope of ever earning his freedom.” 298 For decades, most European nations avoided condemning prisoners to die without any hope of reentering society. 299 In 2013, the European Court of Human Rights held that no member state could inflict such punishments. 300 The case involved persons sentenced to life imprisonment for murder in England and Wales. 301 They could only have been eligible for release if they had become “terminally ill or physically incapacitated,” among other stringent

294 Graham, 560 U.S. at 74.
295 Id. at 1028 (Stevens, J., dissenting).
296 Lockyer, 538 U.S. at 79 (Souter, J., dissenting).
297 Id. at 82.
298 BVerfG June 21, 1977, 45 BVerfGE 187, quoted in Nilsen, supra note 7, at 164.
299 Vinter, at ¶ 68; Simon, supra note 6, at 285.
300 Vinter, at ¶ 189.
301 Id. at ¶ 12.
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criteria. The European Court of Human Rights concluded that these “highly restrictive conditions” barely “could really be considered release at all, if all it meant was that a prisoner died at home or in a hospice rather than behind prison walls.” After reviewing the state of international law and the practices of multiple nations, it concluded that these and other European prisoners cannot be left to die in prison without hope of release. The Court even cited Graham as persuasive authority.

The principle that prisoners should have an opportunity for release finds supports in empirical research. Recidivism is undoubtedly a pervasive problem, as for generations a substantial segment of prisoners have reoffended after being released. But the nature of “recidivism” is more nuanced than may appear at first glance. The term tends to induce fear, yet statistics encompass technical violations for minor issues (e.g., failing a drug test, missing an appointment with a parole officer, etc.), as well as violent crimes. Besides, the notion that prisoners cannot be rehabilitated may be a self-fulfilling prophecy if it results in a penal system that negates the value of rehabilitation and the intrinsic worth of prisoners’ lives by warehousing them in barebones, cutthroat institutions. Prisoners who have received adequate rehabilitative services in a humane environment preparing them to successfully reenter society are less likely to recidivate. Moreover, recidivism patterns differ depending on the category of prisoners, as

302 Id. at ¶ 126.
303 Id. at ¶ 127.
304 Id. at ¶ 59-81.
305 Id. at ¶ 73 (citing Graham, 560 U.S. at 48).
306 See, e.g., GARLAND, CULTURE OF CONTROL, supra note 32, at 20, 57-58 (discussing historical concern about recidivism); RYKEN GRATTEL, JOAN PETERSILIA & JEFFREY LIN, PAROLE VIOLATIONS AND REVOCATIONS IN CALIFORNIA 5 (2008), https://www.ncjrs.gov/pdffiles1/nij/grants/224521.pdf (indicating that “California’s recidivism rate as measured by the ‘return to prison rate’ [was] 66 percent, compared to a 40 percent national average”).
308 Id.
309 See generally Sharon Dolovich, Creating the Permanent Prisoner, in LIFE WITHOUT PAROLE, supra note 6, at 96, 105-09; Mears et al., supra note 261, at 83.
310 Id.
people convicted of murder or paroled from life sentences appear to have relatively low recidivism rates. Overall, the value of incarceration in deterring recidivism appears to have diminishing returns after several months or years in prison, when it may become counterproductive.

Most importantly, social scientists have long known that crime drops significantly with age, which is another reason why Graham, Miller, and Montgomery could lead to expanding the constitutional rights of adults. In these cases, the Supreme Court drew on neurological and behavioral science showing that the last parts of the brain to evolve relate to impulse control, thereby fostering reckless and criminal conduct. But the very same body of scientific research that the Justices cited to conclude that juveniles are especially impetuous equally shows that adults are less so. Illustratively, a different section of a scientific study by Dr. Jeffrey Arnett cited in Roper states that “arrests for offenses such as vandalism and larceny theft are far more common for adolescents than for adults.” “What is true for minor criminal activity is also true for crime generally,” Arnett explains. “Even when factors such as education, occupation, family size, and quality of home life are taken into account, the association of age with criminal behavior is preeminent.”

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311 See generally Gottschalk, supra note 281, at 235-36; Weisberg, supra, note 307, at 789 (“Robbers, car thieves, and burglars are very prone to recidivism, with rates measured in the 70 percent range. At the other end of the spectrum, murderers often have very low recidivism rates, perhaps because murder is a more situation-specific crime . . . .”).
312 Mears et al., supra note 261, at 118-23.
313 See generally Jeffrey Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 DEVELOPMENTAL REV. 339, 343 (1992); Gottschalk, supra note 281, at 235-36; Steinberg, supra note 16, at 515; Weisberg, supra note 307, at 789-90, 804.
314 See Steinberg, supra note 16, at 513.
315 Id. See also Roper, 543 U.S. at 569 (citing Arnett, supra note 313, at 339).
316 Id.
317 Id.
318 Id.
Dr. Laurence Steinberg, whose research the Supreme Court likewise cited,\textsuperscript{319} has found that “[i]n the case of the adult [] the predispositions, values, and preferences that motivate him or her most likely are characterological and are unlikely to change predictably with the passage of time.”\textsuperscript{320} In other words, the criminal behavior of adults “is more likely to be an enduring part of their character” compared to juveniles.\textsuperscript{321} This confirms that youth is legitimately a major mitigating circumstance in criminal law. Nevertheless, Dr. Steinberg observed that crime generally drops with age\textsuperscript{322} and that “individuals will almost always become more deliberate and self-possessed as they gain experience and as their brains mature, without any special interventions designed to facilitate this process.”\textsuperscript{323}

Data demonstrate that crime surges in the teenage years, peaks around twenty years old, and then progressively declines.\textsuperscript{324} By the early fifties, the crime rate has started flattening.\textsuperscript{325} Related data examining impulse control and risky behavior, such as non-fatal self-inflicted injuries and unintentional drownings, show the same pattern suggesting that aging adults act more wisely than teenagers or young adults.\textsuperscript{326} That is partly because the prefrontal cortex of the brain regulating cognitive processing and impulse control does not fully evolve until the early twenties.\textsuperscript{327} In fact, Dr. Steinberg has proposed extending the definition of adolescence to twenty-five years old.\textsuperscript{328}

\textsuperscript{319} Miller, 132 S. Ct. at 2464 (citing Laurence Steinberg & Elizabeth S. Scott, \textit{Less Guilty by Reason of Adolescence}, 58 AM. PSYCHOLOGIST 1009 (2003)); Roper, 543 U.S. at 569 (same).
\textsuperscript{320} Steinberg & Scott, \textit{supra} note 319, at 1015.
\textsuperscript{321} Steinberg, \textit{supra} note 16, at 517.
\textsuperscript{322} \textit{Id.} at 515.
\textsuperscript{323} \textit{Id.} at 517.
\textsuperscript{324} See Steinberg, \textit{supra} note 16, at 515-16.
\textsuperscript{325} \textit{Id.}
\textsuperscript{326} \textit{Id.} at 516-17.
\textsuperscript{327} \textit{Laurence Steinberg, Age of Opportunity: Lessons From the New Science of Adolescence} 6 (2014).
\textsuperscript{328} \textit{Id.} at 6.
Several state legislatures are debating raising the age of juvenile justice jurisdiction until the early twenties. California has created special parole hearing procedures and criteria for persons convicted when they were less than twenty-three years old. In 2015, San Francisco County instituted a Young Adult Court for persons aged eighteen to twenty-five charged with various felonies and misdemeanors. The program aims to moderate their prosecution and provide additional therapeutic services. Its website prominently mentions that “[t]he last two decades have given rise to a body of research establishing that young adults are fundamentally different from both juveniles and older adults in how they process information and make decisions. The prefrontal cortex of the brain . . . does not fully develop until the early to mid-20s.” Reformers created diverse types of young adult court programs in other parts of the country, from Brooklyn to Bonneville County, Idaho.

All of these reasons again caution against a rigid cutoff under which the Eighth Amendment’s bar on “cruel and unusual punishment” would apply to draconian prison terms inflicted on juveniles, but fully exclude adult prisoners. When the Supreme Court reasons that juveniles often step away from crime in adulthood, that is precisely because the farther people

329 French Russell & Denholtz, supra note 198, at 1163; Sarah Barr, States Consider Legislation to Raise the Age for Juvenile Court Into Young Adulthood, JUV. JUST. INFO. EXCHANGE (Apr. 4, 2016), http://jjie.org/2016/04/04/states-consider-legislation-to-raise-the-age-for-juvenile-court-into-young-adulthood/.
330 French Russell & Denholtz, supra note 198, at 1163.
332 Id.
333 Id.
335 The Court mainly interpreted the science to suggest that adults are less capable of rehabilitation than juveniles. Miller, 132 S. Ct. at 2464-65; Roper, 543 U.S. at 569. Nevertheless, its analysis recognized that people become more socially responsible with age. Miller, 132 S. Ct. at 2464-65 (quoting Graham, 560 U.S. at 69) (“We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child’s ‘moral culpability’ and enhanced the prospect that, as the years go by and neurological development occurs, his ‘deficiencies will be reformed.’”); Roper, 543 U.S. at 569 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993))
go into adulthood, the less likely they are to engage in criminal behavior. Yesteryear the Court deemed that juveniles could be executed,\(^{336}\) it has now acknowledged that juveniles are hardly “irredeemable.”\(^{337}\) It may eventually recognize that adult prisoners are not either.

**CONCLUSION**

If mass incarceration were an edifice, its pillars would include the negation of human dignity, the disproportionality of punishment to culpability, the pursuit of illegitimate policy objectives, and hopelessness for the prisoner whose rehabilitation is irrelevant. The Supreme Court’s landmark decisions in *Graham, Miller,* and *Montgomery* called into question all these pillars of mass incarceration.\(^{338}\) While they did so in juvenile life without parole cases, their reasoning would largely apply to adults facing draconian prison terms.

The tendency of Justices, practitioners, and scholars to focus narrowly on the differences between juveniles and adults in the aftermath of these decisions has obscured how they advanced sentencing principles that are not strictly age-dependent: dignity, proportionality, legitimacy, and rehabilitation. A difference of one vote would plausibly have made them part of Eighth Amendment jurisprudence for adults, as *Rummel, Harmelin, Lockyer,* and *Ewing* were 5-4 decisions.

In *Graham* and its progeny the Court’s reasoning began to remarkably mirror the Eighth Amendment sentencing principles that dissenters had advanced in these precedents—and that are

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\(^{336}\) Stanford, 492 U.S. at 361 (1989 decision).

\(^{337}\) See Montgomery, 136 S. Ct. at 734 (quoting Miller, 132 S. Ct. at 2469) ("*Miller* determined that sentencing a child to life without parole is excessive for all but ‘the rare juvenile offender whose crime reflects irreparable corruption’ ". . ."); Graham, 560 U.S. at 73 (quoting Roper, 567 U.S. at 573) ("‘It 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.’”").

\(^{338}\) Empirical evidence indicates that systemic racial discrimination is another driving factor behind mass incarceration, although the Court has been disinclined to address this issue for decades. In comparison, Eighth Amendment jurisprudence has evolved significantly since *Graham.* See *supra* note 19 and accompanying text.
the norm in other Western democracies. The Court’s evolution in this area appears consistent with the evolving judicial philosophy of Anthony Kennedy, who gradually departed from the influential controlling opinion he had authored for the Harmelin plurality. Naturally, time will tell whether these developments in Eighth Amendment jurisprudence will have broader implications for adult prisoners or whether they will remain limited to juvenile justice. Yet we must recall that, during the three decades preceding Graham, the Court had adamantly held that the constitutional safeguard against “cruel and unusual punishment” essentially did not apply to draconian prison sentences per se.

So far the Supreme Court has contributed to several relevant paradigm shifts. A generation ago, juveniles were deprived of constitutional rights under parens patriae’s logic. They gained virtually the same constitutional rights as adults after In re Gault revolutionized juvenile justice in the late 1960s. Soon later juveniles were nonetheless swept into the mass incarceration phenomenon. States widely adopted merciless punishments aiming to permanently lock up teenage “super-predators,” knowing that the Court had announced that “the length of the sentence actually imposed [for a felony] is purely a matter of legislative prerogative.” The main proponent of the “super-predator” scare, the criminologist John Dilulio, eventually disavowed his own research; and joined an amicus brief that criminologists filed in Miller to oppose life without parole for juveniles. Miller, along with Graham and Montgomery, helped precipitate state reforms recognizing juveniles and young adults’ potential for rehabilitation. Certain states that once led the nation in passing merciless juvenile sentencing laws, such as

340 Rummel, 445 U.S. at 274.
341 Becker, supra note 340.
Texas, categorically abolished life without parole for minors.\textsuperscript{343} This historic reversal suggests that a paradigm shift regarding the rights of adult prisoners cannot be excluded.

\textsuperscript{343} \textsc{Campaign for the Fair Sentencing of Youth, supra} not 5, at 4.