

Graham v. Florida and a Juvenile's Right to Age-Appropriate Sentencing

By Martin Guggenheim*

The Solicited Content portion of this issue is devoted to exploring the future of juvenile justice. In the landmark 2010 decision *Graham v. Florida*,¹ the Supreme Court held that sentencing juveniles to life in prison without the possibility of parole for crimes other than homicide is categorically forbidden as a violation of the Eighth Amendment. But, I predict, *Graham* will eventually come to stand for considerably more. It is the most significant juvenile justice case advancing children's rights since the landmark *In re Gault*² decision in 1967. In an unprecedented way, *Graham* paves the way toward a new jurisprudence based on what is special about children.

Technically, *Graham* held that the most severe penalty still available in the criminal justice system³ could not be imposed upon someone who was a minor at the time of the crime in nonhomicide cases. This Article argues that *Graham* has deep implications far beyond the immediate reach of its holding. As will be explained, *Graham* makes room for an argument that was out of bounds in the modern children's rights era: Juveniles have a *substantive* right to be treated differently when states seek to punish them for criminal wrongdoing.

Juvenile rights advocates have long walked a tightrope by striving to demand procedural fairness for accused delinquents while ever fearful that the more juvenile rights advocates demand procedural fairness, the more the juvenile court looks the same as adult criminal court and the less legislators may perceive the need for a special court for juveniles.⁴ Even if abolition of juvenile court is an extremely unlikely result, advocates are also concerned that litigation successful in securing procedural rights in juvenile court will lead to the legislative erosion of juvenile court jurisdiction.⁵ This ultimate bargain has worked out miserably for young people and is a vivid demonstration of the paucity of their rights.⁶ This Article posits that *Graham* ef-

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¹ *Graham v. Florida*, 130 S. Ct. 2011 (2010).

² 387 U.S. 1 (1967).

³ Because *Roper v. Simmons*, 543 U.S. 551 (2005), held that the death penalty may not be imposed on defendants for crimes committed before they turned eighteen years old, the most severe penalty available was life without parole.

⁴ See *infra* note 124 and accompanying text.

⁵ See *infra* note 124 and accompanying text.

⁶ See *infra* notes 124–28 and accompanying text. See generally MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 245–66 (2005); see also *id.* at 252 (“Since the end

fects a dramatic change in the legal rights of young people by allowing their lessened culpability for wrongdoing to be explicitly taken into account by courts.

This Article proceeds in four parts. Part I briefly describes the Court's opinion in *Graham* and explains why the ruling has broad implications well beyond the Eighth Amendment and extremely long sentences for juveniles. Part II offers a review of the history of juvenile justice in the United States, in two sections. The first section discusses the goals and hopes of the Progressives who invented the concept of a juvenile court and played the leading role of spreading it throughout the United States. The second section reveals both the judicial and legislative reaction to juvenile court during the period from 1967 through 2010. Part III contains a brief discussion of all Supreme Court children's rights cases⁷ decided during this same period, in order to place the *Graham* decision in context. Finally, in Part IV, the Article sets out the constitutional claims that follow from *Graham*, arguing that juveniles have a substantive constitutional right to be sentenced as juveniles and that mandatory sentencing schemes designed for adults may not be automatically imposed on juveniles without courts first conducting a sentencing hearing at which prosecutors must bear the burden of proving that the juvenile deserves the sentence.

I. THE *GRAHAM* DECISION

In 2005, in *Roper v. Simmons*,⁸ the Supreme Court held that the Eighth and Fourteenth Amendments barred imposition of a death sentence for persons below the age of eighteen, overruling *Stanford v. Kentucky*.⁹ Five years later, in *Graham v. Florida*,¹⁰ the Court was asked to extend *Roper* and declare that the Eighth Amendment also forbids sentencing juveniles to life in prison without the possibility of parole in a nonhomicide case.¹¹ The Court did indeed rule that the Eighth Amendment prohibits such sentences but, in

of the 1980s, every state has revised its laws to facilitate the prosecution of more juveniles in adult criminal court. It is now easier to prosecute a child in adult criminal court than it has been at any other point in the past seventy years. States have lowered the age for prosecution of children as adults and have expanded the list of crimes that permit prosecution in criminal court.”).

⁷ The children's rights field contains a number of subtleties. Among them is the choice about how to characterize persons under eighteen years of age. Among other names, they commonly might be called “children,” “minors,” “juveniles,” “persons under eighteen years of age,” or “youth.” The writer's choice of label is always purposeful, signaling something about the particular claim under review. At the risk of hurting some readers' ears, I will periodically refer to “children” in this Article, even when the label of choice is something else, partly to have the reader appreciate the awkwardness of the term in certain contexts.

⁸ 543 U.S. 551 (2005).

⁹ 492 U.S. 361 (1989).

¹⁰ 130 S. Ct. 2011 (2010).

¹¹ *Id.* at 2017–18.

doing so, issued an opinion that goes well beyond the parameters of Eighth Amendment jurisprudence.¹²

Before discussing the decision itself, it is important to appreciate how immaterial death penalty decisions are to sentencing reviews not involving the death penalty. “Death is different” has been a bedrock principle of Eighth Amendment jurisprudence since the Court first held, in 1972, that the death penalty violates the Constitution except in carefully defined circumstances.¹³ This means, most of all, that capital sentences are reviewed with extremely careful scrutiny. In contrast, review of sentences in noncapital cases has been “so deferential to state interests as to make Eighth Amendment challenges to excessive incarceration essentially non-starters.”¹⁴ Consequently, the extension of *Roper* in *Graham* means that, for the first time, the Constitution requires that sentences of juveniles not involving the death penalty receive careful scrutiny as well.

Graham involved the application of a formal two-part test, consistent with the Court’s Eighth Amendment jurisprudence in the non-juvenile context. First, the Court determines whether a sentence is categorically forbidden because it is inconsistent with “the evolving standards of decency that mark the progress of a maturing society,”¹⁵ by investigating “whether there is a national consensus against the sentencing practice at issue.”¹⁶ Second, the Court determines for itself whether “the punishment in question violates the Constitution.”¹⁷ The second part of this test carried all of the weight in *Graham*. In holding that sentencing juveniles to life in prison without the possibility of parole for crimes other than homicide is categorically forbidden,¹⁸ *Graham* broke new ground in Eighth Amendment jurisprudence.¹⁹

¹² *Id.* at 2034.

¹³ See *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (“The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.”).

¹⁴ Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 184 (2008); see also Markus Dirk Dubber, *Recidivist Statutes as Arational Punishment*, 43 BUFF. L. REV. 689, 713–14 (1995) (“[T]he ‘death is different’ campaign of opponents of capital punishment [has] won capital defendants certain additional protections, but only at the considerable cost of lumping together all other penalties under the rubric of ‘noncapital’ punishments, thereby effectively shielding incarceration from constitutional scrutiny.”).

¹⁵ *Graham*, 130 S. Ct. at 2021 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)) (internal quotation marks omitted).

¹⁶ *Id.* at 2022 (citing *Roper v. Simmons*, 543 U.S. 551, 572 (2005)).

¹⁷ *Id.* at 2022 (citing *Roper*, 543 U.S. at 572).

¹⁸ *Id.* at 2034.

¹⁹ *Id.* at 2022.

A. Assessing the National Consensus

Initially, Justice Kennedy looked to just the formal laws of each state. He was able to count only thirteen jurisdictions that do not permit juveniles to be sentenced to life without parole (“LWOP”) for nonhomicides.²⁰ He conceded that “[t]hirty-seven States as well as the District of Columbia permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances.”²¹ He also acknowledged that “[f]ederal law also allows for the possibility of life without parole for offenders as young as 13.”²²

Nonetheless, to Justice Kennedy, the argument that there was no national consensus against sentencing juveniles to life in prison without possibility of parole was “unavailing.”²³ He explained, “[a]ctual sentencing practices are an important part of the Court’s inquiry into consensus.”²⁴ By examining “actual sentencing practices in jurisdictions where the sentence in question is permitted by statute,” Justice Kennedy explained, we discover “a consensus against its use.”²⁵ According to Justice Kennedy, there were “123 juvenile nonhomicide offenders serving life without parole sentences.”²⁶ Even if that number by itself was significant, Justice Kennedy further explained that all of these sentences were imposed by only eleven states, with seventy-seven of them imposed in Florida alone.²⁷

After examining the laws as applied, Justice Kennedy acknowledged that the absolute number of juveniles sentenced to LWOP for nonhomicides was higher than in some of the Court’s other Eighth Amendment cases.²⁸ At the time the Court held that the Eighth Amendment categorically forbids executing non-triggerman felony murderers, for example, there had been “only six executions of non-triggerman felony murderers” in the preceding twenty-eight years.²⁹ When the Court held that the Eighth Amendment categorically forbids executing mentally retarded defendants there had been only five such executions in the preceding thirteen years.³⁰ Examining the absolute numbers could have led to the conclusion that juvenile LWOP for nonhomicides was less unusual than other practices where the Court found a national consensus opposing them. However, Justice Kennedy looked to the percentage of juveniles eligible for LWOP who were actually sentenced, and found that the percentage was lower than both the percentage of non-trig-

²⁰ *Id.* at 2015.

²¹ *Id.* at 2023 (citation omitted).

²² *Id.* (citation omitted).

²³ *Id.*

²⁴ *Id.* (citation omitted).

²⁵ *Id.*

²⁶ *Id.* at 2024.

²⁷ *Id.*

²⁸ *Id.* at 2024–25.

²⁹ *Id.* at 2025 (citing *Enmund v. Florida*, 458 U.S. 782, 794 (1982)).

³⁰ *Id.* (citing *Atkins v. Virginia*, 536 U.S. 304, 316 (2002)).

germen arrested for felony murder and sentenced to death and of mentally retarded defendants arrested for homicide.³¹ This was all Justice Kennedy needed to reach the conclusion “that a national consensus has developed against” the challenged punishment.³²

This set of arguments is, to say the least, underwhelming. At the time *Graham* was decided, a solid majority of states permitted sentencing juveniles to life in prison without parole for nonhomicides and a significant absolute number of juveniles had received such a sentence.³³ It would have been considerably more logical to conclude that states had actually sought to impose this sentence only on those juveniles who were most culpable than it was to conclude that there was a consensus against imposing the sentence itself. The fact that states strove to limit the number of juveniles receiving this extreme sentence is hardly evidence that those states had reached an agreement that such a sentence could never be imposed. One can confidently say, given the exceeding weakness in Justice Kennedy’s finding of a national consensus against the use of this sentence, that the majority felt strongly that this punishment was morally wrong.³⁴ If Justice Kennedy’s logic is at all persuasive, it works only for a highly partial audience. No one could make these claims without strongly believing that sentencing juveniles to life in prison without parole is wrong. For this reason, the second part of the test is really what matters—both as an explanation for the holding in *Graham* and for its larger meaning respecting the constitutional rights of juveniles. It is in the second portion of the opinion that we appreciate how strongly Justice Kennedy and four other justices felt that the sentence was morally wrong.

B. *The Court’s Independent Judgment*

In the second prong of the Eighth Amendment inquiry, the Court determines for itself whether “the punishment in question violates the Constitution.”³⁵ Justice Kennedy emphasized, as he did in *Roper*, that regardless of any purported national trend, “the task of interpreting the Eighth Amendment remains our responsibility.”³⁶ In undertaking this responsibility, the Court’s specific task is to carefully examine for itself “the culpability of the

³¹ *Id.* at 2024–25. Justice Kennedy pointed out that in 2007 alone, nearly 400,000 juveniles were arrested for serious felonies. *Id.*

³² *Id.* at 2026 (quoting *Atkins*, 536 U.S. at 316) (internal quotation marks omitted).

³³ *Id.* at 2023 (“Thirty-seven States as well as the District of Columbia permit sentences of life without parole for a juvenile nonhomicide offender in some circumstances. . . . Federal law also allows for the possibility of life without parole for offenders as young as 13.” (citations omitted)).

³⁴ See Corinna Lain, *Lessons Learned from the Evolution of “Evolving Standards,”* 4 CHARLESTON L. REV. 661, 674 (2010) (“The cases that paved the road to evolving standards as a substantive doctrine show the Justices time and again rejecting the result that a cold reading of the law would provide in favor of what they thought was right.”).

³⁵ *Graham*, 130 S. Ct. at 2022 (citing *Roper v. Simmons*, 543 U.S. 551, 564 (2005)).

³⁶ *Id.* at 2026 (quoting *Roper*, 543 U.S. at 575) (internal quotation marks omitted).

offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question.”³⁷ In addition, “the Court also considers whether the challenged sentencing practice serves legitimate penological goals.”³⁸

Perhaps the most remarkable feature of this part of the Court’s decision in *Graham* is that the Court borrowed all of the ideas underlying its conclusion, that the Constitution categorically forbids imposing a sentence less than death on certain juveniles, from *Roper*. In *Graham*, Justice Kennedy asserted that the Constitution forbids juvenile life sentences without parole for nonhomicides for three reasons: (i) Juveniles have a “lack of maturity and an underdeveloped sense of responsibility”; (ii) they “are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure”; and (iii) their characters are “not as well formed.”³⁹ As a consequence, a juvenile’s wrongdoing—regardless of whether the transgression is extremely serious or petty—“is not as morally reprehensible as that of an adult.”⁴⁰ But each of the reasons that provided the basis for categorically forbidding a juvenile’s execution were taken explicitly from *Roper*, a case that, until *Graham*, had virtually nothing to do with non-capital sentences. Justice Kennedy was comfortable relying heavily on *Roper*, in part because he was persuaded that further “developments in psychology and brain science [that] continue to show fundamental differences between juvenile and adult minds” had reaffirmed the Court’s findings.⁴¹

Justice Kennedy justified limiting the punishment of juveniles under the Eighth Amendment entirely based on the special characteristics of juveniles as compared with adults. Not only are juveniles less culpable than adults, Justice Kennedy explained, they “are more capable of change than are adults, and their actions are less likely to be evidence of ‘irretrievably depraved character’ than are the actions of adults.”⁴² As the Court reaffirmed in *Graham*, “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”⁴³ For these reasons, the Court explained, juveniles are less deserving of a punishment based on retribution than adults. Beyond retribution, an adult-like sentence imposed on a juvenile as an act of deterrence is similarly problematic because juveniles are so much more likely than adults to behave “impetuous[ly] [which re-

³⁷ *Id.* (citing *Roper*, 543 U.S. at 568).

³⁸ *Id.* (citing *Roper*, 543 U.S. at 572).

³⁹ *Id.* (quoting *Roper*, 543 U.S. at 569–70) (internal quotation marks omitted).

⁴⁰ *Id.* (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)) (internal quotation marks omitted).

⁴¹ *Id.* at 2026 (citing Brief for American Medical Association et al. as Amici Curiae Supporting Petitioners at 16–24, *Graham*, 130 S. Ct. 2011 (2010) (No. 08-7412), 2009 WL 2247127).

⁴² *Id.*

⁴³ *Id.* at 2026–27 (quoting *Roper*, 543 U.S. at 570) (internal quotation marks omitted).

sults in] ill-considered actions and decisions,”⁴⁴ in part because juveniles “are less likely to take a possible punishment into consideration when making decisions.”⁴⁵

C. Implications Well Beyond Life Sentences

What is most remarkable about *Graham* is how casually the majority broke the “death is different” barrier.⁴⁶ “[T]he unique nature of the death penalty for purposes of Eighth Amendment analysis,” as the Court has reminded us, “has been repeated time and time again in our opinions.”⁴⁷ Capital punishment deserves its own sentencing jurisprudence, according to the Court, because the death penalty “differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.”⁴⁸ In short, death penalty jurisprudence, at least for purposes of evaluating sentences, is unique.

Despite this, Justice Kennedy felt no greater need than to cite *Roper* for all of the reasons the sentence imposed in *Graham* was held to be unconstitutional. One scholar, William Berry, has attempted to explain that the *Graham* Court only slightly abandoned its “death is different” jurisprudence by choosing also to treat juvenile life-in-prison sentences as unique.⁴⁹ For Berry, the new rule is that death is different and so are life-in-prison sentences.⁵⁰ I believe this broadly misconceives the meaning of *Graham*. As another scholar, Neelum Arya, recently said, *Graham* is best understood as the dawning of a new constitutional principle: “Juveniles are different.”⁵¹

⁴⁴ *Id.* at 2028 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

⁴⁵ *Id.* at 2028–29; see generally Marty Beyer, *Immaturity, Culpability & Competency in Juveniles: A Study of 17 Cases*, 15 CRIM. JUST. 27 (Summer 2000) (describing the many differences between juveniles and adults that bear on juveniles’ culpability, including juveniles’ cognitive development, low self-esteem, poor decision making, tendency to minimize danger, trauma, depression, undue need for approval of others, family conflict, capacity for intimidation, inability to function maturely while high, along with their lack of experience, history of abuse, and challenging living arrangements).

⁴⁶ See Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1146 (2009). This certainly was of great consternation to Justice Thomas. See *Graham*, 130 S. Ct. at 2045 n.1 (Thomas, J., dissenting) (“The Court radically departs from the framework those precedents establish by applying to a noncapital sentence the categorical proportionality review its prior decisions have reserved for death penalty cases alone.”). In his *Graham* dissent, Justice Thomas also stated that “[t]oday’s decision eviscerates that distinction. ‘Death is different’ no longer.” *Id.* at 2046.

⁴⁷ *Rummel v. Estelle*, 445 U.S. 263, 272 (1980); see also *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) (“The penalty of death differs from all other forms of criminal punishment, not in degree but in kind.”).

⁴⁸ *Solem v. Helm*, 463 U.S. 277, 312 n.4 (1983) (Burger, C.J., dissenting) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)).

⁴⁹ See William W. Berry III, *More Different than Life, Less Different than Death*, 71 OHIO ST. L.J. 1109, 1123–28 (2010).

⁵⁰ See *id.* at 1112.

⁵¹ See Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99 (2010).

This Article argues that *Graham* will come to stand for what is special about children. Until *Graham*, the chasm between death penalty jurisprudence and the rest of sentencing review was too wide to span. Justice Kennedy made this conceptual leap without even so much as an acknowledgement that this decision changed the rules involving the Eighth Amendment. That is almost certainly because it did not change these rules; nor did the Court understand it was doing so. The entire focus of Justice Kennedy's opinion was on the special characteristics of juveniles, never suggesting that the decision changed the Court's understanding that death penalty sentencing decisions have no application in non-death penalty cases. In other words, *Graham* is not a variant on death penalty jurisprudence—rather, it established that some sentences are categorically too harsh for juveniles. *Graham* is a case about how and why children are different from adults that states a constitutional principle with broad implications across the entire landscape of juvenile justice.

The next part examines the history of juvenile justice in the United States by dividing that history into two periods. The first section looks at the founding period of juvenile justice until the Supreme Court determined in *In re Gault*⁵² that children's rights constrain the unbridled power that juvenile judges had exercised for two-thirds of the twentieth century. The second section examines the period from *In re Gault* to just before *Graham*. Part III will examine a broad variety of constitutional cases involving children to place *Graham* in the proper context.

II. JUVENILE JUSTICE: 1899–2009

A. *The Progressive Conception of Children's Rights (1899–1966)*

In order to understand the importance of *Graham*, it is necessary to briefly review the history of juvenile justice. The Progressives conceived of and then developed throughout the United States perhaps their greatest invention: juvenile court. The idea that children are sufficiently different from adults that they should be processed in a separate system of justice—that operated very differently from the adult criminal system—supported the foundation of the juvenile court system. But that idea, in turn, captured two additional concepts. First, the rules by which adults were prosecuted had no place in this new court. Issues of guilt and innocence were to be replaced by the more important inquiry into the child's needs and best interests.⁵³ Due process and the technicalities of criminal court would only interfere with this inquiry. The second concept—which was never quite expressed independently of the first—was that juveniles should not be punished for their mis-

⁵² 387 U.S. 1 (1967).

⁵³ *Id.* at 15.

deeds the way adults are and the purpose of intervention into the lives of delinquents is reformatory, not punitive.⁵⁴

The Progressives imagined a new way of attending to the needs of young people who got into trouble with the law. They envisioned and created a justice system unlike any that had come before it. This new system, focused on the needs of the young people, was incompatible with existing conceptions of formality, rules, and rights. As the Supreme Court explained:

The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.'⁵⁵

Progressives viewed the juvenile justice system as based on "radically different" principles.⁵⁶ To the Progressives, criminal court was "restrained by antiquated procedure, saturated in an atmosphere of hostility, trying cases for determining guilt and inflicting punishment according to inflexible rules of law."⁵⁷ It was "limited by the outgrown custom and compelled to walk in the paths fixed by the law of the realm,"⁵⁸ and dominated by "prosecutors, and lawyers, trained in the old conception of law [who] stag[ed] dramatically, but often amusingly, legal battles, as the necessary paraphernalia of a criminal court."⁵⁹ All of this was to be replaced by a process freed from the "primitive prejudice, hatred, and hostility toward the lawbreaker" that was omnipresent in criminal court.⁶⁰ In other words, the Progressives' substitute strove "to administer justice in the name of truth, love[,] and understanding."⁶¹

The different kind of court Progressives wanted for children was based on the foundational principle that children are different from adults. Whether they simply intuited that children were less blameworthy,⁶² as the Supreme Court now has recognized,⁶³ or believed that children were inher-

⁵⁴ See *id.* at 15–16.

⁵⁵ *Id.* at 15 (citing Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119–20 (1909)).

⁵⁶ See HERBERT H. LOU, *JUVENILE COURTS IN THE UNITED STATES 1–2* (1927), reprinted in SAMUEL M. DAVIS ET AL., *CHILDREN IN THE LEGAL SYSTEM* 859 (2009).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See *id.*

⁶³ See *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010).

ently innocent,⁶⁴ the Progressives' critical insight was simple: Children are materially different from adults with regard to the reasons they commit crimes, and the consequences that flow from their wrongful acts should reflect that insight.⁶⁵ Although the Court had much to say about the Progressives' ideas concerning the lack of need for formal rules when adjudicating delinquents in juvenile court, until very recently the Court had rarely spoken about whether and to what extent children are different from adults and how such differences ought to matter when it comes to sentencing juveniles for their wrongdoing.

This first period of juvenile justice reform abruptly ended in 1967 with the Court's decision in *In re Gault*.⁶⁶ The virtually complete freedom of states to design and implement a separate juvenile justice system however they saw fit "without coming to conceptual and constitutional grief" characterized that period.⁶⁷ Juvenile justice, as it operated for the first two-thirds of the twentieth century, crashed into the Constitution in 1967 and was never quite the same again.

*B. In re Gault and the Evolving Conception of Juvenile Justice
(1967–2009)*

The second period of the history of juvenile justice, begun by *Gault*, has been characterized by three trends, two of them remarkably opposed to each other. First, led by the Supreme Court, courts repudiated the Progressive idea that due process did not belong in the juvenile justice system.⁶⁸ Although courts never took issue with the Progressives' desire to maintain a separate juvenile justice system, they insisted that these courts be reshaped in a way that would make them practically unrecognizable to the Progressives.⁶⁹ Second, legislatures broadly repudiated the Progressive vision—that children should, except perhaps in the rarest of cases, be prosecuted in a court specially designed for that purpose, and, more importantly, should be punished with far more compassion and lenity than is ordinarily involved when adults are prosecuted.⁷⁰ Third, both courts and legislatures seemed to agree that, except perhaps at the very extreme margins of punishment where

⁶⁴ See ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 16–17 (2008) (stating that children, unlike adults, sometimes "are presumed to be incompetent, dependent, and not responsible").

⁶⁵ See, e.g., Emily Buss, *Rethinking the Connection Between Developmental Science and Juvenile Justice*, 76 U. CHI. L. REV. 493, 501 (2009) ("The key conviction was that children were more amenable than adults to reform and education, and that society as a whole would benefit if delinquents were saved from lives of crime.").

⁶⁶ See generally *In re Gault*, 387 U.S. 1 (1967).

⁶⁷ See *id.* at 16.

⁶⁸ See *infra* notes 78–95 and accompanying text.

⁶⁹ See *infra* notes 78–95 and accompanying text.

⁷⁰ See *infra* notes 125–29 and accompanying text.

death or life in prison is involved, the choice of punishment for children is exclusively a legislative prerogative.⁷¹

(1) *Supreme Court Juvenile Justice Cases*

Altogether, the Court decided only six non-death penalty juvenile justice cases between 1967 and 2009.⁷² Each involved only procedural claims, addressing the adjudicative or pre-adjudicative phase. None raised a question about the proper scope of punishment or sentencing of juveniles. But the framing of these cases is important to appreciate *Graham's* context. In five of these cases, juveniles sought the constitutional right to be treated indistinguishably from adults, asking to be granted the same constitutional rights possessed by adults.⁷³ In each of these cases, state officials defended their choice to afford juveniles fewer rights than the Constitution requires for adults.⁷⁴ In the sixth case, *Fare v. Michael C.*,⁷⁵ the positions were reversed. In that case, the young person sought a ruling that his constitutional rights included the right to *better* treatment than the Constitution requires for adults.⁷⁶ In contrast, the state contended that it was perfectly okay to give the child the same rights that adults have, but not more.⁷⁷

In the first case, *In re Gault*,⁷⁸ state officials argued that, because of the benevolent purposes of juvenile court, states were within their lawful power to create a separate justice system for children without the procedural rules that would be required in a justice system for adults.⁷⁹ The Court rejected the state's argument, repudiating an important feature of the Progressive vi-

⁷¹ See *infra* notes 245–46 and accompanying text.

⁷² The Court has decided several extremely important cases involving the death penalty for juveniles. The first such case, *Thompson v. Oklahoma*, 487 U.S. 815 (1988), held that the Eighth and Fourteenth Amendments forbid sentencing children under the age of sixteen to death. The next Term, the Court held in *Stanford v. Kentucky*, 492 U.S. 361 (1989), that the Eighth Amendment did not forbid sentencing sixteen- and seventeen-year-old children to death. *Stanford* was overruled in 2005 by *Roper v. Simmons*, 543 U.S. 551 (2005). Both *Thompson* and *Roper* are, of course, important examples of decisions upholding claims by children's advocates that children have the right not to be treated as if they were adults. But, because of the well-established, controlling understanding that "death is different," distinguishing *Thompson* and *Roper* this Article ignores those cases.

⁷³ *Schall v. Martin*, 467 U.S. 253 (1984); *Fare v. Michael C.*, 442 U.S. 707 (1979); *Breed v. Jones*, 421 U.S. 519 (1975); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *In re Winship*, 397 U.S. 358 (1970); *In re Gault*, 387 U.S. 1 (1967).

⁷⁴ In *In re Winship*, juveniles argued that they were constitutionally entitled to be proven guilty beyond a reasonable doubt, something the Court had not yet held was true even for adults. 397 U.S. at 361. But the juveniles never suggested they were entitled to more rights than adults; rather, they argued that the requirement that proof of guilt for criminal wrongdoing be proven beyond a reasonable doubt protects both adults and juveniles. That is precisely what the Court held. *Id.* at 368.

⁷⁵ 442 U.S. 707 (1979).

⁷⁶ See *id.* at 729 (Marshall, J., dissenting) ("*Miranda* requires that interrogation cease whenever a juvenile requests an adult who is obligated to represent his interests.>").

⁷⁷ See *id.* at 717–19.

⁷⁸ 387 U.S. 1 (1967).

⁷⁹ *Id.* at 21–26.

sion—due process does not belong in juvenile court.⁸⁰ It did so with harsh language, twice comparing juvenile justice to Star Chamber proceedings.⁸¹ *In re Gault* held that accused delinquents were entitled to a system operated with “the essentials of due process and fair treatment.”⁸² But it did so, in large part, because it was unable to conclude that the alleged offsetting benefits to juveniles amounted to very much. The Court preferred to “candidly appraise” the benefits accruing to juveniles involved in the juvenile justice system and found them wanting.⁸³ As a result, Justice Fortas’s majority opinion identified four essential rights to which juveniles are entitled in juvenile court: the right to notice of charges, the right to remain silent, the right to counsel, and the right to cross-examine adverse witnesses.⁸⁴ It saved for another day the task of deciding whether any additional rights would prove necessary.⁸⁵

It would be difficult to overstate *In re Gault*’s importance to the field of juvenile justice, specifically, and to children’s rights generally.⁸⁶ *In re Gault* so thoroughly repudiated the idea that denying children procedural rights may be good for them that modern readers may miss just how strongly the contrary belief was held. Consider that, as late as two years after *In re Gault*, New York’s highest court, in its first opportunity to speak to the questions addressed in *In re Gault*, stressed that incorporating too many procedural protections into the juvenile justice process may well be bad for children.⁸⁷ The court reiterated that “there is a genuine and responsibly held difference of opinion about what is best to do” when deciding whether accused delinquents ought to secure constitutional rights.⁸⁸ It explained that many believed “it remains essentially valid” that lawyers were not to intrude in juvenile courts to fight for their juvenile clients and that the right against self-incrimination continued to be “thought by proponents of the juvenile court to have no relevancy to a process in which the particular act which brought the child to the inquiry may play no significant part in an attempt to see him in his total environment and to help him.”⁸⁹ The Court further emphasized that “[m]any sociologists believe that the criteria of the criminal

⁸⁰ See *id.* at 22, 27–28.

⁸¹ *Id.* at 18–19 n.25. In both instances, the Court cited others who made this comparison. The two critics were among the most important voices in American law: Deans Roscoe Pound and Arthur T. Vanderbilt.

⁸² *Id.* at 30 (quoting *Kent v. United States*, 383 U.S. 541, 562 (1966)).

⁸³ *Id.* at 21–22.

⁸⁴ *Id.* at 33–34, 55–57.

⁸⁵ *Id.* at 58.

⁸⁶ This Article divides these two topics, with “juvenile justice” being limited to the subject of minors’ rights when they are involved in criminal or juvenile delinquency-related proceedings. “Children’s rights” means to cover all remaining issues involving the rights of young people. “Juvenile justice” could be a part of “children’s rights cases,” but not the other way around.

⁸⁷ *In re Samuel W.*, 247 N.E.2d 253 (N.Y. 1969), *rev’d*, 397 U.S. 358 (1970).

⁸⁸ *Id.* at 255.

⁸⁹ *Id.*

law and its methodology, including protection against self-incrimination and the right to counsel in the case of the young child, impair rather than help a process designed not as punishment but as salvation.”⁹⁰ In concluding that guilt need not be proven by more than a preponderance of evidence in a delinquency case, the court comfortably explained that an accused juvenile delinquent’s “best interest is not necessarily, or even probably, promoted if he wins in the particular inquiry which may bring him to the juvenile court.”⁹¹

The Supreme Court expressly disagreed with the reasoning and conclusion of the New York Court of Appeals. It disagreed that it was probably better for juveniles to be wrongly adjudicated delinquent than not to receive the help they deserve. Accordingly, in *In re Winship*,⁹² the Court held that children may not be adjudicated delinquent at trial except upon proof of guilt beyond a reasonable doubt.⁹³ An additional procedural victory for accused delinquents was the 1975 decision in *Breed v. Jones*,⁹⁴ declaring that juveniles are protected against being placed twice in jeopardy.⁹⁵

Three victories for state officials balanced these three victories for children. In *McKeiver v. Pennsylvania*,⁹⁶ children complained that they were wrongfully deprived of the adult right to a jury trial in delinquency proceedings.⁹⁷ Explaining that the Court did not wish to “remake the juvenile proceeding into a fully adversary process and . . . put an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding,”⁹⁸ it ruled that jury trials are not required in juvenile court.⁹⁹

In 1984, the Court decided *Schall v. Martin*,¹⁰⁰ which upheld a New York statute that allowed judges to detain an accused juvenile delinquent until trial whenever the judge believed there was a risk that the juvenile would commit a crime if released.¹⁰¹ The juveniles complained that they were unconstitutionally being detained—even when the detention was to prevent them from committing petty offenses—before they were tried for the crime for which they were arrested, something manifestly unconstitutional as applied to adults.¹⁰² *Schall* was the first case in the post-*Gault* era to base its ruling rejecting the juvenile’s demand for adult-like rights on the

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *In re Winship*, 397 U.S. 358 (1970).

⁹³ *Id.* at 368.

⁹⁴ *Breed v. Jones*, 421 U.S. 519 (1975).

⁹⁵ *Id.* at 529.

⁹⁶ 403 U.S. 528 (1971).

⁹⁷ *Id.* at 530.

⁹⁸ *Id.* at 545.

⁹⁹ The Court wished to give states some room to adjust their legal systems to account for children’s vulnerability and need for concern, sympathy, and paternal attention. *Id.* at 550.

¹⁰⁰ 467 U.S. 253 (1984).

¹⁰¹ *Id.* at 256–57.

¹⁰² *Id.* at 268 n.18.

characteristics of youth.¹⁰³ Emphasizing the vulnerability of youth and the responsibility of state officials to protect children from their own mistakes, the Court upheld the challenged law.¹⁰⁴ Quoting from New York's highest court, Justice Rehnquist agreed with "the desirability of protecting the juvenile from his own folly."¹⁰⁵ Because "[c]hildren, by definition, are not assumed to have the capacity to take care of themselves,"¹⁰⁶ the Court allowed "the juvenile's liberty interest" to "be subordinated to the State's *parens patriae* interest in preserving and promoting the welfare of the child."¹⁰⁷

The Court explained that it has recognized in other contexts that "minority 'is a time and condition of life when a person may be most susceptible to influence and to psychological damage'"¹⁰⁸ and that "juveniles 'often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.'"¹⁰⁹ Indeed, the Court justified extraordinary power to detain young people on the well-recognized understanding "that juveniles in general are in the earlier stages of their emotional growth, that their intellectual development is incomplete, that they have had only limited practical experience, and that their value systems have not yet been clearly identified or firmly adopted."¹¹⁰ *Schall* is an important example of the Court using the limitations of young people as a justification for making it easier to detain them than it is to detain adults.

In *Fare v. Michael C.*,¹¹¹ decided in 1979, state officials argued that a juvenile's attempt to secure greater rights under the Fifth Amendment should be rejected.¹¹² The juvenile argued that his request to speak to his probation officer after receiving *Miranda* warnings¹¹³ should be treated as if he had asked for a lawyer, conceding that he was asking for greater protection under the law than adults enjoy.¹¹⁴ The California Supreme Court held that when juveniles request to speak to "a trusted guardian figure who exercises the authority of the state as *parens patriae* and whose duty it is to implement the protective and rehabilitative powers of the juvenile court,"¹¹⁵ the juvenile's "request for his probation officer [is] the same as a request to see his par-

¹⁰³ In *McKeiver*, by contrast, the Court permitted the state greater leeway to operate the juvenile justice system in light of the state's purpose in prosecuting children. See *McKeiver*, 403 U.S. at 545. *McKeiver* did not, however, like *Schall*, stress the characteristics of children as a justification for weakening their right to liberty.

¹⁰⁴ *Schall*, 467 U.S. at 274.

¹⁰⁵ *Id.* at 265 (quoting *People ex rel. Wayburn v. Schupf*, 350 N.E.2d 906, 909 (N.Y. 1976)).

¹⁰⁶ *Id.* at 265.

¹⁰⁷ *Id.* at 265 (quoting *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)).

¹⁰⁸ *Id.* at 266 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

¹⁰⁹ *Id.* at 266 (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)).

¹¹⁰ *Id.* at 266 n.15 (quoting *Schupf*, 350 N.E.2d at 908-09).

¹¹¹ 442 U.S. 707 (1979).

¹¹² *Id.* at 717-19.

¹¹³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹¹⁴ *Michael C.*, 442 U.S. at 707-08.

¹¹⁵ *Id.* at 713-14 (quoting *In re Michael C.*, 579 P.2d 7, 10 (Cal. 1978)).

ents during interrogation.”¹¹⁶ The Supreme Court disagreed, siding with state officials and holding that juveniles are not entitled to greater rights than adults in the context of complying with *Miranda*.¹¹⁷ Since asking to speak with a probation officer would not have required ceasing questioning had an adult made the request, the Court held nothing different was required for the juvenile.¹¹⁸

These six cases only addressed pre-trial or trial-related issues and exclusively focused on procedural rights.¹¹⁹ But the preeminent quality of these cases is that, with one exception, the only thing the juveniles sought was to secure the same rights enjoyed by adults. They won this argument three times and lost twice. For the entire second period of juvenile justice cases, in other words, the Justices and the litigants focused almost exclusively on whether juveniles deserve equal rights possessed by adults. In the single exception, involving the questioning of juveniles, the Court was asked to give juveniles more procedural rights than adults possess, which it declined to do. Throughout this entire period, no one ever claimed in any Supreme Court case involving juvenile justice that juveniles have a *substantive* right of any kind outside of the death penalty.

Outside of the death penalty, the Court did not decide a single case involving the sentencing of children until *Graham*. Indeed, until *Graham*, the Court never held that juveniles have a constitutional right to something that adults do not also possess. Only two of the six cases involving juvenile justice even raised the subject of juveniles being different from adults. In *Schall*, state officials successfully argued that because juveniles are more influenced by their peers and more impulsive in their proclivity to commit crimes, they are properly subject to preventive detention even when such detention would violate an adult’s rights because juveniles are less likely to restrain their behavior simply because of the risk that they will be punished.¹²⁰ A juvenile’s traits, in other words, were used to deny juveniles adult-like constitutional rights.¹²¹ In *Michael C.*, the Court rejected the juvenile’s claim that he should be accorded greater rights than adults because he was unable to comprehend his rights as well as adults.¹²²

¹¹⁶ *Id.* at 714.

¹¹⁷ *Id.* at 727–28.

¹¹⁸ *See id.*

¹¹⁹ The holding in *Gault* that juveniles have the right to remain silent is, of course, more than just a procedural right. It is an important substantive right protecting a juvenile’s personal integrity and choice not to cooperate with state officials. *See* Martin Guggenheim, *A Paradigm for Determining the Role of Counsel for Children*, 64 *FORDHAM L. REV.* 1399, 1422–23 (1996).

¹²⁰ *Schall v. Martin*, 467 U.S. 253, 265–66 (1984).

¹²¹ *See id.* at 264–66.

¹²² *See Michael C.*, 442 U.S. at 725–29.

(2) *The Ever-Looming Fear of Too Much Success*

All the while, what seemed to remain true above all else was that juvenile justice was a gift, revocable when and if the legislature concluded that the Supreme Court imposed too many protections or restrictions on juvenile courts. In the early days of the constitutional domestication of juvenile court, some worried that Court decisions that interfered too much with the founding vision of juvenile court might encourage legislatures to close juvenile court entirely. Chief Justice Burger's dissenting opinion in *In re Winship* captures this sentiment well:

My hope is that today's decision will not spell the end of a generously conceived program of compassionate treatment intended to mitigate the rigors and trauma of exposing youthful offenders to a traditional criminal court; each step we take turns the clock back to the pre-juvenile-court era. I cannot regard it as a manifestation of progress to transform juvenile courts into criminal courts, which is what we are well on the way to accomplishing. We can only hope the legislative response will not reflect our own by having these courts abolished.¹²³

This threat always remained in the background. Courts throughout the second phase of juvenile justice acted on the understanding that legislatures are free to decide the sentences to which children may be exposed and the court in which to prosecute them. Even more, judges often revealed their fear of pushing legislators too far and influencing them to abandon juvenile justice altogether.¹²⁴ The implicit fear was that courts would be powerless to do anything about a justice system that chose to treat children indiscriminately from adults.

(3) *Super-Predators and Legislative Repudiation*

Treating juveniles as adults is precisely what states began to do throughout the United States beginning in the 1980s. The Court's repudiation of the Progressive claim that due process has no place in juvenile court was only one of several setbacks for Progressives. The juvenile justice system was under another remarkable attack during this second phase. Beginning in the 1980s and accelerating into the 1990s, state legislatures broadly undermined an important feature of Progressive thought. These years were characterized as a time when American politics permitted only one stance

¹²³ *In re Winship*, 397 U.S. 358, 376 (1970) (Burger, C.J., dissenting).

¹²⁴ See, for example, Justice Blackmun's plurality opinion in *McKeiver v. Pennsylvania*, which ended with this sentiment: "If the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence. Perhaps that ultimate disillusionment will come one day, but for the moment we are disinclined to give impetus to it." 403 U.S. 528, 551 (1971).

for crime-related reform—get tough on crime. It led to an astonishing growth in prisons and prison population, and impacted juveniles just as dramatically as adults.¹²⁵

As a result of a new narrative about dangerous youth, and the complete absence of restraint in the political process, children under the age of eighteen became ever more eligible for prosecution as adults and for adult-like punishments. Legislatures, policy-makers, and courts ceased regarding children as mostly different from adults, and instead, for the first time since juvenile court came into being, began regarding children—at least children who committed very serious crimes and older children—as largely similar to adults. In this era, they became known as “super-predators”¹²⁶ and a powerful new idea, “adult time for adult crime,” became widely popular.¹²⁷ Public fear over juvenile arrests for violent juvenile crimes in the 1980s and 1990s, peaking in 1994, led legislatures in nearly every state to broaden juvenile transfer to adult court, by lowering age or offense thresholds, moving away from individual and toward categorical handling, and shifting authority from judges to prosecutors.¹²⁸ The number of juveniles prosecuted in adult court over the last generation has risen by more than 80%, and “[t]he number of juveniles held in adult jails . . . pending trial rose 366% between 1983 and 1998.”¹²⁹

The ease with which juveniles became eligible for criminal court prosecution and sentencing (and, correspondingly, ineligible for juvenile court prosecution and sentencing) betrayed the Progressive vision that juveniles should be processed in a separate system sensitive to the vulnerabilities of youth. The state legislatures broadly repudiated the substantive content of

¹²⁵ As Kim Taylor-Thompson said, “the movement to close the gap between adolescents and adults [with respect to sentencing] is . . . stunning.” Kim Taylor-Thompson, *States of Mind/States of Development*, 14 STAN. L. & POL’Y REV. 143, 148 (2003).

¹²⁶ John Dilulio coined the term “super-predator” as he described remorseless adolescents involved in murder, rape, and drugs. John Dilulio, Jr., *The Coming of the Super-Predators*, 1 WKLY. STANDARD, no. 11, 1995, at 23.

¹²⁷ Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257, 265 (2007) (“‘Adult time for adult crimes’ became the rallying cry for politicians across the country, leading to changes in the law in almost every jurisdiction between 1992 and 1999.”).

¹²⁸ See generally PATRICK GRIFFIN, NAT’L CTR. FOR JUVENILE JUSTICE, DIFFERENT FROM ADULTS: AN UPDATED ANALYSIS OF JUVENILE TRANSFER AND BLENDED SENTENCING LAWS, WITH RECOMMENDATIONS FOR REFORM (2008). For a 1997 state-by-state table of juvenile waiver offense and minimum age criteria, see OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, JUVENILE JUSTICE: A CENTURY OF CHANGE (1999), which found that in most states, no minimum age is specified in at least one judicial waiver, concurrent jurisdiction, or statutory exclusion provision for transferring juveniles to criminal court. As Jeffrey Fagan and Franklin E. Zimring very helpfully explain, the strong trend of prosecuting adolescents in criminal court began in the 1980s. See generally THE CHANGING LEGAL BORDERS OF JUVENILE JUSTICE: TRANSFERS OF ADOLESCENTS TO THE CRIMINAL COURT (Jeffrey Fagan & Franklin E. Zimring, eds., 2000).

¹²⁹ Martin Guggenheim, *Ratify the U.N. Convention on the Rights of the Child, But Don’t Expect Any Miracles*, 20 EMORY INT’L L. REV. 43, 53 (2006) (quoting Richard E. Redding, *The Effects of Adjudicating and Sentencing Juveniles as Adults*, 1 YOUTH VIOLENCE JUV. JUST. 128, 129 (2003)).

juvenile justice by denying an ever-larger percentage of juveniles even the right to be sentenced as juveniles. Without any legal claim that juveniles had a right to be sentenced as juveniles when charged with criminal wrongdoing, the only restraints that could be imposed on legislative choice during this period would have had to come from the legislators themselves. Since this was the very period when legislators had no reason to appear to a constituency as soft on crime, this meant there was practically no restraint exercised at all.

III. CHILDREN'S RIGHTS IN THE SUPREME COURT OUTSIDE OF JUVENILE JUSTICE 1967–2009

Graham is best understood in the context of the history of the children's rights movement outside juvenile justice, which began with *Gault's* rights revolution. *Gault* set off the modern children's rights movement and gave birth to a new generation of children's lawyers who, understandably, pressed for new recognition of children's procedural and substantive rights. *Gault* inspired a new range of possibilities for expanding children's rights at the same time that it created a new field for lawyers: children's rights advocacy. Soon enough, it was certain that there would be a connection between the two. Although many children's lawyers began by representing accused delinquents when states were forced to hire lawyers for this purpose as a result of the Court's ruling in *In re Gault*, many moved on to become children's rights advocates in different substantive fields.

Buoyed by the Supreme Court's new rhetoric, "children's rights" tended to mean one thing above all others: The more adult-like rights children are able to secure, the better. First, the Court explained in 1967 that, "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."¹³⁰ Children, "in school as well as out of school," the Court added in 1969, "are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect."¹³¹ Less than a decade after *In re Gault*, the Court explained that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."¹³²

This rhetoric, combined with the circumstances under which the children's rights movement began, influenced children's lawyers to regard the law as something oppressing children and unfairly denying them adult-like rights.¹³³ Looking back over this period, one thing stands out above all else: Outside of the death penalty, the only case that reached the Supreme Court between 1967 and 2009 in which the claim raised by *the children's advocate*

¹³⁰ *In re Gault*, 387 U.S. 1, 12 (1967).

¹³¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

¹³² *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976).

¹³³ See GUGGENHEIM, *supra* note 6, at 7–9.

was that children have the right to be treated differently than adults was *Fare v. Michael C.*¹³⁴ For better or worse, children's rights advocates of this period stressed that children should be recognized as possessing the same rights as adults. They attempted to remove restrictions on children or to challenge circumstances in which states wished to treat children worse than adults.¹³⁵ The principal claim was that children had the right to be treated at least as well as adults.

Although the Supreme Court decided a large number of cases involving children's rights during this period, this part will discuss only those cases in which children were named parties and which included as a central question whether children should be recognized as possessing a constitutional right that compares to a right recognized for adults.¹³⁶ The cases reviewed here all

¹³⁴ 442 U.S. 707 (1979).

¹³⁵ See *infra* notes 137–223 and accompanying text.

¹³⁶ Thus, equal protection claims in which children claim that they are being impermissibly treated differently from other children are omitted. A large number of cases affecting children decided by the Supreme Court in this era were based on the Equal Protection Clause of the Fourteenth Amendment. These cases considered whether distinguishing among children violated a child's right. See, e.g., *Miller v. Albright*, 523 U.S. 420 (1998) (considering the rights of children born out of wedlock and children born to parents who were married at the time or whose father became their legally recognized parent); *Plyler v. Doe*, 457 U.S. 202 (1982) (considering differential treatment between undocumented immigrant children and documented immigrant and citizen children); *Trimble v. Gordon*, 430 U.S. 762 (1977); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (finding that school-financing system based on local property taxes did not violate the equal protection rights of children who live in poor neighborhoods); *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973) (considering the rights of children born out of wedlock and children born to parents who were married at the time or whose father became their legally recognized parent); *Gomez v. Perez*, 409 U.S. 535 (1973) (same); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972) (same); *Dandridge v. Williams*, 397 U.S. 471 (1970) (considering differential treatment between first ten children born and later born children); *Glonn v. Am. Guarantee & Liab. Ins. Co.*, 391 U.S. 73 (1968) (same); *Levy v. Louisiana*, 391 U.S. 68 (1968) (same); see also *Michael M. v. Super. Ct. of Sonoma Cnty.*, 450 U.S. 464 (1981) (considering a challenge to California law which made it a crime for boys, but not girls, to engage in sex with a female under the age of eighteen). In *Michael M.*, the minor male argued unsuccessfully that the law violated his equal protection rights because California did not punish girls for engaging in the same conduct it made criminal for boys. 450 U.S. at 466. The Court rejected the challenge and upheld the law. Implicit in enacting the law was California's understanding that it had the authority to treat children differently from adults by forbidding children from engaging in sex. The case was litigated on that understanding. The only issue raised was the means by which the statute punished children for engaging in sex. No one even raised the question whether treating children differently from adults was a legitimate choice by the state.

In addition, cases in which the rights being litigated cannot be characterized within the choice of whether to recognize that children have adult-like rights or not, or whether they may be treated differently from adults, are excluded. See, e.g., *Reno v. Flores*, 507 U.S. 292 (1993) (considering a constitutional challenge by undocumented and unaccompanied immigrant minors to their detention by the Attorney General who refused to release them except to their parents, close relatives, or legal guardians). Still other cases impacted children's lives but the cases were brought by parents or persons who wished to be recognized as parents and were expressly decided in the language of parental, not children's rights. See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972). In one case, *Smith v. Organization of Foster Families For Equality & Reform*, 431

involved claims that children themselves were being denied constitutional rights that the Constitution provides to adults or that children are entitled to a constitutional right that even adults lack.

As we shall see, the claim in every case was always the same. Minors' advocates complained their clients were treated as children; state officials defended their choice to treat minors differently from adults. These matters became lawsuits only because minors regarded their treatment as unfair. On one side, state officials defended their right to treat children differently from adults. On the other, minors' advocates challenged state action as a form of unfair discrimination. Rather than discussing these cases chronologically, they will be divided by category.

A. *First Amendment Rights*

(1) *In School*

In the post-*Gault* era, the Court has decided many cases involving students' rights in public school, most of them concentrated on secondary education.¹³⁷ Because, unlike adults, only children are compelled to attend school in the first place, these disputes necessarily arose in the context of unequal treatment between children and adults. Nonetheless, in all of the school cases decided by the Court, the significant characteristic for purposes of this Article is that the lines of arguments were always the same. The students sought to secure as many adult-like rights as feasible under the circumstances. School officials invariably defended their authority to treat children in ways that the Constitution would forbid for adults.

A major category of school cases involved speech rights of students, a subject that first reached the Court in 1969. In *Tinker v. Des Moines Independent Community School District*,¹³⁸ school officials argued that they should be given wide discretion to take reasonable actions to maintain disci-

U.S. 816 (1977), plaintiff foster children raised a claim that they had a constitutional right to be recognized as securing a liberty interest as members of their foster home. But their foster parents claimed the identical right as well. For this reason, this case does not fall into a category where children have either more or different rights than adults have. They simply sought a newly recognized right that, if the Court had so recognized, would have resulted in a reciprocal right possessed by both the child and parent. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), neither side of the dispute took issue with the fundamental state choice of treating children differently from adults. The state argued that it has the appropriate power to compel children to secure an education under circumstances that could not be applied to adults. The children did not disagree. The dispute was only over whether certain exceptions to the general rule, conceded by all, ought to apply.

¹³⁷ One case, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), involved both secondary and primary school-aged children: "One defying pupil was Paul Tinker, 8 years old, who was in the second grade; another, Hope Tinker, was 11 years old and in the fifth grade; a third member of the Tinker family was 13, in the eighth grade; and a fourth member of the same family was John Tinker, 15 years old, an 11th grade high school pupil." *Id.* at 516 (Black, J., dissenting).

¹³⁸ *Id.* at 503.

pline at school, even if that meant officials may punish students for acts that would be constitutionally protected outside of school.¹³⁹ *Tinker* proclaimed that students in public schools do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”¹⁴⁰ and that they cannot be punished merely for expressing their personal views on the school premises—whether “in the cafeteria, or on the playing field, or on the campus during the authorized hours,”¹⁴¹ unless school authorities have reason to believe that such expression will “substantially interfere with the work of the school or impinge upon the rights of other students.”¹⁴²

Despite the promising holding in *Tinker*, no Supreme Court case since then has held restrictions on student speech rights unconstitutional. In 1982, in *Board of Education v. Pico*,¹⁴³ the Court recognized the authority of school officials not to include in their libraries vulgar but not obscene material over a contrary claim by students that such materials should be made available to those students who want them.¹⁴⁴ In 1986, in *Bethel School District No. 403 v. Fraser*,¹⁴⁵ school officials successfully defended their authority to restrict the speech of schoolchildren and punish students for speech that would inarguably be permissible for adults on the reasoning that student speakers may be taught proper manners,¹⁴⁶ student listeners have a right to be protected from words and ideas that are age inappropriate, and schools may restrict speech that undermines the school’s educational mission.¹⁴⁷

Two years later, in *Hazelwood v. Kuhlmeier*,¹⁴⁸ school officials won the right to censor student speech under conditions that would be impermissible if the speakers or audience had been adults.¹⁴⁹ The students complained that

¹³⁹ *Id.* at 508.

¹⁴⁰ *Id.* at 506.

¹⁴¹ *Id.* at 512–13.

¹⁴² *Id.* at 509.

¹⁴³ 457 U.S. 853 (1982).

¹⁴⁴ *Id.* at 871–72.

¹⁴⁵ 478 U.S. 675 (1986).

¹⁴⁶ *Id.* at 681 (“The role and purpose of the American public school system were well described by two historians, who stated: ‘[P]ublic education must prepare pupils for citizenship in the Republic It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.’”) (citations omitted).

¹⁴⁷ *Id.* at 683 (“The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality.”). The Court explained that the First Amendment rights of students in the public schools “are not automatically coextensive with the rights of adults in other settings,” but will instead be “applied in light of the special characteristics of the school environment.” *Id.* at 682 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)). It permitted school officials the authority to discipline a student for delivering a “sexually explicit” but not obscene speech at a school assembly, explaining that “[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.” *Id.* at 683.

¹⁴⁸ 484 U.S. 260 (1988).

¹⁴⁹ *See id.* at 273. The *Hazelwood* petitioners stated in their brief:

the school principal violated their First Amendment rights by removing several pages of the newspaper without allowing any input from the editors. The Court held “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”¹⁵⁰

Most recently, in *Morse v. Frederick*,¹⁵¹ the Court allowed a high school principal to punish a student for refusing to take down a sign that the principal reasonably interpreted to have advocated drug use.¹⁵² The student argued that he had an adult-like right to express his views when he was not disrupting a school event or expressing a message that could be construed as coming from the school itself.¹⁵³ The Court ruled the principal acted lawfully by punishing the student for advocating illegal drug use in violation of established school policy.¹⁵⁴

(2) *Out of School*

The Court decided a number of important cases involving children and the First Amendment between 1967 and 2009. The first such case was the 1968 decision in *Ginsberg v. New York*.¹⁵⁵ *Ginsberg* addressed the constitutionality of a New York statute prohibiting the sale to minors of materials that could not be barred to adults.¹⁵⁶ The state argued that it was permissible to protect children from the harm that may occur were they permitted access to such material.¹⁵⁷ The children countered that they were entitled to read whatever materials concerning sex that adults may read.¹⁵⁸ Recognizing that “the State has an interest ‘to protect the welfare of children’ and to see that they are ‘safeguarded from abuses’ which might prevent their ‘growth into free and independent well-developed men and citizens,’”¹⁵⁹ the Court upheld the statute. In so doing, the Court explained that “[t]he State . . . has an

The constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings. The Court has acknowledged the importance of public schools in the preparation of individuals for participation as citizens, and as a means of inculcating fundamental values necessary to the maintenance of a democratic political system. [L]ocal school boards must be permitted to establish and apply their curriculum in such a way as to transmit community values, and . . . there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.

Brief for Petitioners at 2728, *Hazelwood*, 484 U.S. 260 (No. 86-836), 1987 WL 864172 (citations omitted) (internal quotation marks omitted).

¹⁵⁰ *Hazelwood*, 484 U.S. at 273.

¹⁵¹ 551 U.S. 393, 397 (2007).

¹⁵² *Id.* at 410.

¹⁵³ Brief for Respondent at 7–10, *Morse*, 551 U.S. 393 (No. 06-278), 2007 WL 579230.

¹⁵⁴ *Morse*, 551 U.S. at 410–11.

¹⁵⁵ 390 U.S. 629 (1968).

¹⁵⁶ *Id.* at 634.

¹⁵⁷ *Id.* at 639–40.

¹⁵⁸ *Id.* at 636.

¹⁵⁹ *Id.* at 640–41 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944)).

independent interest in the well-being of its youth”¹⁶⁰ and that “[t]he well-being of its children is of course a subject within the State’s constitutional power to regulate.”¹⁶¹

This principle—that sexually explicit non-pornographic material may, consistent with the Constitution, be restricted for children simply because it is rational for legislators to conclude that such material is harmful to minors—set the stage for a number of legal challenges decided by the Court over the ensuing decades. In every case, both sides acknowledged that children have lesser rights than adults, at least with regard to sexually explicit material, and the argument was whether the restrictions went too far. In *FCC v. Pacifica Foundation*,¹⁶² federal officials argued that they could regulate the content of public airways in order to censor speech that would otherwise be constitutionally protected from reaching the ears of children.¹⁶³ Recognizing the state’s legitimate “interest in protecting minors from exposure to vulgar and offensive spoken language,”¹⁶⁴ the Court upheld an FCC restriction on radio broadcasting of certain language during the hours children are most likely to be listening. A series of other cases followed, either with the Court holding the federal regulation to be overly restrictive or acceptably narrow.¹⁶⁵

In a case that is difficult to place in any category, *City of Dallas v. Stanglin*,¹⁶⁶ local officials defended an ordinance that restricted admission to

¹⁶⁰ *Id.* at 640.

¹⁶¹ *Id.* at 639. In his concurrence, Justice Stewart’s explanation for the rule that children have fewer First Amendment rights than adults, which has been widely repeated by the Court ever since, is that “at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.” *Id.* at 649–50 (Stewart, J., concurring).

¹⁶² 438 U.S. 726 (1978).

¹⁶³ *Id.* at 749–50 (permitting regulation of radio broadcast during hours most likely to include children in the audience to prohibit “indecent but not obscene” material).

¹⁶⁴ *Id.*

¹⁶⁵ See, e.g., *United States v. Am. Library Ass’n*, 539 U.S. 194 (2003) (holding that the Children’s Internet Protection Act (CIPA), which required public libraries to use Internet filters as condition for receipt of federal subsidies, did not violate First Amendment); *Ashcroft v. ACLU*, 535 U.S. 564 (2002) (finding that the Child Online Protection Act likely violated First Amendment by burdening adults’ access to some protected speech); *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803 (2000) (holding that the Telecommunications Act’s “signal bleed” provision, requiring cable operators either to scramble sexually explicit channels in full or limit programming on such channels to certain hours, was unconstitutional because of absence of showing by government that provision was least restrictive means of achieving goal of preventing children from hearing or seeing images resulting from “signal bleed”); *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996) (finding that both the FCC “segregate and block” provision with respect to leased access channels, and the provision permitting operator to prohibit patently offensive or indecent programming on public access channels violated the First Amendment); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994); *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975).

¹⁶⁶ 490 U.S. 19 (1989).

certain dance halls to persons between the ages of fourteen and eighteen.¹⁶⁷ Challengers to the ordinance argued that the law violated the First Amendment right of children between the ages of fourteen and eighteen to associate with adults.¹⁶⁸ The Court upheld the law, explaining that it was reasonable for local officials to be concerned “that teenagers might be susceptible to corrupting influences if permitted, unaccompanied by their parents, to frequent a dance hall with older persons” and “that limiting dance-hall contacts between juveniles and adults would make less likely illicit or undesirable juvenile involvement with alcohol, illegal drugs, and promiscuous sex.”¹⁶⁹

In all of these cases involving children’s First Amendment rights outside of school, state officials defended their authority to treat children differently than the Constitution would permit had the challenged law involved adults. At the same time, in every case, minors, or those advocating on their behalf, took the position that it was impermissible to deny children some measure of a constitutional right held by adults.

B. School Cases Involving the Fourth Amendment

In 1985, in *New Jersey v. T.L.O.*,¹⁷⁰ state officials claimed the power to search students under circumstances that admittedly would violate the Fourth Amendment if applied to adults.¹⁷¹ Siding with school officials, but in an opinion that also formally held that students are protected against unreasonable searches and seizures, the Court permitted teachers and principals to search students even for violations of school rules.¹⁷²

Twenty years later, in *Vernonia School District v. Acton*,¹⁷³ the Court was asked by school officials to allow them to search student athletes for drug use under conditions that would plainly be unconstitutional if conducted on adults.¹⁷⁴ The Court emphasized that “[t]raditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will”¹⁷⁵ and “that the nature of that power” exercised by school officials over children “is custodial and tutelary, permitting a degree of supervision and control that could not be

¹⁶⁷ *Id.* at 20.

¹⁶⁸ *Id.* at 24.

¹⁶⁹ *Id.* at 27. The Court held that the ordinance did not implicate any expressive associational rights and, as a result, did not implicate the First Amendment. *Id.* at 24–25.

¹⁷⁰ 469 U.S. 325 (1985).

¹⁷¹ *See id.* at 332.

¹⁷² *See id.* at 345. The Court held that in order for a search to be reasonable, it must be “justified at its inception” (allowing more searches than would be permissible if adults were being searched), and justified “in its scope . . . and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.” *Id.* at 341–42.

¹⁷³ 515 U.S. 646 (1995).

¹⁷⁴ *See id.* at 649–51.

¹⁷⁵ *Id.* at 654.

exercised over free adults.”¹⁷⁶ Based on these fundamental differences between minors and adults, the Court granted school officials the power to test randomly student athletes for drug use as a condition to allowing students to participate in sports.¹⁷⁷ Seven years later, in *Board of Education v. Earls*,¹⁷⁸ the Court upheld a school requirement that all children who participate in any extra-curricular activity make themselves available for random drug testing, despite the absence of drug problems in the school.¹⁷⁹

Most recently, a thirteen-year-old student sued school officials for violating her privacy rights by conducting an unreasonable strip search. In 2009, in *Safford Unified School District v. Redding*,¹⁸⁰ school officials had reason to believe that the student was in possession of over-the-counter drugs that were barred on school premises.¹⁸¹ A school nurse and an administrative assistant “directed [the student] to remove her clothes down to her underwear, and then ‘pull out’ her bra and the elastic band on her underpants,” which “necessarily exposed her breasts and pelvic area to some degree.”¹⁸² Applying the rule from *T.L.O.* that the reasonableness of a search is to be judged “in light of the age and sex of the student and the nature of the infraction,”¹⁸³ the Court held that the search violated the student’s privacy rights.¹⁸⁴ The Court also found, however, that the rule was not clearly established at the time the search was conducted and, as a result, the Court held that the school officials had qualified immunity from liability.¹⁸⁵

¹⁷⁶ *Id.* at 655.

¹⁷⁷ *Id.* at 664–65. The Court emphasized the particular need for school officials to protect children from their own mistakes involving drug use. “School years are the time when the physical, psychological, and addictive effects of drugs are most severe,” because “[m]aturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound”; “children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor.” *Id.* at 661 (quoting Richard A. Hawley, *The Bumpy Road to Drug-Free Schools*, 72 PHI DELTA KAPPAN 310, 314 (1990)).

¹⁷⁸ 536 U.S. 822 (2002).

¹⁷⁹ *Id.* at 837–38. The children claimed the search violated their adult-like privacy rights and was therefore forbidden by the Fourth Amendment. Rejecting this claim, the Court explained, “[a] student’s privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety.” *Id.* at 830. In addition, Justice Thomas wrote for the Court that “the need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy.” *Id.* at 836.

¹⁸⁰ 129 S. Ct. 2633 (2009).

¹⁸¹ *See id.* at 2639–40.

¹⁸² *Id.* at 2641.

¹⁸³ *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985).

¹⁸⁴ *Safford*, 129 S. Ct. at 2643. Some readers might argue that both *T.L.O.* and *Safford* should count as examples of the Court creating rules sensitive to the needs of children because both cases held that the reasonableness of a search must be evaluated in light of a child’s age. But this misses the larger significance of these cases. Both allow searches of children that would violate the Constitution if conducted on adults. Only after ruling that children lack the Fourth Amendment rights that adults possess, the Court modestly modified the impact of the ruling by requiring that the reasonableness of the search be assessed in light of the child’s age. The more reasonable classification of these cases, therefore, is to count them as examples of children having lesser rights than adults.

¹⁸⁵ *Id.* at 2643–44.

In all of the Fourth Amendment cases, children's advocates objected to greater encroachments on student privacy than the Constitution would tolerate for adults. School officials defended their greater authority to take action over a student's objection on the ground that the state's interest in students justifies finding a diminished privacy right for students as compared with adults. These cases helped prime the Court to think of students' rights as being primarily, or exclusively, about securing adult-like rights.

C. Fourteenth Amendment Due Process Cases

There have been remarkably few due process claims involving children's rights to reach the Supreme Court during this era. Perhaps the best known is *Goss v. Lopez*, decided in 1975.¹⁸⁶ In that case, school officials argued that students were not entitled to the level of due process protection that adults would enjoy under the Constitution.¹⁸⁷ Students in Columbus, Ohio were suspended from school for up to ten days without being given the opportunity for a hearing to challenge the propriety of the suspension.¹⁸⁸ The students contended that they enjoyed a constitutionally protected adult-like right to notice and an opportunity to be heard before being subjected to the suspension.¹⁸⁹ The Court agreed that the Constitution affords students the adult-like right to an opportunity to be heard before they are suspended from school.¹⁹⁰

Two years later, in *Ingraham v. Wright*,¹⁹¹ junior high school students complained that Dade County's practice of corporally punishing students by "paddling the recalcitrant student on the buttocks with a flat wooden paddle measuring less than two feet long, three to four inches wide, and about one-half inch thick," commonly "limited to one to five 'licks' or blows with the paddle" violated the students' constitutional rights.¹⁹² The students claimed that the paddling violated their Eighth Amendment right and, because these punishments were invariably inflicted without first providing the students an opportunity to be heard, they also were imposed in violation of the Fourteenth Amendment.¹⁹³

The Court rejected both claims. Reasoning that "[t]he schoolchild has little need for the protection of the Eighth Amendment," the Court held that the Eighth Amendment is inapplicable when public school teachers impose disciplinary corporal punishment on students.¹⁹⁴ Even more, the Court held that because students have legal remedies to sue teachers who impose exces-

¹⁸⁶ 419 U.S. 565 (1975).

¹⁸⁷ *See id.* at 567.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 568-69.

¹⁹⁰ *Id.* at 584.

¹⁹¹ 430 U.S. 651 (1977).

¹⁹² *Id.* at 656.

¹⁹³ *Id.* at 653.

¹⁹⁴ *Id.* at 670-71.

sive punishment on them, “the Fourteenth Amendment’s requirement of procedural due process is satisfied by Florida’s preservation of common-law constraints and remedies.”¹⁹⁵

In *Parham v. J.R.*,¹⁹⁶ a 1979 decision, state officials argued that they were constitutionally allowed to place children in a mental health institution with fewer due process protections than would be permissible for adults.¹⁹⁷ Under the Georgia statute in question, children could be admitted to state mental hospitals as “voluntary” patients when placed there by their parents.¹⁹⁸ The children not only argued that they had independent rights from their parents, but, more forcefully, that they had a liberty interest against wrongful confinement in a mental institution.¹⁹⁹ Siding with the state, the Court explained that “[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment.”²⁰⁰ Accordingly, it upheld the state’s choice to grant parents the power to place their children in mental institutions without affording them the kind of judicial hearing adults have the right to receive, reasoning that “[s]imply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state.”²⁰¹ Parents, the Court went on to explain, have extraordinary power to make decisions regarding children because “parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life’s difficult decisions.”²⁰²

D. Unenumerated Rights Cases

Once the Supreme Court famously ruled in 1973, in *Roe v. Wade*,²⁰³ that pregnant women have the right to terminate an unwanted pregnancy, the question of whether pregnant minors would be afforded the same right to privacy that adult women possess was certain to arise. That question first

¹⁹⁵ *Id.* at 683.

¹⁹⁶ 442 U.S. 584 (1979).

¹⁹⁷ *Id.* at 605.

¹⁹⁸ The law also allowed caseworkers to place foster children in state hospitals as “voluntary” patients. *Id.* at 590–91. The claim that foster children ought to be protected from being shunted to a state mental hospital seemed to have gotten lost in Chief Justice Burger’s opinion which stressed, in dramatic language, “Western civilization concepts” that parents presumptively make good decisions for their children despite there being no such history regarding caseworkers’ decision making on behalf of state wards. *Id.* at 602; *see also id.* at 637 (Brennan, J., dissenting) (“The Court dismisses a challenge to this practice on the grounds that state social workers are obliged by statute to act in the children’s best interest I find this reasoning particularly unpersuasive. With equal logic, it could be argued that criminal trials are unnecessary since prosecutors are not supposed to prosecute innocent persons.”).

¹⁹⁹ Brief for Appellees at 18–19, *Parham*, 442 U.S. 584 (No. 75-1690), 1977 WL 189788.

²⁰⁰ *Parham*, 442 U.S. at 603.

²⁰¹ *Id.*

²⁰² *Id.* at 602.

²⁰³ 410 U.S. 113 (1973).

came before the Court in 1976 in *Planned Parenthood of Central Missouri v. Danforth*.²⁰⁴ The issue raised in this case was the thoroughly familiar question of whether minors possess adult rights. Even the lineup of the antagonists was, once again, identical: State officials insisted that it was permissible to give children fewer rights than adults have; minors' advocates claimed that children deserve adult rights. In *Danforth*, pregnant minors challenged a Missouri law that required pregnant minors to secure written parental consent before terminating their pregnancy.²⁰⁵ Pronouncing that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority,"²⁰⁶ the Supreme Court held the law unconstitutional because it impermissibly delegated a possibly arbitrary veto to parents.²⁰⁷

For three years, this remarkable decision seemed to stand for the rule that pregnant minors had the adult-like right to terminate an unwanted pregnancy.²⁰⁸ In 1979, however, the Court sharply retreated from any such suggestion in *Bellotti v. Baird*.²⁰⁹ In *Bellotti*, Massachusetts officials defended a law requiring minors to petition a court for permission to terminate their pregnancy unless such consent is first given by the parent.²¹⁰ Massachusetts argued that children lack the maturity and experience adults have to be entitled to the constitutional right to decide for themselves whether to terminate an unwanted pregnancy, and further claimed that the state's interest in a child's well-being justified Massachusetts creating a process by which judges can oversee a child's decision to terminate a pregnancy when the child chooses not to seek permission from her parents.²¹¹ The children countered that they should be recognized as possessing the right to terminate an unwanted pregnancy whenever an adult has the right to do so.²¹² Stressing that children commonly lack the "ability to make critical decisions in an informed, mature manner"²¹³ and that "immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences,"²¹⁴ the Court ruled that so-called judicial bypass statutes requiring judicial oversight of children's abortions are permissible.²¹⁵ The Court held that it is permissible to require a minor to prove to a judge's satisfaction that she is sufficiently mature to decide for herself to terminate

²⁰⁴ 428 U.S. 52 (1976).

²⁰⁵ *Id.* at 72.

²⁰⁶ *Id.* at 74.

²⁰⁷ *Id.*

²⁰⁸ See Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589, 607 (2002) (noting that *Danforth* "unquestionably appeared at the time to signal a new era of constitutional rights for young people").

²⁰⁹ 443 U.S. 622 (1979).

²¹⁰ *Id.* at 625.

²¹¹ *Id.* at 625–26.

²¹² See *id.* at 640.

²¹³ *Id.* at 634.

²¹⁴ *Id.* at 639.

²¹⁵ *Id.* at 650.

her pregnancy or, if she is unable to make that showing, to authorize the judge to permit the abortion provided the judge concludes that doing so would be in the minor's best interests.²¹⁶

Outside of the abortion context, the Court decided one case addressing the constitutionality of restricting the distribution of contraceptives to children. In *Carey v. Populations Services International*,²¹⁷ New York defended a statute that prohibited distributing contraceptives to minors.²¹⁸ In contrast, the plaintiffs argued that children as well as adults have privacy rights to purchase and use contraception.²¹⁹ A majority held the law unconstitutional, but the Court was unable to agree on the reason.²²⁰ Justice Powell's concurring opinion argued that the statute was overbroad, as it applied to married minors²²¹ and forbade parents from distributing contraception to their own children.²²² But Justice Powell also expressed his view that it is well-settled "that the States have broad latitude to legislate with respect to adolescents."²²³ Justice Stevens regarded the statute as irrational and an impermis-

²¹⁶ Altogether, the Court decided seven cases involving restrictions on a minor's ability to secure an abortion after the *Bellotti* decision in 1979. See *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320 (2006); *Lambert v. Wicklund*, 520 U.S. 292 (1997); *Ohio v. Akron Ctr. for Reprod. Health, Inc.*, 497 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Planned Parenthood Ass'n of Kansas City, Mo. v. Ashcroft*, 462 U.S. 476 (1983); *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983); *H. L. v. Matheson*, 450 U.S. 398 (1981). But all of those cases concerned efforts to modify the rule established in *Bellotti*. All, in other words, were litigated within the agreed-upon framework that children had lesser rights than adults to terminate an unwanted pregnancy and addressed whether a particular change in the judicial bypass scheme *Bellotti* created was itself permissible. Sometimes, children's advocates went very far in arguing that pregnant minors are sufficiently adult-like to deserve the adult right to terminate a pregnancy. In *Hodgson v. Minnesota*, 497 U.S. 417 (1990), for example, the American Psychological Association ("APA") submitted an amicus curiae brief showing that minors have sufficient adult-like capabilities to make important decisions about their own lives. This led Justice Scalia to criticize the APA in a later case for "tak[ing] precisely the opposite position before this very Court" in opposing the death penalty for children on grounds that they are less responsible and less morally culpable than adults for their criminal wrongdoing. *Roper v. Simmons*, 543 U.S. 551, 617–18 (2005) (Scalia, J., dissenting); see also Laurence Steinberg et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "FlipFlop"*, 64 AM. PSYCHOLOGIST 583, 583–85 (2009) (discussing the apparent contradiction).

²¹⁷ 431 U.S. 678 (1977).

²¹⁸ *Id.* at 681.

²¹⁹ *Id.* at 696 n.17.

²²⁰ *Id.* at 681.

²²¹ *Id.* at 707–08 (Powell, J., concurring).

²²² *Id.* at 708.

²²³ *Id.* at 705 ("The principle is well settled that 'a State may permissibly determine that, at least in some precisely delineated areas, a child . . . is not possessed of that full capacity for individual choice' which is essential to the exercise of various constitutionally protected interests." (quoting *Ginsberg v. New York*, 390 U.S. 629, 649–50 (1968) (Stewart, J., concurring))). Justice Powell also reminded readers of the well-worn recognition "that 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'" *Id.* (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).

sible form of propaganda.²²⁴ But he derided the idea that children have adult-like rights to engage in sex.²²⁵

E. Summary

The preceding sections briefly examined all of the cases, outside of the death penalty, that reached the Supreme Court between 1967 and 2009 and required the Court to decide whether or not persons under eighteen have a constitutional right already secured by adults or ought to have a greater constitutional right than adults. At first blush, it would appear challenging to reconcile all of these cases or to find an organizing theme for them. But this is true only if one counts how often the state won and how often the children won. The results are decidedly mixed; even if state officials prevailed more often than minors, minors won often enough to make it impossible to suggest they do not possess any rights.

There is, nonetheless, an obvious pattern to these cases. In none of the cases did the Court reject a legislative judgment to treat children like adults. It is true that the Court commonly permitted states to treat children differently than they would be allowed to treat adults and, less frequently, struck down state efforts to treat children differently from adults. But never did the Court *require* that states treat children differently from adults; nor did it ever strike down a law or practice advanced by the state that treated children indistinguishably from adults on the ground that children have the right to be treated differently.²²⁶ Whenever the Court held that minors could be treated the same as adults, it was siding with the minors or the state. Whenever it held that minors could be treated differently from adults, it sided with the state. But it never ruled that minors should be treated differently from adults by siding with the minors.

In addition, there is an important symmetry to the posture of these various cases. The claim in every case but one was always the same.²²⁷ Minors' advocates complained that minors were treated as children; state officials defended their choice to treat minors differently from adults. These matters became lawsuits only because minors regarded their treatment as unfair. On one side, state officials defended their right to treat children differently from adults. On the other, minors' advocates challenged state action as a form of unfair discrimination.

²²⁴ *Id.* at 715 (Stevens, J., concurring).

²²⁵ *Id.* at 713 ("Indeed, I would describe as 'frivolous' appellees' argument that a minor has the constitutional right to put contraceptives to their intended use, notwithstanding the combined objection of both parents and the State.").

²²⁶ In Emily Buss's words, "[t]he relevance of children's special vulnerabilities to the scope of children's rights has also been only thinly analyzed in the Court's decisions." Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 *HOFSTRA L. REV.* 13, 28 (2009).

²²⁷ The one exception is *Fare v. Michael C.*, 442 U.S. 707 (1979), in which a juvenile unsuccessfully sought greater rights than adults possess when interrogated by the police.

This is the remarkable upshot of the post-*Gault* era through 2010. *Graham* represents a dramatic departure from this pattern. It would not be fair to blame the Supreme Court for thinking that “children’s rights” litigation is mostly, and above all else, about children trying to secure adult-like rights. Children’s advocates must share some blame for this way of thinking because they stressed this quality of children’s rights so single-mindedly. Nonetheless, *Graham* is the first case ever to side with minors in their claim that they have a right to be treated as children even when the state does not agree.

IV. JUVENILE JUSTICE 2010 AND BEYOND—A NEW ERA

The American juvenile justice system has been transformed over the past forty-five years. With a powerful push by the Supreme Court, almost all Americans have thoroughly rejected the Progressives’ vision of a juvenile court process lacking carefully circumscribed procedures. Nor do Americans any longer take seriously the Progressive ideal that the juvenile justice system does not punish young offenders, least of all that the amount of punishment ought to have nothing to do with what the young person did. These remarkable changes even led children’s rights advocates to a simple solution: Abolish the court, merge it with the criminal court, and end the experiment.²²⁸ Although abolishing the juvenile court was never seriously considered by any state, the very suggestion may have had an influence on legislators. Rather than abandon juvenile court, legislatures in many states drastically changed the rules in the decades after *In re Gault*, no longer requiring any kind of presumption that cases be brought in juvenile court and even taking away entirely from judges the authority to decide where juveniles should be prosecuted, giving this power to prosecutors instead.²²⁹

But the Progressives also based their vision on an independent premise, which has been neglected for almost the entire time since *In re Gault*: Children are less culpable than adults and therefore deserve to be treated better than adults who commit the same crimes. More precisely, this idea was largely relegated to the beliefs of liberals that legislatures are free to embrace or reject at will. Few took seriously that children have any kind of “right” to be treated as children when the state is prosecuting them for crimes; in its place was the view that the great juvenile justice experiment was a legislative gift that could be taken away at will.

²²⁸ See, e.g., Katherine Hunt Federle, *The Abolition of Juvenile Court: A Proposal for the Preservation of Children’s Legal Rights*, 16 J. CONTEMP. L. 23 (1990); Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991).

²²⁹ See Franklin E. Zimring, *The Power Politics of Juvenile Court Transfer: A Mildly Revisionist History of the 1990s*, 71 LA. L. REV. 1, 10 (2010) (arguing that this transfer of power has been a leading characteristic of juvenile justice reform over the past twenty-five years).

It is hardly surprising, given the record of litigating children's claims between 1967 and 2010, that the argument for children having rights to be treated better than adults was relegated to a quaint turn-of-the-(twentieth)-century idea. *In re Gault* and its progeny moved everyone's focus away from the old-fashioned idea that children have a right to be treated *better* or, at least, *not as harshly*, as adults.

Prior to 2010, the Court had not articulated this idea since 1962. Before *In re Gault*, the two leading children's rights cases involving criminal justice were decided in 1948 and 1962. In *Haley v. Ohio*,²³⁰ the Court barred the use of a child's confession that was obtained under circumstances that would not have violated the Constitution if the suspect had been an adult.²³¹ In 1962, the Court did the same thing in *Gallegos v. Colorado*.²³² The next time the Court held that the Constitution was violated not because a child was *denied* something an adult possessed, but because a child is *entitled* to something an adult is not, was forty-nine years later in *Graham*. Lest anyone doubt the significance of *Graham*, consider this: In the very next Term, the Court did it again, this time in the context of juvenile confessions by adapting the previously rigid one-size-fits-all *Miranda* rule to children.

In *J.D.B. v. North Carolina*,²³³ the Court held that a judicial determination of whether a minor suspect is in "custody" for purposes of *Miranda v. Arizona*²³⁴ must take into account the age of the suspect and accordingly cannot hold juveniles to the same standard as adults.²³⁵ As Randy Hertz and I recently wrote, "it is evident that *J.D.B.* marks a return to special protections for youth that characterized the Court's confession suppression case law more than half a century ago."²³⁶ Justice Sotomayor's opinion for the Court in *J.D.B.* drew directly on *Graham* in underscoring the special vulnerabilities of juveniles as compared with adults.²³⁷ She was even able to move past the need to prove that juveniles are materially different from adults in matters impacting on criminal justice interventions in the way that Justice Kennedy felt the need to do in *Roper* and *Graham*²³⁸ by reducing the point to

²³⁰ 332 U.S. 596 (1948).

²³¹ *Id.* at 600–01.

²³² 370 U.S. 49 (1962).

²³³ 131 S. Ct. 2394 (2011).

²³⁴ 384 U.S. 436 (1966).

²³⁵ See *J.D.B.*, 131 S. Ct. at 2402–08.

²³⁶ Martin Guggenheim & Randy Hertz, *J.D.B. and the Maturing of Juvenile Confession Suppression Law*, 38 WASH. U. J.L. & POL'Y 109, 109 (2012).

²³⁷ See *J.D.B.*, 131 S. Ct. at 2403. The Court noted that it had "observed that children generally are less mature and responsible than adults; that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; that they are more vulnerable or susceptible to . . . outside pressures than adults; and so on." *Id.* (citations omitted) (internal quotation marks omitted). It relied on *Graham* to determine that there was "no reason to reconsider these observations about the common nature of juveniles." *Id.* (citing *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010)).

²³⁸ See *Roper v. Simmons*, 543 U.S. 551, 572–75 (2005); *Graham*, 130 S. Ct. at 2026–27.

“commonsense.”²³⁹ Even more, *J.D.B.* was a 5-4 decision; Justice Kennedy’s was the key vote needed for the majority.

This forty-nine-year gap between decisions in which children won because the Court held that children must be accorded greater rights than adults should constitute only the beginning of a new jurisprudence for children. *J.D.B.* constitutes a major breakthrough in the law of *Miranda*. Despite a strong consensus, developed over many years, that the requirements of *Miranda* only ought to apply when a suspect can be said objectively to be in custody, the Court concluded that it would be wrong not to require a different set of rules for young people because it is “commonsense” that young people are materially different from adults.²⁴⁰

J.D.B. shows how *Graham*’s premise that children are different has already begun to influence the Court in other areas, and consequently it is important to begin thinking about the other ways advocates can use *Graham*. The remainder of this Article gives one important example.

A. Applying *Graham* to Mandatory Sentences Less Than Life in Prison

Graham does not immediately undermine the broad notion that legislatures get to set the sentences for convicted persons, subject only to the (limited) constraints of the Eighth Amendment. Despite the importance of the decision, *Graham* does not change the fundamental reality that the differences between lengths of sentences imposed on juveniles will rarely, if ever, violate the Eighth Amendment. Legislatures remain broadly free after *Graham* to sentence children to terms in prison that are considerably longer than what was commonly imposed a generation ago and the *length* of a child’s sentence will continue to be limited by the constraints of the Eighth Amendment.²⁴¹ What is impermissible after *Graham*, however, is a legislature’s choice to impose an automatic sentence on children that is the same sentence it imposes on adults for the same crime.

Graham suggests for the first time that treating children differently from adults, even when it comes to sentences well below the most severe, is not simply something states may choose; rather, it is something to which children have a right. Even if the juvenile justice system were abolished,

²³⁹ *J.D.B.*, 131 S. Ct. at 2403 n.5 (“Although citation to social science and cognitive science authorities is unnecessary to establish these commonsense propositions, the literature confirms what experience bears out. . . . [D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds” (citation omitted) (internal quotation marks omitted)).

²⁴⁰ *J.D.B.*, 131 S. Ct. at 2403.

²⁴¹ Eighth Amendment jurisprudence is likely to fail with regard to sentences less than life in prison because neither prong of the test is easily met. Very long sentences (30–60 years, for example) are neither unusual in the sense that very few states make them available to juveniles nor cruel in the sense of being provably disproportionate to the crime because courts have no measure of calibrating what is appropriate. For these reasons, there is not likely to be much room under Eighth Amendment jurisprudence to rely on *Graham* to challenge lesser sentences for juveniles.

Graham suggests that juveniles have a substantive constitutional right to be treated differently from adults when they are sentenced for their misbehavior. Accordingly, I argue that after *Graham* children may not *automatically* be sentenced to terms of imprisonment established by legislatures as mandatory for adults.

I do not argue here that children have any kind of right to be prosecuted in juvenile court²⁴² or that fixed sentences established in juvenile court violate the Constitution. Nor do I go as far as Neelum Arya and suggest that *Graham* stands for the notion that juveniles have a constitutional right to rehabilitation.²⁴³ The argument developed here instead challenges the perceived wisdom that, outside of extreme punishments that raise Eighth Amendment claims, states are free to punish all offenders—juvenile and adult—as they see fit. This general understanding is well captured in an opinion for the Court in 1980 written by then-Justice Rehnquist, who explained that line-drawing for sentences is unavoidably “‘subjective’ and, therefore, properly within the province of legislatures, not courts.”²⁴⁴ Justice Kennedy similarly explained in his concurring opinion in *Harmelin v. Michigan*,²⁴⁵ that “reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes.”²⁴⁶

States are forbidden after *Graham* to presume that juveniles are equally deserving of the identical sanction the legislature has determined is appropriate for adults. *Graham*’s recognition that it will commonly be inappropriate to be retributive to juveniles, combined with its conclusion that deterrence will rarely be an equally appropriate penological goal for juveniles as for adults,²⁴⁷ is just as true for the harshest sentences courts can impose as for lesser sentences. If a legislature has concluded that an adult who commits a particular felony must serve a mandatory term of thirty years in prison, that same sentence may not automatically be imposed on a juvenile.

A state sentencing statute that requires, regardless of the defendant’s age, that a certain sentence be imposed based on the conviction violates a juvenile’s substantive right to be sentenced based on the juvenile’s culpability. When the *only* inquiry made by the sentencing court is to consult the

²⁴² A minor may be prosecuted in adult court for a crime because the youth exceeds the maximum jurisdictional age for prosecution in Family Court (in those jurisdictions that set the cutoff below age eighteen) or because the youth is waived or transferred to adult court (or, in some states, is automatically subject to adult court prosecution for an enumerated crime unless transferred down to Family Court). See generally THE CHANGING BORDERS OF JUVENILE JUSTICE, *supra* note 128; RANDY HERTZ, MARTIN GUGGENHEIM & ANTHONY G. AMSTERDAM, TRIAL MANUAL FOR DEFENSE ATTORNEYS IN JUVENILE COURT (2d ed. 2008 & Supp. 2009).

²⁴³ Arya, *supra* note 51, at 103.

²⁴⁴ *Rummel v. Estelle*, 445 U.S. 263, 275–76 (1980); see also *Solem v. Helm*, 463 U.S. 277, 308 (1983) (Burger, C.J., dissenting).

²⁴⁵ 501 U.S. 957 (1991).

²⁴⁶ 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Solem*, 463 U.S. at 290).

²⁴⁷ *Graham v. Florida*, 130 S. Ct. 2011, 2031–32 (2010).

legislature's mandatory punishment for the crime, without any further inquiry into whether the punishment is appropriate for a juvenile, for no other reason than it is appropriate for an adult, the Constitution requires more.²⁴⁸

The clearest way to explain the unconstitutionality of such a law is by resuscitating the “irrebuttable presumption” cases from the 1970s.²⁴⁹ Thus, for example, in *Stanley v. Illinois*,²⁵⁰ the Court held unconstitutional an Illinois law that authorized the removal of children from the custody of their unwed fathers without requiring any showing of the father's unfitness.²⁵¹ The Court explained that the illegality in the statute was that it relied upon the non-rebuttable presumption that unwed fathers were unfit.²⁵² In *Michael H. v. Gerald D.*,²⁵³ Justice Scalia criticized *Stanley* and the several other cases that also explained that the challenged statutes' infirmity was that they contained an impermissible conclusive presumption about a material fact.²⁵⁴ He argued that these “cases must ultimately be analyzed as calling into question not the adequacy of procedures but . . . the adequacy of the ‘fit’ between the classification and the policy that the classification serves.”²⁵⁵

That is precisely the claim being made here. In light of *Graham*, the “fit” between the classification that indistinguishably includes juveniles and adults who commit a particular crime is inadequate. The preeminent conclusion reached by the *Graham* majority is that most “juveniles have lessened culpability” than most adults.²⁵⁶ Although this statement was made in the context of juveniles who committed serious felonies, the principle cannot be so limited. If most juveniles who commit serious felonies have lessened culpability than most adults who commit the same crimes then it follows that juveniles who commit minor crimes (probably) also have lessened culpability than adults. As a result, the Constitution forbids ignoring these probabilities and automatically imposing a mandatory adult-like sentence on a child.

This is because the statutory punishment would be based on a non-rebuttable presumption that the juvenile who committed the crime is equally morally culpable as an adult who committed the same act. This impermissibly allows the state to forgo having to prove material facts—the propriety of punishing a juvenile based on the same combination of deterrence, incapaci-

²⁴⁸ See, e.g., *Graham*, 130 S. Ct. at 2038 (Roberts, C.J., concurring) (“[J]uvenile offenders are generally—though not necessarily in every case—less morally culpable than adults who commit the same crimes.”); *id.* at 2050 (Thomas, J., dissenting) (“[J]uveniles can sometimes act with the same culpability as adults and . . . the law should permit judges and juries to consider adult sentences—including life without parole—in those rare and unfortunate cases.”).

²⁴⁹ See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972).

²⁵⁰ 405 U.S. 645 (1972).

²⁵¹ *Id.* at 657–58.

²⁵² *Id.*

²⁵³ 491 U.S. 110, 120 (1989).

²⁵⁴ *Id.* at 120.

²⁵⁵ *Id.* at 120–21.

²⁵⁶ *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010).

tation and retribution which is appropriate for an adult—by presuming them to be true. It violates the juvenile’s substantive liberty interest.

The correct form of challenge to a mandatory sentencing statute may nonetheless be a violation of procedural due process. Justice Scalia’s criticism mistakenly suggests this is an either/or choice. Depending on the context of the challenge it will sometimes properly sound in substantive due process terms and sometimes in procedural due process terms. The substantive right in this situation is a juvenile’s right not to be treated invariably as an adult for sentencing purposes, not that the sentence itself violates the child’s substantive right. In order to determine what sentence is proper to impose on the juvenile, there must be a hearing on the question at which the state must bear its burden of proving that the juvenile deserves the same sentence that the legislature would impose automatically on an adult.²⁵⁷ After *Graham*, it is impermissible to deem children as morally culpable as adults and any effort that does is an impermissible legislative shortcut.

In *Graham* itself, Florida argued that age is properly taken into account before juveniles are exposed to the sentencing phase.²⁵⁸ Oddly, Florida defended its law for the precise reason that this Article argues that it is infirm.²⁵⁹ According to Florida, there was nothing wrong with exposing Graham to a sentence of life in prison without the possibility of parole (and with imposing the sentence on him) because under Florida law prosecutors are required to charge sixteen- and seventeen-year-old offenders as adults only for certain serious felonies; prosecutors have discretion to charge those offenders as adults for other felonies; and prosecutors may not charge nonrecidivist sixteen- and seventeen-year-old offenders as adults for misdemeanors.²⁶⁰ The Court rejected this claim because “[n]othing in Florida’s laws prevents its courts from sentencing a juvenile nonhomicide offender to life without parole based on a subjective judgment that the defendant’s crimes demonstrate an ‘irretrievably depraved character.’”²⁶¹ Even more, the Court noted in passing that any state’s “criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.”²⁶²

²⁵⁷ I recognize that both *Roper* and *Graham* ruled that children are categorically excluded from certain punishments, in part, because of the difficulty of differentiating “between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.” *Roper v. Simmons*, 543 U.S. 551, 573 (2005). Nonetheless, once the Constitution recognizes that children are less deserving than adults of being punished for their wrongdoing, the Constitution must forbid legislatures from utterly ignoring all such differences and invariably choosing to treat children indistinguishably from adults for purposes of punishing them. As the Court explained in a related context, “[t]he fact that such a determination is difficult, however, does not mean that it cannot be made.” *Jurek v. Texas*, 428 U.S. 262, 274–75 (1976) (refusing to preclude expert opinion in support of a capital defendant’s future dangerousness).

²⁵⁸ *Graham*, 130 S. Ct. at 2030–31.

²⁵⁹ *Id.*

²⁶⁰ Brief for Respondent at 54, *Graham*, 130 S. Ct. 2011 (No. 08-7412), 2009 WL 2954163 (citing FLA. STAT. § 985.227 (2003)).

²⁶¹ *Graham*, 130 S. Ct. at 2031 (citing *Roper*, 543 U.S. at 572).

²⁶² *Id.* at 2031.

Yet, in many states today, the same remains exactly true for all sentences imposed on juveniles below life in prison.²⁶³

B. Mandatory Sentences Are Applied to Persons Convicted in Many States Today Without Regard to the Age of the Offender

In all states, juveniles can be tried as adults in criminal court.²⁶⁴ In twenty-nine states, juveniles are automatically transferred by statute to crim-

²⁶³ Chief Justice Roberts's concurring opinion in *Graham* supports the critical claim advanced in this Article. As he wrote, the Court has now acknowledged "that juvenile offenders are generally—though not necessarily in every case—less morally culpable than adults who commit the same crimes." *Id.* at 2038. Chief Justice Roberts also agreed that a young person's "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity." *Id.* at 2040 (citing *Roper*, 543 U.S. at 571). Moreover, he stressed that "Graham's youth made him relatively more likely to engage in reckless and dangerous criminal activity than an adult; it also likely enhanced his susceptibility to peer pressure." *Id.* at 2040. As a result, Graham deserved "the general presumption of diminished culpability that *Roper* indicates should apply to juvenile offenders." *Id.* Further, Chief Justice Roberts believed that Graham "was markedly less culpable than a typical adult who commits the same offenses." *Id.* Accepting Chief Justice Roberts's views that juveniles "as a general matter have 'diminished' culpability relative to adults who commit the same crimes," *id.* at 2041 (citing *Roper*, 543 U.S. at 571), and that they nonetheless may properly be sentenced even to a life sentence, we are left with a simple rule: An inquiry in each case into which juvenile is before the criminal court—the one who has diminished culpability or the one who does not—is a precondition in every case to sentencing a juvenile constitutionally to the same sentence that would be imposed on the adult defendant.

²⁶⁴ See OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, *supra* note 128, at 13 ("All states allow juveniles to be tried as adults in criminal court under certain circumstances."). The following states allow certain juveniles to be tried as adults. The number in parentheses indicates the age, if any, for criminal court eligibility. ALA. CODE § 12-15-34 (2011) (14); ALASKA STAT. § 47.12.030 (2011) (16); ARIZ. REV. STAT. ANN. § 13-501 (2011) (14); ARK. CODE ANN. § 9-27-318 (2011) (14); CAL. WELF. & INST. CODE § 707.01 (West 2012) (16); COLO. REV. STAT. § 19-2-518 (2011) (12); CONN. GEN. STAT. ANN. § 46-b-127 (West 2011) (14); DEL. CODE ANN. tit. 10, § 1010 (2011) (no minimum); FLA. STAT. ANN. § 985.56 (West 2011) (no minimum); GA. CODE ANN. § 16-3-1 (2011) (13); HAW. REV. STAT. § 571-22(d) (West 2011) (no minimum for murder); IDAHO CODE ANN. §§ 20-508, 20-509 (2011) (no minimum); 705 ILL. COMP. STAT. ANN. 405 / 5-805(3) (West 2011) (13); IND. CODE ANN. § 14-15-10-3 (West 2011) (16); IOWA CODE ANN. § 232.45 (West 2011) (14); KAN. STAT. ANN. § 38-2347 (West 2011) (14); KY. REV. STAT. ANN. § 635.020 (West 2011); LA. CHILD. CODE ANN. art. 305 (2011) (15); ME. REV. STAT. ANN. tit. 15, § 3101 (2011) (no minimum); MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-06(A)(2) (West 2011) (15; no minimum for murder); MASS. GEN. LAWS ANN. ch. 119, § 72(B) (West 2011) (unclear); MICH. COMP. LAWS ANN. § 712A.4 (West 2011) (14); MINN. STAT. ANN. § 260B.125 (West 2011) (14); MISS. CODE ANN. § 43-21-157(1) (2011) (13); MO. ANN. STAT. § 211.071 (West 2011) (12); MONT. CODE ANN. § 41-5-206 (2011) (12); NEB. REV. STAT. § 43-247 (2011) (no minimum); NEV. REV. STAT. ANN. § 62B.330(3) (West 2009) (16; no minimum for murder or attempted murder); N.H. REV. STAT. ANN. § 628:1 (2011) (13); N.J. STAT. ANN. § 2A:4A-26 (West 2011) (14); N.M. STAT. ANN. § 31-18-15.2 (West 2011) (14); N.Y. PENAL LAW § 30.00 (McKinney 2011) (13); N.C. GEN. STAT. § 7B-2200 (2010) (13); N.D. CENT. CODE § 12.1-04-01 (2011) (14); OHIO REV. CODE ANN. § 2152.10(b) (West 2011) (14); OKLA. STAT. ANN. tit.10A, § 2-5-101 (West 2011) (13); OR. REV. STAT. ANN. § 137.707 (West 2011) (15); 42 PA. CONS. STAT. ANN. § 6355(e) (West 2011) (14; no minimum for murder); R.I. GEN. LAWS § 14-1-7(a) (2011) (no minimum); S.C. CODE ANN. § 63-19-1210 (2011) (14; no minimum for murder); S.D. CODIFIED LAWS § 26-11-3.1 (2011) (10); TENN. CODE ANN. § 37-1-134 (2011) (no minimum); TEX. FAM. CODE ANN. § 54.02 (West 2011); UTAH CODE ANN. § 78A-6-703(3)

inal court for certain crimes; in fifteen, prosecutors are given discretion to file petitions directly in criminal court; in forty-five, juvenile court judges may decide to transfer juvenile cases to criminal court; and a few states have simply lowered the age of criminal responsibility below the age of eighteen.²⁶⁵ As a result, an ever-growing number of persons under eighteen are prosecuted as adults across the United States.²⁶⁶

Most important for these purposes, in a substantial majority of states, juveniles tried as adults are eligible for adult mandatory minimum sentences;²⁶⁷ only a small number of states exclude people under a certain age from mandatory adult minimum sentences.²⁶⁸ Moreover, in most states

(West 2011) (no minimum); VT. STAT. ANN. tit. 33, § 5204 (2011) (10); VA. CODE ANN. § 16.1-269.1 (2011) (14); WASH. REV. CODE ANN. § 13.40.110 (West 2011) (16); W. VA. CODE ANN. § 49-5-10(e) (West 2011) (no minimum); WIS. STAT. ANN. § 938.183 (West 2011) (10); WYO. STAT. ANN. § 14-6-203(d) (2011) (13).

²⁶⁵ GRIFFIN, *supra* note 128, at 2. Twenty-five states have “reverse waiver” statutes, which allow juveniles subject to prosecution in criminal court to petition to have their cases transferred to juvenile court. The states in which juveniles may be granted reverse waiver to juvenile court include Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Iowa, Kentucky, Maryland, Mississippi, Montana, Nebraska, Nevada, New York, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Vermont, Virginia, Wisconsin, and Wyoming. *Id.*

²⁶⁶ *See Arya, supra* note 51, at 108 (finding that an estimated 200,000 youth are prosecuted, sentenced, or incarcerated as adults in the United States).

²⁶⁷ State mandatory minimum statutes that apply to juveniles include: ARK. CODE ANN. § 16-90-202 (2011) (repeat convictions); CONN. GEN. STAT. ANN. § 14-227(a)(g) (West 2011) (second offense of driving under the influence); FLA. STAT. § 893.135 (2011) (drug trafficking); HAW. REV. STAT. §§ 706-660.2 & 3 (West 2011) (conviction of second firearm felony or use of automatic firearm in a felony); IDAHO CODE ANN. § 37-2732B (2011) (drug trafficking); 720 ILL. COMP. STAT. ANN. 5 / 8-4 (West 2011) (varying enumerated crimes); KAN. STAT. ANN. § 21-6621 (West 2011) (including juveniles as persons eligible for mandatory adult sentences for specified crimes); KAN. STAT. ANN. § 21-6805 (West 2011) (drug crimes); MD. CODE ANN., CRIM. LAW § 4203 (West 2011) (carrying a handgun); MONT. CODE ANN. § 45-9-101(2) (2011) (drug distribution); N.H. REV. STAT. ANN. § 651:2 (2011) (felonies committed with firearms); N.J. STAT. ANN. § 2C:35-7 (West 2011) (selling drugs near schools); N.C. GEN. STAT. § 9095 (2011) (drug trafficking); N.D. CENT. CODE § 12.1-32-02.1 (2011) (armed offenders); OHIO REV. CODE ANN. § 2925.03 (West 2011) (drug trafficking); 42 PA. CONS. STAT. ANN. § 9713 (West 2011) (offenses committed on public transportation); R.I. GEN. LAWS § 11-47-3.2 (2011) (crimes committed with a firearm); S.D. CODIFIED LAWS § 22-42-2 (2011) (drug manufacture and sale); UTAH CODE ANN. § 58-37-8 (West 2011) (drug offenses); VA. CODE ANN. § 18.2-57 (2011) (assault on a police officer or judge); D.C. CODE § 22-2803 (2012) (carjacking); WIS. STAT. ANN. § 939.62 (West 2011) (repeat offenses); *cf.* DEL. CODE ANN. tit. 11, § 630A (2011) (providing that the mandatory minimum sentencing provisions of this section shall not apply to juveniles); DEL. CODE ANN. tit. 11, § 1447A (2011) (mandatory minimums for use of a firearm in a felony, noting that every person over age of 15 years falling under this section shall be tried as an adult); OR. REV. STAT. ANN. § 137.700 (West 2011) (providing specifically for application of minimum sentences to juveniles tried as adults under the heading “Mandatory Minimum Sentences and Adult Prosecution of 15-, 16-, and 17-Year-Old Offenders”); WASH. REV. CODE ANN. § 9.94A.540 (West 2011) (noting that section enumerating mandatory minimum sentences “shall not be applied in sentencing of juveniles tried as adults” based on the 2009 legislative finding that juveniles are different than adults).

²⁶⁸ *See, e.g.,* DEL. CODE ANN. tit. 11, § 630A (2011) (providing that the mandatory minimum sentencing for vehicular homicide shall not apply to juveniles); N.M. STAT. ANN. § 31-18-13 (West 2011) (providing that youthful offenders may be sentenced to less than the mandatory minimum); OR. REV. STAT. ANN. § 137.700 (West 2011) (providing specifically for application of minimum sentences to juveniles tried as adults under the heading “Mandatory

that make children eligible for mandatory minimum sentences, judges have no choice but to impose the statutorily-fixed sentence on juveniles convicted as adults;²⁶⁹ a small number of states give judges discretion to sentence juveniles below statutory minimum sentences in particular cases.²⁷⁰

The process by which legislatures have dramatically increased the penalties for children in the United States should trouble anyone committed to the fair application of law. As William Stuntz expressed it:

Voters demand harsh treatment of criminals; politicians respond with tougher sentences (overlapping crimes are one way to make sentences harsher) and more criminal prohibitions. This dynamic has been particularly powerful the past two decades, as both major parties have participated in a kind of bidding war to see who can appropriate the label ‘tough on crime.’²⁷¹

Justice Stevens explained in the last opinion he wrote as a member of the Court: “[W]e have long appreciated that more ‘searching’ judicial review may be justified when the rights of ‘discrete and insular minorities’—groups that may face systematic barriers in the political system—are at stake. . . . Courts have a ‘comparative . . . advantage’ over the elected

Minimum Sentences and Adult Prosecution of 15-, 16-, and 17-Year-Old Offenders”); WASH. REV. CODE ANN. § 9.94A.540 (West 2011) (noting that section enumerating mandatory minimum sentences “shall not be applied in sentencing of juveniles tried as adults”).

²⁶⁹ See, e.g., ARK. CODE ANN. § 16-90-202(a) (2011) (mandatory minimum sentence of life imprisonment for repeat convictions of murder, rape, carnal abuse, or kidnapping); HAW. REV. STAT. § 706-660.1 (West 2011) (use of a firearm in a felony); ME. REV. STAT. ANN. tit. 17-A, § 1105-A (2011) (aggravated drug trafficking); MD. CODE ANN., CRIM. LAW § 4-203(c) (West 2011) (carrying a handgun); MINN. STAT. ANN. § 609.11 (West 2011) (various offenses); MONT. CODE ANN. § 45-9-101(2) (West 2011) (drug distribution); N.H. REV. STAT. ANN. § 651:2 (2011) (felonies committed with firearms); N.J. STAT. ANN. § 2C:35-7 (West 2011) (selling drugs near schools); N.C. GEN. STAT. § 9095 (2011) (drug trafficking); N.D. CENT. CODE ANN. § 12.1-32-02.1(1) (West 2011) (armed offenders); 42 PA. CONS. STAT. ANN. § 9713(d) (West 2011) (offenses committed on public transportation); R.I. GEN. LAWS ANN. § 11-47-3.2 (West 2011) (crimes of violence committed with a firearm); S.D. CODIFIED LAWS § 22-42-2 (2011) (drug manufacture and sale); UTAH CODE ANN. § 58-37-8 (West 2011) (drug offenses); D.C. CODE § 22-2803 (2012) (carjacking); see also MICHELE DEITCH ET AL., FROM TIME OUT TO HARD TIME: YOUNG CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM 38–39 (2009), available at <http://www.utexas.edu/lbj/archive/news/images/file/From%20Time%20Out%20to%20Hard%20Time-revised%20final.pdf> (discussing mandatory minimum sentencing provisions applied to children prosecuted in adult criminal court).

²⁷⁰ See, e.g., CONN. GEN. STAT. ANN. § 54-76b (West 2011) (allowing eligibility for youthful offender status in certain juvenile cases transferred to the adult system); N.M. STAT. ANN. § 31-18-13 (West 2011) (providing that judges may sentence youthful offenders to less than the mandatory minimum); WASH. REV. CODE ANN. § 9.94A.540(3)(a) (West 2011) (noting that section enumerating serious mandatory minimum sentences “shall not be applied in sentencing of juveniles tried as adults” based on the 2005 legislative finding that juveniles are different than adults).

²⁷¹ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001); see also Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1029 (2006) (“Neither criminal defendants nor judges . . . have much sway in the political process.”).

branches on a limited, but significant, range of legal matters.”²⁷² In this light, the traditional test used for Eighth Amendment purposes—counting trends in the nation—is inadequate to protect juveniles challenging sentences of less than life-in-prison because so many states sentence juveniles to lengthy sentences short of life-in-prison.²⁷³

C. *Illinois’s Mandatory Sentencing Laws Applicable to Juveniles*

A majority of states will very likely continue to maintain laws that permit judges to sentence juveniles to the identical sentence an adult would receive for the same crime. What follows is a constitutional argument allowing courts to erect meaningful protection for juveniles while continuing to express deference to legislative choice in sentencing. Describing the Illinois scheme as only one example will help clarify the constitutional argument advanced in this Article.

In Illinois, defendants in criminal court, regardless of age, are eligible for mandatory sentences in many circumstances. A defendant convicted of an attempt to commit first-degree murder with at least one statutory aggravating factor, for example, must be sentenced to a minimum of twenty years in prison.²⁷⁴ If a defendant is convicted of an attempt to commit first-degree murder while armed with a firearm the court must add fifteen years to the term imprisonment.²⁷⁵ If a defendant is convicted of an attempt to commit first-degree murder during which the person personally discharged a firearm, the criminal court judge must add twenty years to the term of imprisonment.²⁷⁶ Finally, someone convicted of an attempt to commit first-degree murder during which the person personally discharged a firearm that proximately caused serious harm or death must have no less than twenty-five years added to the term of imprisonment imposed by the court.²⁷⁷ The only basis for avoiding these mandatory sentences is that the accused is allowed

²⁷² *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3101 (2010) (Stevens, J., dissenting) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938)); see also Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don’t Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1081 (1993) (arguing that, because legislatures are influenced by majoritarian politics that favor harsh penalties, “the active judicial development of constitutional rules governing police, prosecutors, and the criminal trial process is a legitimate exercise of judicial review”).

²⁷³ When legislatures enact laws that include the possibility of very severe sentences for juveniles, they fully understand that the wide swath of discretion available throughout the criminal/juvenile justice process means that only children raised in poor homes will actually end up receiving these sentences. Their families also know this but are unimportant to the political process—indeed, many of these families include adults who are literally disenfranchised because of their own criminal history records. Thus, the children most likely to experience the harshest sentences do not even have parents who are permitted to participate in the political process that enacts these laws. If courts do not come to the rescue, no one will.

²⁷⁴ 720 ILL. COMP. STAT. ANN. 5 / 84(c)(1)(A) (West 2011).

²⁷⁵ *Id.* § 5 / 84(c)(1)(B).

²⁷⁶ *Id.* § 5 / 84(c)(1)(C).

²⁷⁷ *Id.* § 5 / 84(c)(1)(D).

the chance to prove at sentencing that, at the time of the crime, he or she was acting under a sudden and intense passion resulting from serious provocation by the victim.²⁷⁸ Youth is not a defense or even a mitigating factor that a court may consider.

The question that remains is how children come to be prosecuted in adult criminal court in Illinois. They may be prosecuted as adults in one of three ways. Some must be transferred under Illinois's "mandatory transfer" law. Children aged fifteen or older who are charged with "forcible felonies" and have previously been adjudicated delinquent for a felony committed as part of gang activity must be transferred to criminal court upon the prosecutor's motion once the court finds probable cause to believe they committed the crime.²⁷⁹ In addition, children over fifteen who are charged with any of seven specified felonies must also be prosecuted in criminal court upon the prosecutor's motion if the court finds probable cause to believe they committed the newly charged crime and that they previously were adjudicated delinquent of a forcible felony.²⁸⁰

Many more children are "presumptively" transferred to adult criminal court. Children fifteen or older who are charged with any of seven specified felonies²⁸¹ for which the court finds probable cause must be transferred to criminal court upon the prosecutor's motion unless the court finds by clear

²⁷⁸ *Id.* § 5 / 84(c)(1)(E).

²⁷⁹ 705 ILL. COMP. STAT. ANN. 405 / 5-805(1)(a).

²⁸⁰ *Id.* § 405 / 5-805(1)(b). In addition, when there is probable cause to believe a child fifteen years or older committed aggravated discharge of a firearm in a school, within 1,000 feet of a school, or at a school related activity, the child must be prosecuted in criminal court. *See id.* § 405 / 5-805(1)(d).

²⁸¹ *Id.* § 405 / 5-805(2)(a). The felonies are:

(i) [A] Class X felony other than armed violence; (ii) aggravated discharge of a firearm; (iii) armed violence with a firearm when the predicate offense is a Class 1 or Class 2 felony and the State's Attorney's motion to transfer the case alleges that the offense committed is in furtherance of the criminal activities of an organized gang; (iv) armed violence with a firearm when the predicate offense is a violation of the Illinois Controlled Substances Act, a violation of the Cannabis Control Act, or a violation of the Methamphetamine Control and Community Protection Act; (v) armed violence when the weapon involved was a machine gun or other weapon described in subsection (a)(7) of Section 241 of the Criminal Code of 1961; (vi) an act in violation of Section 401 of the Illinois Controlled Substances Act which is a Class X felony, while in a school, regardless of the time of day or the time of year, or on any conveyance owned, leased, or contracted by a school to transport students to or from school or a school related activity, or on residential property owned, operated, or managed by a public housing agency or leased by a public housing agency as part of a scattered site or mixed income development; or (vii) an act in violation of Section 401 of the Illinois Controlled Substances Act and the offense is alleged to have occurred while in a school or on a public way within 1,000 feet of the real property comprising any school, regardless of the time of day or the time of year when the delivery or intended delivery of any amount of the controlled substance is to a person under 17 years of age, (to qualify for a presumptive transfer under paragraph (vi) or (vii) of this clause (2)(a), the violation cannot be based upon subsection (b) of Section 407 of the Illinois Controlled Substances Act)

Id.

and convincing evidence that they would be amenable to the treatment programs available through the facilities of the juvenile court.²⁸² In determining amenability, the court is directed to take into account many criteria, but the statute provides that the criteria to be given greatest weight are “the seriousness of the alleged offense and the minor’s prior record of delinquency.”²⁸³ The list of additional criteria includes the child’s age and history and the circumstances of the offense.²⁸⁴ Finally, the court is to consider, among other things, “whether the security of the public requires sentencing” as an adult,²⁸⁵ which the statute explains requires deciding “whether there is a reasonable likelihood that the minor can be rehabilitated before the expiration of the juvenile court’s jurisdiction.”²⁸⁶

Lastly, any child thirteen or older is subject to discretionary transfer to adult criminal court in Illinois if the court finds upon motion by the prosecutor that there is probable cause to believe the child committed the crime and “that it is not in the best interests of the public to” prosecute the child in juvenile court.²⁸⁷ In deciding this question, the court is to consider the factors discussed in the preceding paragraph. For discretionary transfer, however, there is no presumption that the transfer ought to be ordered.²⁸⁸

As a result of transfer, there are hundreds of children in Illinois every year who are prosecuted as adults and are denied any opportunity to have their youth considered as a mitigating factor, despite *Graham*’s holding that youth is material to determining punishment. Although the Supreme Court has recognized that there are constitutionally material differences between children and adults that courts must take into account when punishing children, the Illinois legislature has chosen to treat these children indistinguishably from the way it treats adults.

²⁸² *Id.* § 405 / 5-805(2)(b).

²⁸³ *Id.* § 405 / 5-805(2)(c).

²⁸⁴ *Id.* § 405 / 5-805(2)(b)(ii)–(iii). In looking at the circumstances of the offense, the statute directs the court to consider, among other things, “whether there is evidence the offense was committed in an aggressive and premeditated manner,” “whether there is evidence the offense caused serious bodily harm,” and “whether there is evidence the minor possessed a deadly weapon.” 5-805(2)(b)(iii)(C)–(E).

²⁸⁵ *Id.* § 405 / 5-805(2)(b)(v).

²⁸⁶ *Id.* § 405 / 5-805(2)(b)(v)(B). The statute also directs the court to take into account “the minor’s willingness to participate meaningfully in available services” and “the adequacy of the punishment or services.” *Id.* § 405 / 5-805(2)(b)(v)(A)(C).

²⁸⁷ *Id.* § 405 / 5-805(3).

²⁸⁸ In *People v. Clark*, 518 N.E.2d 138 (Ill. 1987), the Illinois Supreme Court held that whenever a juvenile is subject to discretionary waiver, the juvenile court judge must specifically take into consideration that the juvenile would be subjected to a mandatory sentence of life in prison when considering whether or not to transfer the juvenile. *Id.* at 144. In *Clark*, the juvenile was transferred and sentenced to life in prison. *Id.* at 139–40. The Illinois Supreme Court vacated the conviction and sentence and remanded the case for a new transfer hearing. *Id.* at 147. This ruling does not apply, however, when the juvenile is subject to mandatory transfer. See *People v. Moore*, 957 N.E.2d 555 (Ill. App. Ct. 2011) (stating that, in making discretionary transfer decision, juvenile court judge must consider fact that juvenile will be subjected to a mandatory minimum sentence if transferred to adult court).

Graham does not rule out the possibility that juveniles and adults may receive identical sentences but merely requires consideration of the differences between juveniles and adults prior to sentencing. The Supreme Court of the United States recognized that some youth might correctly be found to be “incorrigible,” but it also found that the great majority are not.²⁸⁹ For this reason, it may be that some of the children who are prosecuted as adults are deserving of the adult-established mandatory minimum sentence. If they so deserve, sentencing them to the same mandatory minimum sentences would not offend the Constitution (unless, as is extremely improbable, the length of these sentences violates the Eighth Amendment). But, after *Graham*, the Constitution requires consideration of the differences between children and adults when sentencing children to terms of imprisonment. States that deem children to be adult-like merely because of the act the child committed violate a child’s right to be deprived of his or her liberty only based on individualized inquiry.

Sentences imposed for retributive purposes “must be directly related to the personal culpability of the criminal offender.”²⁹⁰ After *Graham*, Illinois’s scheme, along with many others throughout the country, should be found unconstitutional because it completely “fail[s] to take defendants’ youthfulness into account.”²⁹¹ Because “juveniles have lessened culpability” than adults,²⁹² or, in Chief Justice Roberts’s words, “are generally—though not necessarily in every case—less morally culpable than adults who commit the same crimes,”²⁹³ the Constitution forbids a state from ignoring these general and probable differences when creating a punishment scheme for convicted offenders.

Many juveniles in Illinois who are sentenced to a mandatory minimum adult sentence when prosecuted in criminal court are given no opportunity to address the material issues necessary for sentencing young people to sentences designed by the legislature for adults. Three groups of juveniles may end up being prosecuted as adults. The first group is manifestly denied all opportunity. They are transferred mandatorily and then sentenced mandatorily. More need not be said about this arrangement. This is constitutional after *Graham* only by concluding, contrary to the critical claim in this Article, that *Graham* does not change anything outside of life sentences.

But it is important to observe that the juveniles who end up being prosecuted as adults in Illinois through the “presumptive transfer” arrangement are also denied the critical inquiry necessitated by *Graham*. That is an inquiry into *culpability*, and the propriety, given the young individual who committed the crime, of sentencing him or her based on incapacitation and retribution. Although a small number of the laundry list of statutory factors

²⁸⁹ *Graham v. Florida*, 130 S. Ct. 2011, 2032 (2010).

²⁹⁰ *Id.* at 2028 (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)).

²⁹¹ *Id.* at 2031.

²⁹² *Id.* at 2026 (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2004)).

²⁹³ *Id.* at 2038 (Roberts, C.J., concurring).

in the transfer decision are material to these issues, the juvenile court judge is statutorily obligated to overweight the seriousness of the offense from the outset. For this reason, many juveniles who are manifestly less culpable than adults nonetheless must be prosecuted as adults because of the seriousness of the crime charged.²⁹⁴

The statutory overweighting of the seriousness of the crime makes good sense because the choice before the juvenile court judge is not between a mandatory adult sentence and a juvenile sentence. Instead, it is between juvenile court, which has a fixed upper limit sentence, and criminal court, which permits a considerably longer upper limit sentence. But the transfer decision never addresses the critical question that must be considered when sentencing a juvenile in adult court: Does the juvenile *deserve* the mandatory sentence the legislature has fixed for an adult who committed the same crime? The transfer court was not asked that question, and there is no place in the scheme to address it before transferring the juvenile. When there is no place to address it afterwards, as is the case in Illinois and many other states, the sentence should be found unconstitutional in accordance with *Graham*.

CONCLUSION

Graham stands for something new and extremely important: As a general proposition, at least, children are less culpable than adults; less deserving of sentences commonly meted out to adults; more deserving of sympathy, understanding, and leniency; and more likely than adults to learn from their mistakes and be rehabilitated. This important list of factors has constitutional meaning for the first time in history. Legislatures may still, subject only to the limitations of the Eighth Amendment, choose to impose lengthy prison sentences on juveniles. But, they may no longer automatically impose identical sentences on adults and juveniles who have committed the same crime.

The Progressives launched the first juvenile court more than 110 years ago based on the revolutionary idea that children who get in trouble with the law have the right to be sentenced as children. After years in the judicial wilderness, they have finally been vindicated.

²⁹⁴ Both *People v. Clark*, 518 N.E.2d 138 (Ill. 1987) and *People v. Moore*, 957 N.E.2d 555 (Ill. App. Ct. 2011) require that the transfer judge consider the fact that the juvenile will be subject to a very severe sentence if transferred. But these cases do not require a meaningful inquiry into culpability at the time the transfer decision is made. Once the transfer decision is made, no inquiry into culpability is availing.