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***Miller v. Alabama* and the (Past and) Future of Juvenile Justice Policy**

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Miller v Alabama and (Past and) Future of Juvenile
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***Miller v Alabama* and (Past and) Future of Juvenile Crime Regulation**

Elizabeth S. Scott*

This is an exciting period of change in youth crime regulation and the Supreme Court's three Eighth Amendment opinions rejecting the constitutionality of harsh sentences imposed on juvenile offenders are a big part of the excitement. Three times in seven years, the Court has considered questions relating to the sentencing of juvenile offenders. First in 2005 in *Roper v Simmons*,¹ the Court prohibited the death penalty for a crime committed by a juvenile offender. In 2010, in *Graham v. Florida*,² the Court struck down the sentence of Life without Parole (LWOP) for non-homicide offenses. Finally in 2012, in *Miller v. Alabama*³ the Court held that a statute that mandated the sentence of LWOP for homicide amounted to Cruel and Unusual Punishment when applied to a juvenile offender. The Supreme Court indeed seems to be on a roll.⁴

This morning I want to explore the importance of these Eighth Amendment cases, particularly *Miller*, mostly in terms of their meaning for juvenile crime regulation. The Court tells us in emphatic terms that young offenders, because they are developmentally immature, are less culpable than their adult counterparts and more likely to reform—and that these differences

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¹ *Roper v. Simmons*, 543 U.S. 551 (2005).

² *Graham v. Florida*, 130 S.Ct. 2011 (2010).

³ *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

⁴ The Court also held in 2011 that in evaluating whether the failure of a law enforcement officer to give *Miranda* warnings to a youth he was questioning resulted in exclusion of the youth's statement, the age of a youth is relevant to the determination of whether he understood that he was free to leave. *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).

are important to the legal response to juvenile crime.⁵ This message represents a way of thinking about youth crime that has begun to take hold in first decade of 21st century—partly in response to the Court’s opinions but also independently for reasons I will explain. Contemporary lawmakers increasingly have turned to developmental science for guidance in formulating justice policies, recognizing that both fairness and social welfare goals are promoted by differential treatment of adolescent offenders.

But this approach is very different from that of the 1990s, a period when young criminals were seen as vicious “superpredators”⁶ and a series of moral panics swept the country resulting in the transformation of traditional juvenile justice policies. In this hostile climate, the goals of punishing young offenders and protecting the public trumped other considerations and the importance of differences between juvenile and adult offenders was either ignored or denied.

Although we might be happy put it behind us, I want to begin my talk by focusing on that period of recent history—hence my title -- *The past* and future of juvenile crime regulation. My suggestion is that we can learn useful lessons if we understand the dynamics of moral panic decisionmaking and compare it to the scientifically-based and more deliberative approach to juvenile crime regulation that the Supreme Court has implicitly endorsed and that modern lawmakers are at least tentatively beginning to adopt.

My plan is to tell the story of what has been a dramatic period in juvenile justice policy over the past generation (way too dramatic sometimes), focusing on factors that have contributed to a changing legal environment and highlighting the differences between the approach to

⁵ See discussion *infra* t.a.n 37 to 41 .

⁶ The term ‘superpredator’ was coined by John DiIullo, *The Coming of the Superpredators*, WEEKLY STANDARD, . Nov. 27, 1995, who sounded the alarm about a coming wave of violent dangerous youths growing up in moral poverty.

lawmaking in this realm in the late 20th century and more recently. Finally I will propose that it may be possible to adopt strategies to limit the harmful impact of moral panics that inevitably will arise in the future—and to reinforce the current policy direction.

The Moral Panics of the 1990s

Youth crime was a hot political issue in the 1990s. It is fair to say that the concern began as a response to a threat that warranted attention. Violent juvenile crime, particularly homicide, increased dramatically in the late 1980s.⁷ The public reacted with alarm, exacerbated by a widespread perception that the juvenile justice system was ineffective in dealing with the problem.⁸ Not surprisingly politicians responded to the public's concern and, in less than a generation, almost every state changed its laws to make it easier to prosecute and punish juveniles as adults.⁹ This happened through several types of legal reforms. The age of transfer to criminal court was lowered and the range of transfer-eligible offenses expanded, while, under legislative waiver statutes, youths charged with particular offenses were categorically excluded from juvenile court jurisdiction. Many states shifted the authority to make jurisdictional decisions from judges to prosecutors.¹⁰ In the juvenile system, dispositions got harsher and the use of incarceration increased substantially.¹¹ This is a familiar story that need not be repeated,

⁷ OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STATISTICAL BRIEFING BOOK, JUVENILE ARREST RATE TRENDS, available at http://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05200 (“The juvenile arrest rate for all offenses reached its highest level in the last two decades in 1996, and then declined 36% by 2009.”)

⁸ Jane B. Sprott, *Understanding Public Opposition to a Separate Juvenile System*, 44 CRIME & DELINQUENCY 399 (2001)(survey finding support for view that juvenile system's laxness encouraged youth crime).

⁹ ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 4 (2008).

¹⁰ National Center for Juvenile Justice, *National Overviews*, available at <http://www.ncjj.org>; Patricia Torbet, *State Responses to Serious and Violent Juvenile Crime*, OJJDP Research Report (1996), available at <http://ncjrs.gov/pdffiles/statresp.pdf> [hereinafter *State Responses*].

¹¹ See Steve Aos, *The Juvenile Justice System in Washington State: Recommendations to Improve Cost-Effectiveness*, Wash. State Instit.for Pub. Pol. Oct. 2002, at 3, available at <http://www.wsipp.wa.gov/pub.asp?docid=02-10-1201>(describing increased use of incarceration in Washington state).

but suffice to say that, during this period, a legal regime that had viewed most teenage crime as the product of youthful immaturity was transformed into one that often was ready to ignore differences between young offenders and their adult counterparts as irrelevant to criminal punishment.

Supporters defended these changes as simply a coherent policy response to a new generation of violent juveniles-- a recognition that the traditional regime was outmoded and unable to protect the public.¹² But even when the reforms were motivated by legitimate concerns, the process often had the hallmarks of a moral panic—a dynamic that has long interested sociologists,¹³ in which the media, politicians and the public interact in a pattern of escalating alarm in response to a perceived social threat. The danger that sparks a moral panic is often real—think about child sexual abuse.¹⁴ But what distinguishes a moral panic from a straightforward response to a pressing social problem is the gap between the *perception* of the severity of the threat and the reality.¹⁵

This certainly describes the response to juvenile crime in the 1990s. Media coverage of violent youth crime increased dramatically during this period. Stories about high profile

¹² Governor John Engler of Michigan suggested that the juvenile justice system was designed for youths stealing hubcaps in an earlier era—and was inadequate to deal with violent modern youths. *See New Juvenile Code would Come Down Hard on Teens*, Luddington Daily News, January 15, 1996, available at <http://news.google.com/newspapers?nid=110&dat=19950113&id=ODRQAAAIBAJ&sjid=UFUDAAAIBAJ&pg=5523,814670>.

¹³ Stanley Cohen coined the term “moral panic,” and was probably the first sociologist to study and analyze moral panics in a study of British “mods” and “rockers” published in 1972. STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* (3RD ED. 2002). *See also* ERICH GOODE AND NACHMAN BEN-YEHUDA, *MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE* (2ND ED. 2009) (offering comprehensive theoretical and empirical treatment).

¹⁴ The molesting and killing of a 7 year old New Jersey child, Megan Kanka, by a neighbor led states across the country to pass “Megan’s laws,” mandating registration of sex offenders. Kimberley McLarin, *Trenton Races to Pass Bills on Sex Abuse*, N.Y. TIMES, Aug. 20, 1994 (law passed 30 days after Megan’s death). Earlier, charges of satanic sexual abuse against employees and the owner of day care center generated alarm across the country. *See* Margaret Talbot, *The Devil in the Nursery*, N.Y. TIMES MAG., Jan. 7, 2001 available at http://www.newamerica.net/publications/articles/2001/the_devil_in_the_nursery (describing hysteria in obituary for accused worker).

¹⁵ *See* GOODE & BEN-YEHUDA, *supra* note 13, at 35-37 (describing exaggeration of threat as element of moral panic).

crimes—school shootings and gang killings of innocent bystanders—generated public outrage and fear, and particular crimes often came to represent a larger threat.¹⁶ Prosecutors and politicians, eager to demonstrate their concern for victims and for public safety, promised punishment of offenders and protection from young criminals generally. Legislation often followed—effectively institutionalizing the moral panic.

A striking feature of this story is the dramatic change in the way that young offenders were depicted. In the somewhat idealized rhetoric of the traditional juvenile court, delinquents were “children,” immature youths who had gone astray.¹⁷ By the mid-1990s, they had become “superpredators,” remorseless creatures who roamed in gangs, maiming and killing without moral compunction, and considering no consequences other than their own evil gratification. Criminologist John DiIullo, who coined the term, also predicted that the problem would only get worse when the large birth cohort of the early 1990s reached adolescence in the early 21st century.¹⁸ The superpredator label and stereotype was picked up by politicians and the media¹⁹—as was the sense of urgency that something must be done to protect the public from the threat. Young offenders were no longer wayward youths in the public imagination—they had become the enemy of society. This characterization may have been easier for many Americans to accept

¹⁶ See discussion of Columbine High School shootings, *infra* t.a.n. 25 to 27.

¹⁷ See Justine Wise Polier, *Dissenting View*, in JUVENILE JUSTICE STANDARDS PROJECT: STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR (1982).

¹⁸ See DiIullo, *supra* note 6 (describing superpredators and predicting a “coming” wave).

¹⁹ See FRANKLIN ZIMRING, AMERICAN YOUTH VIOLENCE 4-5 (1998) (citing Congressman Bill McCollum, Chair of the House Subcommittee on Crime, “Brace yourself for the coming generation of superpredators.”). Peter Annin, “Superpredators” Arrive: Should we Cage the New Breed of Vicious Kids, *NEWSEEEK*, Jan. 22, 1997, at 57; Jim Atkinson, *Thrill Killers*, *TEXAS MONTHLY* 126, 126-33 (“The culprits...are..a new breed of street criminals known as superpredators..[their crimes are as savage as they are pointless.]. Lynne Abraham, Philadelphia District Attorney opined “We’re talking about kids who have absolutely no respect for human life.” Richard Zoglin, *Now for the Bad News: A Teenage Time Bomb* at 52, *TIME*, Jan. 15, 1996.

because it was assumed that teenage offenders were minority youths—since membership in juvenile gangs, the focus of media attention, was often limited by race and ethnicity.²⁰

In this climate, vivid images of scary teenage criminals captured the public imagination, distorting perceptions about the threat of juvenile crime. Surveys showed that the public thought that *most* violent crime was committed by juveniles, while in fact, they were responsible for about 15%.²¹ The public also thought juvenile crime was on the rise after many years of steady decline.²² Politicians fueled these misperceptions. In 2000, the District Attorney of Ventura County, California, published an op ed supporting Proposition 21—an initiative expanding the net of criminal court jurisdiction over juveniles. He described gang violence as a growing problem and “the most alarming of all crime trends”²³ At the time gang violence had been declining for 6 years and was lower than it had been in decades.²⁴

The 1999 school shootings Columbine High School in Colorado provides an example of the dynamic of a moral panic. Understandably the horrific incident was the focus of massive media attention. Cover stories in national magazines pondered the meaning of the killings and

²⁰ Most gangs were ethnically based and non-white. Two African American gangs in Los Angeles, the Crips and the Bloods, gained notoriety in the 1980s, giving the city the dubious distinction of being known as the “gang capital of the nation.” Robert Conot, *L.A. Gangs: Our City, Their Turf*, L.A. TIMES, Mar. 22 1987, at 1. One commentator described gangs as “a breakdown of the moral order, an evil in which racial or ethnic ties have been perverted for criminal gain.” Jeffrey Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 WAKE FOREST L. REV. 943, 945 (1993).

²¹ A 1996 survey of 1,000 likely California voters found that 60 percent of respondents believed that juveniles were responsible for *most* violent crime; in reality, only 14% of arrests for violent crimes involved juveniles. See Lori Dorfman & Vincent Schiraldi, *Off Balance: Youth, Race, and Crime in the News*, Building Blocks for Youth, 2001, 3-4, 40 n 10, available at www.cclp.org/documents/BBY/offbalance.pdf (describing results of study).

²² In a 1998 study of 2,000 adults, 62% of respondents believed youth crime was on the rise, while the National Crime Victimization Survey for that year revealed youth crime to be at its lowest rate in the 25 year history of the survey. See Justice Policy Institute, *Schools and Suspensions: Self-Reported Crime and the Growing use of Suspensions*, Sep. 1, 2001, available at www.prisonpolicy.org/scans/jpi/sss.pdf. A 2000 California poll found that a majority of voters thought youth crime was increasing- although the crime rate had decreased steadily for at least five years. Dorfman & Schiraldi, *id.*, at 3.

²³ SCOTT & STEINBERG, *supra* note 9, at 107 n 69.

²⁴ *Id.*

the dangers that children faced in school; some described as an “epidemic” of school violence.²⁵ In fact, school shootings have always been extremely rare events (children face a greater risk of being struck by lightning). And they were even rarer in the late 1990s than a decade earlier.²⁶ Nonetheless, in the wake of Columbine, legislatures across the country rushed to pass strict Zero Tolerance laws- making it a crime to threaten violence in school.²⁷

The upshot is that by the beginning of the 21st century, traditional juvenile crime policy had been largely dismantled. Critics, both academics like Barry Feld and myself, and advocates like Bob Schwartz & Marsha Levick, challenged the move to criminalization as unfair to kids and ineffective at preventing crime, and observed that the burden of punitive laws fell disproportionately on minority youths—but these arguments gained little traction in the political arena in the 1990s.

Dissipation of the Moral Panics

In the past decade, the moral panics have gradually subsided and juvenile crime has faded as a hot political issue. Many lawmakers and politicians-- from the Supreme Court to big city mayors-- appear ready to rethink the punitive approach of the 1990s, and recent surveys indicate strong public support for a rehabilitative approach to teenage crime.²⁸ Public safety is still

²⁵In the wake of the Columbine shooting, one reporter described a trend of “alienated youths” against a backdrop of “violent and nihilistic” popular culture. Timothy Egan, *Terror in Littleton: Violence by Youths: Looking for Answers*, THE NEW YORK TIMES, Apr. 22, 1999; *See also*, Lauren Terrazzano, *The Colorado Tragedy: Shooting Upsets Notion of Suburban Sanctuary: Local Anxiety in Wake of Colorado Massacre*, NEWSDAY, Apr. 22, 1999. For general discussion of the exaggerated perceptions of the threat of school violence, *see* DEWEY CORNELL, SCHOOL VIOLENCE: FEAR VERSUS FACTS, 11-23 (2006).

²⁶ GOODE & BEN YEHUDA, *supra* note 13 at 46 (describing declining incidence).

²⁷ These laws were enforced rigidly sometimes against very young children. *See* Joan Wasser, *Zeroing in on Zero Tolerance*, 15 J.L. & POLITICS 747, 747-59 (1999).

²⁸ Daniel Nagin, Alex Piquero, Elizabeth Scott & Laurence Steinberg, *Public Preferences for Rehabilitation versus Incarceration of Young Offenders: Evidence from a Contingent Valuation Study*, 5 J. CRIMINOLOGY AND PUB. POLICY 627 (2006)(study showing greater willingness to pay for rehabilitation than incarceration where both were described as equally effective at reducing crime)

important, of course and it would be an exaggeration to report a widespread repudiation of the punitive policies. But it does seem that paternalism toward young offenders has begun to reemerge in updated form in the early 21st century.

How can we explain the change in attitudes? Certainly it is important that juvenile crime rates declined and that the predicted wave of superpredators never materialized.²⁹ After a decade or so, politicians and the public seemed to realize that the threat of juvenile crime was not as great as it had appeared to be in the 1990s. We might also speculate that another threat—Islamic terrorists—supplanted teenage criminals as the most feared enemies of society. At a more practical level, state governments began to recognize the high cost of incarceration-based policies, particularly as tax revenues fell in the recession. Just as important, a growing body of research indicated that recidivism rates were depressingly high for youths released from incarceration, while some community-based correctional programs showed better outcomes at a fraction of the cost.³⁰

A more intangible influence on law and policy in recent years has been the view that imposing harsh criminal punishment on young offenders violates basic notions of fairness at the heart of any legitimate justice system. This, of course is the essence of the Supreme Court’s opinions—and the Court’s powerful message has resonated through the justice system—

²⁹ Violent juvenile crime rates began a steady decade-long decline in 1994; rates declined for other crimes shortly thereafter. See OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STATISTICAL BRIEFING BOOK, JUVENILE ARREST RATE TRENDS, available at http://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05200 (“The juvenile arrest rate for all offenses reached its highest level in the last two decades in 1996, and then declined 36% by 2009.”); Charles Puzzanchera, *Juvenile Arrests 2008*, OJJDP Juv. Just. Bulletin, Dec. 2009, available at www.ncjrs.gov/pdffiles1/ojjdp/228479.pdf (describing declining rates for specific offenses).

³⁰ See discussion, t.a.n. 62 to 64 *infra*. (discussing states’ decisions to close institutions to shift resources to more effective community programs).

challenging a regime that ignored differences between juveniles and adults.³¹ But these ideas were already beginning to have an influence in the political arena.

Characterizing Contemporary Young Offenders

The change in attitudes about juvenile crime is most evident in the way that young offenders are characterized today in political and legal settings. Perhaps somewhere out there, an angry politician is talking about vicious young superpredators—but I don't know where. Instead, Supreme Court justices, governors, legislators, media types and journalists describe juvenile offenders as youths whose crimes are a product of developmental immaturity and whose maturity into non-criminal adulthood is a reasonable policy goal.

To some extent this change of heart may not be so surprising. Paternalistic attitudes about children and youth were submerged in the 1990s – but they are deeply embedded in our culture—and with the reduced focus on the threat of juvenile crime, they have reemerged. But today's teenage offenders are less likely to be depicted as innocent children than they were a few decades ago. Instead, a more sophisticated account of the differences between juvenile and adult offenders—informed by scientific knowledge about adolescence—particularly developmental brain research.

Stephen Morse in his symposium article discusses this neuroscience research and how it might inform our understanding of juvenile offending.³² What I would note is simply the level

³¹ Another fairness concern has contributed to uneasiness with the punitive regime that took shape in the 1990s—that minority youths disproportionately were adjudicated as adults and received harsh sentences. At least one recent legislative reform was explicitly motivated by this concern; in 2005, Illinois repealed a statute mandating transfer of 15 year olds who sold drugs near a school or housing project when it became clear that those charged under the statute were overwhelmingly minority youths. National Juvenile Defender Center, “2005 State Juvenile Justice Legislation,” November 2005, at <http://njdc.info/publications.php>.

³² Stephen J. Morse, "Brain Overclaim Syndrome Redux: More Cognitive Jurotherapy Is Indicated" **JL. CITE when available** (2012).

of *interest* in “the teenage brain” among lawmakers, the media and the public in recent years.³³ Policymakers at all levels have invoked adolescent brain research in rationalizing legal reforms that deal more leniently with juveniles-- accepting the view that immature brain functioning contributes to adolescents’ decisions to get involved in criminal activity.³⁴ For reasons that are unclear, many observers seem to find the neuroscience evidence more compelling than the extensive body of behavioral research that is largely simply confirmed by the brain studies.³⁵ Whether the interest in developmental neuroscience on the part of the public and politicians played a *causal* role in creating more benign attitudes toward young offenders is unclear but it certainly has strongly reinforced the contemporary view that much adolescent criminal activity is driven by transient developmental immaturity—and that adult criminal punishment may not be appropriate.

Juvenile Offenders in the Supreme Court

The three recent Supreme Court Eighth Amendment opinions were decided against this backdrop of changing attitudes and all draw on developmental research in rejecting harsh sentences as excessive for juvenile offenders. *Roper v. Simmons* in 2005 cited behavioral research in holding the death penalty unconstitutional for a crime committed by a juvenile, while *Graham v. Florida* and *Miller* also invoked neuroscience research in striking down LWOP

³³ Sharon Begley, *Getting Inside a Teenage Brain*, NEWSWEEK, Feb. 28, 2000, at 58; Claudia Wallis, *What Makes Teens Tick?* TIME, May 10, 2004, at 56; Malcolm Ritter, *Experts Link Teen Brains’ Immaturity*, CRIME USA TODAY, Dec. 2, 2007, available at http://www.usatoday.com/tech/science/2007-12-02-teenbrains_N.htm.

³⁴ See, e.g. t.a.n. 56 *infra*. For a discussion of the reforms, see SCOTT & STEINBERG, *supra* note 9, 96-99.

³⁵ Observing that the Court is more willing to accept behavioral research when accompanied by neuroscience research, Laurence Steinberg describes a portion of Seth Waxman’s oral argument for the abolition of the juvenile death penalty in *Roper*. Prompted by Justice Breyer’s inquisition into whether or not the current research is something more than “every parent already knows,” Waxman responded, “I’m not just talking about social science here, but the important neurobiological science.” Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?* 64 AM. PSYCHOLOGIST 739, 742 (2009).

sentences.³⁶ Each of these decisions rests primarily on a developmentally informed proportionality analysis. First, the Court emphasized that juveniles have “greater prospects for reform”³⁷ than do adults because most teenage offending is the product of “transitory” developmental influences.³⁸ But the heart of the Court’s proportionality analysis was its discussion of three distinctive aspects of adolescence that mitigate the culpability of young offenders. First adolescents have diminished decisionmaking capacity due to their impulsivity, proclivity for risktaking and deficiency in foreseeing consequences.³⁹ Second, they are vulnerable to negative external pressures from peers and family to a greater extent than adults and they are less able than adults to escape their social context.⁴⁰ And third, an adolescent’s character is unformed-- his criminal acts are less likely than an adult’s to be evidence of irretrievable depravity.⁴¹

On first glance, *Miller* appears more modest in its reach than the two earlier decisions that imposed *categorical* bans on the challenged sentences for juveniles. *Miller* simply prohibits a *mandatory* sentence of LWOP for homicide. In theory, as long as the youth is permitted to introduce mitigating evidence of his immaturity and circumstances, he could be subject to the sentence—even a youth like Kuntrell Jackson, whose case was joined with *Miller*’s, who was

³⁶ The Court emphasized that the tendency of adolescents to get involved in risky behavior often results in “impetuous and ill-considered decisions.” *Roper*, 543 U.S. at 569; *See also*, *Graham*, 130 S.Ct. at 2026-27 (citing brain research). In *Miller*, the Court noted that brain development involved in behavioral control continues to mature through late adolescence and explained, “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds—for example, in parts of the brain involved in behavior control.” *Miller* 132 S. Ct. at 2464 (internal quotations omitted).

³⁷ *Miller* 132 S. Ct. at 2464.

³⁸ *Id.* at 2465.

³⁹ *Graham*, 130 S.Ct., at 2026; *Roper*, 543 U.S., at 569; *Miller* 132 S. Ct. at 2465.

⁴⁰ *Roper*, 543 U.S., at 569; *Graham*, 130 S.Ct., at 2026; *Miller* 132 S. Ct. at 2454.

⁴¹ *Roper*, 543 U.S. at 570.

convicted of felony murder and whose intent to kill was not proven.⁴² Nonetheless, on my view, *Miller* is at least as powerful a statement about how juveniles should be dealt with in the justice system as the earlier opinions—and apparently the dissenting justices thought so as well.

Miller is noteworthy in three ways that expand its importance beyond its narrow holding. First, the Court (gratuitously, a critic might say) emphasized that, while it was not categorically prohibiting LWOP as Cruel and Unusual Punishment, it expected the sentence to be “uncommon.”⁴³ As Justice Roberts noted in dissent, “uncommon” sounds a lot like “unusual” in 8th Amendment parlance- and he predicted that the next step would be a categorical bar.⁴⁴

Second, *Miller* follows *Graham* in making explicit that juveniles have a very special Eighth Amendment status. The Court has long adopted a two-track approach to reviewing the constitutionality of criminal sentences under the 8th Amendment. The mantra “Death is different” captures the distinction; the Court has applied rigorous proportionality review to the death penalty⁴⁵ but has been extremely reluctant to override non-capital sentencing decisions (no

⁴² *Miller* 132 S. Ct. at 2468. Jackson was not the gunman in the convenience store hold up that resulted in the death of the clerk; indeed he was outside for much of the crime; and there was no evidence that he intended to kill the victim. Justice Breyer would have prohibited LWOP without such evidence, *Id.* at 2476, but the majority, although it noted Jackson’s diminished capacity, did not agree.

⁴³ *Id.* at 2469.

⁴⁴ In his dissent, Chief Justice Roberts speculates, “the Court’s gratuitous prediction [that LWOP for juveniles should be uncommon] appears to be nothing other than an invitation to overturn life without parole sentences...” *Id.* at 2481 (dissenting opinion).

⁴⁵ The Court has prohibited the imposition of the death penalty for offenses other than intentional killing, and for certain categories of offenders, such as mentally retarded offenders and juveniles. *See, e.g.,* *Coker v. Georgia*, 433 U.S. 584 (1977) (holding that the death penalty was grossly disproportionate to the crime of rape); *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that execution of mentally retarded individuals violates the 8th amendment); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding that the 8th amendment prohibits the death penalty as punishment for the rape of a child; *Enmund v. Florida*, 458 US 782 (1982) (holding that the 8th amendment does not permit the death penalty for a defendant who aids or abets a felony that results in a murder by others, when the defendant did not intend or attempt the murder himself). *See also, Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion) (prohibiting mandatory imposition of death penalty and requiring that defendant be evaluated individually, including evaluating mitigating factors).

matter how draconian) for adults.⁴⁶ *Graham* and *Miller* afford juveniles facing LWOP protections that for adults are available only in the death penalty context—the requirement of individualized sentencing⁴⁷ and the categorical exclusion of the sentence as excessive for certain crimes.⁴⁸ The Court actually made the link explicit, comparing LWOP for juveniles to a death sentence.⁴⁹ Indeed, Justice Kagan’s already famous words-- “*If death is different, children are different.*” announced a new principle with implications that potentially reach far beyond LWOP.⁵⁰

The third noteworthy aspect of *Miller* reinforces this principle. The Court insisted that the distinctive features of adolescence that reduce youthful culpability are not crime specific- they are as relevant to homicide as to non-homicide offenses.⁵¹ Implicit in this generalization of the Court’s proportionality analysis- is a broader principle that the same features of adolescence that mitigate the culpability of youths sentenced to LWOP reduce the blameworthiness of juveniles’ criminal choices generally. Justice Roberts lamented in dissent that there was “No clear reason that [*Miller*’s] principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive.”⁵²

⁴⁶ In evaluating whether non-capital adult sentences are excessive, the Court has required “gross disproportionality”, a standard adopted from Justice Kennedy’s concurrence in *Harmelin v. Michigan*, 501 U.S. 957 (1991) (plurality opinion). *See, e.g., Ewing v. California*, 538 U.S. 11, 24-25 (2003) (“The proportionality principles in our cases distilled in Justice Kennedy’s concurrence guide our application of the Eighth Amendment...”). The gross disproportionality standard is rarely met. *See e.g., Ewing*, 538 U.S. at 30 (life sentence for third felony (theft of a golf club) not grossly disproportionate); *Lockyer v. Andrade*, 538 U.S. 63 (2003) (denial of a petition for a writ of habeas corpus while upholding a life sentence for three petty thefts, the 3rd of which was the theft of video tapes worth \$70).

⁴⁷ The Court before *Miller* held that the prohibition of a mandatory sentence only applied to the death penalty and not to non-capital sentences. *See Harmelin* at 1006.

⁴⁸ *See* note 45 *supra*.

⁴⁹ The Court emphasized that LWOP “shares some characteristics with death sentences that are shared with no other sentences.” *Miller*, 132 S. Ct., at 2464-66 (quoting *Graham v. Florida*, 130 S.Ct. 2011, 2027).

⁵⁰ *Miller*, 132 S. Ct., at 2470.

⁵¹ *Id.* at 2465.

⁵² *Id.* at 2482 (Roberts, J., dissenting). Justice Roberts also observed “[The] [p]rinciple behind today’s decision seems to be only that because juveniles are different from adults, they must be sentenced differently.” *Id.*

I think Justice Roberts is correct, although it seems unlikely that the Court will apply this principle as a *constitutional* constraint on sentencing juveniles as broadly as he fears.

Nonetheless, the importance of these opinions is hard to exaggerate. It is true that they affect a relatively small number of offenders convicted of the most serious crimes. But following a long period in which the relevance to criminal punishment of differences between juvenile and adult offenders was either ignored or denied, our highest legal institution has emphatically rejected the view of young criminals that dominated in the 1990s.

Juvenile Crime Regulation in the 21st century

Although its opinions surely influence other lawmakers, the Supreme Court does not dictate most juvenile crime regulation. But changing attitudes toward young offenders have affected policymakers at all levels of government; across the country, there has been a rethinking of tough incarceration-based policies and a readiness to try different approaches. To be sure, many (probably most) statutes mandating or allowing the adult prosecution and punishment of juveniles are still in place. But the recent legislative trend has been *away* from punitive laws. Some states have repealed mandatory transfer statutes and others have restricted the transfer of younger juveniles.⁵³ Connecticut raised its general jurisdictional age from 16 to 18—following a campaign in which supporters emphasized the developmental immaturity of adolescents and the

⁵³ For example, in 2009, the state of Washington, as part of a broad reform moderating its approach to juvenile crime, repealed an automatic transfer statute enacted in 1994 and also prohibited transfer of youths under the age of 15 except for murder or aggravated assault. Engrossed Substitute Senate Bill 5746 (“ESSB 5746”), 61st Legislature, 2009 Regular Session, passed April 22, 2009 *available at* <http://apps.leg.wa.gov/documents/billdocs/2009-10/Pdf/Bills/Senate%20Passed%20Legislature/5746-S.PL.pdf>. *See also*, note 31 *supra* (describing repeal of an Illinois statute that mandated adult prosecution of 15 year olds charged with selling drugs near a school or housing project, on the basis of evidence that most of those charged under the law were minority youths).

ineffectiveness of adult punishment in reducing recidivism.⁵⁴ Even youths who are tried as adults are more likely to receive different treatment than a decade ago. A few states (most recently California in 2012) have abolished LWOP for juveniles altogether.⁵⁵ In Colorado, repeal followed a series of sympathetic stories in the Rocky Mountain News; politicians pointed to adolescent brain research in explaining their support for the measure.⁵⁶ Legislatures in other states have passed laws requiring an assessment of juveniles' competence to stand trial, when they are adjudicated as adults--addressing concerns first raised by the Court in *Graham* that some youths may be unable to function effectively as defendants in criminal proceedings.⁵⁷ As the differences between juveniles and adults have become more salient, lawmakers increasingly have paid attention to the values of procedural and substantive fairness.

But in terms of impact, the reforms that many states have undertaken of their juvenile justice systems are just as important as restrictions on criminal prosecution and punishment. Several states, including California and New York, have dramatically reduced the number of youths confined to state institutions, shifting resources to community-based programs. California in 2007 dismantled the California Youth Authority and closed most of its facilities.⁵⁸ In New York,

⁵⁴ S.R. 1500, Gen. Ass., Je. Sp. Sess.(CT 2007, amending Conn. Gen. Stat. Ann. Sect. 46b-120. See CONNECTICUT JUVENILE JURISDICTION PLANNING AND IMPLEMENTATION COMMITTEE, FINAL REPORT, 2-4 (2007) (legislative committee report citing research, including brain research on immaturity of juveniles and high recidivism rates of youths receiving adult sentences as basis of raising jurisdictional age from 16 to 18), available at www.housedems.ct.gov/jjpic/070212_JJPIC_report_revised_pdf.

⁵⁵ See Pacific Juvenile Defender Center, "SB 9 Is Signed into Law Giving Juveniles Serving Life-Without-Parole Sentences A Second Chance", October 2012 at <http://www.pjdc.org/2012/10/sb-9-is-signed-into-law-giving-juveniles-serving-life-without-parole-sentences-a-second-chance/>.

⁵⁶ Miles Moffeit and Kevin Simpson, *Research Points to Changing Teen Brain*, DENVER POST, Feb. 19, 2006, at A1; Miles Moffeit, *Juvenile Justice Legislation a Milestone in Sentencing*, DENVER POST May 28, 2006. See also Gwen Florio, Sue Lindsey, & Sarah Langbein, *Life for Death: Should Teen Murderers get a Second Chance at Freedom?*, ROCKY MTN NEWS, Sept. 17 2005, at 1A. Governor Bill Owen pointed to brain research in explaining his support.

⁵⁷ See, e.g., FLA. CODE ANN. SECT. 985.223(1)(F)(describing mental capacities to be addressed in evaluating juvenile's competence); ARIZ. REV. STAT. SECT. 8-291.07(B)(1)-(4). See also 2007 State Juvenile Justice Legislation, available at <http://www.njdc.info/publications.php>.

⁵⁸ Pursuant largely to a 2007 statutory directive (SB 81 and AB 191), the state renamed the CYA the Division of Juvenile Justice (DYJ and directed that most convicted youths remain in their communities. http://www.cdcr.ca.gov/Juvenile_Justice/DJJ_History/index.html. The DYJ census dropped by more than 80%. *Id.*

a Task Force appointed by Governor Patterson issued a scathing report in 2009 harshly criticizing the state's juvenile system. The report noted that most youths placed in juvenile institutions, at a cost to taxpayers of \$210,000 a year, were misdemeanants—and that their recidivism rates were appallingly high- 75% reoffended within 3 years.⁵⁹ The system's punitive approach, the report stated, “damaged the future prospects of these young people, wasted millions of taxpayers' dollars and violated the fundamental principles of positive youth development.”⁶⁰ New York City officials responded by announcing a plan to drastically reduce the number of city youths sent to state institutions.⁶¹ Under the plan, most youths have remained in their homes, receiving therapeutic services that had been shown to reduce crime more effectively than institutional placement at a fraction of the cost.

Other states have implemented policies aimed at deterring institutional placement and keeping youths in their communities.⁶² Several jurisdictions, including Ohio and Illinois, have reversed perverse financial incentives that previously encouraged judges to sentence youths to state facilities, allowing the locality to avoid the cost of dispositions.⁶³ Other states such as Maryland have adopted strategic plans, redirecting funds from secure institutions to community programs. And many states have reformed residential placement itself, adapting a model developed in

⁵⁹ CHARTING A NEW COURSE: A BLUEPRINT FOR TRANSFORMING JUVENILE JUSTICE IN NEW YORK STATE (2009)

⁶⁰ *Id.* at 8.

⁶¹ Julie Bosnan, *City Signals Intent to Put Fewer Teenagers in Jail*, N.Y. TIMES, Jan. 21, 2010, available at <http://www.nytimes.com/2010/01/21/nyregion/21juvenile.html?ref=nyregion&pagewanted=print> *Id.* (describing a cost of \$17,000 per youth).

⁶² NATIONAL JUVENILE JUSTICE NETWORK, BRINGING YOUTH HOME: A NATIONAL MOVEMENT TO INCREASE PUBLIC SAFETY, REHABILITATE YOUTH AND SAVE MONEY (2011) [hereinafter BRINGING YOUTH HOME], available at <http://www.njjn.org/library/search-results?subject=8> (describing the move to community based sanctions in various states).

⁶³ *Id.*

Missouri that rejects prison-like institutions in favor of small therapeutic facilities near offenders' homes.⁶⁴

Foundations have been important catalysts for 21st century reform, working with states and localities to change juvenile crime policy. The MacArthur Foundation with its longstanding commitment to bringing a developmental approach to juvenile crime regulation, has pursued its ambitious Models for Change program in a number of states.⁶⁵ The Annie E Casey Foundation has reformed juvenile detention practices across the country through its JDAI program that aims to reduce racial disparity in detention and restrict it to those youths who represent a substantial risk.⁶⁶

As I have suggested, these reforms were motivated by a mix of factors—and the goals of cutting costs and saving state resources are high on the list. But policymakers are also coming to recognize that locking kids up may not be the best way to reduce crime. This is not surprising given what we know about the important role of social context in adolescent development.⁶⁷ As the work of Donna Bishop and other has shown, adult prisons and institutional facilities are

⁶⁴See MO. DEP'T OF SOC. SERVICES, DIV. OF YOUTH SERVICES, ANNUAL REPORT FOR THE FISCAL YEAR 2006, available at www.dss.mo.gov/re/pdf/dys/dysfy06.pdf. Recidivism rates are reported to be far lower than the rates of youths coming out of institutional placement. *Id.* (reporting recidivism rates of 8.7%). See Marian Wright Edelman, *Juvenile Justice Reform: Making the "Missouri Model" an American Model*, HUFFINGTON POST, Mar. 21, 2010, available at http://www.huffingtonpost.com/marian-wright-edelman/juvenile-justice-reform-m_b_498976.html (advocating a nationwide shift to the Missouri Model).

⁶⁵The Foundation, in collaboration with other funders, sponsored empirical research on dimensions of adolescent development relevant to criminal activity and to the adjudication of youths for their offenses. For general information, see www.adjj.org. The Models for Change program, the centerpiece of The Foundation's recent juvenile justice efforts, is a collaboration between the foundation and targeted states to implement fairer and more developmentally conscious juvenile justice models. See <http://www.modelsforchange.net/index.html>.

⁶⁶ See generally <http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative.aspx>.

⁶⁷ Several environmental conditions provide the "opportunity structures" and conditions necessary for healthy psychological development—the presence of an authoritative adult parent figure; association with pro-social peers; and participation in educational and other activities that facilitate the development of autonomous decision-making and critical thinking skills. See He Len Chung, Michelle Little, & Laurence Steinberg, *The Transition to Adulthood for Adolescents in the Juvenile Justice System: A Developmental Perspective*, in ON YOUR OWN WITHOUT A NET: THE TRANSITIONS TO ADULTHOOD FOR VULNERABLE POPULATIONS (Wayne Osgood, Michael Foster, Constance Flanagan, & Gretchen Ruth eds., 2005).

harmful developmental settings;⁶⁸ and long incarceration undermines the opportunities for delinquent youths to mature into productive adults. Against the backdrop of developmental knowledge, the high recidivism rates of youths released from these facilities is not surprising. States increasingly have embraced the view that public safety is often promoted by addressing the needs of young offenders through scientifically based rehabilitative services near offenders' homes.⁶⁹

This more pragmatic approach to youth crime regulation has been possible, in part, because teenage crime has not been a pressing social concern—other threats (such as terrorism and the economy) have become more urgent. Under these conditions, policymakers have been more inclined to deliberate on the long term costs and benefits of various policies and to focus on values such as fairness and racial justice—considerations that got little attention in the late 20th century. In combination, the promise of cost savings, crime reduction and better long term outcomes for youths have led many states to substantially revise their juvenile justice policies to incorporate the lessons of modern developmental science. Interestingly, contemporary knowledge has contributed to a revival of the principle that animated the traditional juvenile

⁶⁸ Donna Bishop & Charles Frazier, *Consequences of Transfer*, in THE CHANGING BORDERS OF JUVENILE JUSTICE, 227 (JEFFREY FAGAN & FRANK ZIMRING EDS., 2000). The deficiencies of institutional settings (especially prison) include impersonal relationships between inmates and adult staff, unstructured interactions with fellow inmates, and inadequate educational, mental health and occupational services. See also Martin Forst, Jeffrey Fagan & Scott Vivona, *Youths in Prisons and Training Schools: Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40 JUV AND FAM. CT. J 1 (1989); CHARTING A NEW COURSE, *supra* note 59 at 19, 47, 57-62.

⁶⁹Effective scientifically-based programs aim to create social contexts that provide delinquent youths with opportunity structures essential to healthy development in adolescence—by seeking to build their relationships with authoritative parents or other adults, minimize the influence of antisocial peers, and provide appropriate training and educational services. See note 67 *supra*. The most effective programs adopting this approach have been evaluated repeatedly over a twenty year period. SCOTT & STEINBERG, *supra* note 9, at 215-21 (describing effective programs using this approach).

court-- that young offenders are different from their adult counterparts and should be dealt with differently when they commit crime.

Forestalling Future Moral Panics.

This account of the evolution of youth crime regulation over the past generation seems like a story with a happy ending—one in which the lawmakers have accepted the lessons of developmental science and henceforth will regulate juvenile crime in ways that reduce its social cost and are also fairer to young offenders. There is a lot to like in this story. But unfortunately, I need to interject a note of realism; there is little reason to be confident that the relatively benign attitudes supporting the current sensible policies will persist. The forces that triggered public fears in the 1990s are likely to be activated again at some point—resulting in new moral panics directed at young criminals, predictably leading to new punitive law reforms. So the question I would like to address in conclusion is whether there is anything we could do to reinforce the current legal trend. I think the answer is “possibly”—lawmakers may be able to adopt what might be called precommitment strategies to deter future moral panics or at least reduce their cost.

The problem with decisionmaking during a moral panic is that it is driven by pressing immediate concerns-- punishing criminals, protecting the public, and avenging victims. In a climate of fear and anger, distorted perceptions of the threat result in precipitous decisions-- while long term goals or interests that (in the abstract) most would acknowledge are as (or more) important—tend to be ignored or discounted. So in the rush to protect the public from juvenile crime in the 1990s, little attention was paid to the financial cost of the punitive reforms, their fairness, their impact on young offenders’ lives-- or even whether they were effective at

reducing crime (except in the most immediate sense). In calmer times, deliberation is possible and government officials are more likely to consider these long term goals and concerns in making decisions. And, essentially, that is what has happened. To the extent that there has been a policy shift in recent years, it is because these broader considerations have been weighed in the calculus—something that didn't happen in the 1990s.

So what is the remedy for the moral panic problem? Here I turn to decision theory and research which provides a framework for thinking about the problem that we face in juvenile justice policy – and suggests that it is not uncommon in human experience. In many domains, individuals are sometimes tempted to make decisions based on compelling but transitory preferences, while discounting stable long term goals and future consequences.⁷⁰ (The dieter who reaches for a piece of chocolate cake is a good example from everyday life). But decision theory also suggests that individuals and lawmakers can employ corrective strategies to assist them in adhering to their long term interests and goals.⁷¹ In our context, lawmakers acting during a period when deliberation is possible can adopt policies that could promote better decisionmaking in the future by avoiding ill-advised actions and by incorporating consideration of long term interests into the regulatory process.

Restricting Prosecutors and Judges

⁷⁰ The problem of inconsistent choice over time was first identified by R.H. Strotz, “*Myopia and Inconsistency in Dynamic Utility Maximization*,” 23 REV. ECON. STUD. 165 (1955-56). The problem is analyzed from multiple perspectives in GEORGE LOWENSTEIN AND JON ELSTER, EDS., CHOICE OVER TIME (1992).

⁷¹ Political economist Thomas Schelling has explored numerous situations from everyday life in which individuals use precommitment strategies to adhere to their long term goals. See THOMAS SCHELLING, CHOICE AND CONSEQUENCE 83-95 (1984); Thomas Schelling, *Self Command in Practice, in Policy and in a Theory of Rational Choice*, 74 AM. ECON. REV. 1 (1984). Schelling offers a long list of precommitment strategies and tactics, including relinquishing authority to someone else, contracting, arranging delays, rewards and penalties, establishing enforceable rules. See also Strotz, *id.* (introducing precommitment as a response to problem of inconsistent choice); George Ainslie & Nick Haslam, *Self-Control*, CHOICE OVER TIME, *id.* at 177-85 (discussing types of precommitments).

First, prosecutors (particularly) but also judges are front line decisionmakers, and simply by virtue of their roles in the justice system, are most subject to pressure to respond to the criminal acts of teenagers on the basis of immediate concerns- punishing the criminal and assuaging angry victims and the public. Clear statutory directives allowing criminal court prosecution only when fairness and social welfare goals support it can insulate these officials from these pressures. Removing prosecutors' authority to make jurisdictional decisions⁷² and limiting transfer eligibility to older juveniles charged with serious violent felonies⁷³ would go some distance toward achieving this goal.

Legislative Precommitments

Precommitments that restrict and guide future legislative decisions are trickier—since a future legislature can always repeal any statutory restraint. But in other areas, lawmakers have adopted legislative strategies to promote deliberation, focus decisionmaking on policy goals and monitor legislative actions for consistency with these goals—and generally they have not been inclined to repeal constraints when they are inconvenient.⁷⁴ Some such mechanisms could be adapted to the context of juvenile crime regulation.

⁷² This would include repealing direct-file statutes, but also automatic transfer laws, under which prosecutors can choose whether to charge youths with a transferrable offense or with a less serious crime that will be adjudicated in juvenile court. National Center for Juvenile Justice, *National Overviews*, available at <http://www.ncjj.org>; Patricia Torbet, *State Responses to Serious and Violent Juvenile Crime*, OJJDP Research Report (1996), available at ncjrs.gov/pdffiles/statresp.pdf. (describing the enactment of these laws).

⁷³ SCOTT & STEINBERG, *supra* note 9, at 96 (recommending that only 15 year old youths previously convicted of a serious violent crime and currently charged with such a crime be eligible for transfer).

⁷⁴ Consider the Senate cloture rule, which allows a minority of the body to block legislation unless overridden by 60 votes. UNITED STATES SENATE, *FILIBUSTER AND CLOTURE*, available at http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Clature.htm. In theory this requirement could be ignored or overridden by a majority vote, and while majority Senators occasionally have expressed interest in repeal, the cloture rule stands. Steven Portnoy, *Senate Majority Rules? Senator Wants Showdown on Filibuster Reform*, Dec. 31, 2010, available at <http://abcnews.go.com/Politics/senate-majority-rules-senator-showdown-filibuster-reform/story?id=12511495> (Senator Tom Udall argues for reform of filibuster rules).

First, legislatures can enact a version of what William Eskridge and John Ferejohn call “super-statutes”⁷⁵—in this case, a comprehensive statute setting in place substantive juvenile crime policies—and announcing the principles, goals and guidelines to direct lawmakers in the future. In other substantive areas, lawmakers have shaped the future direction of policy through such statutes. The National Environmental Policy Act (NEPA), for example, establishes broad environmental goals and policies, and institutes procedures to promote adherence to these policies.⁷⁶ Similarly, a comprehensive juvenile justice statute can establish scientifically-based policies that further the substantive goals of recidivism reduction, cost effectiveness and public protection, as well as fairness and proportionality, together with procedural requirements that maximize the likelihood that future regulation will conform to these goals and principles.

What procedural requirements can encourage future lawmakers to adhere to (or at least be aware of) long term goals? Two possibilities are cost-benefit analysis and impact statements. In other legal settings, government agencies are sometimes required to undertake cost-benefit analyses to encourage consideration of the predicted financial costs over time of a proposed regulatory change.⁷⁷ This practice could be beneficial in the context of juvenile crime regulation

⁷⁵ These scholars coined this term to describe federal laws that create “a new normative or institutional framework for state policy.” They argue that super-statutes (such as the Sherman Anti-Trust Act and the Civil Rights Act of 1964) embody far-reaching and fundamental principles and have transformed an area of law. (On their view, super-statutes can only be identified *ex post*). William N. Eskridge, Jr. and John Ferejohn, *Super-Statutes*, 50 DUKE L. J. 1215 (2001). The aspiration of comprehensive juvenile crime legislation would be similar.

⁷⁶ The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-37, *available at* www.nepa.gov, established broad environmental policy goals and requires federal agencies to evaluate the environmental impact of proposed actions, regulations, programs and legislative proposals. 40 CFR § 1508.18. Its goal is to require that agency decisionmakers be informed of the environmental consequences of their decisions. The Environmental Protection Agency reviews and comments on other agencies’ analyses of environmental impact.

⁷⁷ Cost benefit analysis is routinely used to evaluate environmental, health and safety regulations and policies and create standards for industry practice. *See* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY NATIONAL CENTER FOR ENVIRONMENTAL ECONOMICS, GUIDELINES FOR PREPARING ECONOMIC ANALYSES, *available at* <http://yosemite.epa.gov/ee/epa/eed.nsf/webpages/Guidelines.html> (describing guidelines for cost benefit analyses, their purpose, subject matter, etc.). The Office of Information and Regulatory Affairs (OIRA) directs Federal agency cost-benefit analyses of proposed regulations. In 2011, President Obama issued an executive order, generally mandating that Federal agencies undertake cost-benefit analysis of existing regulations (for the reported purpose of assuring that regulations did not hamper job creation). Exec. Order No. 13563, Improving Regulation and

as well. As we have seen, legislatures rushing to enact laws in the midst of moral panics seldom considered their long term budgetary impact. This problem can be mitigated if cost benefit analysis is built into the legislative and regulatory process.

Another procedural mechanism that could improve deliberation in the lawmaking process is the requirement of an impact statement. Under NEPA, an environmental impact statement is required when proposed government action is likely to have substantial consequences for the environment.⁷⁸ Closer to our context, some states require legislatures and agencies to prepare racial impact statements when considering changes to sentencing and other criminal justice policies.⁷⁹ These requirements amount to mandates that lawmakers weigh (or at least be aware of) long term considerations that they otherwise may tend to discount in making regulatory decisions. A juvenile justice impact statement could improve regulatory decisionmaking by focusing on long term consequences that otherwise might be ignored, including the likely effect of the proposed legal change on incarceration rates and duration, recidivism rates, racial disparity, and on the future educational and employment opportunities of the youths affected by the law.

Finally it is realistic to assume that despite the adoption of precommitment mechanisms, legislatures will sometimes enact ill-considered laws in response to public fears about teenage

Regulatory Review, 76 FR 3821 (Jan. 18, 2011), press release available at <http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order>. Some states also use cost-benefit analyses. The legislature in Washington state has created an independent institute to evaluate the costs and benefits of social and educational programs, including juvenile justice programs. See note 11 *supra*.

⁷⁸ NEPA, 42 U.S.C. §§ 4321-37, available at www.nepa.gov. requires federal agencies to evaluate the environmental impact of proposed actions, regulations, programs and legislative proposals. 40 CFR § 1508.18. The NEPA process requires either an Environmental Assessment (where environmental impact is uncertain) or Environmental Impact Statement (a more comprehensive evaluation).

⁷⁹ Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities*, at [http://www.sentencingproject.org/doc/rd_abaarticle.pdf\(describing adoption of requirement and benefits of impact statements\)](http://www.sentencingproject.org/doc/rd_abaarticle.pdf(describing%20adoption%20of%20requirement%20and%20benefits%20of%20impact%20statements)).

crime. But the cost of such lapses can be contained through oversight by a standing law revision commission, appointed by the legislature to review juvenile crime regulation periodically to evaluate conformity to established principles and goals. In the United Kingdom and in several American states, independent law commissions review different areas of law and propose legislative reform when laws are outdated, inconsistent with contemporary policies, or otherwise problematic.⁸⁰ The evidence indicates that these bodies have been remarkably effective; most reforms proposed by standing law commissions have been adopted.⁸¹ In the context of juvenile crime regulation, an independent legislatively- appointed commission can perform an important monitoring function, serving as a safeguard when the social costs of laws enacted during periods of moral panic later become evident. During calmer periods, legislatures may be open to taking corrective action in response to law commission recommendations.

As I have described the proposed precommitment framework, you may have been asking yourself “Why would any politician support restrictions on their ability to act quickly in response to urgent public concerns about juvenile crime in the future?” It is a good question and I may not have a completely satisfactory answer. Even though most of the framework has been implemented in other legal settings, the politics of crime is different from environmental politics—and politicians may think that the public will be outraged if the government seems insufficiently responsive to a school shooting or gang killing.

⁸⁰ The U.K. commission, created as an independent body by Parliament in 1965, consists of 5 members who serve full time; the chair must be an appellate judge. <http://www.justice.gov.uk/lawcommission/about/who-we-are.htm>. Statutorily created commissions have played important roles in proposing legislative reform in New York and California. See <http://www.lawrevision.state.ny.us/> (describing purpose of N.Y. commission’s review and reform purposes). See also <http://www.clrc.ca.gov/>.

⁸¹ More than 23 of the U.K. commission’s proposed law reforms are enacted or accepted by the government. <http://www.justice.gov.uk/lawcommission/about/381.htm>. Over 90% of California’s Law Revision Commission’s recommendations have been enacted into law, affecting more than 22,500 sections of the California statutory codes. <http://www.clrc.ca.gov/>.

These are legitimate concerns, but my, perhaps optimistic, view is that public opinion may represent a less formidable obstacle to reform than politicians assume. Substantial evidence indicates that although the public cares about protection from violent crime, it also endorses a rehabilitative approach for juvenile offenders.⁸² The view that adolescents are different from adult criminals may be forgotten during a moral panic, but recent history shows that the demands for harsh punishment are likely to fade over time, and paternalistic (and pragmatic) attitudes toward youth reemerge. Ultimately – in calmer periods—the public realizes it is in society’s interest to have both effective and fair juvenile crime regulation. This is more likely to be achieved by attending to the features of adolescence that distinguish teenage criminal activity.

* * *

This symposium has been convened at an exciting time in the history of juvenile justice policy—one in which we have a window of opportunity for a new wave of law reform. So it may seem like the wrong time to be looking back at the bad old days. But in my view, our best hope of sustaining our current policy direction and of reinforcing the perspective on adolescent offending endorsed by the Supreme Court is to think about how to avoid returning to a period in a lot of harm was done by (mostly) well-meaning officials who thought they were effectively combating youth crime.

⁸² Daniel Nagin, et. Al., *supra* note 28 (study showing greater willingness to pay for rehabilitation than incarceration where both were described as equally effective at reducing crime); Julian Roberts, *Public Opinion and Youth Justice*, 31 CRIME AND JUSTICE 495 (2004) (studies conducted over 20 years showing considerable support for rehabilitative programs).