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

Elizabeth S. Scott†

This is an exciting period of change in juvenile 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 mandating 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 are important to the legal response to juvenile crime.⁵ This

†. Harold R. Medina Professor of Law, Columbia Law School. The author presented this essay as a keynote address at a symposium conference sponsored by *Law and Inequality: A Journal of Theory and Practice* at the University of Minnesota Law School on October 4, 2012. Thanks to Annie Steinberg for research assistance and to Jamie Buskirk and the other Journal editors for organizing the symposium.

1. 543 U.S. 551, 578 (2005).

2130 S. Ct. 2011, 2034 (2010).

3. No. 10-9646, slip op. at 27 (S. Ct. June 25, 2012).

4. See *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2398–99 (2011) (holding 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).

5. *Miller*, No. 10-9646, slip op. at 9 (discussing how specific attributes of youth such as rashness and a less developed ability to assess consequences “diminish the penological justifications for imposing the harshest sentences on juvenile

message represents a way of thinking about youth crime that has begun to take hold in the first decade of the twenty-first century—partly in response to the Court’s opinions, but also independently for reasons I will discuss. Contemporary lawmakers have increasingly 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.⁶

This approach is very different from that of the 1990s, a period when young criminals were seen as vicious “super-predators”⁷ 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.⁸

Although we might be happy to 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 decision-making and compare it to the scientifically-based and more deliberative approach to juvenile crime regulation that the Supreme Court has implicitly endorsed and that lawmakers are at least tentatively beginning to adopt.⁹

My plan is to tell the story of what has been a dramatic period in juvenile justice policy over the past generation (too dramatic sometimes), focusing on factors that have contributed to a changing legal environment and highlighting the differences between the approach to lawmaking in this realm in the late twentieth century and more recent approaches. 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.

offenders”).

6. See ELIZABETH S. SCOTT & LAURENCE STEINBERG, *RETHINKING JUVENILE JUSTICE* 94–102 (Harvard Univ. Press 2008).

7. John Dilulio, coined the term “super-predator”. John Dilulio, *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23 (coining the term “super-predator” and sounding the alarm about a coming wave of violent, dangerous youths growing up in moral poverty).

8. See SCOTT & STEINBERG, *supra* note 6, at 4–5.

9. See *id.* at 265–83.

I. The Moral Panics of the 1990s

Youth crime was a hot political issue in the 1990s.¹⁰ The concern began as a response to a threat that warranted attention.¹¹ Violent juvenile crime, particularly homicide, increased dramatically in the late 1980s. The public reacted with alarm, exacerbated by a widespread perception that the juvenile justice system was ineffective in dealing with the problem.¹² Not surprisingly, politicians responded to the public's concern and, in less than a generation, almost every state had changed its laws to make it easier to prosecute and punish juveniles as adults.¹³ 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.¹⁴ Further, under legislative waiver statutes, youths charged with particular offenses were categorically excluded from juvenile court jurisdiction.¹⁵ Many states shifted the authority to make jurisdictional decisions from judges to prosecutors.¹⁶ In the juvenile system, dispositions got harsher and the use of incarceration increased substantially.¹⁷ This is a familiar story that need not be repeated. Suffice it 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 was often ready to ignore differences between young offenders and their adult counterparts as irrelevant to criminal punishment.¹⁸

Supporters defended these changes as simply a coherent policy response to a new generation of violent juveniles, and

10. See *id.* at 265.

11. See OFF. OF JUV. JUST. AND DELINQ. PREVENTION, STATISTICAL BRIEFING BOOK: JUVENILE ARREST RATE TRENDS, available at http://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05200 (showing increasing rates of juvenile arrest rate trends from 1980 to the late 1990s).

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

13. SCOTT & STEINBERG, *supra* note 6, at 4–5.

14. *Id.* (“Under the traditional legal regime, the transfer to criminal court of a minor charged with a crime was a rare occurrence. That is no longer the case.”).

15. PATRICIA TORBET ET AL., U.S. DEPT OF JUST., STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 3–9 (1996), available at <https://www.ncjrs.gov/pdffiles/statresp.pdf> [hereinafter STATE RESPONSES].

16. *Id.*

17. See STEVE AOS, THE JUVENILE JUSTICE SYSTEM IN WASHINGTON STATE: RECOMMENDATIONS TO IMPROVE COST-EFFECTIVENESS 2 (2002), available at <http://www.wsipp.wa.gov/pub.asp?docid=02-10-1201> (describing the increased use of incarceration in Washington state).

18. See SCOTT & STEINBERG, *supra* note 6, at 4–5.

recognizing that the traditional regime was outmoded and unable to protect the public.¹⁹ Yet 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,²⁰ in which the media, politicians, and the public interact in a pattern of escalating alarm in response to a perceived social threat.²¹ The danger that sparks a moral panic is often real. Think, for instance, about child sexual abuse.²² 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.²³

This certainly describes the response to juvenile crime in the 1990s. Media coverage of violent juvenile crime increased dramatically during this period.²⁴ Stories about high profile crimes—school shootings and gang killings of innocent bystanders—generated public outrage and fear, and particular crimes often came to represent a larger threat.²⁵ Prosecutors and politicians, eager to demonstrate their concern for victims and for

19. See *New Juvenile Code Would Come Down Hard on Teens*, LUDINGTON DAILY NEWS, Jan. 15, 1996, <http://news.google.com/newspapers?nid=110&dat=19950113&id=ODRQAAAAIABAJ&sjid=UFUDAAAAIABAJ&pg=5523,814670> (quoting Michigan Governor John Engler suggesting that the current juvenile justice system was designed “for kids stealing hubcaps in the ‘50s, not for some of the things we see today”).

20. Stanley Cohen was probably the first sociologist to study and analyze moral panics in a study of British “Mods” and “Rockers” published in 1972. See STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS* (3d ed. 2002); see also ERICH GOODE & NACHMAN BEN-YEHUDA, *MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE* 22 (2d ed. 2009) (offering comprehensive theoretical and empirical treatment of moral panics).

21. GOODE & BEN-YEHUDA, *supra* note 20, at 21–33.

22. The molesting and killing of a seven-year-old New Jersey child, Megan Kanka, by a neighbor, led states across the country to pass laws mandating registration of sex offenders. See Kimberly McLarin, *Trenton Races to Pass Bills on Sex Abuse*, N.Y. TIMES, Aug. 30, 1994, at A27, available at <http://www.nytimes.com/1994/08/30/nyregion/trenton-races-to-pass-bills-on-sex-abuse.html> (discussing noting that the law went before the New Jersey Senate thirty days after Megan’s death). Earlier, charges of satanic ritual sexual abuse against employees and the owner of a 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 and the trials of an accused worker).

23. See GOODE & BEN-YEHUDA, *supra* note 20, at 35–37 (describing exaggeration of the threat as an element of moral panic).

24. See, e.g., Timothy Egan, *Terror in Littleton: The Reasons; Violence by Youths: Looking for Answers*, N.Y. TIMES, Apr. 22, 1999, at A17, available at <http://www.nytimes.com/1999/04/22/us/terror-in-littleton-the-reasons-violence-by-youths-looking-for-answers.html>.

25. *Id.*; see also DEWEY G. CORNELL, *SCHOOL VIOLENCE: FEARS VERSUS FACTS* (Lane Akers ed., 2006).

public safety, promised punishment of offenders and protection from young criminals generally. Legislation often followed—effectively institutionalizing the moral panic.²⁶

A striking feature of this story is 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.²⁷ By the mid-1990s, they had become “super-predators”—remorseless creatures who roamed in gangs, maiming and killing without moral compunction and considering no consequences other than their own evil gratification.²⁸ Criminologist John Dilulio, 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 twenty-first century.²⁹ The super-predator label and stereotype were picked up by politicians and the media,³⁰ 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 enemies of society.³¹ This characterization may have been easier for many Americans to accept because it was assumed that offenders were minority youths, since membership in juvenile gangs, the focus of media attention, was often limited by race and ethnicity.³²

26. See SCOTT & STEINBERG, *supra* note 6, at 4–5.

27. See Justine Wise Polier, *Dissenting View*, in JUVENILE JUSTICE STANDARDS PROJECT: STANDARDS RELATING TO NONCRIMINAL MISBEHAVIOR 67 (1982).

28. See Dilulio, *supra* note 7, at 23 (“In prison or out, the things that super-predators get by their criminal behavior—sex, drugs, money—are their own immediate rewards. Nothing else matters to them.”).

29. See *id.* at 23 (describing super-predators and predicting their increase).

30. See FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 4–5 (1998) (“[B]race yourself for the coming generation of ‘super-predators.’”) (quoting *Hearing on Youth Violence, Gangs, and the Juvenile Justice and Delinquency Before the Subcomm. on Early Childhood, Youth and Families*, 104th Cong. 3 (1996) (statement of Rep. McCollum, Member, H. Comm. on the Judiciary) (emphasis in original)); Jim Atkinson, *Thrill Killers*, TEX. MONTHLY, Nov. 1996, at 126–33 (“The culprits this time around are . . . a new breed of street criminals known as [super-predators]. . . . Their crimes are as savage as they are pointless.”); Peter Annin, “*Superpredators Arrive: Should We Cage the New Breed of Vicious Kids*,” NEWSWEEK, Jan. 22, 1997, at 57. Lynne Abraham, Philadelphia District Attorney, opined: “We’re talking about kids who have absolutely no respect for human life.” See Dilulio, *supra* note 7, at 23; see also Richard Zoglin, *Now for the Bad News: A Teenage Time Bomb*, TIME, Jan. 15, 1996, at 52 (discussing the “future crime patterns” of America’s youth).

31. See Dilulio, *supra* note 7, at 23 (commenting on the increasing perception of youths as “hardened” and “remorseless”).

32. 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

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 thirteen percent.³³ The public also thought that juvenile crime was on the rise after many years of steady decline.³⁴ 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.³⁵ He described gang violence as a growing problem and “the most alarming of all crime trends.”³⁶ At that time, gang violence had been declining for several years and was lower than it had been in decades.³⁷

The 1999 school shootings at Columbine High School in Colorado provide an example of the dynamic of a moral panic.³⁸ Understandably, the horrific incident was the focus of massive media attention. Cover stories in national magazines pondered the meaning of the killings and the dangers that children faced in school; some described an alarming escalation of school violence.³⁹

nation.” Robert Conot, *L.A. Gangs: Our City, Their Turf*, L.A. TIMES, Mar. 22, 1987, at E1. 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 J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 WAKE FOREST L. REV. 943, 945 (1993).

33. A 1996 survey of 1,000 likely California voters found that sixty percent of respondents believed that juveniles were responsible for *most* violent crime; in reality, only thirteen percent of arrests for violent crimes involved juveniles. See LORI DORFMAN & VINCENT SCHIRALDI, OFF BALANCE: YOUTH, RACE, & CRIME IN THE NEWS, in BUILDING BLOCKS FOR YOUTH 3 (2001), available at <http://www.cclp.org/documents/BBY/offbalance.pdf>.

34. In a 1998 study of 2,000 adults, sixty-two percent 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 twenty-five-year history of the survey. DORFMAN & SCHIRALDI, *supra* note 33, at 3. A 2000 California poll found that a majority of voters thought youth crime was increasing, although the crime rate had been decreasing steadily for at least five years. See JUST. POL’Y INST., SCHOOLS AND SUSPENSIONS: SELF-REPORTED CRIME AND THE GROWING USE OF SUSPENSIONS, Sept. 1, 2001, available at <http://www.prisonpolicy.org/scans/jpi/sss.pdf>.

35. SCOTT & STEINBERG, *supra* note 6, at 102–07.

36. *Id.* at 107.

37. *Id.* at 105.

38. See Egan, *supra* note 24, at A24 (“The more troubling question, perhaps, is why the normal problems of adolescence seem to be resolved now in extraordinary spasms of violence.”).

39. In the wake of the Columbine shooting, one reporter described a trend of “alienated youths” against a backdrop of “violent and nihilistic” popular culture. *Id.*; see also Lauren Terrazzano, *The Colorado Tragedy: Shooting Upsets Notion of Suburban Sanctuary: Local Anxiety in Wake of Colorado Massacre*, NEWSDAY, Apr.

In fact, school shootings have always been extremely rare events (children face a greater risk of being struck by lightning). School shootings were even fewer in the late 1990s than a decade earlier.⁴⁰ 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.⁴¹

The upshot is that by the beginning of the twenty-first century, traditional juvenile crime policy had been largely dismantled. Critics, both academics like Barry Feld and myself, and advocates like Bob Schwartz and 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.⁴²

II. 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.⁴³ 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.⁴⁴ Public safety is still important, of course, and it would be an exaggeration to report a

22, 1999, at A23. For general discussion of the exaggerated perceptions of the threat of school violence, see CORNELL, *supra* note 25, at 11–23 (Lane Akers ed., 2006).

40. GOODE & BEN-YEHUDA, *supra* note 20, at 46 (detailing declining incidences).

41. These laws were sometimes enforced rigidly against very young children. See, e.g., Joan M. Wasser, *Zeroing In On Zero Tolerance*, 15 J.L. & POL. 747, 747–59 (1999).

42. See Barry C. Feld & Donna M. Bishop, *Transfer of Juveniles to Criminal Court*, in OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 801, 827 (Barry C. Feld & Donna M. Bishop eds., 2012) (arguing that treating juveniles as criminals corresponds with increased recidivism); see also Marsha Levick & Neha Desai, *Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at All Stages of the Juvenile Court Process*, 60 RUTGERS L. REV. 175, 182 (2007) (asserting that juveniles are ill-equipped to handle the criminal process in comparison with their adult counterparts); Robert Schwartz, *Kids Should Never Be Tried as Adults*, CNN (Feb. 18, 2010, 8:32 AM), <http://www.cnn.com/2010/OPINION/02/18/schwartz.kids.trials/index.html> (arguing that the culpability of a juvenile is not the same as the culpability of an adult for the same offense).

43. SCOTT & STEINBERG, *supra* note 6, at 11.

44. Daniel S. Nagin et al., *Public Preferences for Rehabilitation Versus Incarceration of Young Offenders: Evidence from a Contingent Valuation Study*, 5 J. CRIMINOLOGY & PUB. POL'Y 627, 629 (2006) (showing greater willingness to pay for rehabilitation than incarceration where both were described as equally effective at reducing crime).

widespread repudiation of punitive policies. But it seems that paternalism toward young offenders has begun to reemerge in updated form in the early twenty-first century.

How can we explain the change in attitudes? Certainly it is important that juvenile crime rates declined and that the predicted wave of super-predators never materialized.⁴⁵ 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.⁴⁶ We might also speculate that another threat—Islamic terrorists—supplanted teenage criminals as the most feared enemies of society.⁴⁷ At a more practical level, state governments began to recognize the high cost of incarceration-based policies, particularly as tax revenues fell during the recession.⁴⁸ 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.⁴⁹

45. Violent juvenile crime rates began a steady, decade-long decline in 1994; rates declined for other crimes shortly thereafter. See U.S. DEP'T OF JUST., OFF. OF JUV. JUST. AND DELINQ. PREVENTION STATISTICAL BRIEFING BOOK, JUVENILE ARREST RATE TRENDS (2009), 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 43% by 2010."); CHARLES PUZZANCHERA, JUVENILE ARRESTS 2008 3 (Dec. 2009), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/228479.pdf> (describing declining rates for specific offenses).

46. See SCOTT & STEINBERG, *supra* note 6, at 11–12 (discussing political reforms seeking more moderate punishments for juvenile offenders).

47. See, e.g., Alex Gourevitch, *Fear*, CHRON. HIGHER EDUC., Aug. 7, 2011, <http://chronicle.com/article/Era-in-Ideas-Fear/128492> (arguing that terrorism is society's greatest fear).

48. See JOHN SCHMITT ET AL., CTR. FOR ECON. & POL'Y RES., THE HIGH BUDGETARY COST OF INCARCERATION 10 (2010), available at <http://www.cepr.net/documents/publications/incarceration-2010-06.pdf> ("[B]y far the largest share of the costs of corrections are borne by state and local governments.").

49. See *infra* notes 105–06 and accompanying text (discussing states' decisions to close juvenile penal institutions to shift resources to more effective community programs). The 2009 New York Governor's Task Force report emphasized the high cost of institutionalization of youths (\$210,000 per year per youth), the majority of whom were misdemeanants, and their very high recidivism rates. VERA INST. OF JUST., CHARTING A NEW COURSE: A BLUEPRINT FOR TRANSFORMING JUVENILE JUSTICE IN NEW YORK STATE 10 (2009). The system's punitive approach, it stated, "damaged the future prospects of these young people, wasted millions of taxpayer dollars and violated the fundamental principles of positive youth development." *Id.* at 8. New York City officials responded by announcing a drastic reduction in the number of city youths sent to state institutions. Julie Bosnan, *City Signals Intent to Put Fewer Teenagers in Jail*, N.Y. TIMES, Jan. 20, 2010, at A31, available at <http://www.nytimes.com/2010/01/21/nyregion/21juvenile.html?ref=nyregion&pagew>

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.⁵⁰ This, of course, is the essence of the Supreme Court's opinions—and the Court's powerful message has resonated through the justice system—challenging a regime that has ignored differences between juveniles and adults.⁵¹ But these ideas were already beginning to have an influence in the political arena.

III. 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 super-predators—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.⁵²

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 seem to 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, has

anted=print. Most youths would remain in their homes and receive therapeutic services that had been shown to reduce crime more effectively than institutionalization at a fraction of the cost. *Id.* (describing a cost of \$17,000 per youth).

50. See Schwartz, *supra* note 42.

51. 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 fifteen-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. ILL. JUV. JUST. INITIATIVE, CHANGING COURSE: A REVIEW OF THE FIRST TWO YEARS OF DRUG TRANSFER REFORM IN ILLINOIS 4 (2008).

52. See, e.g., Graham v. Florida, 130 S. Ct. 2011, 2030 (2012) (emphasizing that when imposing sentences, states must provide “some meaningful opportunity for release based on demonstrated maturity and rehabilitation”).

emerged.⁵³

Stephen Morse, in his Symposium Article, discusses this neuroscience research and how it might inform our understanding of juvenile offending.⁵⁴ What I would note is simply the level of interest in “the teen brain” among lawmakers, the media, and the public in recent years.⁵⁵ Policymakers at all levels have invoked adolescent brain research in rationalizing legal reforms that deal more leniently with juveniles than adults—accepting the view that immature brain functioning contributes to adolescents’ decisions to get involved in criminal activity.⁵⁶ 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 confirmed by the brain studies.⁵⁷ 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 this research 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.

IV. 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

53. Kelly Richards, *What Makes Juvenile Offenders Different From Adult Offenders?*, 409 TRENDS & ISSUES ON CRIM. JUSTICE 1, 3–4 (2011) (discussing research on juvenile brain development).

54. Stephen J. Morse, *Brain Overclaim Syndrome Redux: More Cognitive Jurotherapy Is Indicated*, 31 LAW & INEQ. 509 (2013).

55. See Sharon Begley, *Getting Inside a Teen Brain*, NEWSWEEK, Feb. 27, 2000, at 58; Claudia Wallis, *What Makes Teens Tick?*, TIME, Sept. 26, 2008, at 56; Malcolm Ritter, *Experts Link Teen Brains’ Immaturity, Crime*, USA TODAY (Dec. 2, 2007, 12:01 PM), http://www.usatoday.com/tech/science/2007-12-02-teenbrains_N.htm.

56. For a discussion of the reforms, see SCOTT & STEINBERG, *supra* note 6, at 96–99.

57. Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 AM. PSYCHOL. 739, 742 (2009). 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.” *Id.*

unconstitutional for a crime committed by a juvenile, while *Graham v. Florida* and *Miller* also invoked neuroscience research in striking down LWOP sentences.⁵⁸ Each of these decisions rests primarily on a developmentally informed proportionality analysis. First, the Court emphasized that juveniles have “greater prospects for reform”⁵⁹ than do adults because most teenage offending is the product of “transitory” developmental influences.⁶⁰ 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 decision-making capacity due to their impulsivity, proclivity for risk-taking, and deficiency in foreseeing consequences.⁶¹ Second, they are vulnerable to negative external pressures from peers and family to a greater extent than adults, and thus they are less able than adults to escape their social context.⁶² Third, an adolescent’s character is unformed—his or her criminal acts are less likely than an adult’s to be evidence of irretrievable depravity.⁶³

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.⁶⁴ In theory, as long as the youth is permitted to introduce mitigating evidence of his immaturity and circumstances, he or she could be subject to the sentence—even a youth like Kuntrell Jackson—whose case was joined with *Miller*—who was convicted of felony murder and whose intent to kill was not proven.⁶⁵ Nonetheless, in my view, *Miller* is at least as powerful a statement about how juveniles should be

58. *Roper v. Simmons*, 543 U.S. 551, 569 (2005); see also *Graham v. Florida*, 130 S. Ct. 2011, 2026–27 (2010) (citing brain research). In *Miller*, the Court noted that brain development involved in behavioral control continues to mature through late adolescence and explained: “[D]evelopments 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 v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (internal quotations omitted).

59. *Miller*, 132 S. Ct. at 2464.

60. *Id.* at 2465.

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

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

63. *Roper*, 543 U.S. at 570.

64. *Miller*, 132 S. Ct. at 2476.

65. *Id.* 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. The majority, although it noted Jackson’s diminished capacity, did not agree.

dealt with in the justice system as the earlier opinions—and apparently the dissenting justices thought so as well.⁶⁶

Miller is noteworthy in three ways that expand its importance beyond its narrow holding. First, the Court (a critic might say gratuitously) emphasized that, while it was not categorically prohibiting LWOP as cruel and unusual punishment, it expected the sentence to be “uncommon.”⁶⁷ As Justice Roberts noted in dissent, “uncommon” sounds a lot like “unusual” in Eighth Amendment parlance, and he predicted that the next step would be a categorical bar.⁶⁸

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 Eighth Amendment.⁶⁹ The mantra “death is different” captures the distinction; the Court has applied rigorous proportionality review to the death penalty⁷⁰ but has been extremely reluctant to override non-capital sentencing decisions (no matter how draconian) for adults.⁷¹ *Graham* and *Miller* afford juveniles facing LWOP

66. *Miller*, 132 S. Ct. at 2481 (Roberts, C.J., dissenting).

67. *Id.* at 2469.

68. In his dissent, Chief Justice Roberts speculates: “[T]he 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 (Roberts, C.J., dissenting).

69. *Miller*, 132 S. Ct. at 2470.

70. 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, 584 (1977) (holding that the death penalty was grossly disproportionate to the crime of rape); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that execution of mentally retarded individuals violates the Eighth Amendment); *Kennedy v. Louisiana*, 554 U.S. 407, 412 (2008) (holding that the Eighth Amendment prohibits the death penalty as punishment for the rape of a child); *Enmund v. Florida*, 458 U.S. 782, 798–99 (1982) (holding that the Eighth 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, 305 (1976) (plurality opinion) (prohibiting mandatory imposition of death penalty and requiring that defendant be evaluated individually, including evaluating mitigating factors).

71. 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, 959–61 (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 (holding that a life sentence for a third felony was not grossly disproportionate); *Lockyer v. Andrade*, 538 U.S. 63, 76–78 (2003) (denying petition for a writ of habeas corpus while upholding a life

protections that for adults are available only in the death penalty context—the requirement of individualized sentencing⁷² and the categorical exclusion of the sentence as excessive for certain crimes. The Court actually made the link explicit, comparing LWOP for juveniles to a death sentence.⁷³ 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.⁷⁴

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.⁷⁵ 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.⁷⁶ In his dissent, Justice Roberts lamented 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.”⁷⁷

I believe that 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.⁷⁸ But following a long period in which the relevance to criminal punishment of differences between juvenile and adult offenders was either

sentence for three petty thefts, the third of which was the theft of video tapes worth seventy dollars).

72. Before *Miller* the Court held that the prohibition of a mandatory sentence only applied to the death penalty and not to non-capital sentences. See *Harmelin*, 501 U.S. at 1006.

73. The Court emphasized that LWOP “shares some characteristics with death sentences that are shared by no other sentences.” *Miller v. Alabama*, 132 S. Ct. 2455, 2466 (2012) (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2027).

74. *Miller*, 132 S. Ct. at 2470.

75. *Id.* at 2465.

76. *Id.*

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

78. Adam Liptak, *Juvenile Killers in Jail for Life Seek a Reprieve*, N.Y. TIMES, Apr. 20, 2011, at A13, available at http://www.nytimes.com/2011/04/21/us/21juvenile.html?pagewanted=all&_r=0.

ignored or denied, our highest legal institution has emphatically rejected the view of young criminals that dominated in the 1990s.

V. Juvenile Crime Regulation in the 21st century

Although the Court's views surely influence other lawmakers, the Supreme Court does not dictate most juvenile crime regulations.⁷⁹ But changing attitudes toward young offenders have affected policymakers at all levels of government; across the country, there has been a rethinking of harsh incarceration-based policies and a readiness to try different approaches.⁸⁰ To be sure, many (probably most) statutes mandating or allowing the adult prosecution and punishment of juveniles are still in place.⁸¹ 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.⁸² Connecticut raised its general jurisdictional age from sixteen to eighteen, following a campaign in which supporters emphasized the developmental immaturity of adolescents and the ineffectiveness of adult punishment in reducing recidivism.⁸³ 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)

79. *Roper v. Simmons*, 543 U.S. 551, 571 (2005). The Court noted, “[i]n general we leave to legislatures the assessment of the efficacy of various criminal penalty schemes,” but went on to suggest that the execution of juveniles presented a special case warranting judicial intrusion. *Id.*

80. See NAT'L JUV. DEFENDER CTR., JUVENILE DEFENDER RESOURCE GUIDE (2012), available at http://www.njdc.info/pdf/2012_resource_guide/NJDC_ResourceGuide12.pdf (describing various legislative developments toward rehabilitative and community-focused programs).

81. See *Id.*; GOODE & BEN-YEHUDA, *supra* note 20, at 247–48 (describing how moral panics are institutionalized through legislation which is difficult to undo).

82. 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 fifteen except for murder or aggravated assault. 2009 Wash. Sess. Laws 2276, available at <http://www.leg.wa.gov/CodeReviser/documents/sessionlaw/2009pam3.pdf>. See also NAT'L JUV. DEFENDER CTR., *supra* note 80 (describing repeal of an Illinois statute that mandated adult prosecution of fifteen 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).

83. S. Rep. 1500, Gen. Assemb., June Sp. Sess. (Conn. 2007) (enacted) (amending CONN. GEN. STAT. ANN. § 46b-120 to raise the age of juvenile jurisdiction from sixteen to eighteen); see also CONN. JUV. JURISDICTION PLANNING AND IMPLEMENTATION COMM., FINAL REPORT 2–4 (2007) (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 sixteen to eighteen), available at www.housedems.ct.gov/jjpic/070212_JJPIC_report_revised.pdf.

have abolished the sentence of life without parole (LWOP) for juveniles altogether.⁸⁴ In Colorado, repeal followed a series of sympathetic news stories highlighting differences between adolescents and adults; politicians pointed to adolescent brain research in explaining their support for the measure.⁸⁵ Legislatures in other states have passed laws requiring an assessment of juveniles' competence to stand trial when they are adjudicated as adults—addressing concerns raised by the Court in *Graham* that some youths may be unable to function effectively as defendants in criminal proceedings.⁸⁶ As the differences between juveniles and adults have become more salient, lawmakers have increasingly paid attention to the values of procedural and substantive fairness.

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 instead to community-based programs. California, in 2007, dismantled the California Youth Authority and closed most of its facilities.⁸⁷ In New York, a task force appointed by Governor Patterson issued a scathing report in 2009 harshly criticizing the state's juvenile justice system.⁸⁸ The report noted that most youths placed in juvenile institutions, at a cost to

84. See *SB 9 Is Signed into Law Giving Juveniles Serving Life-Without-Parole Sentences A Second Chance*, PAC. JUV. DEFENDER CTR. (Oct. 4, 2012), <http://www.pjdc.org/2012/10/sb-9-is-signed-into-law-giving-juveniles-serving-life-without-parole-sentences-a-second-chance/>.

85. Miles Mofeit & Kevin Simpson, *Research Points to Changing Teen Brain*, DENVER POST, Feb. 19, 2006, at A1; Miles Mofeit, *Juvenile Justice Legislation a Milestone in Sentencing*, DENVER POST, May 28, 2006, at C3; see also Gwen Florio, Sue Lindsey & Sarah Langbein, *Life for Death: Should Teen Murderers get a Second Chance at Freedom?*, ROCKY MTN. NEWS, Sep. 17, 2005, at 1A (noting that Governor Bill Owen pointed to brain research in explaining his support).

86. See, e.g., FLA. CODE ANN. § 985.223(1)(F) (describing mental capacities to be addressed in evaluating juvenile's competence) (West 2008); ARIZ. REV. STAT. § 8-291.07(B)(1)-(4) (West 2012); see also NAT'L JUV. DEFENDER CTR., STATE JUVENILE JUSTICE LEGISLATION (2007), available at http://www.njdc.info/pdf/2007_Legislative_Summary.pdf.

87. Pursuant largely to a 2007 statutory directive (SB 81 and AB 191), the state renamed the CYA the Division of Juvenile Justice (DJJ) and directed that most convicted youths remain in their communities. See HISTORY OF THE DJJ, CAL. DEP'T OF JUV. JUST., http://www.cdcr.ca.gov/Juvenile_Justice/DJJ_History/index.html. The DJJ census dropped by more than eighty percent. *Id.*

88. TASK FORCE ON TRANSFORMING JUV. JUST., CHARTING A NEW COURSE: A BLUEPRINT FOR TRANSFORMING JUVENILE JUSTICE IN NEW YORK STATE (2009) [hereinafter CHARTING A NEW COURSE].

taxpayers of \$210,000 a year, were misdemeanants and that their recidivism rates were appallingly high: seventy-five percent reoffended within three years.⁸⁹ The system's punitive approach, the report stated, "damaged the future prospects of these young people, wasted millions of taxpayer dollars, and violated the fundamental principles of positive youth development."⁹⁰ New York City officials responded by announcing a plan to drastically reduce the number of city youths sent to state institutions.⁹¹ 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.⁹²

Other states have implemented policies aimed at deterring institutional placement and keeping youths in their communities.⁹³ Several jurisdictions, including Ohio and Illinois, have reversed perverse financial incentives that previously encouraged judges to sentence youths to state facilities, allowing localities to avoid the cost of dispositions.⁹⁴ Other states, such as Maryland, have adopted strategic plans, redirecting funds from secure institutions to community programs.⁹⁵ And many states have reformed residential placement itself, adapting a model developed in Missouri that rejects prison-like institutions in favor of small therapeutic facilities near offenders' homes.⁹⁶

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

89. *Id.* at 10.

90. *Id.* at 8.

91. Bosnan, *supra*, note 49.

92. *Id.* (describing a cost of \$17,000 per youth).

93. NAT'L JUV. JUST. 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 toward community based sanctions in various states).

94. *Id.* at 5.

95. See MD. DEPT OF JUV. SERVS., CMTY. SUPERVISION, <http://www.djs.state.md.us/community-supervision.asp> (outlining the program).

96. See MO. DEPT OF SOC. SERVS., DIV. OF YOUTH SERVS., 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, 9:50 AM), http://www.huffingtonpost.com/marian-wright-edelman/juvenile-justice-reform-m_b_498976.html (advocating a nationwide shift to the Missouri Model).

crime regulation, has pursued its ambitious Models for Change program in a number of states.⁹⁷ The Annie E. Casey Foundation has reformed juvenile detention practices across the country through its Juvenile Detention Alternative Initiative (JDAI) program that aims to reduce racial disparity in detention and restrict it to those youths who represent a substantial risk.⁹⁸

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.⁹⁹ This is not surprising given what we know about the important role of social context in adolescent development.¹⁰⁰ As the work of Donna Bishop and Charles Frazier has shown, adult prisons and institutional facilities are harmful developmental settings,¹⁰¹ and lengthy incarceration undermines opportunities for delinquent youths to mature into productive adults.¹⁰² Against the backdrop of developmental knowledge, the high recidivism rates of youths

97. The 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 *ADOLESCENT DEV. & JUV. JUST.*, www.adj.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 *MODELS FOR CHANGE*, <http://www.modelsforchange.net/index.html> (last visited Mar. 10, 2013).

98. See *THE ANNIE E. CASEY FOUNDATION, JUVENILE DETENTION ALTERNATIVE INITIATIVE*, <http://www.aecf.org/MajorInitiatives/JuvenileDetentionAlternativesInitiative.aspx> (last visited Feb. 21, 2013).

99. See, e.g., *CHARTING A NEW COURSE*, *supra* note 88 (highlighting the evolution of policy making in New York).

100. 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 et al. eds., 2005).

101. 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 prisons) 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. & FAM. CT. J.* 1 (1989); *CHARTING A NEW COURSE*, *supra* note 88, at 19, 47, 57–62.

102. Bishop & Frazier, *supra* note 101, at 264–65.

released from these facilities is not surprising.¹⁰³ States have increasingly embraced the view that public safety is often promoted by addressing the needs of young offenders through scientifically based rehabilitative services near their homes.¹⁰⁴

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 economic decline have become more urgent.¹⁰⁵ 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 twentieth century.¹⁰⁶ 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.¹⁰⁷ Interestingly, contemporary knowledge has contributed to a revival of the principle that animated the traditional juvenile court—that young offenders are different from their adult counterparts and should be dealt with differently when they commit crime.¹⁰⁸

VI. 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. 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

103. *Id.* at 261.

104. The most effective programs adopting this approach have been evaluated repeatedly over a twenty-year period. SCOTT & STEINBERG, *supra* note 6, at 215–21 (describing effective programs using this approach).

105. See Mussarat Khan & Kathryn Ecklund, *Attitudes Toward Muslim Americans Post-9/11*, 7 *J. MUSLIM MENTAL HEALTH* 1 (2012) (reviewing the research showing drastic increases in violence against and fear of Muslims in the wake of the terrorist attacks of September 11th).

106. See, e.g., CHARTING A NEW COURSE, *supra* note 88.

107. See, e.g., *id.* at 10.

108. Nagin et al., *supra* note 44 (finding that public attitudes toward juvenile crime once more favor rehabilitation).

point—resulting in new moral panics directed at young criminals, and predictably leading to new, punitive legal reforms.¹⁰⁹ 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 social cost.¹¹⁰

The problem with decision-making 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).¹¹¹ 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.¹¹²

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 major problem that we face in framing 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.¹¹³ The dieter who reaches for a piece of chocolate

109. The drug panics serve as a useful analogy, with resurgences in the 1960s, 80s, and 90s. Crime generally tends to be cyclical; thus it would not be surprising if a new panic over juvenile crime arose in the future. For a more thorough analysis of the drug panics, see GOODE & BEN-YEHUDA, *supra* note 20.110. For a general discussion of the function of precommitment strategies, see *infra* 124–25 and accompanying text.

110. For a general discussion of the function of precommitment strategies, see *infra* 124–25 and accompanying text.

111. See, e.g., CHARTING A NEW COURSE, *supra* note 88.

112. See *id.*

113. The problem of inconsistent choice over time was first identified by R.H. Strotz. See R.H. Strotz, *Myopia and Inconsistency in Dynamic Utility Maximization*, 23 REV. ECON. STUD. 165 (1955–56). For multiple perspectives on

cake is a good example from everyday life. But decision theory also suggests that individuals and lawmakers can employ corrective precommitment strategies to assist them in adhering to their long-term interests and goals.¹¹⁴ In our context, lawmakers acting during a period when deliberation is possible can adopt policies that could promote better decision-making in the future by avoiding ill-advised actions and by incorporating consideration of long term interests into the regulatory process.

A. *Restricting Prosecutors and Judges*

First, prosecutors and judges are front line decision-makers. Simply by virtue of their roles in the justice system, they are most subject to pressure to respond to the criminal acts of teenagers on the basis of immediate concerns, such as 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 decisions¹¹⁵ and limiting transfer eligibility to older juveniles charged with serious violent felonies¹¹⁶ would go some distance toward achieving this goal.

B. *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

this problem, see GEORGE LOWENSTEIN & JON ELSTER, *CHOICE OVER TIME* (1992).

114. 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, *supra* note 113 (introducing precommitment as a response to problem of inconsistent choice); George Ainslie & Nick Haslam, *Self-Control, in CHOICE OVER TIME, supra* note 113, at 177-85 (discussing types of precommitments).

115. 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. See PATRICIA TORBET, *OFF. OF JUV. JUST. AND DELINQ. PREVENTION, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME* (1996), available at <http://ncjrs.gov/pdffiles/statresp.pdf>. (describing the enactment of these laws).

116. SCOTT & STEINBERG, *supra* note 6, at 96 (recommending that only fifteen year old youths previously convicted of a serious violent crime and currently charged with such a crime be eligible for transfer).

adopted legislative strategies to promote deliberation, focus decision-making 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.¹¹⁷ Some such mechanisms could be adapted to the context of juvenile crime regulation.

First, legislatures can enact a version of what William Eskridge and John Ferejohn call “super-statutes”¹¹⁸—in this case, a comprehensive statute setting in place substantive juvenile crime policies—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.¹¹⁹ 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?

117. Consider the Senate cloture rule, which allows a minority of the body to block legislation unless overridden by sixty votes. U.S. SENATE, FILIBUSTER AND CLOTURE ORIGINS & DEVELOPMENT, http://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Cloture.

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*, ABC NEWS, Dec. 31, 2010, available at <http://abcnews.go.com/Politics/senate-majority-rules-senator-showdown-filibuster-reform/story?id=12511495> (reporting on Senator Tom Udall arguing for reform of filibuster rules).

118. 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. & John Ferejohn, *Super-Statutes*, 50 DUKE L. J. 1215, 1215 (2001). The aspiration of comprehensive juvenile crime legislation would be similar.

119. The NATIONAL ENVIRONMENTAL POLICY ACT OF 1969 (NEPA), 42 U.S.C. §§ 4321-37, available at www.nepa.gov, also requires federal agencies to evaluate the environmental impact of proposed actions, regulations, programs and legislative proposals. 40 CFR § 1508.18 (1970). Its goal is to require that agency decision-makers be informed of the environmental consequences of their decisions. The Environmental Protection Agency reviews and comments on other agencies’ analyses of environmental impact.

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.¹²⁰ This practice could be beneficial in the context of juvenile crime regulation 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.¹²¹ 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.¹²² These requirements amount to mandates that lawmakers weigh (or at least be aware of) long-term considerations that they otherwise may discount in making regulatory decisions. A juvenile justice impact statement could improve regulatory decision-making by

120. Cost benefit analysis is routinely used to evaluate environmental, health and safety regulations and policies and create standards for industry practice. See U.S. ENVTL. PROT. AGENCY, NAT'L CTR. FOR ENVTL. ECON., 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, which, in part, is directed toward evaluating the impact of regulations on private business activity. 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, Press Release, White House, Executive Order 13563 – Improving Regulation and Regulatory Review (Jan. 18, 2011), 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 OFF. OF JUV. JUST. AND DELINQ. PREVENTION, *supra* note 11.

121. NEPA 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).

122. Marc Mauer, *Racial Impact Statements: Changing Policies to Address Disparities* (2009), http://www.sentencingproject.org/doc/rd_abaarticle.pdf (describing adoption of requirement and benefits of impact statements).

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 of teenage 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.¹²³ The evidence indicates that these bodies have been remarkably effective; most reforms proposed by standing law commissions have been adopted.¹²⁴ 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

123. The U.K. commission, created as an independent body by Parliament in 1965, consists of five members who serve full time; the chair must be an appellate judge. LAW COMMISSION: REFORMING THE LAW, <http://www.justice.gov.uk/lawcommission/about/who-we-are.htm> (last visited Mar. 10, 2013). Statutorily created commissions have played important roles in proposing legislative reform in New York and California. See NEW YORK STATE LAW REVISION COMMISSION, <http://www.lawrevision.state.ny.us/> (last visited Mar. 10, 2013) (describing the New York commission's review and reform purposes); see also CALIFORNIA LAW REVISION COMMISSION, <http://www.clrc.ca.gov/> (last visited Mar. 10, 2013).

124. More than two-thirds of the UK commission's proposed law reforms are enacted or accepted by the government. See LAW COMMISSION, LAW COMMISSION RECOMMENDATIONS: IMPLEMENTATION LOG, available at <http://www.justice.gov.uk/lawcommission/about/381.htm> (last visited Mar. 10, 2013). Over ninety percent of California's Law Revision Commission's recommendations have been enacted into law, affecting more than 22,500 sections of the California statutory codes. See CALIFORNIA LAW REVISION COMMISSION, <http://www.clrc.ca.gov/> (last visited Mar. 10, 2013).

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.

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.¹²⁵ 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 that 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.

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This Symposium has been convened at an exciting time in the history of juvenile justice policy, a period in which we have a window of opportunity for a new wave of law reform. 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 during which a lot of harm was done by (mostly) well-meaning officials who thought they were effectively combating youth crime.

125. See, e.g., Nagin et al., *supra* note 44 (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 & JUST.* 495 (2004) (showing considerable support for rehabilitative programs).