No. 10-9647

In The
Supreme Court of the United States

KUNTRELL JACKSON,

Petitioner,

v.

RAY HOBBS, DIRECTOR,
ARKANSAS DEPARTMENT OF CORRECTION,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Arkansas

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does imposition of a life-without-parole sentence on a 14-year-old child convicted of homicide violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishments?

2. Does such a sentence violate the Eighth and Fourteenth Amendments when it is imposed upon this 14-year-old petitioner, who did not personally kill the homicide victim, did not personally engage in any act of physical violence toward the victim, and was not shown even to have anticipated, let alone intended, that anyone be killed?

3. Does such a sentence violate the Eighth and Fourteenth Amendments when it is imposed upon a 14-year-old child as a result of a mandatory sentencing scheme that categorically precludes consideration of the offender's young age or any other mitigating circumstances?

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OPINIONS BELOW

The majority, concurring, and dissenting opinions in the Arkansas Supreme Court below are reported at 2011 Ark. 49 and appear at J.A. 77-89. The order of the Jefferson County Circuit Court is unreported and is found at J.A. 72-76. The Arkansas Supreme Court opinion affirming Kuntrell Jackson's conviction on direct appeal is *Jackson v. State*, 359 Ark. 87, 194 S.W.3d 757 (Ark. 2004).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Arkansas Supreme Court's judgment was entered February 9, 2011. The petition for certiorari was filed March 21, 2011.

RELEVANT CONSTITUTIONAL PROVISIONS

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

It bears upon the States through the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

Kuntrell Jackson was sentenced to life imprisonment without parole for felony murder occurring during a robbery incident on November 18, 1999, less than three weeks after his 14th birthday. The State's evidence showed that Kuntrell and two older boys, Derrick Shields and Travis Booker (Kuntrell's cousin), were walking through a housing project when they began discussing the idea of robbing a local video store. *Jackson v. State*, 194 S.W.3d 757, 758 (Ark. 2004). Kuntrell then became aware that Shields was carrying a shotgun in his coat sleeve. *Id.* At the store, the two older boys entered; Kuntrell chose to stay outside. *Id.* Inside, Shields pointed his gun at a clerk and demanded money six or seven times. *Id.* at 758-59. The clerk refused. *Id.* at 759. During this exchange, Kuntrell entered the store. *Id.* When the clerk threatened to call the police, Shields shot and killed her. *Id.* The boys ran from the store. *Id.* They did not take any money. *Id.*

The prosecutor exercised his discretion under Arkansas Code § 9-27-318(c) to charge Kuntrell as an adult with one count of capital felony murder (Ark. Code Ann. § 5-10-101) and one count of aggravated robbery (Ark. Code Ann. § 5-12-103). J.A. 42-43. Following the trial court's refusal to transfer the case to juvenile court, *Jackson v. State*, No. CA 02-535, 2003 WL 193412 (Ark. Ct. App. Jan. 29, 2003), Kuntrell was convicted of capital felony murder and aggravated robbery on July 19, 2003. J.A. 53-54. The judge, legally barred from considering Kuntrell's

age, character, individual circumstances, or degree of involvement in the offense, imposed a mandatory sentence of life without parole on the capital-murder conviction. J.A. 54-57. The Arkansas Supreme Court affirmed without reviewing the propriety of the sentence. *Jackson*, 194 S.W.3d at 762.

On January 8, 2008, following this Court's decision in *Roper v. Simmons*, 543 U.S. 551 (2005), Kuntrell filed a petition for habeas corpus under Arkansas Code § 16-112-101 *et seq.*, in the Jefferson County Circuit Court. Kuntrell's petition asserted that the Eighth and Fourteenth Amendments prohibit a mandatory sentence of life without parole for a 14-year-old child who was not the trigger person and who did not intend to kill. The State filed a motion to dismiss. After a non-evidentiary hearing, the circuit court granted the State's motion on September 17, 2008. J.A. 72-76.

Kuntrell appealed to the Arkansas Supreme Court. While his appeal was pending, this Court decided *Graham v. Florida*, 130 S. Ct. 2011 (2010), holding that juveniles cannot be sentenced to life without parole for nonhomicide offenses. Kuntrell was granted leave to file a supplemental brief regarding *Graham*. It made three arguments. First, *Graham* confirms Kuntrell's basic submission that juveniles can assert categorical challenges to life-without-parole sentences under the Eighth and Fourteenth Amendments. Second, *Graham*'s recognition that a young person's age must constitutionally be considered at sentencing prohibits mandatory sentences

of life without parole for juveniles. Third, because Kuntrell did not commit the shooting and did not intend the victim's death, *Graham* invalidates his life-without-parole sentence.

The Arkansas Supreme Court affirmed Kuntrell's sentence on February 9, 2011. J.A. 77-82. Addressing the merits of Kuntrell's Eighth and Fourteenth Amendment claims, the Arkansas Supreme Court concluded that "[t]he [United States Supreme] Court's holdings in *Roper* and *Graham* are very narrowly tailored to death-penalty cases involving a juvenile and life-imprisonment-without-parole cases for non-homicide offenses involving a juvenile." J.A. 81. A four-justice majority therefore "decline[d] to extend the Court's bans to homicide cases involving a juvenile where the death penalty is not at issue." J.A. 81-82. Two justices dissented from the court's judgment. J.A. 84-89. They concluded that *Graham* rendered Kuntrell's sentence unconstitutional because the state failed to prove that he had any intent to kill. J.A. 87-88. The dissenters emphasized that Kuntrell's role in the offense was "no more, if not less than, Graham's involvement had been." J.A. 88. They noted that Kuntrell's mandatory sentence did not take account of his young age or other mitigating circumstances, as *Graham* requires. J.A. 88. A third justice wrote a separate concurrence to note that he "agree[d] with [Kuntrell's] argument that this state needs a procedural mechanism for the jury to hear aggravating and mitigating circumstances before a juvenile is put away in prison for the rest of his life

without the possibility of parole." J.A. 83. Such individualized consideration in Kuntrell's case "may well have convinced the jury that life without parole was too severe and not appropriate in light of [Kuntrell's] age and circumstances." J.A. 83.

SUMMARY OF ARGUMENT

Graham v. Florida, 130 S. Ct. 2011 (2010), and *Roper v. Simmons*, 543 U.S. 551 (2005), identified numerous features of adolescence that make teen offenders less culpable than adults: Biologically and psychologically, teens are given to impulsive, heedless, sensation-seeking behavior and excessive peer pressure. Through inexperience and neurological underdevelopment, they lack mature behavioral controls. They are shaped by environments they did not choose and cannot change or escape. Their youthful characters are transitory, their adult characters unpredictable.

These features are widely recognized by our legal and cultural institutions. Each bears centrally on the retributive, deterrent, and incapacitative justifications for life-without-parole sentences. *Graham*'s reasons for finding the justifications lacking apply no less to murder than other crimes. *Roper* so holds.

Life-without-parole homicide sentences for young teens are vanishingly rare. Homicides by young teens are themselves infrequent. No pragmatic difficulty – including the doctrinal problem of drawing an age

line – warrants abandoning all *Graham*'s logic in murder cases.

ARGUMENT

THE CONSTITUTIONAL LOGIC OF *ROPER V. SIMMONS* AND *GRAHAM V. FLORIDA* CONTROLS THIS CASE.

In recent years, this Court has twice addressed the application of the Eighth Amendment to harsh penalties imposed on children. Each time, it has recognized that the substantial differences between children and adults are constitutionally relevant. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court found that, even in the most serious murder cases, three general differences between adolescents and adults "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders." *Id.* at 569. As compared to adults, teenagers have "[a] lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures"; and their character "is not as well formed." *Id.* at 569-70 (citation omitted). Because these differences make juveniles less culpable than adults, this Court concluded that "[w]hen a juvenile offender commits a heinous crime, the State can exact forfeiture of some of the most basic liberties, but the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity." *Id.* at 573-74.

In *Graham v. Florida*, 130 S. Ct. 2011 (2010), the Court recognized that the same differences between children and adults are relevant to the constitutionality of sentences of life imprisonment without parole. *Id.* at 2026-27. Reviewing the case of a 16-year-old convicted of armed burglary, the Court repeated *Roper*'s reasoning "that because juveniles have lessened culpability they are less deserving of the most severe punishments" (*id*. at 2026) in concluding categorically that life without parole is excessive for juvenile nonhomicide offenders (*id*. at 2030). Thus, this Court has now held: (1) that even those juveniles who have committed the most aggravated murders cannot be treated as equivalent to adults in Eighth Amendment excessive-punishment analysis (*Roper*, 543 U.S. at 570-74) and (2) that similar considerations – taking account of the categorical differences between juvenile and adult offenders – must inform Eighth Amendment analysis of the permissibility of imposing life-without-parole sentences on juveniles (*Graham*, 130 S. Ct. at 2026-29).

Graham began this latter, specific analysis by tracking and reaffirming *Roper*'s reading of the well-informed contemporary understanding of the common characteristics of young people. It cited scientific studies of adolescent brain structure and functioning which confirm the daily experience of parents everywhere that teenagers are still undeveloped personalities, labile and situation-dependent, impulse-driven, peer-sensitive, and largely lacking in the mechanisms of self-control which almost all of them will gain later

in life. It was these ubiquitous features of youth that led the Court to conclude that "it would be misguided to equate the failings of a minor with those of an adult" (*Graham*, 130 S. Ct. at 2026 [citing *Roper*, 543 U.S. at 569-70]) and that the Eighth Amendment "forbid[s] States from making the judgment at the outset that . . . [young] offenders never will be fit to reenter society" (130 S. Ct. at 2030).

Logically, the identical features of youth compel two additional conclusions. First, adolescents' "lessened culpability" cannot rationally be supposed to be crime-specific. Whatever developmental immaturity, impulsivity, and situational vulnerability set the scene for a teenager's participation in a home-invasion robbery will be operating similarly when he or she is drawn into conduct constituting robbery-murder. Second, by every measure deemed relevant in *Roper* and *Graham*, the younger a child is, the more compelling are the distinctions between children and adults and the less culpable children are as a class compared to adults. And in the case of children 14 or younger, nationwide practice unmistakably reinforces these conclusions: life-without-parole sentences for murder in this age group are particularly rare. Thus, every factor which the Court considered crucial for the results in *Roper* and *Graham* equally or more strongly compels the invalidation of Kuntrell Jackson's life-without-parole sentence.

A. The Components of This Court's Decisions in *Roper* and *Graham*

1. Children Are Different From Adults in Ways That Bear Directly on the Question of Culpability Central to Eighth Amendment Excessiveness Analysis.

The core of this Court's reasoning in *Roper* and *Graham* is that children are not simply miniature adults. Through no fault of their own, they are at a unique stage of development that makes them peculiarly susceptible to physical and psychological pressures toward risk-taking, and they are not yet adequately equipped with the capacity for mature behavioral controls. They lack the resources to choose their environments and avoid negative influences; those environments are created and controlled by the adults around them. Because "their characters are 'not as well formed,'" *Graham*, 130 S. Ct. at 2026 (quoting *Roper*, 543 U.S. at 570), they have the innate potential for change and rehabilitation. Society's recognition of these well-known facts is reflected both in its actual practices when sentencing teens convicted of violent crimes and in its innumerable laws designed to protect teens from dangers including their own immature judgment.

a. This Court Has Recognized That Children Are Involuntarily and Particularly Susceptible to Physical and Psychological Drives That Can Lead Them Into Criminal Behavior.

Roper and *Graham* both recognized that a salient difference between children and adults is that children's immaturity and turbulent impulses render them peculiarly susceptible to engaging in thoughtless, rash, risky behavior. A "'lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'" *Roper*, 543 U.S. at 569 (citation omitted); *accord*: *Graham*, 130 S. Ct. at 2028; and see *id*. at 2032, observing that teens have "[d]ifficulty in weighing long-term consequences" and "a corresponding impulsiveness." Thus, "'adolescents are overrepresented statistically in virtually every category of reckless behavior.'" *Roper*, 543 U.S. at 569 (citation omitted).

b. This Court Has Recognized That Children Innately Lack Mature Behavioral Controls.

Both *Roper* and *Graham* also recognized that teens have underdeveloped capacities for behavioral control. *Roper* noted that "scientific and sociological studies" of adolescent development confirm what "any parent knows": teens lack adult powers of self-control.

543 U.S. at 569. In *Graham*, the Court found *Roper*'s conclusions buttressed by "developments in psychology and brain science continu[ing] to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence." 130 S. Ct. at 2026. These findings informed the Court's judgment that "'the case for retribution is not as strong with a minor as with an adult'" and that "'juveniles will be less susceptible to deterrence.'" *Id.* at 2028 (citation omitted).

c. This Court Has Recognized That Children, Through No Fault of Their Own, Lack Resources Necessary to Choose Their Environment and Mode of Life.

Roper and *Graham* also recognized that children lack both legal and practical capacity to escape from harmful environments. Teens "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Roper*, 543 U.S. at 569; *see also Graham*, 130 S. Ct. at 2026. They "have less control, or less experience with control, over their own environment." *Roper*, 543 U.S. at 569. For this reason, "'youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.'" *Id.* (citation omitted).

d. This Court Has Recognized That Children Are Not Solely Responsible for the Conditions That Have Shaped Them.

This Court has also recognized that children are, in A.E. Housman's sense, "stranger[s] and afraid / In a world . . . [they] never made."[1] The adults around them largely dictate and therefore share responsibility for the circumstances of their lives. "'[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting.'" *Roper*, 543 U.S. at 569 (citation omitted). Teens' "own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Id*. at 570.

e. This Court Has Recognized That Children Are Works-In-Progress, Capable of Change and Likely to Change.

A central tenet of both *Roper* and *Graham* was that the final character of a child is as yet unknown and unknowable because children have an inherent potential for growth, change, rehabilitation. "'[T]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years

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[1] *Last Poems, XII in Collected Poems* 117 (2d ed. 1961).

can subside.'" *Roper*, 543 U.S. at 570 (citation omitted). "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id*. at 570. Even in the case of an aggravated homicide, a juvenile's culpability cannot be equated with that of an adult, because "a greater possibility exists that a minor's character deficiencies will be reformed." *Id.*; *accord Graham*, 130 S. Ct. at 2026-27.

This Court has also recognized that, not only are teens capable of change, but most teens actually will change as an inevitable part of growing up. "'For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.'" *Roper*, 543 U.S. at 570 (citation omitted). For this reason, the *Graham* Court found that:

> To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable. "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose

> crime reflects irreparable corruption." *Roper*, [543 U.S.] at 572.

Graham, 130 S. Ct. at 2029.

f. This Court Has Recognized That Objective Indicators Demonstrate a Societal Understanding That the Preceding Conditions Exist and That They Are Relevant to Culpability.

Both *Roper* and *Graham* also noted that these facts of adolescent life are pervasively acknowledged in a societal consensus marked by objective indicators of several sorts. "In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent." *Roper*, 543 U.S. at 569.[2] In *Roper*, the Court found that even when juveniles have committed aggravated homicides, "the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice . . . provide sufficient evidence that today our society views juveniles . . . as 'categorically less culpable than the average criminal.'" 543

[2] See also *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011): "The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them."

U.S. at 567 (citation omitted). In *Graham*, the Court identified only 123 juveniles sentenced to life without parole for nonhomicide offenses "stretching back many years," and found that "only 11 jurisdictions nationwide in fact impose life without parole sentences on juvenile nonhomicide offenders – and most of those do so quite rarely." 130 S. Ct. at 2024. Considering that many thousands of juveniles are arrested for serious felonies each year, "in proportion to the opportunities for its imposition" such sentences are extremely rare. *Id.* at 2025. The Court concluded that the rarity of these sentences reflected a societal consensus that the incorrigibility necessary to justify a life without parole sentence is "'inconsistent with youth.'" *Id.* at 2029 (citation omitted).

* * *

The following sections of this brief will: (1) show that this Court's recognition of the special nature and circumstances of adolescence is factually indisputable, (2) detail the specific components of the difference between young adolescents and adults, and (3) show how those details confirm the full applicability of the reasoning of *Roper* and *Graham* to children like Kuntrell Jackson. Ultimately, nothing in the constitutional analysis established by the *Roper* and *Graham* opinions and nothing in the real-world facts and conditions relevant to that analysis permits a rational distinction between life without parole for children who commit murder and life without parole for children who commit other serious crimes, particularly in the case of children 14 and younger.

B. How the Reasoning of *Roper* and *Graham* Applies to Young Adolescents Sentenced to Life Imprisonment Without Parole

Graham pinpoints the constitutional vice in sentencing children to life imprisonment without parole: a lifelong, unchangeable sentence "requires the sentencer to make a judgment that the juvenile is incorrigible . . . [while t]he characteristics of juveniles make that judgment questionable." 130 S. Ct. at 2029. Because a child is not yet what he will be, "[a] life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity." *Id*. at 2029. To declare a 14-year-old like Kuntrell Jackson forever unfit to live in society violates "the duty of the government to respect the dignity of all persons," *Roper*, 543 U.S. at 560. This is all the more unjustifiable because children's "struggle to define their identity," *id*. at 570, *is* a struggle, bringing with it unique, temporary impairments and vulnerabilities that reduce their criminal culpability.

1. The Scientific Consensus on Adolescent Development

Contemporary psychological, sociological, and neurological studies converge[3] to demonstrate that

[3] The convergence of the research in multiple disciplines makes the scientific consensus particularly strong. *See* Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 Am. Psychol. 739, 744 (2009).

the factors which *Roper* and *Graham* recognized as critical for Eighth Amendment analysis in the case of children – changeability, immature judgment, underdeveloped capacity for self-regulation, vulnerability to negative influences and outside pressures, and a lack of control over either their own impulses or their environment – are at their peak in young teens. This is the onset of the crucial developmental period of adolescence, bringing radical transformations that include the stressful physical changes of puberty (increases in height and weight and sex-related physiology), followed later by progressive gains in capacity for reasoned, mature judgment, impulse control, and autonomy.[4] A "rapid and dramatic increase in dopaminergic activity within the socioemotional system around the time of puberty" drives the young adolescent toward increased sensation-seeking and risk-taking; "this increase in reward seeking precedes the structural maturation of the cognitive control system and its connections to areas of the socioemotional system, a maturational process that is gradual, unfolds over the course of adolescence, and permits more advanced self-regulation and impulse control."[5]

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[4] Charles Geier & Beatriz Luna, *The Maturation of Incentive Processing and Cognitive Control*, 93 Pharmacol. Biochem. Behav. 212, 212 (2009); *and see* L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 Neurosci. & Biobehav. Rev. 417, 434-36 (2000) (discussing radical hormonal changes in adolescence).

[5] Laurence Steinberg, Elizabeth Cauffman, et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by*

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"The temporal gap between the arousal of the socio-emotional system, which is an early adolescent development, and the full maturation of the cognitive control system, which occurs later, creates a period of heightened vulnerability to risk taking during middle adolescence."[6]

These biological and psychosocial developments explain what is obvious to parents, teachers, and any adult who reflects back on his or her own teenage years: 13- and 14-year-old middle-schoolers lack the maturity, independence, and future orientation that adults, and even older teens, have acquired over the course of adolescence. While 16- and 17-year-olds are working after-school jobs to save up for their first car and applying to college, 13- and 14-year-olds are agonizing about who will sit with them at lunch. Graduating seniors are thinking about their future careers and families, while seventh-graders are fixated on who will be their "BFF"[7] that day. Among adolescents, young teens have the least capacity to imagine consequences, regulate their wildly-shifting emotions, and resist peer pressure, and the most capacity for change, precisely because they are at the

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Behavior and Self-Report: Evidence for a Dual Systems Model, 44 Dev. Psychol. 1764, 1764 (2008).

[6] Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clinical Psychol. 459, 466 (2009).

[7] Text message shorthand for, ironically, "Best Friends Forever." *The NetLingo List of Acronyms & Text Message Shorthand*, NetLingo.com, http://www.netlingo.com/acronyms.php (last visited Jan. 3, 2012).

beginning of the most intense period of rapid growth in their lifetimes.[8]

a. Young Adolescents Have Not Yet Developed the Capacity to Make Mature and Responsible Decisions.

By the standards of adults or even older adolescents,[9] the judgment of young teenagers is multiply handicapped: they lack life experience and background knowledge to inform their choices; they struggle to generate options and to imagine consequences; and, perhaps for good reason, they lack the self-confidence necessary to make reasoned judgments and stick by them.[10] In addition, their brain structure

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[8] "[A]dolescence is second only to the neonatal period in terms of both rapid biopsychosocial growth as well as changing environmental characteristics and demands. . . ." Spear, *supra* note 4, at 428; *see also id.* at 429 (stress is elevated in early adolescents; incidence of depression is often highest in adolescence; and teens experience sleep problems, great extremes in mood, and peak anxiety and self-consciousness).

[9] Compared to twelfth graders, seventh and eighth graders show deficiencies in imagining risks and future consequences. Catherine C. Lewis, *How Adolescents Approach Decisions*, 52 Child Dev. 538, 543 (1981); *see also* Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. Applied Dev. Psychol. 257, 271 (2001).

[10] B. Luna, *The Maturation of Cognitive Control and the Adolescent Brain, in From Attention to Goal-Directed Behavior* 249, 252-56 (F. Aboitiz & D. Cosmelli eds., 2009); Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults*,

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at this developmental stage hampers their ability to make the kind of judgments at 14 that they will comfortably handle at 17. Like a car with a powerful accelerator but weak brakes, a young teenager's brain is fully developed in the part responsible for emotional arousal and sensitivity to peer pressure (the gas pedal), but the parts in the frontal lobes that control impulses and allow long-term thinking, planning, and resistance to peer pressure (the brakes) are still developing.[11] At 13 and 14, the major transformation in brain structure that will result in a sophisticated system of circuitry between the frontal lobe and the rest of the brain, enabling adults to exercise cognitive control over their behavior, is barely underway.[12]

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18 Behav. Sci. & L. 741, 756 (2000); Leon Mann et al., *Adolescent Decision-Making: The Development of Competence*, 12 J. Adolescence 265, 267-70 (1989); Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 Dev. Rev. 1, 12 (1991).

[11] Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 Dev. Rev. 78, 83 (2008) [hereinafter Steinberg, *Social Neuroscience*]; Laurence Steinberg, *Risk Taking in Adolescence: New Perspectives from Brain and Behavioral Science*, 16 Current Directions Psychol. Sci. 55, 56-58 (2007) [hereinafter Steinberg, *Risk Taking*].

[12] Luna, *supra* note 10, at 257; *see also* Thomas J. Whitford et al., *Brain Maturation in Adolescence*, 28 Human Brian Mapping 228, 228 (2007). At the core of this transformation are contemporaneous increases in white matter (myelination) and decreases in gray matter (synaptic pruning). Jay N. Giedd, *Structural Magnetic Resonance Imaging of the Adolescent Brain*, 1021 Annals N.Y. Acad. Sci. 77, 77-83 (2004). Myelination

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increases the efficiency of information processing and supports the integration of the widely distributed circuitry needed for complex behavior; it is the wiring of connections among and between the frontal regions and the rest of the brain. Immature myelination is thought to make adolescents vulnerable to impulsive behavior, while the increased processing speed facilitated by myelination facilitates cognitive complexity. Geier & Luna, *supra* note 4, at 216; *see also* Giedd, *supra*, at 80. White matter in the brain increases in a linear fashion, so that older adolescents and adults benefit from a greater number of myelinated neurons than younger teens. *Id.*

Cortical gray matter is thickest early in adolescence. *Id.* at 82. Later in the teenage years, this cortical gray matter undergoes significant "pruning," making more efficient that part of the brain responsible for inhibiting impulses and assessing risk. *Id.*; *see also* Tracy Rightmer, *Arrested Development: Juveniles' Immature Brains Make Them Less Culpable than Adults*, 9 Quinnipiac Health L.J. 1, 12 (2005); Spear, *supra* note 4, at 439.

Pruning typically is not complete until middle to late adolescence, and the parts of the brain that process risk and control executive functioning do not finish myelinating until late adolescence or early adulthood. Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: a Longitudinal MRI Study*, 2 Nature Neurosci. 861, 862 (1999); *see also* Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 Nature Neurosci. 859, 860 (1999); Beatriz Luna & John A. Sweeney, *The Emergence of Collaborative Brain Function*, 1021 Annals N.Y. Acad. Sci. 296, 301 (2004). The "patterns of development in the prefrontal cortex, which is active during the performance of complicated tasks involving long-term planning and judgment and decision making, suggest that these higher order cognitive capacities may be immature well into late adolescence." Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence*, 58 Am. Psychologist 1009, 1013 (2003); *see also* Elizabeth R. Sowell et al., *Localizing Age-Related Changes in Brain Structure Between Childhood and Adolescence Using Statistical Parametric Mapping*, 9

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Young adolescents find themselves behind the wheel of this fundamentally deficient vehicle with no driver's ed instruction to guide them. Their hunger for thrilling speed easily overwhelms their scant capacity to apprehend the possibility of a serious crash; they have weak brakes and very limited visibility ahead or behind. This is why no State permits young adolescents to drive. That older adolescents *are* issued driver's licenses reflects the fact that they are further along in development: – they have more experience in making decisions; their brain circuitry is more efficient; the hormonal storm of puberty is not brand-new to them; and they have a better view of their futures.[13] Sixteen- and seventeen-year-olds still are risky, bad drivers compared to adults,[14] but there is clear consensus that 14-year-olds are so lacking in maturity and decisionmaking capability that they should not even be allowed to take the wheel.

NeuroImage 587, 596 (1998); Halpern-Felsher & Cauffman, *supra* note 9, at 271.

[13] *See supra* notes 10, 12; Steinberg, *Social Neuroscience* at 86.

[14] Recognizing this fact, all States but one have enacted some sort of graduated licensing law, which "phases in unrestricted driving by allowing beginners to get their initial behind-the-wheel experiences under conditions that reduce the risk of collision." Christine Branche et al., *Graduated Licensing for Teens,* 30 J.L. Med. & Ethics 146, 146-47 (2002).

b. Young Adolescents Are Especially Susceptible to Risk-Taking Impulses and Negative Peer Influences.

Early teenagers' propensity for risk-taking exacerbates their decisionmaking difficulties. It is universally recognized that adolescence is characterized by risk-taking behavior; contemporary neurological science establishes that this is a function of physical brain development as well as a socially scripted phase of the passage from childhood to maturity.[15] For the purpose of understanding young adolescent behavior relative to that of adults, and even older teens, the critical observations are that (1) most adolescent risk-taking is a group phenomenon and (2) young adolescents are the most vulnerable to peer-group influence.

Parents, teachers, and observers of teenagers the world over know that social interactions and affiliations with peers take on out-sized importance in adolescence. Teens spend about one-third of waking hours talking with peers (but only 8% with adults).[16] While all adolescents are more peer-oriented than adults, the research indicates that vulnerability to peer pressure, especially for boys, increases during early

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[15] *E.g.,* Steinberg, *Risk Taking*, *supra* note 11, at 56-58; Geier & Luna, *supra* note 4, at 218; Ann E. Kelley et al., *Risk Taking and Novelty Seeking in Adolescence*, 1021 Annals N.Y. Acad. Sci. 27, 27 (2004).

[16] Spear, *supra* note 4, at 420.

adolescence to an all-time high in eighth grade.[17] The need to fit in with the peer group – to impress peers with daredevil antics and smart-alecky comments – exerts enormous influence on the behavior of young adolescents, more so than during pre-adolescence or late adolescence.[18] Indeed, extreme vulnerability to peer influence (especially when it is to do something bad) is a defining characteristic of young adolescence, reflected in the fact that it is statistically aberrant for boys to refrain from minor criminal behavior during this period.[19]

Most teens grow out of this behavior as a part of the maturation process.[20] Typically, the ability to resist peer influence and to regulate internal impulses matures in middle or late adolescence.[21] Adolescents' capacity to extricate themselves from a group or other setting where they are likely to get into trouble also

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[17] Laurence Steinberg & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 Child Dev. 841, 846, 848 (1986); Mann, *supra* note 10, at 267-68, 274; Steinberg, *Risk Taking*, *supra* note 11, at 57; N. Dickon Reppucci, *Adolescent Development and Juvenile Justice*, 27 Am. J. Community Psychol. 307, 318 (1999).

[18] Steinberg, *Social Neuroscience* at 92.

[19] Spear, *supra* note 4, at 421; Reppucci, *supra* note 17, at 319.

[20] Spear, *supra* note 4, at 421; Daniel Seagrave & Thomas Grisso, *Adolescent Development and the Measurement of Juvenile Psychopathy*, 26 Law & Hum. Behav. 219, 229 (2002); Reppucci, *supra* note 17, at 319.

[21] Laurence Steinberg, *Risk Taking in Adolescence: What Changes and Why*, 1021 Annals N.Y. Acad. Sci. 51, 55 (2004).

increases with age. Denied the rights and privileges that accrue at age 18, all adolescents have less ability than adults to free themselves from morally toxic or dangerous environments. But the youngest teens are worst off. State and federal laws meant to protect young teens from exploitation and from their own underdeveloped sense of responsibility – including restrictions on driving, working, and leaving school – operate conversely to disable a 14-year-old from escaping an abusive parent, a dysfunctional or violent household, or a dangerous neighborhood.

c. Young Adolescents Have Not Yet Begun to Form Their Own Identities or to Imagine Their Futures.

Young teens, to a much greater extent than adults or even older teens, are handicapped by their inability to envision who they want to be or what they want to achieve in the future. Young teens are readily distinguishable from 15- and 16-year-olds by their excruciatingly low self-esteem and high self-consciousness, which fixate them on the instantaneous present.[22] Not until age 16 do adolescents obtain something close to a mature sense of perspective. And

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[22] Nurmi, *supra* note 10, at 12-13; *see also* Laurence Steinberg & Elizabeth Cauffman, *Maturity of Judgment in Adolescence*, 20 Law & Hum. Behav. 249, 255 (1996); Seagrave & Grisso, *supra* note 20, at 229; Reppucci, *supra* note 17, at 318-19; Jeffrey Arnett, *Reckless Behavior in Adolescence*, 12 Dev. Rev. 339, 344 (1992); Steinberg, *Social Neuroscience* at 90.

not until the late teens or early twenties do they begin to form a coherent identity – although teens 16 and older do have a more mature sense of self than adolescents under 15.[23]

Very few young adolescents think about their future beyond age 30.[24] As adolescents grow older, they become increasingly focused upon tasks of self-development, contemplating future education, occupation, and family. With this added perspective, their ability to plan and to realistically anticipate long-term consequences improves.[25] But at 13 and 14, middle-schoolers tend to struggle with planning even how to get tonight's homework done in time to watch their favorite television program.

The flip side of young adolescents' underdeveloped sense of self is that they have, relative to older individuals, more potential to change and develop positive character traits as they grow up. A typical 14-year-old who acts irresponsibly in reaction to a thrilling impulse or peer pressure is not irretrievably depraved or permanently flawed. Nothing about his character is permanent, and he has years of development ahead, during which he can (and, in most cases, will) grow into a moral, law-abiding adult.[26]

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[23] Steinberg, *Social Neuroscience* at 94; Seagrave & Grisso, *supra* note 20, at 226, 229.

[24] Nurmi, *supra* note 10, at 27.

[25] *Id.* at 27-29.

[26] *See supra* note 21.

> Dozens of longitudinal studies have shown that the vast majority of adolescents who commit antisocial acts desist from such activity as they mature into adulthood and that only a small percentage – between five and ten percent, according to most studies – become chronic offenders. Thus, nearly all juvenile offenders are adolescent limited. . . .
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> [M]ost juvenile offenders mature out of crime . . . and . . . will desist whether or not they are caught, arrested, prosecuted or sanctioned . . . .[27]

This Court has recognized that adolescents, as a class, lack the maturity, autonomy, and self-governing capacity of adults. *Roper*, 543 U.S. at 569-71; *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982). Within that class, which is defined by the transition from childhood to adulthood, there are gradations in capability that correlate with age. As is readily observable and widely accepted, the youngest adolescents are the least mature, most susceptible to internal impulses and external influences, and have the greatest capacity for change.[28]

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[27] Steinberg, *supra* note 6, at 66.

[28] *See, e.g.,* Laurence Steinberg, Sandra Graham, et al., *Age Differences in Future Orientation and Delay Discounting*, 80 Child Dev. 28, 28, 39-40 (2009) [hereinafter Steinberg, Graham, et al., *Future Orientation*]; Laurence Steinberg & Kathryn C. Monahan, *Age Differences in Resistance to Peer Influence*, 43 Dev. Psychol. 1531, 1540 (2007); Steinberg, Cauffman, et al., *supra* note 5, at 1775-76.

2. The Constitutional Significance of Young Adolescents' Limited Cognitive Capacity and Psychosocial Immaturity

Roper and *Graham* teach that the special vulnerabilities and frailties of adolescence bear directly on the Eighth Amendment calculus of personal culpability. *See supra* pp. 6-15. This is in accord with the scientific consensus and common-sense understanding of parents and teachers everywhere that a 14-year-old is not a 17-year-old and that neither is an adult. Young adolescents' culpability is diminished because they have not yet reached the level of cognitive and psychosocial development that permits adults to make mature decisions, forecast consequences, and control their impulses. The sensation-seeking proclivity and lack of impulse control characteristic of adolescents further support the conclusion that "their irresponsible conduct is not as morally reprehensible as that of an adult." *Roper*, 543 U.S. at 561.

Young adolescents in particular will *necessarily* change over time, either as a result of natural maturation or through the intervention worked by conviction and sentence. To pass a life-without-parole sentence on a young adolescent – a final, inflexible, reconsideration-resistant judgment that this still-incompletely-formed individual will *never* be fit to participate in civil society – is not merely premature but oblivious to "the duty of the government to respect the dignity of all persons," *Roper*, 543 U.S. at 560.

C. Hundreds of State and Federal Laws Recognize the Special Vulnerabilities and Deficiencies of Young Adolescents.

Roper and *Graham* do not stand alone in recognizing the special fragility of young adolescents and its implications for the degrees of responsibility and protection which they should be given – including protection from themselves. *See J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011) ("[T]he common law has reflected the reality that children are not adults," and has erected safeguards to "'secure them from hurting themselves by their own improvident acts.'" (citation omitted)); *Eddings*, 455 U.S. at 115-16 ("Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults."); *Roper*, 543 U.S. at 581-88, Appendices B-D (collecting State laws on voting, jury service, and marriage without parental consent). Numerous State and federal laws provide special protections for early adolescents while, at the same time, limiting their freedoms, consistent with the understanding that young teens are not mature enough for a wide range of responsibilities and privileges – from the obvious and universal (driving,[29]

[29] All States issue at least restricted driver's licenses to 16- or 17-year-olds. No State will issue even a learner's permit to a 13-year-old, and the vast majority will not issue a learner's permit to a 14-year-old. *See* App. A to Pet. Br., *Miller v. Alabama*, 10-9646 [hereinafter *Miller* App.].

marriage,[30] sex[31]) to the mundane or obscure (fireworks, hunting,[32] tattoos[33]). *See* App. A to Pet. Br., *Miller v. Alabama*, 10-9646 [hereinafter *Miller* App.], collecting State laws differentiating between younger and older adolescents. These ubiquitous regulations manifest the breadth of the consensus that the capacities and vulnerabilities of young adolescents differ substantially from those of adults and even of older teens.

1. State and Federal Law Recognizes That Young Adolescents Are Especially Vulnerable and Provides Heightened Protection from Exploitation and Abuse.

Reflecting the societal judgment that young teens are especially vulnerable to exploitation, abuse, and

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[30] Most States, while forbidding persons under 18 to marry without parental consent (*see Roper*, App. D), do allow 16- and 17-year-olds to marry *with* parental consent; but they deny that privilege to younger teens. *See Miller* App.

[31] All States differentiate between younger and older adolescents in regard to consent to sexual activity. A majority sets the minimum age of general consent at 16. Some States allow 13- or 14- or 15-year-olds to consent to sexual activity with other adolescents; but States generally do not allow a 14-year-old child to consent to sex with an adult. *See Miller* App.; Richard A. Posner & Katharine B. Silbaugh, *A Guide to America's Sex Laws* 44 (1996).

[32] *See Miller* App.

[33] *See, e.g.,* Idaho Code Ann. § 18-1523; Cal. Penal Code § 653; Wis. Stat. Ann. §§ 948.01, 948.70; S.C. Code Ann. § 44-34-60.

persuasion, State and federal laws protect them by imposing enhanced criminal liability on older people who victimize them[34] and by obligating adults and older teens to safeguard young adolescents within their sphere of control.[35] Every State and the federal jurisdiction accords early adolescents enhanced protection from sex offenses:[36] most States provide that children

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[34] *See, e.g.,* Ala. Code § 13A-5-40(a)(15) (murder made capital where victim is 13 or younger); Ariz. Rev. Stat. Ann. § 13-751(F)(9) (victim 14 or younger); Ark. Code Ann. § 5-10-101(a)(9) (victim 14 or younger and defendant at least 18); Conn. Gen. Stat. Ann. § 53a-54b(8) (victim under 15 or younger); Del. Code Ann. tit. 11, § 4209(e)(1)(s) (victim 14 or younger and defendant at least 4 years older); 18 Pa. Cons. Stat. Ann. § 2901 (allowing conviction for kidnapping for taking of child under 14 without parental consent, even if child acquiesces); Wash. Rev. Code Ann. § 9A.40.010 (same for child 15 or younger); U.S. Sentencing Guidelines Manual § 2A2.3 (2011) ("Minor Assault") (adding 4 offense levels where victim younger than 16).

[35] *See, e.g.,* Ala. Code § 32-5-222 (operator of vehicle must require passengers 14 and younger to wear seat belts); Ark. Code Ann. § 5-65-111 (enhanced penalties for DUI with child 15 or younger in vehicle); Ariz. Rev. Stat. Ann. § 28-1383(A)(3) (same 14 or younger); *id.* § 28-909(B) (operator of vehicle must require passenger 15 or younger to wear seat belt); Mo. Ann. Stat. § 307.179(2) (same); Wash. Rev. Code Ann. § 46.61.688(4) (same); *see also, e.g.,* Ariz. Rev. Stat. Ann. § 13-3619 (misdemeanor to endanger life of minor under 16). *See generally Miller* App.

[36] *See, e.g.,* Ala. Code § 13A-6-67; Ga. Code Ann. § 16-6-3; 18 U.S.C. § 2241; *see also, e.g.,* Colo. Rev. Stat. Ann. § 18-1-503.5 (eliminating affirmative defense based on mistake of age where child 14 or younger).

under 16 are incapable of consenting to sexual activity[37] and, recognizing that young teens are particularly susceptible to negative influences, criminal statutes specifically prohibit the luring or enticing of young teens for the purpose of proposing illicit conduct.[38] The overwhelming majority of States acknowledge that appearing in court traumatizes young adolescents to such a degree that they require shielding when testifying against their abusers.[39]

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[37] *See supra* note 31. Many other States set the age of consent at 17, e.g., Mo. Ann. Stat. § 566.034, and even those that set the age of general consent at 18 typically provide stricter protections for children under 16. *Compare, e.g.,* Fla. Stat. Ann. § 800.04(4) (proscribing various types of sexual contact with children 12-15, without regard to age of defendant), *with id.* § 794.05 (proscribing a narrower range of sexual contact with children 16 and 17, unless emancipated, and only when defendant 24 or older).

[38] *See, e.g.,* Ala. Code § 13A-6-69; Ga. Code Ann. § 16-6-5; 720 Ill. Comp. Stat. Ann. 5/10-5.1; Neb. Rev. Stat. § 28-311; *see also Miller* App.

[39] *See, e.g.,* Ala. Code §§ 15-25-2, 15-25-3; Ariz. Rev. Stat. Ann. §§ 13-4251, 13-4253; Mo. Ann. Stat. § 491.075; *see also Miller* App.

2. State and Federal Law Recognizes That Early Adolescents Are Immature, Impulsive, and Relatively Irresponsible, as Well as That They Are Exceedingly Susceptible to Coercion, by Limiting Their Rights and Responsibilities in Many Aspects of Life.

The law seeks to protect young adolescents from exploitation and from their own lack of judgment in diverse contexts: education, employment, economic transactions, and so forth. Thirteen- and fourteen-year-olds universally are deemed too immature and irresponsible to drive, vote, serve on juries, drink alcohol, gamble, or marry even with parental consent. *See Miller* App. All States require children under 16 to attend school.[40] All States and the federal government limit the type and amount of work young teens can do[41] and most jurisdictions have adjudged early adolescents incapable of entering into contracts.[42]

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[40] Mark G. Yudof et al., *Education Policy and the Law* 1 (4th ed. 2002).

[41] *See, e.g.,* Mo. Ann. Stat. §§ 294.011, 294.021, 294.040 (forbidding most employment of children under 14 and limiting employment of 14 and 15 year olds); 43 Pa. Cons. Stat. Ann. §§ 42, 44 (limiting employment of 14- and 15-year-olds more strictly than 16- and 17-year-olds); 29 U.S.C. §§ 203(l), 212, 213(c) (regulating child labor and distinguishing between teens younger than 16 and teens 16 or 17 years old). *See also Miller* App.

[42] *See, e.g.,* Ala. Code § 27-14-5 (minors 15 and older can contract for certain kinds of insurance); Ariz. Rev. Stat. Ann. § 20-1106 (same); Colo. Rev. Stat. Ann. § 10-4-104 (same, 16 and

(Continued on following page)

As this Court has recognized, "the legal disqualifications placed on children as a class – e.g., limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent – exhibit the settled understanding that the differentiating characteristics of youth are universal." *J.D.B.*, 131 S. Ct. at 2403-04. Although jurisdictions draw lines for these protective and restrictive provisions at various points in early- to mid-adolescence, they universally bar 14-year-olds from activities that require maturity and responsible judgment. *See Miller* App. That these activities are permitted for many late adolescents demonstrates society's widespread recognition that early adolescents are developmentally distinct from adults and older teens – that 14-year-olds specifically lack the developmental capacity to bear such responsibilities, but that their incapacity will abate over the course of adolescence.

D. The Distinctive Characteristics of Young Adolescents Recognized in State, Federal, and Constitutional Law Undermine the Legitimacy and Utility of Life-Without-Parole Sentences for Young Teens.

Precisely the same reasoning that dictated this Court's decisions in *Roper* and *Graham* compels the

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older); Mich. Comp. Laws Ann. § 500.2205 (same); N.Y. Educ. Law § 281 (infants 16 and older cannot disaffirm education loans).

conclusion that a sentence of life imprisonment without parole imposed on a 14-year-old child for any offense violates the Eighth Amendment. As we have seen, the analysis of *Roper* and *Graham* centers on the disjunction between a punishment that declares an offender finally and forever unfit to exist in society and the uniquely transitory characteristics of youth that preclude any such declaration. *Roper* and *Graham* identify those characteristics, the kinds of scientific and legal sources from which additional information about them can be obtained, and the ways in which that information bears upon the Eighth Amendment's guiding principles. When the constitutional methodology of *Roper* and *Graham* is applied to the signature characteristics of young adolescents spelled out in the preceding pages of this brief, a firm basis emerges for the finding that a child of 14 – even one convicted of murder – cannot legitimately be consigned to lifelong incarceration with no possibility of ever being redeemed and ready for release on parole.

1. Some of These Characteristics Bear Directly on the Degree of Culpability That Can Be Found to Attach to Adolescent Criminal Behavior.

Children of 13 and 14 are especially vulnerable to each of the frailties and limitations that *Roper* and *Graham* regarded as relevant to culpability. They are neurologically, hormonally, and emotionally hardwired for sensation-seeking, impulsivity, poor foresight, worse judgment, and control failure. They are

uniquely sensitive to peer pressure and bad external influences. They did not and cannot choose the conditions of upbringing that make them what they are, and the very protective laws that recognize their incapacities have the correlative effect of limiting their ability to escape from those conditions. Their existence is dominated by the "struggle to define their identity," *Roper*, 543 U.S. at 570, which they are not yet equipped to win. *Graham* reaffirmed *Roper*'s conclusion that, even for older teens, "'the case for retribution is not as strong with a minor as with an adult.'" *Graham*, 130 S. Ct. at 2028 (citation omitted). And it is still more true of younger teens that their "culpability or blameworthiness is diminished, to a sustantial degree, by reason of youth and immaturity." *Roper*, 543 U.S. at 571.

2. Some of These Characteristics Bear on the Inutility of Life Without Parole as a Deterrent.

Roper and *Graham* both explained that the "'same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence.'" *Graham*, 130 S. Ct. at 2028 (citation omitted). Because "adolescents are less oriented to the future than are adults,"[43] far-future consequences are less meaningful to them; it is

[43] Steinberg, Graham, et al., *Future Orientation supra* note 28, at 39.

particularly difficult to imagine them planning their current actions by assigning heavier deterrent weight to a life-without-parole sentence than to a life-with-eligibility-for-parole sentence. Testing of individuals from 10 to 30 years of age shows "significantly lower planning scores among adolescents between 12 and 15 than among younger or older individuals."[44] Thus, young adolescents are "less likely to take a possible punishment into consideration when making decisions." *Graham*, 130 S. Ct. at 2028-29.

3. Some of These Characteristics Bear on the Risks of Wrongful Conviction (Or Degree of Conviction) and on the Even More Serious Risks of Erroneous Judgment Regarding Appropriate Sentence.

Graham recognized that "even if we were to assume that some juvenile nonhomicide offenders might have 'sufficient psychological maturity, and at the same time demonstrat[e] sufficient depravity,' . . . to merit a life without parole sentence, it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." 130 S. Ct. at 2032. We have argued above that this predictive difficulty is one of the considerations that make life-without-parole sentences inherently unsuitable for young adolescents. It also means that if such sentences are

[44] *Id.* at 36.

permitted, there is a significant risk that they will be imposed on the wrong adolescents.

As *Graham* found, "the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings." 130 S. Ct. at 2032. The disadvantage is greatest in the case of young adolescents because this age group tends to be the most cognitively and psychosocially impaired in ways that undermine the fairness and reliability of criminal proceedings against them. These impairments not only enhance the risk of erroneous sentencing decisions; they also enhance the risk of erroneous convictions. "Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it." *Id.* "Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects, all can lead to poor decisions by one charged with a juvenile offense" and "are likely to impair the quality of a juvenile defendant's representation." *Id.*

In adult criminal proceedings, critical decisions – such as whether to accept a plea agreement, waive a jury trial, or testify – must be made by the defendant. Model Rules of Prof'l Conduct R. 1.2(a). The empirical evidence raises doubts about the capacity of a significant number of 14-year-olds to make these

decisions.[45] And unsurprisingly, young adolescents are particularly susceptible to giving false confessions. Of young adolescents who have been exonerated in the United States, 69% had confessed falsely, as compared to 8% of adults and 25% of older teens.[46] Because young adolescents more readily perceive short-term benefits than hard-to-imagine future outcomes, they tend to give inculpatory statements in order to be allowed to go home.[47] Young adolescents are quick to comply with the wishes of authority figures, making them highly susceptible to police suggestions and pressure.[48]

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[45] *See, e.g.,* Thomas Grisso et al., *Juveniles' Competence to Stand Trial*, 27 Law & Hum. Behav. 333, 356-57 (2003); Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 Psychol. Pub. Pol'y & L. 3, 14 (1997).

[46] Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 545 (table 4) (2005); *see also* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 944 (2004); Allison S. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 Law & Hum. Behav. 141, 148 (2003).

[47] Christine S. Scott-Hayward, *Explaining Juvenile False Confessions: Adolescent Development and Police Interrogation*, 31 Law & Psychol. Rev. 53, 65-66 (2007).

[48] Redlich & Goodman, *supra* note 46, at 150-52.

4. The Severe, Terminal Sanction of Life Without Parole Is Inappropriate for Young Adolescents Because the Retributive, Deterrent, and Incapacitative Virtues of Such a Punishment Are Attenuated in Their Cases.

Graham recognized that "[l]ife without parole is an especially harsh punishment for a juvenile." 130 S. Ct. at 2028. In their absolute condemnation of the remainder of a child's life, "life without parole sentences share some characteristics with death sentences that are shared by no other sentences." *Id.* at 2027. A sentence to lifelong incarceration "alters the offender's life by a forfeiture that is irrevocable" and "deprives the convict of the most basic liberties without giving hope of restoration." *Id.*

For adolescents sentenced to life without parole, this permanent judgment is issued before their adult lives have even begun, before they have ever had the most basic freedoms to shape their own destiny. "Under this sentence, a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender." *Id.* at 2028. For this reason, "[a] 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." *Id.* As this Court has found, a life without parole sentence imposed on a child "'means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in

prison for the rest of his days.'" *Id.* at 2027 (citation omitted).

Life without parole was enacted "to deal with dangerous and incorrigible individuals who would be a constant threat to society." *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968). As *Graham* recognized, there is no sound basis for finding incorrigibility in the case of an as-yet-undeveloped young teen. 130 S. Ct. at 2029. Plainly put, "incorrigibility is inconsistent with youth." *Id.* (quoting *Workman*, 429 S.W.2d at 378).[49] This is especially so in the case of young adolescents who still have so far to go toward their "potential to attain a mature understanding of . . . [their] own humanity," *Roper*, 543 U.S. at 554.

E. Objective Indicia Demonstrate That There Is a Consensus Against Imposing Sentences of Life Imprisonment Without Parole Upon Young Adolescents.

In gauging the acceptance or rejection of a particular criminal punishment by contemporary society, the Court looks to both legislative enactments and actual usage. *Graham*, 130 S. Ct. at 2023; *Roper*, 543

[49] Life without parole is not necessary to serve the penological goal of incapacitation. Life *with* possibility of parole would permit review and evaluation of an offender, as an adult, to determine whether dangerousness or incorrigibility should preclude his or her release – a determination that cannot reliably or accurately be made at sentencing, when a child's character has not yet formed.

U.S. at 564-67. *Graham* noted that "[a]ctual sentencing practices are an important part of the Court's inquiry into consensus" (130 S. Ct. at 2023) and relied on the fact that "[n]ationwide, there are 123 juvenile nonhomicide offenders serving life without parole sentences" and that "only 11 jurisdictions nationwide in fact impose . . . [such] sentences" to conclude that "[t]he sentencing practice now under consideration is exceedingly rare." *Id.* at 2025-26.

Roper based its finding of "sufficient evidence that today our society views juveniles . . . as 'categorically less culpable than the average criminal'" (543 U.S. at 567 (citation omitted)) partly on the observation that "even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent. . . . [In the past 16 years], six States have executed prisoners for crimes committed as juveniles. In the past 10 years, only three have done so." *Id.* at 564-65. This analysis tracked that in *Atkins v. Virginia*, 536 U.S. 304, 316 (2002), where this Court had "emphasized that even in the 20 States without formal prohibition, the practice of executing the mentally retarded was infrequent"; from 1989 to 2002, "only five States had executed offenders known to have an IQ under 70." *Roper*, 543 U.S. at 564.

The touchstone of actual use makes particularly good sense in the context of life-without-parole sentences for young adolescents because the statutory authorizations for these sentences are largely the result of the unplanned interplay of two independent

legislative developments: (i) the expansion of life-without-parole sentences for adult crimes; and (ii) modifications of juvenile-court jurisdiction that bring a larger number of adolescents into adult court. These developments cannot be read as expressing any legislative judgment on the specific issue of the appropriateness of life without parole for adolescents.

1. Life Without Parole for Young Adolescents Is an Unconsidered Consequence of Two Distinct Legislative Developments.

In the last few decades, politically popular "tough on crime" policies like "truth in sentencing" have greatly circumscribed parole, resulting in a dramatic increase in the availability of life-without-parole sentences *for adults*.[50] Simultaneously with the trend to stiffen penalties for adult offenders by expanding life without parole, many States responded to concerns about the perceived inadequacy of the juvenile justice system to deal with violent youth crime. They did this principally by lowering the age at which children could be prosecuted in adult court.[51] These changes in inter-court jurisdictional boundaries or in transfer provisions represented an abandonment of

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[50] *See* Marc Mauer et al., *The Meaning of "Life": Long Prison Sentences in Context* 1, 5-8, 12 (2004), http://sentencingproject.org/Admin/Documents/publications/inc_meaningoflife.pdf.

[51] *See* U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Juvenile Justice: A Century of Change* 4-5 (1999), http://www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf.

the previously prevailing regimes that were commonly understood to limit juvenile-court dispositions to detention in a juvenile facility until age 18 or 21 at a maximum.[52] But there is no evidence of any significant legislative consideration of the specific question whether lifelong imprisonment without parole is appropriate for young adolescents. For the most part, life-without-parole sentencing for young adolescents became technically possible as an adventitious consequence of the overlay of two distinct movements, neither directed to the question.

Graham recognized that "the fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole sentences." 130 S. Ct. at 2025. This is so because such statutes reveal at most the age at which States have determined a child is "'old enough to be tried in criminal court for serious crimes (or too old to be dealt with effectively in juvenile court), *but tells us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders*.'" *Id.* (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 829 n.24 (1988) (plurality opinion) with *Thompson*'s emphasis); *accord Thompson*, 487 U.S. at

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[52] *See, e.g.,* Lisa S. Beresford, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment*, 37 San Diego L. Rev. 783-86, 792 (2000).

850-51 (O'Connor, J., concurring). *Graham* and *Thompson* teach that legislative judgments about the appropriate penalty for a child offender cannot be inferred from a statute that simply regulates the boundary between juvenile-court and adult-court jurisdictions.

2. Virtually Every State That Has Expressly Addressed the Question of the Minimum Age of Eligibility for a Life-Without-Parole Sentence Has Set the Age Above 14.

Where States have expressly addressed the minimum age at which life imprisonment without parole may be imposed, they have all but unanimously set that age above 14. *See, e.g.,* La. Child. Code Ann. art. 857(B) ("Notwithstanding any other provision of law to the contrary, a fourteen-year-old who is transferred pursuant to this Article and subsequently convicted shall not be confined for such conviction beyond his thirty-first birthday."); Colo. Rev. Stat. Ann. § 17-22.5-104(2)(d)(IV) (minimum age for life without parole is 18); Cal. Penal Code § 190.5(b) (minimum age for life without parole for first-degree murder is 16);[53] Ind. Code Ann. § 35-50-2-3(b)(2) (minimum age

[53] The California Court of Appeal has invalidated a code provision permitting a juvenile kidnapper under age 16 to be sentenced to life without parole, Cal. Penal Code § 209(a), as violating the federal and California Constitutions. *In re Nuñez*, 93 Cal. Rptr. 3d 242, 258-59 (Cal. Ct. App. 2009).

for life without parole for murder is 16); D.C. Code § 22-2104 (minimum age for life without parole for murder is 18); Kan. Stat. Ann. § 21-6618 (minimum age for life without parole for capital murder is 18); Ky. Rev. Stat. Ann. § 640.040 (minimum age for life without parole for murder is 18); Mont. Code Ann. § 46-18-222 (exempting all children under 18 from restrictions on parole eligibility); Or. Rev. Stat. Ann. § 161.620 (prohibiting life without parole for children under 18 waived from juvenile court); Tex. Penal Code Ann. § 12.31(a)(1), (b)(1) (prohibiting life without parole for children under 17 waived from juvenile court). The outlier, Massachusetts, sets the minimum age at 14 (for life without parole for murder). Mass. Gen. Laws Ann. ch. 119, § 72B.[54]

The near-complete absence of express legislative approval of such a sentence for 13- and 14-year-olds reflects a consensus that the sentence would be excessively harsh punishment as applied to a young adolescent.

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[54] Some death-penalty States explicitly abolished the death penalty for juveniles by provisions that arguably authorize life without parole. *See, e.g.,* 730 Ill. Comp. Stat. Ann. 5/5-8-1; Md. Code Ann. Crim. Law § 2-202(b)(2); Nev. Rev. Stat. Ann. § 176.025 (amended by 2011 Nev. Stat. Ch. 12 to comply with *Graham*); N.C. Gen. Stat. Ann. § 14-17; Ohio Rev. Code Ann. § 2929.03(E); Va. Code Ann. § 18.2-10(a); *cf.* Mo. Ann. Stat. § 565.020 (amended 1990).

3. In Actual Practice, the Imposition of a Life-Without-Parole Sentence on a Young Teenager Is an Aberrant, Exceedingly Rare Occurrence.

Although not explicitly addressing the issue of the propriety of life-without-parole sentences for the youngest teens, statutes in 26 States have the effect of exposing 13-year-olds to such a sentence;[55] and statutes in an additional 13 States make the sentence possible for 14-year-olds.[56] In the light of this broad theoretical availability, the infrequency with which 13- and 14-year-olds are actually sentenced to life without parole is striking. It evidences nationwide repudiation, not acceptance, of the sentence for children of these young ages.

There are only about 79 persons in the United States under life-without-parole sentences for offenses committed at age 13 or 14.[57] This number is

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[55] *See infra* Appendix A.

[56] *See infra* Appendix B.

[57] J.A. 19, 21; Equal Justice Initiative, *Cruel and Unusual: Sentencing 13- and 14-Year-Old Children to Die in Prison* 20 (2007) [hereinafter *Cruel and Unusual*] (reporting results of a nationwide study identifying 73 children serving life-without-parole sentences for offenses at age 13 or 14). Since the publication of this report, there has been some fluctuation in the number: some children originally identified have obtained relief from their convictions or sentences (including some under this Court's decision in *Graham*), and some new sentences have also been imposed. Counsel's extensive research sets the current total number of 13- and 14-year-old children serving sentences of life without parole at 79 plus or minus one or two.

especially indicative of nationwide repudiation when one considers that 79 represents the total *accumulation* of life-without-parole sentences imposed on 13- and 14-year-olds "stretching back many years" because "a juvenile sentenced to life without parole is likely to live in prison for decades." *Graham*, 130 S. Ct. at 2024. An accumulation of approximately 79 life-without-parole sentences since 1971[58] in a nation whose population rose from 200,000,000 to more than to 311,000,000 during those 40 years is a singularly unimpressive showing of institutional or public acceptance.

The number 79 bears comparison with the parallel figures for the classes involved in *Graham* and *Roper*. When *Graham* found a national consensus against life-without-parole sentences for children convicted of nonhomicides, there were 123 individuals serving such sentences. 130 S. Ct. at 2024. When *Roper* recognized a national consensus against death sentences for juveniles, 71 juvenile offenders were under that sentence.[59]

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[58] The earliest sentence imposed upon a 14-year-old juvenile currently serving life-without-parole was Brian Wilson's, dating from 1971. *See Commonwealth v. Wallace*, 500 A.2d 816 (Pa. Super. Ct. 1985).

[59] Victor L. Streib, *Death Sentences and Executions for Juvenile Crimes*, *January 1, 1973-February 28, 2005* 3 (Oct. 2005), http://www.law.onu.edu/faculty_staff/faculty_profiles/coursematerials/streib/juvdeath.pdf.

The vast majority of jurisdictions nationwide – 32 States, the District of Columbia, and the federal government – have not sentenced a single child of either 13 or 14 to life imprisonment without parole. Only 18 States have 13- or 14-year-old offenders serving life-without-parole sentences.[60] Most of these jurisdictions that have imposed life-without-parole sentences on young adolescents have done so rarely: Only six States have more than two or three children serving such sentences.[61]

Even this smattering of sentences can hardly be said to represent reasoned judgments that lifetime imprisonment without parole was necessary or appropriate for the individual juveniles involved. Ninety percent of these sentences were – like Kuntrell's sentence – imposed under mandatory sentencing statutes that prevented the sentencer from considering these childrens' young ages or other mitigating circumstances.[62] They do not reflect focused, factually

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[60] *See Cruel and Unusual* at 20 (juveniles 14 or younger serving life without parole in 19 States: Alabama, Arkansas, Arizona, California, Colorado, Delaware, Florida, Illinois, Iowa, Michigan, Missouri, Mississippi, Nebraska, North Carolina, Pennsylvania, South Dakota, Tennessee, Washington, and Wisconsin). The current number is 18 States because California now has no people serving life without parole for offenses committed at 14 or younger. *See Nuñez*, 93 Cal. Rptr. 3d at 259, cited *supra* note 53.

[61] *Cruel and Unusual* at 20.

[62] Only eight of the approximately 79 sentences were imposed under discretionary sentencing schemes: two in Arkansas for first degree murder; one in Arizona for first degree murder;

(Continued on following page)

informed efforts to attune punishment to juvenile offenders' particular degree of culpability, but rather automatic applications of statutory schemes which – as we have noted at pages 41-45 *supra* – themselves bear no assurance of such an effort by Legislatures. And where sentencers *are* accorded discretion to impose or withhold life-without-parole sentences for young teens, such sentences are exceedingly rare: – fewer than a dozen nationwide. Another measure of the level and nature of public toleration of such sentences is the race of the people who get them. Of the approximately 79 people nationwide serving life-without-parole sentences for offenses committed at ages 13 or 14, 70% are racial minorities.[63]

The determination that life without parole is an excessive punishment for adolescent offenders is further confirmed by "the global consensus against the sentencing practice in question." *Graham*, 130 S. Ct. at 2033; *see also Roper*, 543 U.S. at 575 (consensus against sentence "finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction" to this punishment). The United States stands alone in sentencing children to die in prison without hope of ever winning release.[64] No other country is

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two in Florida for attempted first degree and second degree murder; one in Illinois for first degree murder; one in Tennessee for first degree murder; and one in Wisconsin for first degree intentional homicide.

[63] *Cruel and Unusual* at 20.

[64] *Graham*, 130 S. Ct. at 2034.

known to have any offenders serving life-without-parole sentences for crimes as children.[65] Sentencing juveniles to life without parole is banned by international conventions signed by almost every member of the world community of nations. As *Graham* noted, "the United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990), ratified by every nation except the United States and Somalia, prohibits the 'imposition of life imprisonment without possibility of release . . . for offences committed by persons below eighteen years of age,'" 130 S. Ct. at 2034; and the United States was alone in opposing a resolution in the United Nations General Assembly calling on all states to abolish life sentences without parole for juveniles. The motion passed by a vote of 176 to 1.[66]

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[65] *See* Connie De La Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law & Practice*, 42 U.S.F. L. Rev. 983, 990 (2008).

[66] G.A. Res. 61/146, ¶ 31(a), UN Doc. No. A/Res/61/146 (Dec. 19, 2006). The United States has been found to be in potential violation of two treaties to which it *is* a signatory – the International Covenant on Civil and Political Rights and the Convention Against Torture, Inhumane or Degrading Treatment or Punishment – due to its imposition of life imprisonment without parole on children. U.N. Human Rights Committee, 87th Sess., Concluding Observations on the United States of America, ¶ 34, U.N. Doc. CCCPR/C/SR.2395 (Dec. 18, 2006); U.N. Committee Against Torture, 36th Sess., Conclusions and Recommendations on the United States of America, ¶ 34, U.N. Doc. No. CAT/C/USA/CO/2 (July 25, 2006).

When the actual practice of imposing life-without-parole sentences on young adolescents is examined, it amounts to a powerful demonstration of domestic and global unacceptability. Most jurisdictions in this Nation have had a chance to use life without parole extensively in the sentencing of adolescents but have voted with their feet against this form of punishment. It is shunned world-wide. What emerges is a solid consensus that the passing of irrevocable judgment on a child of 14, condemning him or her to be imprisoned until death, is an intolerable aberration.

F. There Is No Legal, Empirical, or Practical Justification for Disregarding in Homicide Cases the Findings of *Roper* and *Graham* That Salient Differences Between Young Teens and Adults Bear Directly on the Question of Culpability Central to the Eighth Amendment Excessiveness Analysis.

1. Young Teens Convicted of Homicide Are Indistinguishable from Those Convicted of Nonhomicide Offenses Under This Court's Reasoning in *Roper* and *Graham*.

None of the analytical considerations identified in *Roper* and *Graham* can rationally countenance a distinction between homicide and nonhomicide crimes. It cannot be said that children who commit homicides have any less "[d]ifficulty in weighing long-term consequences" (*Graham*, 130 S. Ct. at 2032) or that they are any less likely to make "impetuous and

ill-considered actions and decisions" (*id.* at 2028) than those who commit nonhomicides. Nor are the "parts of the brain involved in behavior control" (*id*. at 2026) more mature in the case of a child who commits a homicide. Children involved in homicides do not have more "control, or experience with control, over their own environment" than other children, and they are no less "vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Roper*, 543 U.S. at 569.

The character of a child who commits homicide is no less "transitory" (*id.* at 570) and no more "well formed" (*Graham*, 130 S. Ct. at 2026) than that of a juvenile nonhomicide offender. "The reality that juveniles still struggle to define their identity means it is less supportable [than in the case of an adult] to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Roper*, 543 U.S. at 570. And it is no less challenging in homicide cases than in cases of other violent crimes to accurately "distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." *Graham*, 130 S. Ct. at 2032.

Roper recognized that juveniles as a class differ from adults in every one of these dimensions, even in the case of aggravated homicides. And for young adolescents like Kuntrell, the class-wide differences from adults in capability and culpability are even greater. Regarding this subclass of younger teens, the infrequency with which they have been sentenced to life without parole during recent decades of "[a]ctual

sentencing practices" (*Graham*, 130 S. Ct. at 2023) is as striking as that in *Graham* and *Roper*.

2. The "Super-Predator" Is An Exploded Myth That Cannot Justify Sentencing Young Teens to Life Without Parole.

Homicides by young adolescents do not constitute a danger of such magnitude as to warrant their exclusion from the constitutional logic of *Roper* and *Graham*. Although the 79 children 14 and younger who have been sentenced to life without parole for homicides represent only a minuscule percentage of children that age arrested for homicides, the total number of young adolescents arrested for homicide also represents only a tiny fraction of the total number of homicide arrests every year.[67]

In the 1990s, fears of a massive increase in violent juvenile crime stimulated many of the legal changes that removed young adolescents from juvenile courts and exposed them to sentences of life without parole. Some influential criminologists issued predictions of a coming wave of "super-predators" with whom the juvenile justice system would be

[67] For example, in 2010 the Uniform Crime Reports indicate that out of 8667 people arrested for murder or non-negligent homicide, only 73 (0.8%) were 14 or younger. *See* U.S. Dep't of Justice, Fed. Bureau of Investigation, Uniform Crime Reports for the United States, Table 38 (2010), *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s./2010/crime-in-the-u.s.-2010/tables/10tbl38.xls.

unable to cope.[68] These theorists suggested that we would soon see "elementary school youngsters who pack guns instead of lunches" and who "have absolutely no respect for human life."[69] Panic over the impending crime wave expected from these "radically impulsive, brutally remorseless"[70] children led nearly every State to enact legislation increasing the exposure of children to adult prosecution.[71]

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[68] "Super-predator" language was commonly used in conjunction with dire predictions that a vast increase in violent juvenile crime was occurring or about to occur. *See, e.g.,* Sacha Coupet, *What to Do With the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. Pa. L. Rev. 1303, 1307 (2000); Laura A. Bazelon, *Note: Exploding the Superpredator Myth: Why Infancy is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. Rev. 159 (2000). Much of the frightening imagery was racially coded. *See, e.g.,* John J. DiIulio, Jr., *My Black Crime Problem, and Ours*, City Journal (1996), http://www.city-journal.org/html/6_2_my_black.html (warning about "270,000 more young predators on the streets than in 1990, coming at us in waves over the next two decades . . . as many as half of these juvenile super-predators could be young black males"); William J. Bennett, John J. DiIulio, Jr., & John P. Walters, *Body Count: Moral Poverty – And How to Win America's War Against Crime and Drugs* 27-28 (1996) [hereinafter *Body Count*].

[69] John J. DiIulio, Jr., *The Coming of the Super-Predators*, Wkly. Standard, Nov. 27, 1995, at 23.

[70] Bennett, *supra* note 68, at 27.

[71] *See* U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Juvenile Justice: A Century of Change* 4-5 (1999), http://www.ncjrs.gov/pdffiles1/ojjdp/178993.pdf.

In the last decade, those predictions have proved wildly inaccurate.[72] Lower rates of juvenile crime from 1994 to 2000 despite simultaneous increases in the juvenile population led academics who had originally supported the "super-predator" theory to back away from their predictions.[73] In 2001, the Surgeon General of the United States released a report labeling the "super-predator" theory a myth and stating that "[t]here is no evidence that young people involved in violence during the peak years of the early 1990s were more frequent or more vicious offenders than youths in earlier years."[74]

Even during the height of the violent crime wave of the early 1990s, when homicide arrests did temporarily increase for older teens and young adults, homicides by children 14 and younger remained a

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[72] *See* Franklin E. Zimring, *The Youth Violence Epidemic: Myth or Reality?*, 33 Wake Forest L. Rev. 727, 728 (1998).

[73] *See, e.g.,* Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. Times, Feb. 9, 2001, at A19.

[74] U.S. Surgeon General, *Youth Violence: A Report of the Surgeon General,* Chapter 1: Myths About Youth Violence (2001), http://www.surgeongeneral.gov/library/youthviolence/chapter1/sec2.html#myths; *see also* U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Challenging the Myths*, at 5 (2001), http://www.ncjrs.gov/pdffiles1/ojjdp/178995.pdf (finding that "analysis of juvenile homicide arrests also leads to the conclusion that juvenile superpredators are more myth than reality").

very small part of the problem.[75] Thus, there is no pragmatic justification for abandoning or cutting back all of the teachings of *Roper* and *Graham* in order to make constitutional space for lifelong incarceration of a few 14-year-olds convicted of murder.

3. Principled, Practical Procedures Are Available to Assure Against Improvident Release of Young Teens Imprisoned for Homicide.

Graham forbids juvenile sentences that provide "no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope." 130 S. Ct. at 2032. Its aim is to secure for children "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." *Id.* at 2030.

Many States have procedures suitable for providing a "meaningful opportunity to obtain release" by encouraging incarcerated children to work "to achieve maturity of judgment." *Id.* at 2032. Alabama begins considering release for parole-eligible life-term

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[75] The 1992 UCR figures, for example, show 19,491 people arrested for murder or non-negligent homicide, but only 304 (1.6%) who were 14 or younger. *See* U.S. Dep't of Justice, Fed. Bureau of Investigation, Uniform Crime Reports for the United States, at 227 (1992); *see also* U.S. Dep't of Justice, Bureau of Justice Statistics, *Homicide Trends 1980-2008*, 4 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/htus8008.pdf (showing trends in homicide arrests by age from 1980 to 2008).

inmates after 15 years and subsequently conducts periodic review of prisoners not yet deemed ready to return to society. *See* Ala. Board of Pardons and Paroles, Rules, Regulations, and Procedures, Art. 1(8). Louisiana requires that any 14-year-old tried as an adult be released by age 31. *See* La. Child. Code Ann. art. 857(B). Provisions of this sort balance the need for punishment with the need to provide hope and incentive for improvement.

They also respect *Graham*'s and *Roper*'s recognition of the salient characteristics of youth, particularly children's innate "capacity for change," *Graham*, 130 S. Ct. at 2030. They respect *Graham*'s insight that "[a] young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual." *Id.* at 2032. They can be used to assure an opportunity for release which is not so far beyond the time horizon of a teen that it fails to provide an incentive for reform or so close to death that it denies a reformed teen the chance to contribute to the society to which he or she returns. They refute the bleak, destructive, self-fulfilling prophesy that "the system itself . . . [must become] complicit in the lack of development" of incarcerated children by "withhold[ing] counseling, education, and rehabilitation programs" (*id.* at 2032-33) that can foster "self-recognition of human worth and potential" (*id*. at 2032).

"A State is not required to guarantee eventual freedom to a juvenile offender." *Id*. at 2030. For young teens convicted of homicide, no less than for

those convicted of lesser crimes, the States can keep the promise of *Graham* through any sentencing or post-sentence review procedure that provides a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," *id.*

G. Appropriate Categorical Lines Can Readily Be Drawn.

Roper and *Graham* both recognized that, given the "dilemma of juvenile sentencing," *Graham*, 130 S. Ct. at 2032, a categorical rule, while "imperfect," was necessary. *Id.* at 2030; *Roper*, 543 U.S. at 572. "[A]llowing the imposition of these sentences based only on a discretionary, subjective judgment by a judge or jury that the offender is irredeemably depraved" is "insufficient to prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability." *Graham*, 130 S. Ct. at 2031. And "even if we were to assume that some juvenile nonhomicide offenders might have 'sufficient psychological maturity, and at the same time demonstrat[e] sufficient depravity,' . . . to merit a life without parole sentence, it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change." *Id*. at 2032

(citation omitted).[76] Given the inescapable difficulty of reliably predicting a child's character development years into the future,[77] a categorical rule barring the infliction of a life-without-parole sentence on any offender under a certain age is necessary. The question is not whether to draw a category boundary but where to draw it.[78]

This is, of course, familiar terrain for the Court. "The case-by-case approach to sentencing must . . . be confined by some boundaries." *Graham*, 130 S. Ct. at 2031-32. A well-established process for locating the boundary line through consideration of "objective indicia of society's standards," *Graham*, 130 S. Ct. at 2022, and "the exercise of [the Court's] own independent judgment," *id.*, is fully adequate to the task.

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[76] In homicide cases particularly, an "unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity" should require consideration. *Roper*, 543 U.S. at 573.

[77] "[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings." *Graham*, 130 S. Ct. at 2032. "Difficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel . . . all can lead to poor decisions by one charged with a juvenile offense." *Id.* These problems heighten the risk that, under a case-by-case approach, a court or jury will misjudge a particular child's culpability and amenability to reform.

[78] Despite "the objections always raised against categorical rules . . . , a line must be drawn." *Roper*, 543 U.S. at 574.

The Court could discern a satisfactory basis for drawing the line at any one of several different ages. To a considerable extent, the vulnerabilities and limitations of adolescence are common to a 14-year-old like Kuntrell Jackson and to a 17-year-old. For that reason, and because of the widespread recognition that full adult responsibilities requiring maturity of judgment should be withheld from adolescents below the age of 18 (*see, e.g.*, *Roper*, 543 U.S. at 579, Appendices B-D), the line could properly be drawn at 18.

However, as the scientific data we have summarized at pages 16-27 *supra* and the common-sense observations of parents world-wide attest, 13- and 14-year-olds as a class are much less mature than 17-year-olds.[79] Numerous State statutes recognize this plain fact of life by providing special protections for children of 13 and 14 and by restricting their freedoms in ways that are thought unnecessary in the case of older teenagers. *See supra* pp. 29-34. An additional – indeed, independently sufficient – basis for drawing the line between 14 and 15 would be the indisputable numerical evidence of repudiation of sentences of life imprisonment without the possibility of parole for 13- and 14-year-olds: a nationwide total of only approximately 79 such sentences having accumulated over the past 40 years. *See supra* pp. 47-50.

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[79] *See, e.g.,* Steinberg, Graham, et al., *Future Orientation*, *supra* note 28, at 39; Steinberg & Monahan, *supra* note 28, at 1538-41; Steinberg, Cauffman, et al., *supra* note 5, at 1776.

While we do not have access to precise data regarding the comparable figure for older adolescents, the available indications are that the numbers rise sharply from age 15 upwards.[80]

There is also justification for drawing the line between 15 and 16. Many State statutes group 15-year-olds with 13- and 14-year-olds for purposes of the special protections and restrictions that they prescribe for younger teens but not older ones. And in the ordinary course of adolescent development, the growth of some capabilities that are crucial for mature judgment appears to level off at 16. *See, e.g.*, Laurence Steinberg, Elizabeth Cauffman, et al., *Age Differences in Sensation-Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 Dev. Psychol. 1764, 1771 (2008) ("[S]ensation seeking increases during the first half of adolescence and then declines steadily from age 16 on."); *id*. at 1774 ("[H]eightened sensation seeking is most clearly and consistently seen among individuals between the ages of 12 and 15."); Laurence

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[80] As of 2008, Human Rights Watch estimated there were 2484 offenders serving juvenile life-without-parole sentences in the United States. Human Rights Watch, *The Rest of Their Lives: Life without Parole for Youth Offenders in the United States in 2008* (May 2008), http://www.hrw.org/sites/default/files/reports/us1005execsum.pdf. Human Rights Watch previously estimated that 13.3% of these children were 15 years old at the time of their offense. *See* Amnesty Int'l & Human Rights Watch, *Rest of Their Lives: Life without Parole for Youth Offenders in the United States* 26 (Oct. 11, 2005), http://www.hrw.org/en/reports/2005/10/11/rest-their-lives.

Steinberg, *Adolescent Development and Juvenile Justice*, 5 Ann. Rev. Clinical Psychol. 47, 55 (2009).

But wherever the line is drawn, there is no defensible constitutional logic consistent with *Roper* and *Graham* that allows a State to condemn a 14-year-old child to "die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes," *Graham*, 130 S. Ct. at 2033.

H. The Constitutional Rule of *Graham* Would Be Stripped of Intelligible Meaning If It Were Held Inapplicable to the Mandatory Life-Without-Parole Sentence Imposed on 14-Year-Old Kuntrell Jackson for a Homicide Crime Attributed to Him Through Accessorial Felony-Murder Doctrines.

As the dissent below found, it is difficult to distinguish Kuntrell Jackson's level of personal culpability from Terrance Graham's. J.A. 85 ("The facts in *Graham* are not terribly different from the facts in the instant case, except that the victim in *Graham* did not die from Graham's accomplice's physical attack."). Both young men engaged in a robbery with other teens, and, in both cases, an accomplice attacked the robbery victim. J.A. 84-86. Indeed, if case-specific distinctions were to be drawn, convincing reasons could be found to regard Kuntrell Jackson's

culpability as less than Terrance Graham's. Kuntrell was barely 14 years old; he became aware of an older companion's possession of a gun only shortly before his companions entered the shop where the robbery was committed; he himself initially chose to remain outside the shop (*Jackson*, 194 S.W.3d at 758-59); and the circumstances strongly suggest that his companion's firing of the gun was unexpected: the startled trio ran away without taking any money; Kuntrell's felony-murder conviction was not obtained on the theory that he intended any assault upon the victim;[81] and the conviction was affirmed on the express ground that the evidence was not insufficient solely because the jury could have resolved the "question of fact as to whether Jackson said 'We ain't playin'' or 'I thought you all was playin'' upon entering the store" (*id*. at 760) in such a way as to support a conclusion that "Jackson did, in fact, in some way solicit, command, induce, procure, counsel, or aid in the commission of the crime *sub judice*" (*id*.).

Graham observed that "a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." 130 S. Ct. at 2027. To be sure, from the standpoint of the harm caused, even unintended

[81] "In order to convict the appellant of capital murder, the State had to prove that Jackson attempted to commit or committed an aggravated robbery and, in the course of that offense, he, or an accomplice, caused Ms. Troup's death under circumstance manifesting an extreme indifference to the value of human life." 194 S.W.3d at 760 (emphasis added).

felony murder is a more serious crime than the nonhomicide offenses on which it is predicated. This is undeniable and explains why it is traditionally and legitimately punished more severely. But the application of felony-murder liability to young children becomes problematic in the light of the differences between children and adults recognized in *Roper* and *Graham*.

The felony-murder doctrine rests essentially on the idea that one who chooses to become involved in a potentially violent felony should reasonably anticipate injury to victims or bystanders. *See Tison v. Arizona*, 481 U.S. 137, 159-60 (1987) (Brennan, J., dissenting). As *Graham* implicitly recognizes, this rationale is attenuated in the case of juveniles. Juveniles as a group, and especially young adolescents like Kuntrell, have a significantly impaired ability to anticipate future consequences.[82] For this reason, they are less able to recognize that their participation in a robbery may lead to someone's injury or death. Moreover, juveniles' poor impulse control and high susceptibility to peer influence inhibit their ability to withdraw from potentially deadly situations when they are encouraged into wrongdoing by others. *See Graham*, 130 S. Ct. at 2026. In short, Kuntrell's incarceration for life with no possibility of parole cannot be reconciled with *Graham*'s square holding through

[82] See the authorities in note 22 *supra*.

any logic that takes this Court's reasoning in *Graham* and *Roper* at all seriously.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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APPENDIX A

States in Which Children 13 and Older Are Exposed to a Sentence of Life Without Parole

Delaware:	Del. Code Ann. tit. 10, § 1010; *id.* tit. 11, § 4209 (amended in non-pertinent part by 2011 Del. Legis. Ch. 179 H.B. 214, approved Aug. 17, 2011)
Florida:	Fla. Stat. Ann. §§ 775.082, 985.557, 985.56(1)
Georgia:	Ga. Code Ann. §§ 16-3-1, 16-5-1(d), 15-11-28(b)
Hawaii:	Haw. Rev. Stat. §§ 571-22, 706-656(1)
Idaho:	Idaho Code Ann. §§ 18-4004, 20-509(1)
Illinois:	705 Ill. Comp. Stat. Ann. 405/5-130, 730 Ill. Comp. Stat. Ann. 5/5-8-1(a)(1)
Maine:	Me. Rev. Stat. Ann. tit. 15, § 3101; *id.* tit. 17-A, § 1251
Maryland:	Md. Code Ann., Cts. & Jud. Proc. § 3-8A-06; *id.,* Crim. Law §§ 2-201, 2-202, 2-203, 2-304
Michigan:	Mich. Comp. Laws Ann. §§ 712A.2d, 750.316, 791.234(6)(a)
Mississippi:	Miss. Code Ann. §§ 43-21-151(3), 43-21-157, 97-3-21
Missouri:	Mo. Ann. Stat. §§ 211.071, 565.020
Nebraska:	Neb. Rev. Stat. §§ 28-105, 28-303, 43-247

Nevada:	Nev. Rev. Stat. Ann. §§ 62B.330, 200.030
New Hampshire:	N.H. Rev. Stat. Ann. §§ 169-B:24, 628:1, 630:1-a
North Carolina:	N.C. Gen. Stat. Ann. §§ 7B-2200, 14-17
Oklahoma:	Okla. Stat. Ann. tit. 10A, § 2-5-101; *id.* tit. 21, § 701.9
Pennsylvania:	42 Pa. Cons. Stat. Ann. §§ 6302, 6355, 9711
Rhode Island:	R.I. Gen. Laws Ann. §§ 11-23-2, 14-1-7
South Carolina:	S.C. Code Ann. §§ 16-3-20, 63-19-1210(6)
South Dakota:	S.D. Codified Laws §§ 22-16-12, 22-6-1, 26-11-4
Tennessee:	Tenn. Code Ann. §§ 37-1-134, 39-13-202, 39-13-204
Vermont:	Vt. Stat. Ann. tit. 33, §§ 5102(2)(C), 5204; *id.* tit. 13, § 2303
Washington:	Wash. Rev. Code Ann. §§ 10.95.030, 13.40.110
West Virginia:	W. Va. Code Ann. §§ 49-5-10, 61-2-2, 62-3-15
Wisconsin:	Wis. Stat. Ann. §§ 938.18, 938.183, 940.01, 939.50(3)(a)
Wyoming:	Wyo. Stat. Ann. §§ 6-2-101, 14-6-203, 14-6-237

APPENDIX B

States in Which Children 14 and Older Are Exposed to a Sentence of Life Without Parole

Alabama:	Ala. Code §§ 12-15-203, 13A-5-39(1)
Arizona:	Ariz. Rev. Stat. Ann. §§ 13-501(B), 13-752(A)
Arkansas:	Ark. Code Ann. §§ 5-4-104(b), 9-27-318
Connecticut:	Conn. Gen. Stat. Ann. §§ 46b-127, 53a-35a, 53a-54a, 53a-54d
Iowa:	Iowa Code Ann. §§ 232.45(6)(a), 902.1
Massachusetts:	Mass. Gen. Laws Ann. ch. 119, § 74; *id.* ch. 265, § 2 (invalidated in non-pertinent part by *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Mass. 1984)).
Minnesota:	Minn. Stat. Ann. §§ 260B.125, 609.106
New Jersey:	N.J. Stat. Ann. §§ 2A:4A-26, 2C:11-3
New Mexico	N.M. Stat. Ann. §§ 31-18-14, 32A-2-3, 32A-2-20
North Dakota:	N.D. Cent. Code Ann. §§ 12.1-04-01, 12.1-16-01, 12.1-32-01
Ohio:	Ohio Rev. Code Ann. §§ 2152.10, 2929.03
Utah:	Utah Code Ann. §§ 76-2-301, 78A-6-602(3), 76-3-206
Virginia:	Va. Code Ann. §§ 16.1-269.1, 18.2-10