

Nos. 08-7412, 08-7621

In The
Supreme Court of the United States

TERRANCE JAMAR GRAHAM,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

JOE HARRIS SULLIVAN,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

*On Writs of Certiorari to the Florida
First District Court of Appeal*

**BRIEF FOR THE STATES OF LOUISIANA, ET AL.,
AS AMICI CURIAE IN SUPPORT OF RESPONDENT**

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INTEREST OF STATE AMICI

Juvenile violence in the United States has increased dramatically over the past half-century. The State *amici* have, and have always had, primary responsibility for meeting this daunting problem. As the United States Department of Justice observed over a decade ago:

States are well along in developing innovative approaches to the vexing problem of juvenile violence while still maintaining, for the majority of juvenile law violators, a system of juvenile justice that preserves the hopeful aspects of a system premised on the malleability of youth.¹

But States also have the regrettable duty of punishing, remedying, and preventing the terrible crimes that some juveniles commit. Such crimes are presented in these cases: the beating and brutal rape of a 72-year-old woman by the 13-year-old Sullivan, and the violent armed robberies perpetrated by the 16-year-old Graham.²

Ninety percent of the States have retained life-without-parole as an available sentence for certain violent juvenile offenders. Thankfully, only rare cases warrant that severe sanction, and the States

¹ Patricia Torbet *et al.*, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME iii (U.S. Dep't of Justice, Office of Juvenile Justice and Delinquency Prevention) (July 1996) ("O.J.J.D.P. REPORT").

² See Brief of Respondent at 4-5, *Sullivan v. Florida*, No. 08-7621 (U.S. Jul. 16, 2009); Brief of Respondent at 6-9, *Graham v. Florida*, No. 08-7412 (U.S. Jul. 16, 2009).

themselves vary on when it may be imposed on juveniles. The State *amici* have an overarching interest in retaining the discretion to calibrate juvenile sentences. Only if left free to do that can the States continue to respond to the evolving challenge of juvenile violence.

SUMMARY OF ARGUMENT

No one wants to believe that young people can commit horrible crimes. But sometimes they do. And no one wants to consider whether they should serve lengthy prison terms. But States must consider it, since they are responsible to their own citizens for protecting them, for deterring crime, for assuaging the victims, and for punishing the guilty. Consequently, as Part I explains, the Eighth Amendment leaves States considerable latitude in deciding how to sentence violent juvenile offenders.

It is a rare and agonizing decision to sentence a juvenile to life-without-parole. But rare does not mean unconstitutional. Rather, rarity is an index of mercy—of reluctance to take this severe step. And yet, as Part II describes, States have overwhelmingly made the reasoned legislative choice that certain crimes—such as rape, robbery and kidnapping—are so morally reprehensible, so damaging to victims, and so undermine a community’s sense of security, that the law’s second-most severe sentence should be available, even if the offender is a juvenile. The District of Columbia and the federal government have done so as well. And even the few States that expressly disallow juvenile life-without-parole sentences

would nonetheless permit lengthy mandatory sentences of up to 50 years.

Finally, as Part III explains, politically-accountable state legislatures are the ones that should weigh such painful choices, and they have done so vigilantly. The best example is the kaleidoscope of state transfer and waiver provisions through which juveniles may become subject to adult penalties. Through those mechanisms, States have grappled profoundly with every facet of juvenile violence—such as an offender’s age, maturity, psycho-social development, criminal background, and potential for rehabilitation. States thus expose juveniles to a possible life-without-parole sentence only in carefully considered circumstances in which deterrence and punishment outweigh rehabilitation.

Far from condemning such a choice, this Court has tacitly approved it. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court reasoned that States had deterrence options for violent juveniles other than the death penalty. The Court deemed it “worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.” *Id.*, at 572. The Court should not now interpret the Eighth Amendment to remove the States’ power to impose this sanction on violent juvenile criminals such as the Petitioners.

ARGUMENT**I. OUTSIDE THE DEATH-PENALTY CONTEXT, THE EIGHTH AMENDMENT STRONGLY DEFERS TO STATE SENTENCING JUDGMENT.**

How severe should criminal sentences be? Should the guilty be eligible for parole? If so, when? Should sentencing aim primarily to reform, punish or deter? It is “properly within the province of legislatures, not courts” to ponder these questions. *Harmelin v. Michigan*, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring) (quoting *Rummel v. Estelle*, 445 U.S. 263, 275-76 (1980)).³ This Court “do[es] not sit as a ‘superlegislature’ to second-guess” the hard sentencing choices that fall to state legislatures. *Ewing v. California*, 538 U.S. 11, 29 (2003) (op. of O’Connor, J.). And squarely within their responsibilities is the agonizing subject presented in these cases: how severely to sentence violent juvenile offenders.

The Court’s death-penalty cases have little to say about the issue. Life-without-parole “cannot be compared with death.” *Harmelin*, 501 U.S., at 996 (op. of Court). As Justice Stewart once observed, “[d]eath, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.” *Woodson v. North*

³ See also *Solem v. Helm*, 463 U.S. 277, 290 (1983) (explaining that the Eighth Amendment affords “substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes”).

Carolina, 428 U.S. 280, 305 (1976) (op. of Stewart, J.). The Court has refused to extend death-penalty analysis to life-without-parole sentences.⁴ Cases such as *Roper*, *supra*, then, provide marginal assistance in gauging juvenile prison terms, “[b]ecause a sentence of death differs in kind from any sentence of imprisonment, *no matter how long.*” *Rummel*, 445 U.S., at 272 (emphasis added).⁵

Every State carefully considers juveniles’ age, maturity, and background before trying them as adults. *See infra* Part II.A. But the Eighth Amendment does not directly regulate state discretion over such matters. *See, e.g., Harmelin*, 501 U.S., at 994-95 (op. of Court) (holding that Eighth Amendment does not require consideration of mitigating factors in non-capital sentencing). At most, juvenile non-capital sentences must satisfy a narrow proportionality principle that “forbids only extreme sentences ... ‘grossly disproportionate’ to the crime.” *Harmelin*, 501 U.S., at 997, 1001 (Kennedy, J., concurring) (and collecting cases); *see*

⁴ *See Harmelin*, 501 U.S., at 996 (op. of Court) (rejecting argument that, simply because life-without-parole is “the second most severe known to the law,” it should be constitutionally equated with death); *Roper*, 543 U.S., at 568 (explaining that “[b]ecause the death penalty is the most severe punishment, the Eighth Amendment applies to it *with special force*”) (emphasis added).

⁵ *See also Solem*, 463 U.S., at 295 (explaining “the death penalty is different from other punishments in kind rather than degree”); *Rummel*, 445 U.S., at 272 (observing that “[t]his theme, the unique nature of the death penalty for purposes of Eighth Amendment analysis, has been repeated time and time again in our opinions”) (collecting cases).

also Ewing, 538 U.S., at 21 (op. of O’Connor, J.). Such review is ill-adapted for drawing lines at particular sentence lengths, ages, or stages of psycho-social development.⁶

Gross proportionality implicitly allows the different States to adopt a variety of approaches to juvenile sentencing. Comparing juvenile sentences across state lines may provide some limited analytical guidance⁷—here, for instance, it underscores the widespread availability of life-without-parole for violent juvenile crime, and hence the relative *proportionality* of the sentence. *See infra* Part II.A. But even if one State imposes,

⁶ *See, e.g., Harmelin*, 501 U.S., at 1000-01 (Kennedy, J., concurring) (reasoning that the Court’s “decisions recognize that [it] lack[s] clear objective standards to distinguish between sentences for different terms of years”); *see also Rummel*, 445 U.S., at 1139-40 (observing that the relatively “bright lines” between different *types* of punishments are “considerably clearer than would be any constitutional distinction between one term of years and a shorter or longer term of years”); *see also Harris v. Wright*, 93 F.3d 581, 584 (9th Cir. 1996) (explaining that “capital punishment aside, there’s no constitutional (or rational) basis for classifying punishment in distinct, ordinal categories”).

⁷ *See, e.g., Harmelin*, 501 U.S., at 1005 (Kennedy J., concurring) (noting that inter- and intra-state comparisons are “appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality”); *see also id.*, at 999-1000 (explaining that “[s]tate sentencing schemes may embody different penological assumptions, making interstate comparison of sentences a difficult and imperfect enterprise”); *Ewing*, 538 U.S., at 23 (op. of O’Connor, J.) (agreeing that proportionality “d[oes] not mandate comparative analysis” (quotations omitted)).

nationally, the most stringent juvenile sentences, that alone does not render them grossly disproportionate for Eighth Amendment purposes.⁸

This restrained review affords States wide latitude in deciding how severely to punish violent juvenile crime in particular. The Court has emphasized that, for Eighth Amendment purposes, “nonviolent crimes are less serious than crimes marked by violence or the threat of violence.” *Solem*, 463 U.S., at 292-93.⁹ Thus States may decide that direct violent assaults against persons—even by juveniles—merit especially severe penalties.¹⁰ And offenses may be deemed serious even if they are merely related to other violent crime.¹¹ In sum, States may “with reason conclude that the threat posed to the individual and society by” violent

⁸ See, e.g., *Rummel*, 445 U.S., at 281 (explaining that “[e]ven were we to assume that the statute employed against Rummel was the most stringent found in the 50 States, that severity hardly would render Rummel’s punishment ‘grossly disproportionate’ to his offenses or to the punishment he would have received in the other States”).

⁹ See also *Harmelin*, 501 U.S., at 1002 (Kennedy, J., concurring) (quoting *Solem*, 463 U.S., at 296) (reasoning that issuing a bad check—“one of the most passive felonies a person could commit”—is relatively non-serious, given it “involve[s] neither violence nor threat of violence”).

¹⁰ See, e.g., *Solem*, 463 U.S., at 297 (observing that prior three-strike felonies “were nonviolent and none was a crime against a person”).

¹¹ See, e.g., *Harmelin*, 501 U.S., at 1002-03 (Kennedy, J., concurring) (deeming cocaine possession violent for Eighth Amendment purposes given a “direct nexus between illegal drugs and crimes of violence”).

crimes “is momentous enough to warrant the deterrence and retribution of a life sentence without parole.” *Harmelin*, 501 U.S., at 1003 (Kennedy, J., concurring).

When States calibrate juvenile sentences they make “a normative judgment about deserved punishment [that] rests on a moral foundation, not a scientific one.” Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J. L. & FAM. STUD. 11, 72 (2007) (“Feld”). It is thus a task lying at the core of politically-accountable state sovereignty. This Court has a “longstanding [...] tradition of deferring to state legislatures in making and implementing such important policy decisions.” *Ewing*, 538 U.S., at 24 (op. of O’Connor, J.) (collecting cases).

II. IN THE VAST MAJORITY OF STATES, VIOLENT JUVENILES MAY BE TRIED AS ADULTS AND SENTENCED TO LIFE- WITHOUT-PAROLE.

The sentencing landscape over the last half-century shows that a super-majority of States have decided that life-without-parole should remain available for violent juvenile criminals. Such sentences are rare, of course, and should be. But 90% of the States have deliberately retained this severe measure for dealing with juvenile violence.

Petitioners in both cases have framed their arguments solely in terms of *Roper*’s death-penalty

analysis.¹² But, as Part I *supra* explains, that is the wrong test for non-capital juvenile sentences. In that context, the Eighth Amendment “forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” *Harmelin*, 501 U.S., at 1001 (Kennedy, J., concurring) (quoting *Solem*, 463 U.S., at 288). Consequently, the following survey of sentencing policies and trends will serve double duty.

First, it will demonstrate that, even under the stricter standards Petitioners have incorrectly adopted, there is no “objective indicia of consensus” that life-without-parole is disproportionate for violent juvenile offenders. *See Roper*, 543 U.S., at 564. To the contrary, any objective measure based on legislative enactments points overwhelmingly in the opposite direction. Second, and more to the point, the data will demonstrate that such sentences are not grossly disproportionate to violent crimes committed by juveniles generally—and certainly not to the beating and brutal rape of a 72-year-old woman perpetrated by Sullivan, nor to the violent armed robberies perpetrated by Graham.¹³ In sum, States have a “reasonable basis for believing” that life-without-parole for violent juvenile crime “‘advance[s] the goals of [their] criminal justice systems in [a] substantial way.’” *Ewing*, 538 U.S.,

¹² See Brief for Petitioner at 25-27, *Graham v. Florida*, No. 08-7412 (U.S. Jul. 16, 2009); Brief for Petitioner at 8, *Sullivan v. Florida*, No. 08-7621 (U.S. Jul. 16, 2009).

¹³ See Brief of Respondent at 4-5, *Sullivan v. Florida*, No. 08-7621 (U.S. Jul. 16, 2009); Brief of Respondent at 6-9, *Graham v. Florida*, No. 08-7412 (U.S. Jul. 16, 2009).

at 28 (op. of O'Connor, J.) (quoting *Solem*, 463 U.S., at 297 n.22).

A. Legislation in Forty-Five States Allows Life-Without-Parole for Violent Juvenile Offenders.

The raw data from legislative enactments demonstrate an overwhelming judgment that life-without-parole is appropriate for certain juveniles who commit violent crimes. Overall, **forty-five** States have decided that juvenile offenders may be tried as adults and sentenced to life-without-parole. While they understandably do not highlight the point in their briefs, the Petitioners in both *Graham* and *Sullivan* broadly accept—if somewhat understate—these figures. See Brief for Petitioner at App'x C, *Graham v. Florida*, No. 08-7412 (U.S. Jul. 16, 2009); Brief for Petitioner at 49-50, *Sullivan v. Florida*, No. 08-7621 (U.S. Jul. 16, 2009). The State data break down as follows.

(1). Seven States allow the sentence for homicide crimes only.

The following six States allow life-without-parole sentences for juveniles convicted of homicide crimes only:

- (1). **Connecticut** mandates automatic transfer of juveniles to adult court at age 14 for a capital felony, Class A or B felony or arson murder, CONN. GEN. STAT. ANN. § 46b-127 (2009), exposing them to a possible life-without-parole sentence for a capital felony, *id.* § 53A-35A (2008).

- (2). **Hawaii** allows judicial waiver of a minor at any age for murder and attempted murder in the first and second degrees, HAW. REV. STAT. ANN. § 571-22(d) (2006), mandating a life-without-parole sentence upon conviction of murder or attempted murder in the first degree, *id.* § 706-656(1) (1993).¹⁴
- (3). **Maine** mandates a bind-over hearing for juveniles at any age, ME. REV. STAT. ANN. tit. 15 § 3101(4) (2003), exposing them to a potential life-without-parole sentence for murder, *id.* tit. 17-a § 1251 (2006).
- (4). **Massachusetts** automatically excludes from juvenile jurisdiction a 14-year-old charged with first degree murder, MASS. GEN. LAWS ANN. ch. 119 § 74 (2008), opening up a possible life-without-parole sentence, *id.* ch. 265 § 2 (2008).
- (5). **New Jersey** mandates transfer for certain juveniles 14 or older, N.J. STAT. ANN. § 2A:4A-26 (2009), permitting a life-without-parole sentence, *id.* § 2C:11-3(b)(5) (2009), for murder where the victim is a law enforcement officer, *id.* § 2C:11-3(b)(2) (2009), or where

¹⁴ A minor convicted of murder or attempted murder in the second degree receives a mandatory sentence of life imprisonment with the possibility of parole. But a second-degree murder sentence may be enhanced to life-without-parole if “the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity,” or if the minor was previously convicted of first or second degree murder in Hawaii or an equivalent crime in another State. *Id.* §§ 706-656(2); 706-657 (Supp. 2008).

the victim was under age 14 and was sexually assaulted, *id.* § 2C:11-3(b)(3) (2009).

- (6). **New Mexico** defines a “serious youthful offender” as “an individual fifteen to eighteen years of age who is charged with and indicted or bound over for trial for first degree murder,” N.M. STAT. § 31-18-15.2(A) (1996), thus allowing a life-without-parole sentence, *see id.* § 31-18-14 (2009) (amended by 2009 N.M. Laws, ch. 11, Sec. 1) (abolishing death penalty but providing that “the defendant shall be sentenced to life imprisonment or life imprisonment without possibility of release or parole”).¹⁵
- (7). **Vermont** allows judicial transfer even from ages 10 to 13, VT. STAT. ANN. tit. 33, § 5204 (2007), thus exposing juveniles to a potential life-without-parole sentence for first or second degree murder, *id.* tit. 13, § 2303 (2005).

¹⁵ The previous version of N.M. STAT. § 31-18-14 provided “if the defendant has not reached the age of majority at the time of the commission of the capital felony for which he was convicted, he may be sentenced to life imprisonment but shall not be punished by death.” The recently amended 31-18-14 no longer distinguishes between minors and adults, but specifically retains a possible life-without-parole sentence for both. *See also id.* § 31-18-15.3(D) (1993) (providing “court *may* sentence the [serious youthful] offender to less than, but not exceeding, the mandatory term for an adult,” if guilty of first degree murder) (emphasis added).

(2). *Thirty-eight States also allow the sentence for non-homicide crimes.*

The following thirty-nine States additionally¹⁶ provide that juveniles may be sentenced to life-without-parole for non-homicide violent crimes, such as sexual assault, burglary, armed robbery, and kidnapping:

- (1). **Alabama** allows transfer to adult court of a juvenile from age 14, ALA. CODE § 12-15-203 (2009), thus permitting a life-without-parole sentence for felony offenses, including burglary and rape, *id.* §§ 13A-5-9(c)(3), (4) (2000); 13A-7-5 (2006); 13A-6-61 (2000).
- (2). **Arizona** allows, and sometimes mandates, adult prosecution of juveniles age 14 and older, ARIZ. REV. STAT. § 13-501 (2009), thus exposing them to a potentially mandatory natural life sentence for certain violent sexual assaults, *see id.* § 13-1423 (2009).
- (3). **Arkansas** allows juvenile transfer from age 14, ARK. CODE ANN. § 9-27-318 (2003), and so permits a life-without-parole sentence for multiple crimes including kidnapping, rape

¹⁶ Juvenile transferees in these States are also eligible (unless otherwise noted) for life-without-parole for homicide crimes to the same extent as adults. For instance, in addition to the non-homicide crimes discussed *infra*, Delaware requires adult prosecution of juveniles for murder, DEL CODE ANN. tit. 10, §§ 1010(a)(1); 921(2)(a) (2008), thus requiring a sentence of life-without parole for first degree murder, *id.* tit. 11, §§ 636; 4209(a) (2008), and permitting that sentence for second degree murder, *id.* tit. 11 §§ 635; 4205(b) & (j) (2008).

and aggravated robbery, *id.* § 5-4-501(c)(1)(b), (c)(2) (2009).

- (4). **California** allows adult prosecution of persons under age 18, CAL. PENAL CODE § 1170.17 (2004), thus permitting life-without-parole upon multiple convictions of various non-homicide sexual assault and robbery crimes, *id.* §§ 667.7(a), (b) (2007).
- (5). **Delaware** requires adult prosecution of juveniles for various crimes, including attempted murder, rape, assault, kidnapping and robbery, DEL. CODE ANN. tit. 10, §§ 1010(a)(1); 921(2)(a) (2008), thus allowing life-without-parole for attempted murder or rape, *id.* tit. 11 §§ 636; 531; 773; 4205(b) & (j) (2008).
- (6). **Florida** makes juveniles of any age subject to indictment for crimes punishable by death penalty or life imprisonment, FLA. STAT. ANN. § 985.56 (2007), and thus makes life-without-parole available for certain sexual batteries, *id.* § 794.011(3) (2002), and certain burglaries, *id.* § 810.02(2) (2007).
- (7). **Georgia** allows transfer for juveniles age 13 and 14 for aggravated battery and life imprisonment crimes, GA. CODE ANN. § 15-11.30.2(4) (2000), thus allowing life-without-parole for rape, *id.* § 16-6-1(b) (2006), and mandating it upon second conviction for various “serious violent felonies,” including armed robbery, kidnapping, rape, and aggravated sexual battery, *id.* § 17-10-7(b)(2) (1994).

- (8). **Idaho** provides discretionary transfer for juveniles of any age for crimes including murder, robbery, rape, and assault, IDAHO CODE §§ 20-508; 20-509 (2007), thereby making available life sentences for robbery and rape, *id.* §§ 18-6503, 18-6104 (2009).
- (9). **Illinois** allows juvenile transfer at age 13 and mandates it at age 15, 705 ILL. COMP. STAT. 405/5-805(1)-(3) (2007), thus exposing juveniles to a possible natural life for certain sexual assaults, 730 ILL. COMP. STAT. 5/5-8-1(a)(2.5), (d)(4) (2009).
- (10). **Indiana** requires transfer of “child” for felony prosecution, IND. CODE § 31-30-3-6(1) (2008), and thus makes available life-without-parole upon multiple convictions for various crimes, including sexual battery, robbery, and burglary (if each committed with a deadly weapon), *id.* § 35-50-2-8.5(a) (2009).
- (11). **Iowa** allows transfer of juveniles age 14 and older, IOWA CODE § 232.45(6), permitting natural life imprisonment for Class A felonies, including kidnapping and sexual abuse, *id.* §§ 902.1 (2003); 710.2 (2009), 709.2 (2003).
- (12). **Louisiana** allows adult prosecution of juveniles age 14 and older, LA. CHILD. CODE art. 305 (2004); art. 857(A) (2004), thus permitting life-without-parole sentences for 15 year olds convicted of aggravated rape and aggravated kidnapping, LA. REV. STAT. ANN. §§ 14:42(D)(1) (2007); 14:44 (2007); *see* LA.

CHILD. CODE art. 857(B) (2004) (14-year-old transferee may only be imprisoned to age 31).

- (13). **Maryland** provides discretionary transfer for a juvenile of any age for crimes punishable by death or life imprisonment, MD. CODE ANN., CTS. & JUD. PROC. §§ 3-8A-06(a)(2) (2001); 3-8A-03(d)(1) (2001), and thus makes a juvenile subject to life-without-parole for first degree rape, MD. CODE ANN., CRIM. LAW § 3-303(d)(2) (2009).
- (14). **Michigan** allows waiver for felonies committed by juveniles 14 and over, MICH. COMP. LAWS §§ 712A.4 (2002)); 769.1 (1) (2000); 764.27 (2000), and thus permits life-without-parole sentences for kidnapping, *id.* § 750.349(3) (2007), armed robbery, *id.* § 750.529 (2004), carjacking, *id.* § 750.529a(1) (2004), and recidivist controlled substances offenses, *id.* § 333.7413(1) (2001).
- (15). **Minnesota** provides discretionary transfer for juveniles 14 or older, MINN. STAT. § 260B.125(1) (2007), allowing mandatory life-without-parole for certain sex offenses, *id.* §§ 609.055 (2009); 609.3455(2) (2009).
- (16). **Mississippi** allows transfer for juveniles 13 or older, MISS. CODE ANN. § 43-21-157 (2009), thus exposing them to potential mandatory life-without-parole sentences for recidivist violent offenses, including sex crimes and robbery, *id.* §§ 47-7-3(1)(a) (2009); 99-19-81 (1977); 99-18-83 (1977).

- (17). **Missouri** has discretionary transfer for juveniles 12 or older, MO. REV. STAT. § 211.071(1) (2009), and so allows a mandatory life-without-parole sentence for persistent sexual offenders, *id.* § 558.018 (2009), and for some drug offenses, *id.* §§ 195.222 (2004); 195.223 (2004), and for persistent drug offenders, *id.* §§ 195.214 (2004); 195.218 (2004).
- (18). **Montana** allows transfer from age 12 for certain felonies (from age 16 for others), MONT. CODE ANN. § 41-5-206(1)(a), (b) (2007), thus allowing a life-without-parole sentence, *id.* §§ 41-5-2503(1)(a) (1999); 46-18-202(2) (2007), for crimes such as aggravated kidnapping, *id.* § 45-5-303 (1995), non-consensual sexual intercourse, *id.* § 45-5-503 (2007), and aggravated assault while in official detention, *id.* § 46-18-220 (2001).¹⁷
- (19). **Nebraska** allows discretionary prosecution for juveniles under age 16, NEB. REV. STAT. §§ 43-247 (2008); 43-276 (2008), thereby authorizing a life-without-parole sentence, *id.* §§ 29-2204 (2002); 28-105 (2002), for all class IA, and IB felonies, including first and second degree murder, kidnapping and sexual assault of a child, *id.* §§ 28-303 (2008); 28-304 (2008); 28-313(2) (1977); 28-319.01 (2009).

¹⁷ Montana permits, but does not mandate, juvenile life-without-parole for homicide. *See id.* §§ 46-18-219(1)(a)(i) (2001); 46-18-222(1) (2007).

- (20). **Nevada** excludes from juvenile jurisdiction certain sexual assault and firearm crimes at age 16 for previously-adjudicated delinquents, certain felonies on school property resulting in death or great bodily harm for any age, and other recidivist crimes for any age, NEV. REV. STAT. § 62B.330(b)-(e) (2004),¹⁸ thus permitting life-without-parole sentences for, *inter alia*, certain sexual assaults, *id.* § 200.366(2)-(4), battery with the intent to commit sexual assault, *id.* § 200.400(4), and habitual criminal offenses, *id.* §§ 207.010(1)(b)(1); 207.012(1)(b)(1).
- (21). **New York** provides generally that “a person less than sixteen years old is not criminally responsible for conduct,” N.Y. PENAL LAW § 30.00(1) (2008), thus allowing a mandatory life-without-parole sentence for a sixteen-year-old convicted of terrorism crimes involving a class A-I felony such as first-degree kidnapping, *id.* §§ 490.25(d) (2008); 135.25 (2009).¹⁹

¹⁸ Additionally, a juvenile court has discretion to certify as an adult a juvenile age 14 or older charged with an offense punishable as a felony, and is required to certify a juvenile age 14 or older charged with certain violent sexual assault or firearm crimes. *Id.* §§ 62B.390(1), (2) (2004).

¹⁹ *See also id.* § 70.00(5) (2009) (allowing life-without-parole sentence for sixteen-year-old convicted of second-degree murder); *cf. id.* § 30.00(2) (2009) (allowing 13-, 14-, or 15- year old to be found criminally responsible for second degree murder); § 70.05(2)(a) (2009) (mandating maximum term of life imprisonment for juvenile offender convicted of second degree murder).

- (22). **New Hampshire** allows juvenile transfer from age 13, N.H. REV. STAT. ANN. §§ 628:1(II) (2004); 169-B:24(II) (2004), and thus permits life-without-parole for multiple convictions of sexual assault, *id.* § 651.6(III)(e) (2009).
- (23). **North Carolina** provides that a juvenile 13 or older may be sentenced to life-without-parole for violent habitual offenses, N.C. GEN. STAT. § 14-7.12 (2007), for a second conviction of first degree rape or sexual assault, *id.* § 15A-1340.16B(a) (2007), or for committing a Class B1 felony while wearing or possessing a bullet proof vest, *id.* § 15A-1340.16C (2007). *See* N.C. GEN. STAT. § 7B-2200 (2007).
- (24). **North Dakota** requires adult prosecution of juveniles 14 and older for certain crimes, N.D. CENT. CODE §§ 27-20-34 (2007); 12.1-04-01 (1981), permitting life-without-parole for gross sexual imposition, *id.* §§ 12.1-20-03 (2009); 12.1-32-01(1) (1997).
- (25). **Ohio** makes juveniles 14 or older eligible for discretionary transfer, OHIO REV. CODE ANN. § 2152.10(B) (2002), allowing them to be sentenced to life-without parole for rape under certain circumstances, *id.* §§ 2152.12 (2000); 2907.02 (2007), 2971.03 (2007).
- (26). **Oklahoma** allows juveniles ages 14 or older to be prosecuted and sentenced as adults, OKLA. STAT. tit. 10A, §§ 2-5-204; 2-5-206 (2009), thus permitting mandatory life-

without-parole on second offense of forcible sodomy and rape, *id.* tit. 21, § 51.1a (2009).

- (27). **Oregon** does not allow life-without-parole for juveniles transferred to adult court, *see* OR. REV. STAT. ANN. § 161.620 (2009), but would allow the sentence for 15- to 17-year-old juveniles direct-charged, *id.* § 137.707(1) (2009), for crimes such as aggravated murder and third-strike Class A felony sex crimes, *id.* §§ 163.150(3) (2009); 137.719(1) (2003).
- (28). **Pennsylvania** allows, and in many cases requires, adult transfer of juveniles ages 14 and over, 42 PA. CONS. STAT. §§ 6355(a) (2000); 6302 (2000), allowing life-without-parole sentences for third-offense violent crimes and for certain rapes, *id.* § 9714(2) (2007); 18 PA. CONS. STAT. § 3121(e)(2) (2000); 61 PA. CONS. STAT. § 331.21(a) (1999).
- (29). **Rhode Island** allows a juvenile of any age to be tried as an adult for crimes punishable by life, R.I. GEN. LAWS § 14-1-7 (1990), making a life-without-parole sentence available for a third-offense crime of violence involving a firearm, *id.* § 11-47-3.2(a) (2000).
- (30). **South Carolina** allows juveniles 14 or older to be tried as adults for serious felonies, S.C. CODE ANN. § 63-19-1210 (2008), exposing them to life-without-parole sentences for committing, or aiding in committing, first-degree burglary, criminal sexual battery on minors under 11, and second conviction of crimes including robbery, burglary, kidnapping and criminal sexual conduct, *id.*

§§ 16-1-40 (2003); 16-11-311(B) (1995); 16-3-655(A)(1) (2008), 17-25-45 (2009).

- (31). **South Dakota** allows adult transfer of felony-charged juveniles 10 and older (requiring it at age 16), S.D. CODIFIED LAWS §§ 26-11-4 (1997); 26-11-3.1 (2006); 22-3-1 (2005), thus permitting life-without-parole for all Class A, B and C felonies, including kidnapping and rape, *id.* §§ 22-22-1 (2005); 22-19-1 (2005); 22-6-1 (2005); 22-15-4 (2004).
- (32). **Tennessee** allows adult transfer of any juvenile for serious crimes, TENN. CODE ANN. § 37-1-134 (a)(1) (2006), thus mandating life-without-parole sentences for repeat violent offenses including rape and aggravated burglary, *id.* § 40-35-120(g) (1995);
- (33). **Utah** allows certification to adult court of juveniles 14 and older charged with felonies, UTAH CODE ANN. § 78A-6-703 (2008); 78A-6-602(3) (2008); 76-2-301 (1973), permitting a life-without-parole sentence for crimes including aggravated kidnapping and sexual assault, *id.* §§ 76-3-406 (2009); 76-5-302(3) (2007); 76-5-405(2) (2009).
- (34). **Virginia** allows adult transfer for juveniles 14 or older charged with felonies, VA. CODE ANN. § 16.1-269.1 (1997), making them eligible for life-without-parole for third offense of crimes such as rape and armed robbery, *id.* § 53.1-151(B1) (1993).
- (35). **Washington** allows adult transfer of juveniles 8 or older, WASH. REV. CODE §§

13.40.110 (2009); 9A.04.050 (1975), exposing them to life-without-parole sentences for multiple convictions of class A felonies, *id.* §§ 9.94A.570 (2000); 9.94A.505 (2009).

- (36). **West Virginia** mandates for certain serious offences adult transfer of juveniles 14 and older, and allows transfer of juveniles of any age, W. VA. CODE § 49-5-10(b)-(e) (2001), allowing a life-without-parole sentence for kidnapping, *id.* § 61-2-14a(a) (1999).
- (37). **Wisconsin** generally allows transfer of juveniles age 14 and older, while mandating transfer of any juveniles for certain crimes, WIS. STAT. §§ 938.18 (2009); 938.183 (2009), and thus permits a life-without-parole sentence for “persistent repeat” felony offenses, *id.* §§ 939.62(2m)(c) (2005); 973.014 (1998).
- (38). **Wyoming** allows transfer of juveniles 13 and older, WYO. STAT. ANN. § 14-6-237 (2004), permitting life-without-parole sentences for recidivist sex offenders, *id.* § 6-2-306(d) (2007).

(3). Only four States specifically disallow life-without-parole, while still allowing lengthy mandatory terms.

Only four States—Colorado, Kansas, Kentucky, and Texas—specifically disallow juvenile life-

without-parole sentences for any crime.²⁰ Even so, these States would allow juveniles to be sentenced to mandatory prison terms of up to 50 years before parole eligibility. *See, e.g.*, TEX. PENAL CODE § 12.31 (2009); TEX. GOV'T CODE § 508.145(b) (2009) (imposing mandatory life on juveniles convicted of capital felony, with parole available only after serving “40 calendar years”); COLO. REV. STAT. ANN. § 18-1.3-401(4)(b)(I) (2009) (same for class 1 felonies); KAN. STAT. ANN. 21-4635(b) (2004) (allowing mandatory sentence of 50 years for first degree murder upon finding of aggravating factors).

²⁰(1). **Colorado**, COLO. REV. STAT. ANN. § 18-1.3-401(4)(b) (2009) (changing law in 2006 to mandatory life sentence with possibility of parole after 40 years).

(2). **Kansas**, KAN. STAT. ANN. § 21-4622 (2004) (removing sentence in 2004).

(3). **Kentucky**, KY. REV. STAT. ANN. § 640.040(1) (1998); *Shepherd v. Commonwealth*, 251 S.W.3d 309, 320-21 (Ky. 2008) (interpreting § 640.040(1) to allow only life-without-parole for 25 years for Class A felony).

(4). **Texas**, TEX. PENAL CODE § 12.31 (2009) (amended effective September 1, 2009, to remove possibility of life-without-parole for capital felony); *see also* 2009 TEX. SESS. LAW SERV. Ch. 765 (S.B. 839) (Sept. 1, 2009).

Alaska makes parole available for any crime, whether committed by adults or juveniles. *See* ALASKA STAT. § 12-55-015(g) (2009) (providing for mandatory parole eligibility).

(4). Both the District of Columbia and the federal government allow juvenile life-without-parole for non-homicide crimes.

The judgment of the vast majority of States to allow life-without-parole sentences for violent juvenile crime is reinforced by the District of Columbia and the federal government, both of which allow such sentences for homicide and violent non-homicide crimes. The District of Columbia allows filing of a delinquency petition without reference to a juvenile's age. *See* D.C. CODE ANN. § 16-2305 (2005). While a juvenile convicted in the District of first degree murder may not receive life-without-parole, *id.* § 22-2104 (2001), juveniles are nonetheless eligible for life-without-parole sentences for the murder of a law-enforcement officer, *id.* § 22-2106 (2002), for terroristic first-degree murder, *id.* § 22-3153(a) (2002), for aggravated first-degree sexual abuse, *id.* § 22-3020(a) (2001), and for recidivist crimes of violence, *id.* § 22-1804a(a)(2) (2001).

The United States allows adult prosecution of juveniles age 15 or older for crimes of violence and certain controlled substance and firearm offenses. 18 U.S.C. § 5032 (1996). Adult prosecution is authorized for 13-year-olds for specified crimes within federal maritime or territorial jurisdiction, including murder, manslaughter, certain aggravated sexual abuse offenses, armed robbery, and assault. *See id.* (citing 18 U.S.C. §§ 113(a)-(c); 1111; 1113; 2111; 2113; 2241(a), (c)). These transfer provisions expose juveniles as young as 13 years old to mandatory life-without-parole sentences for

multiple violent felony convictions. *See* 18 U.S.C. § 3559(c)(1), (c)(2)(F) (2006).^{21 22}

B. Evolving Transfer Provisions Show that States Have Consciously Toughened Juvenile Sentencing.

Illuminating the raw data from state legislation are the statutory mechanics making juveniles eligible for life-without-parole. Juvenile offenders may be tried as adults generally through three “transfer” or “waiver” mechanisms: judicial waiver, legislative offense exclusion, and prosecutorial direct-file. *See generally* Feld, *supra*, at 38-39 (discussing mechanisms); Richard E. Redding, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*, JUVENILE JUSTICE BULLETIN, Aug. 2008, at 1-2 (“Redding”) (same); *see also* Parts II.A.1 & II.A.2, *supra* (detailing state transfer laws).

²¹ Additionally, 17-year-olds may enlist in the United States Military, *see* 10 U.S.C. § 505(a) (2008), and are thus eligible for life-without-parole, *id.* § 856a (2000), for crimes including murder, child rape, and other crimes for which a court-martial may impose a life sentence, *id.* §§ 918 (2000); 920 (2007); *see also United States v. Christian*, 63 M.J. 205 (2006) (generally discussing life-without-parole sentences under military law).

²² A bill pending before a House subcommittee, the “Juvenile Justice Accountability and Improvement Act of 2009,” would require the United States to provide juvenile offenders periodic opportunities for parole or supervised release “not less than once during the first 15 years of incarceration, and not less than once every 3 years thereafter.” H.R. 2289, 111th Cong. § 5 (considered as such by House subcommittee, June 9, 2009). The bill would also withhold certain federal funds from any States that did not establish such a parole system. *Id.* § 3.

Through such provisions, States make a conscious election respecting juvenile punishment: “[w]aiver of juvenile court jurisdiction presents the *stark choice* between treating a youth in the juvenile system and punishing him in the criminal justice system.” Feld, *supra*, at 38 (emphasis added).²³ The evolution of state transfer mechanisms over the past several decades evidences an unmistakable “nationwide policy shift toward transferring juvenile offenders to the criminal court.” Redding, *supra*, at 2.²⁴

“The evolution in youth violence and homicide rates in the late 1980s and early 1990s caused almost every state to revise its laws to transfer more juveniles in criminal court.” Feld, *supra*, at 40. Scholars in this area report that, from 1979 to 2003, the number of States requiring *automatic* transfer from juvenile to adult court rose from 14 to 31. See Redding, *supra*, at 1 (citing B. Steiner & C. Hemmens, *Juvenile waiver 2003: Where are we now?*, 54(2) JUVENILE AND FAMILY COURT JOURNAL 1-24 (Spring 2003)). Another scholar observes that “[i]n a three-year period, between 1992 and 1995,

²³ See also, e.g., *State v. Rauch*, 13 P.3d 324, 333 (Haw. 2000) (reasoning that juvenile transfer provisions “clearly evince[] a legislative policy” regarding the relative severity of juvenile crime).

²⁴ See also Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 688 (1998) (“Logan”) (explaining that “[w]ith these changes [*i.e.* to state transfer laws] has come a dramatic expansion in the scope and number of juvenile offenders eligible, or indeed required, to be prosecuted in adult court”).

forty jurisdictions enacted or expanded provisions for juvenile waiver to adult court.” Logan, *supra*, at 688 (citing Melissa Sickmund *et al.*, U.S. DEP’T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE 29).²⁵ Symptomatic of deeper sociological and philosophical debates over juvenile punishment, *see infra* Part III, such trends show States deliberately “adopt[ing] punitive laws to transfer more and younger offenders to criminal courts and to punish them more severely.” Feld, *supra*, at 34; *see also* Redding, *supra*, at 1 (observing that expansion of transfer laws was part of “legal reforms designed to get tough on juvenile crime”).

These trends explain why juvenile offenders in a super-majority of States are, today, more readily subject to life-without-parole sentences. Whereas “prior to the 1970s, virtually no states imposed [life-without-parole] sentences,” movement toward greater severity has altered the landscape—so dramatically, in fact, that in one scholar’s reckoning:

judges now sentence youths to [life-without-parole] three times as frequently as they did in 1990. The average age at which juveniles committed the crimes for which courts impose [life-without-parole] sentences is

²⁵ *See also* Patricia Torbet *et al.*, STATE RESPONSES TO SERIOUS AND VIOLENT JUVENILE CRIME 3-9 (U.S. Dep’t of Justice, Office of Juvenile Justice and Delinquency Prevention) (July 1996) (“O.J.J.D.P. REPORT”) (documenting “trend” from 1992-95 that “[m]ore serious and violent juvenile offenders are being removed from the juvenile justice system in favor of criminal court prosecution”).

sixteen years, but children as young as thirteen years of age receive such sentences.

Feld, *supra*, at 69-70. This juvenile sentencing trend coincides with an overall increase in life-without-parole sentences for all offenders. *See, e.g.*, Ashley Nellis & Ryan S. King, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 4-6, 8-9 (The Sentencing Project) (July 2009) (reporting that over last quarter-century, the number of individuals serving life sentences has quadrupled, and that between 1992 and 2008 the number serving life-without-parole sentences has tripled).²⁶

Death-penalty opponents have encouraged these juvenile sentencing trends by “provid[ing] bipartisan support for [life-without-parole] sentences as an alternative to capital punishment.” Feld, *supra*, at 69 (citing Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838 (2006)). Life-without-parole “is seen as a sentencing compromise by both ends of the political spectrum,” because it promises strong deterrence without the death penalty’s political and moral baggage. Logan, *supra*, at 690 n.37. This Court has itself taken a similar view, observing in *Roper* that “the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.” 543 U.S., at 572.

Finally, confirmation of these sentencing trends comes also from opponents of juvenile life-without-

²⁶ Report available at http://www.sentencingproject.org/doc/publications/inc_noexit.pdf.

parole. Even those who decry sentencing any juvenile to life-without-parole admit that sentencing trends have headed toward greater severity. For instance, Amnesty International / Human Rights Watch candidly recognizes “[t]he dramatic increase in the imposition of life without parole sentences” on juvenile criminals:

[S]tates have by no means abandoned the use of life without parole for child offenders: the estimated rate at which the sentence is imposed on children nationwide remains at least three times higher today than it was fifteen years ago.

Amnesty International / Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* 2-3 (2005).²⁷ Scholars opposed to the practice similarly admit to contrary developments, such as the reality that “[c]ourts regularly uphold [life-without-parole] sentences and extremely long terms of imprisonment imposed on twelve-, thirteen-, fourteen-, or fifteen-year-old youths.” Feld, *supra*, at 67 (and collecting cases).

III. STATE LEGISLATURES ARE BEST SITUATED TO SET JUVENILE SENTENCING POLICIES.

Calibrating juvenile sentences implicates profound political, sociological, philosophical and moral issues. Consequently, actors accountable to the people should be the ones to shoulder, and answer for, this difficult task. This is always where

²⁷ Report available at <http://www.hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf>.

our nation has deliberated the delicate issues presented by juvenile crime and punishment.²⁸ Thus, in 1996 the U.S. Department of Justice could report that

States are well along in developing innovative approaches to the vexing problem of juvenile violence while still maintaining, for the majority of juvenile law violators, a system of juvenile justice that preserves the hopeful aspects of a system premised on the malleability of youth.

O.J.J.D.P. REPORT, *supra*, at iii. Given their accumulated wisdom and political accountability, weighing the application of juvenile life-without-parole sentences should remain firmly within the States' discretion.

A. Officials Who Calibrate Juvenile Sentencing Must Remain Directly Accountable to Their Citizens.

It is a simple fact that our nationwide trend toward stringent juvenile sentences has grown out of considered legislative responses to increased

²⁸ See, e.g., Feld, *supra*, at 12-17 & nn. 3, 17, 21 (discussing history of juvenile court system) (citing, *inter alia*, David S. Tannenhaus, *The Evolution of Juvenile Courts in the Early Twentieth Century: Beyond the Myth of Immaculate Construction*, in A CENTURY OF JUVENILE JUSTICE 42, 46 (Margaret K. Rosenheim *et al.* eds. 2002); JOHN SUTTON, STUBBORN CHILDREN: CONTROLLING DELINQUENCY IN THE UNITED STATES 122 (1988); ELLEN RYERSON, THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT 22 (1978)).

violent juvenile offenses.²⁹ The unfortunate but undeniable reality is that the United States has higher rates of juvenile crime than most Western nations.³⁰ But the incidence and nature of juvenile crime has varied over time, and will continue to

²⁹ See, e.g., Human Rights Watch, *supra*, at 15 (reporting that “[s]tarting in the mid-1980s, the United States experienced a steep and troubling increase in violent crime, including violent crime by adolescents”); Feld, *supra*, at 29 (observing that a “sharp spike in juvenile arrests for violence and homicide occurred between 1986 and 1994” and that “[t]he overall arrest rates of all youths for violent index crimes increased nearly two-thirds (66%)” (and collecting sources); Logan, *supra*, at 681 n.1 (reporting that “[b]etween 1983 and 1992, juveniles accounted for 25% of the increase in murders, forcible rapes, and robberies” and “[b]etween 1988 and 1992, the number of juveniles arrested for murder increased by 51% (as opposed to 9% for adults)” (and collecting sources)); O.J.J.D.P. REPORT, *supra*, at xi (reporting in 1996 that “[n]early every State has taken legislative or executive action in response to escalating juvenile arrests for violent crime and public perception of a violent juvenile crime epidemic”).

³⁰ See, e.g., Charles D. Stimson & Andrew M. Grossman, ADULT TIME FOR ADULT CRIMES: LIFE WITHOUT PAROLE FOR JUVENILE KILLERS AND VIOLENT TEENS 21-22 (Heritage Foundation, Center for Legal and Judicial Studies Aug. 2009) (“ADULT TIME FOR ADULT CRIMES”) (reporting that the United States “ranks highly in every category” of juvenile crime statistics) (citing statistical evidence from DIVISION FOR POLICY ANALYSIS AND PUBLIC AFFAIRS, UNITED NATIONS OFFICE ON DRUGS AND CRIME, SEVENTH UNITED NATIONS SURVEY OF CRIME TRENDS AND OPERATIONS OF CRIMINAL JUSTICE SYSTEMS (1998-2000) 99-100, 154-155 (2004), available at http://www.undoc.org/pdf/crime/seventh_survey/7pv.pdf); WORLD HEALTH ORGANIZATION, WORLD REPORT ON VIOLENCE AND HEALTH 28-29 (2002), available at <http://whqlibdoc.who.int/hq/2002/9241545615.pdf>).

fluctuate.³¹ Only politically-accountable state (and federal) representatives have the necessary flexibility and incentives to adjust juvenile sentences to changing circumstances. Consequently, it is to those same representatives that pleas to mitigate or enlarge—or abolish—juvenile life-without-parole sentences are properly made. *See, e.g.*, Feld, *supra*, at 76-81 (discussing state legislative consideration).

Political accountability is critical here, because adjusting juvenile sentences is not a mere bookkeeping exercise. It is instead a delicate endeavor bound up with competing philosophies of crime and punishment. Movement toward stricter sentences over recent decades thus “represents both a reaction to the increasingly serious nature of juvenile crime and a fundamental shift in juvenile justice philosophy.” O.J.J.D.P. REPORT, *supra*, at xi.

Well-known are the longstanding debates over “root cause” versus responsibility-based theories of crime, and over rehabilitative versus retributive approaches to punishment.³² As juvenile sentencing

³¹ *See, e.g.*, Feld, *supra*, at 12 & n.1 (noting “oscillating” nature of youth crime policies) (and citing THOMAS J. BERNARD, THE CYCLE OF JUVENILE VIOLENCE (1992)); ADULT TIME FOR ADULT CRIMES, *supra*, at 19-21 (noting that, according to U.S. Department of Justice, “between 1994 and 2004, the arrest rate for juveniles for violent crimes fell 49 percent, only to see a 2 percent uptick in 2005 and then a 4 percent gain in 2006”) (citing Howard Snyder, *Juvenile Arrests 2006*, JUVENILE JUSTICE BULLETIN, Nov. 2008, at 1)).

³² *See, e.g.*, Feld, *supra*, at 25-42 (chronicling the philosophical and sociological debates over juvenile punishment) (and collecting sources); Logan, *supra*, at 685-86 (discussing these debates and observing that “[i]n recent years

scholar Barry Feld has explained, “[t]he ideology, structure, and practices of juvenile justice evolved over time in a politically contested context.” Feld, *supra*, at 16-17. Consequently, the U.S. Department of Justice accurately described the last several decades’ trend towards stricter juvenile punishment as “a fundamental philosophical departure, particularly in the handling of serious and violent juvenile offenders” that has “resulted in dramatic shifts in the areas of jurisdiction, sentencing, correctional programming, confidentiality, and victims of crime.” O.J.J.D.P. REPORT, *supra*, at xi. It is precisely because “the Eighth Amendment does not mandate adoption of any one penological theory,” *Harmelin*, 501 U.S., at 999 (Kennedy, J., concurring), that the Constitution leaves to the accumulated wisdom of State actors the resolution of these profound questions.

B. States Have Crafted Juvenile Sentencing Policies that Wisely Balance Justice with Mercy.

The States have been at the forefront of confronting the delicate issues presented in these cases. For instance, in 2006 the Colorado Legislature adopted a somewhat more rehabilitative sentencing model by lowering the maximum sentence for a juvenile convicted of a class 1 felony from mandatory life-without-parole to mandatory life with parole possible after 40 years. *See* 2006

... juvenile justice has experienced a sea-change in philosophy and practice”); ADULT TIME FOR ADULT CRIMES, *supra*, at 19-20 (observing that “[t]he root causes of this epidemic have been debated, studied, tested, and analyzed for decades”).

COLO. LEGIS. SERV. Ch. 228 (H.B. 06-1315) (July 1, 2006) (amending, *inter alia*, COLO. REV. STAT. ANN. § 18-1.3-401(4)(b) (2009)). In doing so, Colorado embraced some of the same philosophical premises about juvenile psycho-social development that Petitioners themselves advocate. *See id.* Ch. 228 §1 (reciting legislative declarations); *and see* Brief for Petitioner at 11-41, *Sullivan v. Florida*, No. 08-7621 (U.S. Jul. 16, 2009).³³ Texas, too, has recently amended its penal law to remove mandatory juvenile life-without-parole for a capital felony. *See* 2009 TEX. SESS. LAW SERV. Ch. 765 (S.B. 839) (Sept. 1, 2009) (amending TEX. PENAL CODE § 12.31 (2009)). Instead, Texas now imposes a mandatory life sentence with parole eligibility after 40 years. *See* TEX. GOV'T CODE § 508.145(b) (2009).³⁴

³³ Similarly, in 2007 a state commission recommended that the North Carolina Legislature adopt certain changes to its juvenile sentencing policy based on a “more rehabilitative” model. *See* REPORT ON STUDY OF YOUTHFUL OFFENDERS at IV(1), cmt. (a) (North Carolina Sentencing and Policy Advisory Comm’n) (March 2007), *available at* www.nccourts.org/Courts/CRS/Councils/spac/Documents/yo_finalreporttolegislature.pdf; *see also* Feld, *supra*, at 80-81 (discussing North Carolina commission proposal). A bill entitled the “Youth Accountability Act” (H.B. 1414) is currently pending in a House committee and, if adopted, would raise the age of an adult from 16 to 18 over a period of years, but would still require mandatory transfer of anyone over 13 for a Class A felony. The current text of the bill and a summary of action on the bill can be found at: <http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2009&BillID=H1414>.

³⁴ Bills pending in the Michigan Legislature would remove the possibility of juvenile life-without parole. *See* H.B.

Of course, legislative developments such as those in Colorado and Texas lie at the margins of the nationwide picture.³⁵ Other States—such as Alaska, Delaware, and Nevada—have recently gone in the opposite direction by toughening their juvenile transfer laws.³⁶ But the overall picture, as described *supra* in Part II.A, is most telling: 90% of the States continue to allow life-without-parole sentences for a wide variety of violent crimes, as do the District of Columbia and the federal government.

And there is a deeper lesson to draw from State legislative developments: the States are well equipped to face the challenges of juvenile sentencing. States have carefully adjusted, and will

4518, 4594-95; S.B. 173-176, 1999 Leg., 95th Sess. (Mich. 2009), *analysis available at* <http://www.legislature.mi.gov>.

³⁵ See, e.g., Feld, *supra*, at 77-78 (observing that only “[a] few state legislatures have taken some initial steps” towards mitigating juvenile sentencing, and discussing only Colorado as eliminating mandatory life-without-parole); Redding, *supra*, at 1 (observing that, while most States have toughened juvenile transfer laws over the past three decades, “very recently, some States have reduced the scope of transfer laws”) (citing Bishop, *Injustice and irrationality in contemporary youth policy*, 3 CRIMINOLOGY & PUBLIC POLICY 633-44 (2004)).

³⁶ See, e.g., Feld, *supra*, at 77 & n.362 (discussing enactment of more stringent juvenile transfer provision in Alaska (2005)) (referring to 2005 amendment to ALASKA STAT. § 41.12.030(a)); 74 DEL. LAWS c. 106, §§ 28, 33 (2003) (adding robbery first degree and assault first degree to those crimes requiring adult prosecution of any juvenile); NEV. SENATE BILL No. 235, § 2 (enacting new chapter 62B of the Nevada Revised Statutes related to juvenile transfer hearings) (eff. Oct. 1, 2009) (text and commentary available at http://www.leg.state.nv.us/75th2009/Bills/SB/SB235_EN.pdf).

continue to adjust, their sentencing policies to the continually changing incidence of juvenile crime. States have carefully weighed, and will continue to weigh, the nature of juvenile culpability, punishment, rehabilitation, and deterrence in all their dimensions—philosophical, moral, sociological, and scientific.

The most concrete confirmation of this is found in the kaleidoscope of state transfer provisions through which juveniles may become subject to adult sentences. *See generally* Parts II.A.1 & II.A.2, *supra* (detailing state transfer provisions). These mechanisms dramatize the States’ profound investment in the problems of juvenile crime. Unsurprisingly, the States’ approaches vary considerably. They allow, and sometimes mandate, juvenile transfer for adult prosecution at a wide range of ages for an array of offenses, reflecting “[t]he inherent nature of our federal system.” *Harmelin*, 501 U.S., at 999 (Kennedy, J., concurring) (quoting *Solem*, 463 U.S., at 291 n.17).

But most importantly, the transfer provisions are concrete evidence of State expertise in juvenile sentencing. They show that the States have crafted mechanisms for addressing—with both realism and hope, rigor and compassion—the terrible dilemmas associated with sentencing juveniles for terrible crimes.

Ohio’s transfer provision provides an excellent example of this sort of evenhanded sensitivity. *See generally* OHIO REV. CODE ANN. § 2152.12 (2000). In considering certain transfers, a juvenile court must deem the following factors to favor transfer:

- The nature of the harm done to the victim, *id.* § 2152.12(D)(1-2);
- Whether “the child’s relationship with the victim facilitated the act charged,” *id.* § 2152.12(D)(3);
- Whether “[t]he child allegedly committed the act charged for hire or as a part of a gang or other organized criminal activity,” *id.* § 2152.12(D)(4);
- Whether the crime involved certain uses of a firearm, *id.* § 2152.12(D)(5);
- The child’s juvenile record and whether “[t]he results of any previous juvenile sanctions and programs indicate that rehabilitation of the child will not occur in the juvenile system,” *id.* § 2152.12(D)(6-7);
- Whether the “child is emotionally, physically, or psychologically mature enough for the transfer,” *id.* § 2152.12(D)(8); and
- Whether “[t]here is ... sufficient time to rehabilitate the child within the juvenile system,” *id.* § 2152.12(D)(9).

But the court must consider the following factors as *against* a transfer:

- Whether “[t]he victim induced or facilitated the act charged,” *id.* § 2152.12(E)(1);
- The nature of the child’s responsibility and whether “the child was under the negative influence or coercion of another person,” *id.* § 2152.12(E)(2-3);

- The absence of physical harm to person or property, *id.* § 2152.12(E)(4);
- Whether “[t]he child is not emotionally, physically, or psychologically mature enough for the transfer,” and whether “[t]he child has a mental illness or is a mentally retarded person, *id.* § 2152.12(E)(6-7); and
- Whether “[t]here is sufficient time to rehabilitate the child within the juvenile system and the level of security available in the juvenile system provides a reasonable assurance of public safety.” *Id.* § 2152.12(E)(8).

While Ohio’s transfer statute is unusually articulate, the state transfer mechanisms are filled with such requirements. Far from showing the States’ thoughtless cruelty towards juvenile offenders, they are instead compelling evidence of their sensitivity, flexibility, and realism in dealing with juvenile violence.

CONCLUSION

When to be merciful to a juvenile who has committed a terrible crime? When to punish? What weight to give deterrence? What weight rehabilitation? And, most difficult of all: when to rule out the possibility of release? No one wants the responsibility for answering these agonizing questions, but they must be answered. The Constitution leaves that arduous but necessary task to the collective wisdom of the States and their citizens.

The Court should affirm the decisions of the Florida First District Court of Appeal.

Respectfully submitted,

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September 21, 2009

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