JUVENILE REMORSELESSNESS: AN UNCONSTITUTIONAL SENTENCING CONSIDERATION

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I.
INTRODUCTION

Juvenile courts abandoned their rehabilitative roots long ago.[1] While the 1967 Supreme Court decision *In re Gault*[2] granted youth the right to counsel and other protections at the adjudicatory phase, the decision did nothing to protect youth from increasingly punitive punishments. From 1976 to 2005, states executed twenty-two individuals for crimes they committed before turning eighteen-years-old.[3] While the death penalty has since been banned for crimes committed as juveniles, over 1,500 youth are currently serving life sentences without the possibility of parole.[4] A juvenile conviction can effectively end an offender's life.

Furthermore, judges in juvenile courts are not required to have any training or background in working with youth.[5] Consequently, judges' decisions often reflect consideration only of the immediate situation and conduct of the young people before them. They rely on untrained perceptions of youths' behaviors in

1. *See, e.g.*, Stephan E. Oestreicher, Jr., *Toward Fundamental Fairness in the Kangaroo Courtroom: The Due Process Case Against Statutes Presumptively Closing Juvenile Proceedings*, 54 VAND. L. REV. 1751, 1760 (2001).

2. 387 U.S. 1, 41 (1967).

3. *Execution of Juveniles in the U.S. and Other Countries*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/execution-juveniles-us-and-other-countries#execsus (last updated Feb. 23, 2011).

4. Ashley Nellis, *The Lives of Juvenile Lifers: Findings from a National Survey*, THE SENTENCING PROJECT 7 (Mar. 2012), *available at* http://sentencingproject.org/doc/publications/jj_The_Lives_of_Juvenile_Lifers.pdf.

5. *See* Carol S. Stevenson, Carol S. Larson, Lucy Salcido Carter, Deanna S. Gomby, Donna L. Terman and Richard E. Behrman, The Juvenile Court: Analysis and Recommendations, THE FUTURE OF CHILDREN, 19 (Winter 1996), *available at* http://futureofchildren.org/futureofchildren/publications/docs/06_03_FullJournal.pdf. See also La. Const. art. V, § 24 (Judges; Qualifications) for an example of the statutory requirements to become a judge. Note that no specialized training is necessary to serve in Family Court. *Id.* The author was unable to access any judicial training manuals or rules and regulations governing the specific training juvenile judges must undergo. The lack of such available information regarding judicial training calls into question the capacity of these judges to make sensitive determinations of juvenile remorselessness, among other factors.

court to sentence youthful offenders. One factor commonly relied upon to increase juvenile sentences is a youth's failure to express remorse.

The use of remorse in adult criminal courts has a long history. Expression of remorse is frequently cited as a mitigating sentencing factor, especially in capital cases. Conversely, a defendant's lack of remorse may lead to a more certain conviction and a harsher sentence. Contemporary use of remorse reflects what some scholars have referred to as the "individual badness model,"[6] in which remorselessness offers judges a proxy for determining a defendant's blameworthiness and potential for rehabilitation. According to this model, a seemingly remorseless individual is considered to have failed to adopt societal expectations and express the appropriate amount of sorrow. Thus, one can presume that she is unwilling to alter her future behavior and cannot be rehabilitated. When applied to juveniles, however, this model's justification for aggravating sentences does not hold up under scrutiny.

In 2005, the Supreme Court banned the death penalty for juveniles in *Roper v. Simmons*.[7] The Court relied heavily on psychological studies that recognize youth as immature, susceptible to peer pressure, and unformed in character, and thus inherently less culpable for their actions than adult offenders.[8] Five years later, in *Graham v. Florida*, the Court again acknowledged the impact of youthful immaturity on culpability when extending the *Roper* considerations to ban life without parole (LWOP) sentences for non-homicide juvenile offenders.[9]

Graham reflects a turning point in juvenile sentencing. The Court extended special protections to juveniles, not because LWOP was similar to the death penalty, but rather because the condition of youth is unique and thus warrants special protections, namely the consideration of developmental immaturity in applying punishment.[10] Decisions following *Graham*, notably *Miller v. Alabama*,[11] have extended these principles to other realms of juvenile sentencing and criminal procedure. In the eyes of the Supreme Court, youth truly are different.[12]

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6. *See, e.g.*, Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 90 (2004) (critiquing the individual badness model as overlooking the social value of remorse and apology, which can "heal, teach, and reconcile offenders, victims, and communities").

7. Roper v. Simmons, 543 U.S. 551, 568 (2005).

8. *Id.* at 569–70.

9. Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

10. *Id.* at 2026.

11. Miller v. Alabama, 132 S. Ct. 2455 (2012) (extending *Graham* to all juvenile homicide offenders sentenced to mandatory life without possibility of parole). *See also, e.g.*, J.D.B. v. N. Carolina, 131 S. Ct. 2394, 2404 (2011) (considering characteristics of youth when determining whether custodial statements were taken in violation of respondent's *Miranda* rights).

12. *Miller*, 132 S. Ct. at 2469 ("[W]e require [sentencing courts] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.").

Despite the Supreme Court's recognition that youth are different, however, juvenile courts routinely aggravate sentences due to perceived remorselessness, thereby treating youthful offenders like adults. Problems with this practice abound. As an initial matter, adult perceptions of juvenile remorselessness are fraught with error. Behaviors that judges cite as demonstrating a lack of remorse often indicate a juvenile's developmental immaturity and susceptibility to sociological pressures.[13] Behavior perceived to indicate remorselessness is thus unlikely to accurately reflect a juvenile's internal emotions.

This article argues that the use of remorselessness to aggravate juvenile sentences is unconstitutional. Even if perceptions of juvenile behavior accurately indicated a youth's genuine emotional state, the reasoning in *Roper* that youth are developmentally different than adults undermines the penological justifications for using remorselessness at sentencing.[14] Due to juveniles' unformed character, determinations about their future dangerousness are necessarily arbitrary.[15] Similarly, sentences that rely on a juvenile's failure to express societally appropriate responses to a situation merely punish developmental immaturity and what often might be a natural reaction to the social pressures that inhibit youth from expressing remorse in the courtroom.

Following this introduction, Part II of this article explores the use of remorse in sentencing adults. Part III analyzes recent Supreme Court decisions affecting juvenile sentencing. The line of cases from *Thompson v. Oklahoma*[16] to *Miller v. Alabama*[17] suggests that the Court now recognizes a juvenile's procedural due process right to have the particularities of youth considered in sentencing. Part IV then describes and discusses the use of perceived remorselessness as a sentencing factor in juvenile courts. This discussion illustrates how the same rationales that justify using remorse to aggravate sentences for adult offenders are used in juvenile courts as well. Part V explains the unique difficulties of accurately perceiving juvenile remorselessness and the predictive problems that follow. Finally, this article concludes that the use of remorse as an aggravating sentencing factor is arbitrary, erroneous, and unfounded when applied to juveniles, in both juvenile and adult courts, and thus violates a juvenile's constitutional protections against being punished without consideration of her youthful status.

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13. *See infra* Part V.B.

14. *See* Roper v. Simmons, 543 U.S. 551, 569 (2005).

15. *Id.* at 570.

16. Thompson v. Oklahoma, 487 U.S. 815 (1988) (holding that the Eighth Amendment prohibits execution of offenders who were 15-years-old or younger at the time the crime was committed).

17. *Miller*, 132 S. Ct. 2455 (holding that the Eighth Amendment prohibits mandatory imposition of life without parole for juvenile offenders).

II.
WHY REMORSE MATTERS IN SENTENCING

After convicting an adult defendant in a criminal trial, courts turn to a variety of factors to determine an appropriate sentence. Remorse is one factor that courts look to in making these important decisions.[18] Judges often expect criminal defendants to show remorse because it provides them with "yardsticks for an offender's need for deterrence and retribution."[19]

Deterrence of criminal behavior protects the public from future harm. Triers of fact often view a showing of remorse "as evidence that the defendant, having made his first step on the way to rehabilitation, is less likely to be dangerous in the future."[20] This capacity for self-transformation, indicated by remorse, necessarily demands less punishment in order to produce character reformation.[21] Judge Richard Posner explains this idea pointedly, noting that, "[a] person who is conscious of having done wrong, and who feels genuine remorse for his wrong rather than indignation at being a victim of circumstances . . . is on the way to developing those internal checks that would keep many people from committing crimes even if the expected costs of criminal punishment were lower than they are."[22] In short, courts rely on remorse as an indicator of amenability to rehabilitation, and thus, as a predictor of future dangerousness.[23]

Remorse may further indicate a defendant's acceptance of responsibility or moral blameworthiness. Here, judges expect that experiencing remorse is "the proper moral response to one's wrongdoing."[24] This expectation likely stems from religious underpinnings from the colonial era and the early development of U.S. criminal law that hold remorse as a core indicator of "justice and

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18. Bibas & Bierschbach, *supra* note 6, at 92–101.

19. Bibas & Bierschbach, *supra* note 6, at 104 (describing "the individual badness model" of remorse and apology). *See also* Jules Epstein, *Silence: Insolubly Ambiguous and Deadly: The Constitutional, Evidentiary and Moral Reasons for Excluding "Lack of Remorse" Testimony and Argument in Capital Sentencing Proceedings*, 14 TEMP. POL. & CIV. RTS. L. REV. 45, 84 (2004) ("The rationale is simple: the person who is remorseless is perceived to be more dangerous, less likely to rehabilitate, and thus a more appropriate candidate for the ultimate sanction, death.").

20. Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *But Was He Sorry? The Role of Remorse in Capital Sentencing*, 83 CORNELL L. REV. 1599, 1605–06 (1998) (discussing the purposes of remorse as a mitigating sentencing factor).

21. *See* Bibas & Bierschbach, *supra* note 6, at 94 (explaining why remorse justifies mitigation). *See also* B. Douglas Robbins, *Resurrection from a Death Sentence: Why Capital Sentences Should Be Commuted Upon the Occasion of an Authentic Ethical Transformation*, 149 U. PA. L. REV. 1115, 1134 (2001) (describing remorse as indicative of transformative capacity).

22. United States v. Beserra, 967 F.2d 254, 256 (7th Cir. 1992).

23. *See* Bryan H. Ward, *Sentencing Without Remorse*, 38 LOY. U. CHI. L.J. 131, 138 (2006) (explaining judicial connections between rehabilitation and remorse, and arguing that remorse should not be so heavily relied upon in sentencing because "its application is completely subjective" and often illogical or prejudicial in application).

24. Eisenberg, Garvey & Wells, *supra* note 20, at 1605.

righteousness."[25] Even though religion does not take as central of a role in modern criminal law as it did during colonial times, defendants are still expected to show remorse "for reasons of general public order."[26]

The social purposes of remorse are thus two-fold. Expression of remorse shows both an apology to the community,[27] and an internal reflection indicative of self-imposed punishment.[28] In the first instance, remorse is viewed as a "restorative act," offering the victims and the community their expected apologies.[29] This rationale emphasizes the symbolic significance of remorse as a communicative act to the community.[30] Additionally, many judges expect defendants to publicly express the pain and suffering they experience by acknowledging to themselves their personal wrongdoing.[31] This expectation goes beyond mere sorrow for having been caught.[32] Rather, the expectation is that a defendant will empathize with the pain caused to a victim, and thus express that suffering and regret as genuine remorse.[33]

When defendants fail to express remorse, judges routinely punish them more severely than they otherwise would.[34] This is because these defendants have seemingly not demonstrated their rehabilitative capacity nor accepted moral responsibility for their wrongdoing.[35] Judges have held that a lack of remorse is "relevant to the character and propensities of the defendant," possibly indicative of "wanton cruelty" and "a propensity to act in a similar fashion if confronted with the same situation in the future."[36]

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25. Epstein, *supra* note 19, at 47 (arguing that there are two concurrent reasons for the desire to see remorse in the accused: religious beliefs about justice and the perception that remorselessness itself is a secondary harm to the crime itself).

26. Ward, *supra* note 23, at 137.

27. *See id.*

28. *See id.* at 141.

29. Epstein, *supra* note 19, at 83.

30. *See* Jeffrie G. Murphy, *Remorse, Apology, and Mercy*, 4 OHIO ST. J. CRIM. L. 423, 439 (2007).

31. *See* Ward, *supra* note 23, at 134.

32. *Id.* at 143 (differentiating sorrow for getting in trouble from remorse for harming a victim). *See also* MICHAEL PROEVE & STEVEN TUDOR, REMORSE: PSYCHOLOGICAL AND JURISPRUDENTIAL PERSPECTIVES 142 (2010).

33. Ward, *supra* note 23, at 134 (citing Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 35 (2003)).

34. Paul H. Robinson, Sean E. Jackowitz & Daniel M. Bartels, *Extralegal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 745–46 (2012) (describing that lack of remorse can be an aggravating factor authorized by federal sentencing guidelines, state high courts, and state statutes). *See also* Lisa F. Orenstein, *Sentencing Leniency May Be Denied to Criminal Offenders Who Fail to Express Remorse at Allocution*, 56 MD. L. REV. 780, 786–87 (1997) (discussing state high court decisions on lack of remorse as an aggravating sentencing factor).

35. *See, e.g.*, Ward, *supra* note 23, at 131 ("[M]any states have found the absence of remorse to be an appropriate aggravating factor when calculating an appropriate criminal punishment.").

36. *Id.* at 140 (citations omitted) (internal quotation marks omitted).

While the practice of considering remorselessness in determining sentences is widely accepted in adult criminal court, this article questions whether the same use of remorselessness is appropriate for juvenile defendants.[37] For the sake of argument, this article presumes that the above explanations provide legitimate justifications for looking to remorse in sentencing adults. However, an analysis of recent Supreme Court jurisprudence, which highlights juvenile defendants' developmental immaturity and limited culpability, demands consideration of a juvenile's youthful status in sentencing decisions. According to the Supreme Court's logic in *Roper v. Simmons*,[38] *Graham v. Florida*,[39] and *Miller v. Alabama*,[40] it is unrealistic to expect that youthful offenders have the social and psychological capacity to display the appropriate moral expressions of remorse expected of adults. Consequently, the use of remorselessness to predict future dangerousness or rehabilitative potential is misplaced when applied to juvenile defendants.

III.
JUVENILE SENTENCING UNDER THE CONSTITUTION

A. Early Eighth Amendment Juvenile Sentencing Decisions

William Thompson was sixteen-years-old when an Oklahoma trial court sentenced him to death.[41] In an adult criminal court, a jury convicted Thompson of brutally murdering his former brother-in-law and handed down a death sentence.[42] Thompson was only fifteen-years-old at the time of the incident. On appeal, Thompson challenged his sentence as "cruel and unusual," violating the Eighth Amendment of the United States Constitution.[43] The Oklahoma Court of Criminal Appeals upheld Thompson's conviction and sentence, opining that "once a minor is certified to stand trial as an adult, he may also, without violating the Constitution, be punished as an adult."[44]

37. Despite broad acceptance and implementation of remorse and remorselessness in adult criminal sentencing, vast amounts of legal scholarship contend that this practice is unreliable and should be discontinued. *See, e.g.*, PROEVE & TUDOR, *supra* note 32, at 139–57; Ward, *supra* note 23, at 140 (arguing that remorse has no place in criminal sentencing because it is too subjective). *But see* Bibas & Bierschbach, *supra* note 6, at 104 (arguing that a more nuanced approach to integrating remorse into criminal procedure may contribute to a system of restorative, rather than retributive, justice). This debate is beyond the scope of this article, which presumes, *arguendo*, that the justifications for using remorse, whether legitimate or not, are not constitutional as applied to sentencing juveniles.

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

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

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

41. Thompson v. Oklahoma, 487 U.S. 815, 815 (1988).

42. *Id.* at 819–20.

43. U.S. CONST. amend. VIII.

44. *Thompson*, 487 U.S. at 820.

The Supreme Court overturned Thompson's sentence, finding the death penalty unconstitutional as applied to youth under sixteen-years-old.[45] The Court held that a juvenile's culpability should not be measured by the same standard as an adult's.[46] Due to a youth's natural immaturity, neither the deterrent nor the retributive purposes of the death penalty would be served by sentencing a youth to death.[47] To support its rationale, the Court pointed out that states treat youth differently than adults. By drawing a bright-line between juveniles and adults at sixteen-years-old, the Court differentiated between youth and adulthood at a point commonly accepted by the vast majority of states at the time, and held that youth under sixteen-years-old merit special protections from punishment.[48]

A year after deciding *Thompson*, the Supreme Court affirmed the narrow age range of its death penalty ban, upholding capital punishment for juveniles aged sixteen and seventeen.[49] In *Stanford v. Kentucky*, two petitioners, Heath Wilkins and Kevin Stanford, argued that their young age rendered their death sentences unconstitutional.[50] Wilkins contended that the limiting age should be sixteen; Stanford argued for the same line to be drawn at seventeen.[51] The Court rejected both arguments. The *Stanford* Court did not find a national consensus against the use of the death penalty for sixteen- and seventeen-year-olds.[52] The Court noted that the Eighth Amendment requires an unconstitutional punishment be both "cruel *and* unusual," not just one or the other.[53] Without a national consensus against this punishment, the Court failed to find it unusual.[54] Consequently, the Court refused to consider evidence that the death penalty was disproportionately cruel in light of the petitioners' youth.[55]

B. Roper v. Simmons*: Juvenile Death Penalty Is Cruel and Unusual*

The Supreme Court revisited the *Stanford* question in the case of *Roper v. Simmons*.[56] The Court held that under the Eighth Amendment, the death penalty is unconstitutional when applied to juveniles under the age of eighteen.[57] In 2005, the Court found that between 1989 and 2005, a national consensus had

45. *Id.* at 822–23.
46. *Id.* at 835.
47. *Id.* at 835–37.
48. *Id.* at 824–35.
49. Stanford v. Kentucky, 492 U.S. 361 (1989).
50. *Id.* at 365.
51. *Id.* at 368.
52. *Id.* at 373.
53. *Id.* at 378.
54. *Id.* at 377.
55. *Id.* at 378 ("In short, we emphatically reject petitioner's suggestion that the issues in this case permit us to apply our 'own informed judgment'. . . .").
56. Roper v. Simmons, 543 U.S. 551 (2005).
57. *Id.*

developed against applying the death penalty to this age group.[58] In accordance with Eighth Amendment jurisprudence, and in light of an emerging consensus among the states, the court then examined whether the death penalty was cruel and unusual as applied to juveniles under eighteen. Ultimately, the *Roper* Court held that the death penalty as applied to juveniles was unconstitutional because youth are categorically less culpable than adults.[59]

Roper held that three primary factors inherent in youth evidenced a juvenile's diminished culpability: immaturity, susceptibility to influence, and yet-developed character.[60] A youth's "lack of maturity and underdeveloped sense of responsibility" means that she cannot be among the worst offenders deserving of the death penalty.[61] Similarly, the Court found that juveniles are more vulnerable than adults to negative social influences, most notably, peer pressure.[62] The Court also acknowledged that a juvenile's character is "not as well formed as that of an adult."[63] Thus, the court recognized the inaccuracies of predicting a youth's future conduct based on her present behavior.

Ultimately, *Roper* held that the death penalty does not serve traditional penological goals when applied to juveniles. *Roper* analogized the frailties of youth to the "impairments of mentally retarded offenders," which "make[s] it less defensible to impose the death penalty as retribution for past crimes."[64] Because a youth has diminished blameworthiness, imposing the law's most severe penalty on a youthful offender violates principles of proportionality.[65] Furthermore, "the same characteristics that render juveniles less culpable than adults suggest . . . that juveniles will be less susceptible to deterrence."[66] Here, as in *Thompson*, *Roper* acknowledged that young people cannot apply the same cost-benefit analysis that criminal law presumes adult offenders conduct.[67] Thus, *Roper* concluded that executing juveniles serves neither the retributive nor the deterrent functions of criminal law.

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58. *Id.* at 564–67. To reach this conclusion, the Court counted states that had banned the death penalty altogether as explicitly doing so for juveniles. While this sort of "bean counting" allowed the court to move on to the second prong of an Eighth Amendment analysis, the limited foundation for the finding that there was specific concern among the states about applying the death penalty to juveniles suggests that the Court had made up its mind before it started the counting exercise. *See* Martin Guggenheim, Lecture in "Child, Parent & State" at New York University School of Law (October 1, 2012) (on file with author). *See also* Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 153–56 (2005) (explaining how some Supreme Court justices relied on international law to find a consensus rejection of the juvenile death penalty and noting that the domestic consensus was likely overstated by the Court).

59. *Roper*, 543 U.S. at 567.

60. *Id.* at 569–70.

61. *Id.* at 569.

62. *Id.*

63. *Id.* at 570 (citing generally to ERIK ERIKSON, IDENTITY: YOUTH AND CRISIS (1968)).

64. *Id.* at 563.

65. *Id.* at 571.

66. *Id.*

67. *Id.* at 571–72 (citing Thompson v. Oklahoma, 487 U.S. 815, 837 (1988)).

Extending its prior reasoning in *Thompson*, the *Roper* Court held that executing anyone for a crime they committed under the age of eighteen would offend our society's evolving standards of decency.[68] The Court reasoned that the fact that juveniles are not afforded the "privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult."[69] For example, youth under eighteen-years-old cannot vote, cannot serve on juries, and cannot marry without parental consent.[70] The Court acknowledged that while a categorical line is necessarily arbitrary, it should not fall below the recognized age of maturity because of the irreversibly high stakes that a death sentence carries.[71]

The *Roper* decision is an important step in establishing the constitutional rule that youth cannot be sentenced as if they were adults. The Court demanded that juveniles' diminished culpability be taken into account, and as a result the penological justifications for extreme sentences failed to justify applying the death penalty to juveniles. Importantly, *Roper* recognizes that youths' behaviors are not entrenched, and so juveniles have a greater possibility of actual reform.[72] Thus, the Court decried equating a youth's failings to those of an adult.[73] These findings lay the foundation for a juvenile's constitutional right to be sentenced as a youth and to not be punished for conduct and maturity that she cannot be expected to express.

C. Graham v. Florida*: Applying* Roper *to Non-Capital Sentencing*

In *Graham v. Florida*[74] the Supreme Court extended *Roper*, finding unconstitutional a sentence of life in prison without the possibility of parole (LWOP) for juveniles who had committed non-homicide offenses. The *Graham* Court reaffirmed the importance of considering youthful characteristics in determining constitutionally acceptable sentences. Perhaps of greatest importance, *Graham* used the logic of *Roper* to establish a categorical ban on a non-capital punishment. This is notable because in capital punishment cases the Supreme Court frequently reiterates the significance of the death penalty in its

68. *Id.* at 570–71 ("In *Thompson*, a plurality of the Court recognized the import of these characteristics with respect to juveniles under 16, and relied on them to hold that the Eighth Amendment prohibited the imposition of the death penalty on juveniles below that age. We conclude the same reasoning applies to all juvenile offenders under 18.").

69. *Id.* at 561.

70. *Id.* at 569.

71. *Id.* at 574.

72. *Id.* at 570 ("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.") (quoting Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009 (2003)).

73. *Id.*

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

decision-making by noting that "death is different."[75] However, by extending *Roper*'s reasoning in *Graham* to ban some juvenile LWOP sentences, the Court demonstrates that the driving consideration in juvenile sentencing decisions is not the punishment itself, but rather the unique frailties of youth.

At sixteen-years-old, Terrance Graham was arrested for an attempted robbery. He eventually pled guilty and was given a three-year sentence. After serving twelve months, Graham was released on probation.[76] Less than six months later, Graham was again arrested.[77] With an available sentencing range of five years to life imprisonment, Graham's attorney recommended the minimum. The Department of Corrections suggested a maximum of four years imprisonment, while the State recommended a thirty-year sentence.[78] Based on this second arrest and two non-homicide charges, the trial court found Graham to be incorrigible.[79] Without meaningful explanation, the court insisted that it had given Graham "a great opportunity" to do something with his life and that Graham had insisted upon throwing away the opportunity, evidenced by his "escalating pattern of criminal conduct."[80] The judge sentenced Graham to LWOP.[81] The appellate court found Graham's sentence not to be disproportionate, in part by pointing to Graham's incorrigibility and the impossibility of his rehabilitation.[82]

The Supreme Court overturned Graham's sentence, invalidating the use of LWOP for non-homicide crimes committed by defendants under the age of eighteen.[83] Again, employing an Eighth Amendment analysis, the Court first found a national consensus developing against non-homicide juvenile LWOP.[84]

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75. *See, e.g.*, Ford v. Wainwright, 477 U.S. 399, 411 (1986) (holding that the Eighth Amendment prohibits the execution of the "insane" and weighing the fact that "death is different" heavily in the analysis).

76. *Graham*, 130 S. Ct. at 2018.

77. *Id.*

78. *Id.* at 2019.

79. *Id.* at 2020.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* at 2034 ("The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.").

84. *Id.* at 2023. Similar to *Roper*, the *Graham* Court stretched the national consensus standard in order to justify moving on to the second prong of the Eighth Amendment analysis. Ignoring the widespread availability of juvenile non-homicide LWOP, the Court relied upon *actual* sentencing practices to find a national consensus against the practice. Again, the Court's "bean counting" is underwhelming. At least one scholar suggests that this standard obviates the fact that the Court had made up its mind long before embarking on the numerical exercise. *See* Martin Guggenheim, Graham v. Florida *and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 461 (2012). An additional explanation for the Court's deviation from a strict national consensus analysis may be the recognition that objective indicia cede the delicate protections of the Eighth Amendment to hyper-politicized and majoritarian legislatures. *See, e.g.*, Ian P. Farrell, *Abandoning Objective Indicia*, 122 YALE L.J. 303, 311–13 (2013) (outlining four primary critiques of the Court's objective indicia analysis).

This was followed by an independent examination of the sentencing practice, considering the culpability of the offenders, the severity of the crime, and whether the practices serve legitimate penological justifications.[85] Building on its findings five years earlier in *Roper*, and relying on more recent supplementary evidence in the scientific literature, *Graham* held that youths' diminished culpability should be considered in determining constitutionally acceptable punishments in non-homicide cases.[86] The Court emphasized juvenile phenomena such as limited brain development, greater capacity for rehabilitation, and the tenuous connection between behavior and truly depraved character in juveniles.[87] Additionally, the Court insisted that states have a constitutional responsibility to respect the "human attributes" of every offender.[88] In *Graham*, the condition of youth is identified as one such "human attribute" deserving of constitutional respect.[89]

An important distinction identified by the *Graham* Court was not that LWOP is identical to capital punishment, but rather that a juvenile sentenced to death deserves the same considerations as a juvenile sentenced to LWOP.[90] The Court maintained that murder was categorically different from other crimes.[91] Even so, the Court applied the *Roper* factors of youth—reduced culpability, increased susceptibility to outside pressures, and yet-developed character—to its analysis of Graham's non-homicide crime, finding in this instance that the juvenile defendant had a "twice diminished moral culpability," once from "the nature of the crime," and more importantly, once from "the age of the offender."[92] This application recognized that *Roper*'s consideration of youth is not limited to analyzing death sentences. Although death is indeed different, in *Graham* the Court shifted its emphasis from the kind of crime a young person has committed to the difference between adults and youth. Thus, *Graham*'s determinative factor was not the severity of the crime, but rather the nature of the offender and his unique developmental status as a juvenile.

Furthermore, *Graham* held that the penological justifications that failed to uphold the death penalty for juveniles were equally inapplicable to LWOP sentences for non-homicide juvenile offenders.[93] Because of the juvenile's twice diminished culpability in these cases, retribution "cannot support the sentence at

85. *Graham*, 130 S. Ct. at 2026.

86. *Id.* at 2026–27.

87. *Id.*

88. *Id.* at 2021.

89. *Id.* at 2026.

90. *Id.*

91. *Id.* at 2027 ("The Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.").

92. *Id.* ("It follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability. The age of the offender and the nature of the crime each bear on the analysis.").

93. *Id.* at 2029.

issue" as proportional to blameworthiness.[94] These same characteristics that render juveniles less culpable limit their capacity for deterrence.[95] In addition, the incapacitation of youthful non-homicide offenders for the remainder of their lives is inconsistent with the evidence that young people's characters are not yet fully developed.[96] A life sentence, without the possibility of parole, necessarily finds a juvenile incorrigible, a determination that neither a court, nor even a trained psychologist, can accurately distill.[97] Ultimately, LWOP usurps all rehabilitative possibility and "den[ies] the defendant the right to reenter the community."[98]

Read together, *Graham* and *Roper* acknowledge that a juvenile criminal act is not as indicative of a young person's character as it may be of an adult's. The logic of *Graham* suggests that considerations of youth should extend to all juvenile offenders, not only those in capital or LWOP cases. *Graham* demands consideration of the three *Roper* factors of youth—reduced culpability, increased susceptibility to outside pressures, and yet-developed character—at all stages of sentencing and "across the entire landscape of juvenile justice."[99] Following this reasoning, *Graham* is only one decision of many that will hopefully follow that explicates a juvenile's right to be tried, treated, and sentenced like a juvenile.

D. Miller v. Alabama*: Extending* Graham *to Criminal Process*

In 2012, the Supreme Court extended *Graham*'s reasoning to another area of juvenile sentencing. In *Miller v. Alabama*, the Court declared mandatory LWOP sentences unconstitutional, as their automatic imposition failed to consider the unique position of juvenile defendants.[100] Setting the stage for the analysis to follow, the Court explained that both *Graham* and *Roper* "establish that children are constitutionally different from adults for purposes of sentencing."[101] The Court did not qualify or temper this observation to a particular range of sentences or types of offenses. In turn, *Miller* reaffirmed *Graham*'s insistence that age should be considered at all stages of criminal proceedings.[102]

Miller breaks ground as the first Supreme Court opinion to assess juvenile sentencing procedure, rather than the nature of a sentence itself. The Court specifically held that *Graham*'s and *Roper*'s recognition of juvenile

94. *Id.* at 2028.

95. *Id.*

96. *Id.* at 2026 (citing Roper v. Simmons, 543 U.S. 551, 570 (2005)).

97. *Id.* at 2029.

98. *Id.* at 2029–30.

99. Guggenheim, *supra* note 84, at 464 ("*Graham* is a case about how and why children are different from adults that states a constitutional principle with broad implications across the entire landscape of juvenile justice.").

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

101. *Id.* at 2464.

102. *Graham*, 130 S. Ct. at 2031 ("[C]riminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.").

characteristics is not crime specific, and thus applies in all cases of juvenile sentencing.[103] In fact, the Court noted that the scientific evidence relied on in earlier cases had "become even stronger."[104] Thus, the mandatory LWOP scheme is unconstitutional because it proscribes individual considerations relevant to a juvenile's age.[105]

In an unprecedented break from the Court's long-standing insistence that special sentencing rules were constitutionally necessary in capital cases (because "death is different"[106]), *Miller* demanded special rules for sentencing juveniles, even absent a threat of death. Again recognizing a juvenile's diminished culpability, the Court expressed concern that mandatory punishments, especially LWOP, would unacceptably foreclose a court from "considering an offender's youth and attendant characteristics."[107] Although adults are routinely sentenced to mandatory punishments, even LWOP, *Miller* insists that "a sentencing rule permissible for adults may not be so for children."[108]

According to this logic, simply because courts rely on remorselessness to sentence adults does not mean that the same practice is appropriate when sentencing juveniles. The *Roper*, *Graham*, and *Miller* trilogy suggest that a juvenile's criminal act is not as determinative proof of her character as it may be for an adult. Furthermore, treating criminal conduct of youth and adults similarly risks erroneously punishing behaviors that are more indicative of age than of actual criminal character. The following section, Part IV, illustrates that many courts overseeing juvenile defendants fail to make this distinction between conduct and character when assessing juvenile's post-arrest conduct as well. Courts that invoke notions of juvenile remorselessness frequently track the rationales employed when sentencing adult defendants. Part V then contends that a juvenile's conduct, notably the failure to express remorse, is equally susceptible to misinterpretation. Consequently, it is inadvisable, and, as this piece argues, unconstitutional, to rely on such inaccurate predictors of criminality in determining juvenile sentences.

IV.
USE OF REMORSELESSNESS IN JUVENILE SENTENCING

A judicial perception of juvenile remorselessness is likely to land a youthful offender a longer and more severe sentence.[109] Judges in juvenile court

103. *Miller*, 132 S. Ct. at 2465 ("[N]one of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific.").

104. *Id.* at 2464 n.5.

105. *Id.* at 2466.

106. *See, e.g.*, Ford v. Wainwright, 477 U.S. 399, 411 (1986).

107. *Miller*, 132 S. Ct. at 2471.

108. *Id.* at 2470 (reasoning that while death is different in constitutional terms, "children are different too").

109. Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Court?: Retributive Versus Rehabilitative Systems of Justice*, 97 CAL. L. REV. 1107, 1149 (2009).

frequently use a perceived lack of remorse as an aggravating sentencing factor.[110] A judge may use as little as a single act or statement to determine that a juvenile lacks remorse.[111] Most judicial opinions that mention a juvenile's supposed remorselessness do not explain their reasoning and rarely discuss a finding of remorselessness or how it specifically factors into the sentencing.[112] When judges do offer explanations for using remorselessness, their reasoning seems to parallel that of the "individual badness model" in which remorse offers a proxy for a defendant's blameworthiness and potential for rehabilitation.[113] Thus, judges' perceptions of remorselessness—and its relevance to culpability—do not change whether they are sentencing juveniles or adults.

A. Cited Reasons for Sentencing Juveniles Based on Remorselessness

1. Predicting Future Dangerousness

When judges in juvenile cases provide reasons for their use of remorse in sentencing, the reasoning often tracks the penological underpinnings discussed above in Part II. Specifically, some trial courts connect a perceived lack of remorse with a juvenile's future dangerousness. These claims allege a link between judicial perceptions of current character and predictions of future behavior.[114]

For instance, Michael Hill was committed to a juvenile institution following a conviction for rape and sexual abuse.[115] These acts were alleged to have occurred against Hill's developmentally disabled five-year-old sister. At the time, Hill was only twelve-years-old. After three and a half years in custody, Hill was released. Only two months later, he became angry with his sister for playing her radio too loudly and allegedly raped her again.

Hill entered a guilty plea and was sentenced to 240 months of incarceration.[116] At sentencing for this second offense, the State recommended a

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110. *See generally* Martha Grace Duncan, *"So Young and So Untender": Remorseless Children and the Expectations of the Law*, 102 COLUM. L. REV. 1469 (2002), and the discussion of cases in Part IV of this article.

111. Duncan, *supra* note 110, at 1491.

112. *See, e.g.*, Duncan, *supra* note 110, at 1493 (explaining that after examining 200 cases in which remorselessness was used as an aggravating factor, in "most of the opinions in which remorse appears, it was unexplained").

113. *See, e.g.*, State v. Hill, No. 22714–2–II, 1999 WL 39483 (Wash. Ct. App. Jan. 29, 1999); State *ex rel.* TLR, 513 So. 2d 554, 557 (La. Ct. App. 1987). *See also* Bibas & Bierschbach, *supra* note 6, at 104 (discussing the individual badness model and perceived remorse as "yardsticks for an offender's need for deterrence and retribution").

114. *See, e.g.*, State *ex rel.* TLR, 513 So. 2d 554, 557 (La. Ct. App. 1987) (where the trial court judge observed that the defendant's demonstrated remorselessness required a sentence of incarceration because probation left open the "serious danger that he would commit another crime"); *Hill*, 1999 WL 39483, at *5 (alleging that a defendant's lack of remorse "relates also to the future dangerousness issue" in sentencing a juvenile to 240 months in prison).

115. *Hill*, 1999 WL 39483, at *1.

116. *Id.*

mid-range sentence of 119 months' incarceration. The Department of Corrections rebuffed the State's suggestion, and submitted a report recommending an "exceptional term of confinement of 240 months."[117] Hill's supposed "lack of remorse" was one of six factors enumerated in the Department's report.[118] The sentencing court accepted the exceptional recommendation and sentenced Hill to 240 months of incarceration, noting that confinement "would allow Hill to mature as an adult before being returned to the community."[119]

A Washington state court of appeals denied Hill's challenge to the finding of remorselessness, reasoning that adult criminal cases have historically looked to a lack of remorse as an appropriate aggravating factor.[120] The appellate court highlighted Hill's supposed lack of remorse by pointing to his concern with losing his job, his failure to understand what he had done wrong, and his waiting to come forward about the incident.[121] These observations hardly evince violent or dangerous behavior. However, citing the original sentencing court's findings, the appellate court maintained that Hill's supposed lack of remorse "relates . . . to the future dangerousness issue." Nowhere in the opinion does the appellate court consider that the same factors used to sentence an adult may be inappropriate for sentencing a juvenile. Consequently, this analysis appears inconsistent with recent Supreme Court decisions that expound the uniqueness of the juvenile condition and demand the consideration of youth in juvenile sentencing procedures.[122]

While some courts cite remorselessness as directly predictive of future dangerousness, others simply imply this conclusion and instead relate a perceived lack of remorse to a limited rehabilitative capacity. For instance, a Tennessee court of appeals upheld thirteen-year-old Daniel Hood's sentence of confinement until his nineteenth birthday. The court justified the sentence by pointing to Hood's "rationaliz[ing] the offense with little guilt or remorse." The evidence for this finding was that Hood "consistently minimized" his role in a conviction for rape and kidnapping. Hood, along with seventeen-year-old Robert Sanico, chased Hood's fourteen-year-old cousin around a house and restrained her with duct tape. Sanico removed the cousin's clothing and inserted a plunger handle into her vagina. When the older boy asked Hood if he wanted to do the same, Hood refused. Yet, at trial, the court perceived Hood to be downplaying his involvement in the incident by placing blame on Sanico and consequently

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117. *Id.*

118. *Id.*

119. *Id.*

120. *See id.* at *5 (citing State v. Stuhr, 794 P.2d 1297 (Wash. Ct. App. 1990), *review denied*, 803 P.2d 1309 (Wash. 1991); State v. Creekmore, 783 P.2d 1068 (Wash. Ct. App. 1989), *review denied*, 792 P.2d 533 (Wash. 1990); State v. Ratliff, 731 P.2d 1114 (Wash. Ct. App. 1987); State v. Wood, 790 P.2d 220 (Wash. Ct. App. 1990), *review denied*, 797 P.2d 514 (Wash. 1990)).

121. *Id.*

122. *See* discussion on Juvenile Sentencing Under the Constitution, *supra* Part III.

found that Hood lacked remorse. In turn, the court of appeals upheld Hood's sentence, noting that he "is in need of extensive treatment and rehabilitation."[123]

In more extreme instances, courts have held that a failure to show remorse indicates that a defendant would not be amenable to rehabilitation at all. This determination is often used as a factor in transferring a juvenile to the adult criminal courts.[124] In *State v. Hopfer*,[125] an Ohio appellate court upheld the transfer of seventeen-year-old Rebecca Hopfer to adult criminal court. The basis for this decision was the judicial determination that she "would not be amenable to rehabilitation or treatment within the juvenile penal system."[126] Support for this finding came from a psychologist's testimony that Rebecca was not remorseful over the loss of her newborn child.[127] Consequently, Rebecca was transferred to adult court and a system of punitive punishment as opposed to the rehabilitative juvenile legal system.[128] Rebecca was eventually convicted of murder and gross abuse of a corpse and sentenced to imprisonment for fifteen years to life.[129]

2. Lack of Appropriate Moral Response

While some judges rely on remorse as an indicator of limited rehabilitative capacity and thus presumed future dangerousness, other opinions reflect the concern that a juvenile's supposed remorselessness is somehow inconsistent with a socially appropriate moral response to accusations of wrongdoing. Although few opinions offer insight into how exactly a juvenile is expected to perform in

123. State v. Hood, 221 S.W.3d 531, 539 (Tenn. Ct. App. 2006).

124. *See id.* While this article is limited to a discussion of juvenile sentencing practices, it is worth mentioning that the use of remorselessness at juvenile transfer hearings may pose additional constitutional concerns. Judges routinely use remorselessness in determining that a juvenile is not amenable to rehabilitation and should thus be transferred to the adult criminal system. Some states have even codified this practice. Although unlikely to meet the "unusual" prong of an Eighth Amendment challenge, this practice flies in the face of a criminal defendant's Fifth Amendment right against self-incrimination. An expression of remorse requires an acceptance of responsibility and thus at least a partial admission of guilt. By making transfer decisions based on a juvenile's failure to show remorse, trial courts essentially demand a confession from juveniles under the threat of more punitive punishment. While some juveniles and their advocates may understand this paradoxical demand, the possible outcomes present a catch-22 for young defendants. By showing the remorse demanded by courts at transfer hearings, a juvenile's acceptance of responsibility may then be used against her during adjudication. Alternatively, in order to avoid that outcome, a juvenile may refrain from accepting pre-adjudication responsibility in order to maintain her innocence. In doing so, however, the youth then risks transfer to a more punitive adult criminal system. For further discussion of the problems posed by remorse at transfer hearings, see Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99 (2010), and Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299, 322 (1999).

125. State v. Hopfer, 679 N.E.2d 321 (Ohio Ct. App. 1996).

126. *Id.* at 330–31.

127. *Id.* at 329–30.

128. *Id.* at 329.

129. *Id.*

court, judges do not shy away from pointing out behaviors that they disapprove of as indicating a lack of remorse.[130]

a. Non-Apologetic Conduct in Court

Judges often expect apologies from youthful offenders. When a juvenile fails to satisfy a judge in this regard, her behavior might be cited as remorseless and used to rationalize an aggravated sentence. For example, in Florida, a sixteen-year-old single-mother identified as N.B. was adjudicated delinquent for shoplifting a pacifier from Wal-Mart. During a dispositional hearing, N.B. shook her head at the judge's admonishments.[131] Based on this minor in-court behavior, the trial judge concluded that N.B. "showed no remorse." The judge then rejected a recommendation of probation and committed her to a residential facility.[132]

Just as a headshake may cause a judge to declare a youth remorseless, the even subtler facial expressions made in court by a juvenile may prove to be equally damming.[133] For example, an Illinois trial court found that fourteen-year-old Sherard Martin's face was "impassive" and "amoral."[134] Based on these observations, the court determined that the juvenile system did not have the "facilities necessary to treat him and correct him."[135] Martin had conceded to the court that he shot his friend, Fred Harper. However, Martin maintained that Harper's death was caused by the hospital's mistreatment of the decedent. This partial admission of responsibility was insufficient to satiate the court's need for a morally appropriate apology. The court upheld the decision to transfer Martin to an adult court based on a psychiatrist's report that Martin lacked remorse because he denied causation between his crime and the victim's death.[136] Martin was convicted of first-degree murder and sentenced to twenty-five years imprisonment.[137]

130. *See generally* Duncan, *supra* note 110 (discussing over 200 juvenile cases considering remorse).

131. N.B. v. State, 911 So. 2d 833, 835 (Fla. Dist. Ct. App. 2005) (reversing trial court's deviation from Department of Juvenile Justice's recommended probationary sentence because court failed to provide valid basis for its deviation).

132. *Id.*

133. People v. Martin, 674 N.E.2d 90, 100 (Ill. App. Ct. 1996).

134. *Id.*

135. *Id.*

136. *Id.* at 92–94, 100. The court also dismissed the same psychiatrist's assertion that Martin could be rehabilitated within the juvenile system—an assertion also made by four witnesses from the juvenile detention center who noted Martin was a good student and never a disciplinary problem. *Id.* at 100.

137. *Id.* at 92.

b. Lack of Empathy for Victims

Juvenile courts might also aggravate an offender's sentence when they find remorselessness based on the perception that the defendant lacked appropriate empathy for the victim of a crime. For example, a Louisiana court recently upheld a fourteen-year-old's sentence of confinement until his twenty-first birthday.[138] On appeal, the youth attempted to rebut the presumption that the mandatory minimum sentence could constitutionally apply to his case by showing he presented exceptional circumstances.[139] Notwithstanding the fact that the child's IQ was an estimated seventy-three, the appellate court upheld this sentence, relying in part on the size disparity between the victim and the offender and in part on a psychologist's report that the offender expressed no empathy or remorse.[140] This same concern is evident in the pre-*Roper* case of *Thomas v. Commonwealth*,[141] in which seventeen-year-old Douglas Thomas was tried for murdering his fourteen-year-old girlfriend's parents because they had threatened to break up the young relationship. Thomas was found guilty of capital murder and sentenced to death.[142] The trial court held that the seventeen-year-old defendant lacked remorse based on his going to sleep following the alleged commission of a serious crime.[143] The judge seemingly did not believe that Thomas could adequately understand the effect of his actions if he was so readily capable of slumbering. However, at least one scholar has suggested that sleeping in temporal proximity to a crime may be more indicative of a defendant's admission of guilt and desire to be caught than of her callous remorselessness.[144]

c. Failure to Express Pain and Suffering

Perhaps most notably, juvenile courts aggravate sentences when they perceive that a defendant failed to express the pain and suffering expected from an adult perpetrator. Juveniles who crack jokes with police officers,[145] or sing

138. State *ex rel.* D.Y., No. 2011 KJ 1281, 2011 WL 5395149 (La. Ct. App. Nov. 9, 2011).

139. *Id.* at *2.

140. *Id.* at *3 ("The report also indicated the child 'expressed no empathy, remorse or guilt for any sexually inappropriate behaviors.' However, the report noted the child maintained that the incidents never occurred.").

141. Thomas v. Commonwealth, 419 S.E.2d 606 (Va. 1992), *abrogated by* Haugen v. Shenandoah Valley Dept. of Soc. Services, 645 S.E.2d 261 (Va. 2007).

142. *Id.* at 608.

143. *Id.* at 619.

144. Duncan, *supra* note 110, at 1487–89 (discussing the proposition that falling asleep in proximity to a crime may suggest a defendant's recognition of their guilty conscience, citing literary classics and personal memoirs such as Fyodor Dostoevsky's *Crime and Punishment*, William Shakespeare's *Hamlet*, and Malcolm Braly's *False Starts: A Memoir of San Quentin and Other Prisons*).

145. *Id.* at 1480–81 ("A few hours after her mother's death, an incident occurred that . . . would have a lasting impact on perceptions of the youthful offender's character. Gina was entering the ladies' room in the company of a female police officer when she quipped: 'Don't worry, I don't have body parts in my pocket.' Word of this incident reached James R. Metts, Sheriff of Lexington

while incarcerated,[146] may be perceived as lacking appropriate levels of remorse due to their failure to demonstrate internal suffering.[147] Findings of remorselessness based on seemingly childish behavior are exacerbated by the fact that the majority of states set no minimum age for criminal liability.[148] Thus, even the youngest offender may face criminalization of her youthful behavior. For instance, at only eleven-years-old, Mary Bell was convicted of murdering two young boys. At trial, Mary looked "emotionally blank" while her co-defendant, Norma Bell,[149] "reacted to evidence and testimony with a more childlike combination of fear and nervous tears."[150] The prosecutor, Rudolf Lyons, described Mary Bell as "a most abnormal child, aggressive, vicious, cruel, *incapable of remorse*."[151] Although the two girls were tried on similar evidence, Norma was found not guilty while Mary was convicted.[152]

In addition, even an offender's showing of internal pain might not satisfy courts if such suffering is perceived to be misguided. In one such case, sixteen-year-old Ed Tilley pled guilty to two counts of attempted murder among other charges.[153] He did not deny his involvement in the incidents and he was not emotionless about his adjudication.[154] However, the clinical child psychologist who examined Ed Tilley found that the youngster lacked remorse because, "the thing that makes him feel the worst is that he is going to lose his girlfriend."[155] This is similar to the court's finding in *State v. Hill*, discussed above, in which the court noted that Hill's concern with losing his job rather than the suffering he

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County, who concluded that she was a 'sociopath with no conscience'; it was a diagnosis he would often repeat in the years ahead.").

146. Commonwealth v. Archer, 722 A.2d 203, 207 (Pa. Super. Ct. 1998).

147. At the time of this article's publication, three young men aged fifteen and sixteen are set to face murder charges for the shooting of an Australian baseball player in an Oklahoma neighborhood. While judicial determinations are far off, the media has already begun to hone in on the boys' "lack of remorse," supposedly evinced by their "danc[ing] and laugh[ing] in the county jail." This article posits that often judicial interpretations of such behavior are no more grounded in reality than this laughably speculative, yet tragic, news story. *See* Jeff Maysh and Meghan Keneally, *'Bored' Teen Who 'Gunned Down' Australian Student 'Danced and Laughed' After Being Arrested and Said the Shooting 'Was No Big Deal' as It Emerges He Tweeted About 'Hating White People,'* MAILONLINE, http://www.dailymail.co.uk/news/article-2400005/Chris-Lane-shooting-accused-teens-James-Edwards-Chancey-Luna-danced-laughed-arrested.html (last updated Aug. 22, 2013, 1:34 PM).

148. UNIV. OF S.F. SCH. OF LAW, CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 48 (2012), *available at* http://www.usfca.edu/law/docs/criminalsentencing (thirty-three states have no minimum age of criminal liability and the restrictions in the remaining seventeen states all allow children under the age of ten to be tried criminally).

149. There is no relation between the two girls with the same last names.

150. Shirley Lynn Scott, *Mary Bell*, CRIME LIBRARY, Chapter 10: The Trial Begins, *available at* http://www.trutv.com/library/crime/notorious_murders/famous/bell/index_1.html.

151. *Id.* at Chapter 13: The Verdict (emphasis added).

152. *Id.*

153. State v. Tilley, No. CA-9059, 1993 WL 385318 (Ohio Ct. App. 1993).

154. *Id.* at *2.

155. *Id.*

caused indicated a lack of remorse.[156] Apparently, while both boys did express their sorrow, the cause of this emotion was misplaced in the eyes of the presiding judge and thus indicative of remorselessness.

Even if a juvenile verbalizes his remorse, a court might reject the sentiment as inadequate. In *State v. R.B. Jr.*, the fourteen-year-old respondent was adjudicated delinquent of an armed robbery.[157] The twelve-year-old complainant alleged that R.B. had pointed a gun at him in gym class and then demanded his baseball hat. The complainant reported the incident the following day after learning that R.B. was arrested for possession of a gun.[158] R.B. testified that he did not take the hat, but rather returned it to the twelve-year-old after others had stolen it. R.B. highlighted that if he had wanted to rob someone, he would not need a gun because his reputation for fighting preceded him.[159] Because of this negative attitude, R.B.'s probation officer informed the court that although the youth "has verbalized remorse for his actions in the past . . . his actions send a totally different message."[160] R.B. was sentenced to custody until his twenty-first birthday.[161]

When young people appear callous or display a disregard for their crime they are labeled remorseless; however, even when they cooperate with law enforcement officials, they may still face negative accusations about their character. Jeanice DeWester was seventeen at the time she was arrested and charged with first-degree murder.[162] A sentencing report considered by the court noted that Jeanice was sociable and cooperative with the state agencies that she worked with following her arrest.[163] However, this same report noted concern that Jeanice's lack of "high-level anxiety" indicated that she was "fak[ing] normal."[164] The perception that she failed to act in an emotionally charged manner led the court to conclude that Jeanice lacked remorse.[165] Based on these findings the court sentenced Jeanice to twenty-five years to life in a state prison.[166]

Similarly, a Michigan trial court felt comfortable asserting that a fourteen-year old boy's failure to express pain and suffering was indicative of his remorselessness following the murder of his step-grandfather.[167] In making this determination, the court relied upon the arresting officers' testimony that the

156. State v. Hill, No. 22714–2–II, 1999 WL 39483, at *6 (Wash. Ct. App. Jan. 29, 1999).
157. State v. R.B. Jr., 595 So. 2d 702, 702 (La. Ct. App. 1992).
158. *Id.* at 702–03.
159. *Id.* at 703.
160. *Id.* at 704.
161. *Id.* at 702.
162. People v. Dewester, 178 Cal. Rptr. 125, 126 (Ct. App. 1981).
163. *Id.* at 127.
164. *Id.* at 128.
165. *Id.*
166. *See id.* at 128, 130.
167. People v. Eliason, 300 Mich. App. 293 (Ct. App. 2013).

youth was calm, not upset, and generally respectful during a post-arrest conversation.[168] The youth, Dakotah Eliason, had been under enormous stressors at the time of the incident, as he had "experienced a significant amount of loss in a relatively short period of time, namely the deaths of his cousin, dog and friend to suicide, not to mention the back drop of the very significant and repeated loss of his mother via abandonment."[169] Dakotah originally received a mandatory sentence of life without the possibility of parole.[170] Because the Supreme Court's decision in *Miller* barred such mandatory sentences, a Michigan court of appeals granted Dakotah a new sentencing hearing.[171] Nevertheless, the court of appeals held that a life sentence was still constitutional, and that the only issue would be whether to impose the sentence with or without the possibility of parole.[172] The court noted that such a harsh sentence seemed well deserved, in part based on Dakotah's apparent lack of remorse as evinced by his otherwise calm demeanor.[173]

B. Use of Remorselessness as an Unexplained Aggravating Factor

Numerous sentencing decisions refer to a juvenile's supposed lack of remorse. The above cases illustrate that judges explicitly consider perceived remorselessness as indicative of both future dangerousness and an inappropriate moral response. However, while some judges articulate how remorselessness plays into a sentencing calculation, others do not explicitly discuss their reliance on perceptions of remorselessness even when it plays into their sentencing decisions. For example, in the case of fifteen-year-old D.W., the trial judge noted that "she did not get the sense that there was any remorse whatsoever on D.W.'s part."[174] Based on this reasoning, but without any further discussion of why remorse mattered, the reviewing court upheld the judge's confinement of D.W. until his twenty-first birthday.[175] Elsewhere in Louisiana, other juvenile court judges have made similar findings of supposed remorselessness based on their own perception of circumstances surrounding the crime or the character of the respondent but failed to identify the reasons why remorselessness should aggravate a juvenile's sentence.[176]

Frequently, judges consider a perceived lack of remorse alongside other aggravating factors to rationalize a particular sentence. However, these laundry

168. *Id.* at 296–97 nn.3 & 5.

169. *Id.* at 333.

170. *Id.* at 307.

171. *Id.* at 310.

172. *Id.* at 307–11.

173. *Id.* at 337.

174. State *ex rel.* D.W., 47 So. 3d 1048, 1062 (La. Ct. App. 2010), *reh'g denied.*

175. *Id.* at 1051.

176. *See, e.g.*, State v. Q.U.O., 907 So. 2d 221, 226 (La. Ct. App. 2005) (quoting the trial court judge's finding that "[i]t is clear to me [the defendant] has no remorse whatsoever for anything he has done"). *See also* State v. R.B. Jr., 595 So. 2d 702, 704 (La. Ct. App. 1992).

lists do not offer any explanation for the weight given to each factor. For example, in the case of Calvin L., the court simply noted the youth's failure to show remorse before committing him to twelve months of supervision by the Office of Children and Family Services.[177] The sentencing judge lumped in perceived remorselessness among other considerations of the "serious nature of the act," the defendant's "prior juvenile delinquency adjudications, his poor school attendance record, and the other relevant circumstances," including a failure to accept responsibility.[178] This language parallels that used in *State v. Hill*, discussed earlier, where the court found a 240-month-term of incarceration "warranted based upon the following factors: (1) particular vulnerability of the victim, (2) foreseeable impact on others, (3) rapid recidivism, (4) invasion of zone of privacy, (5) lack of remorse, and (6) future dangerousness."[179] Here, the court merely cited a perceived lack of remorse alongside other penological justifications for a severe sentence. Thus, the mere mention of remorselessness operates as an aggravating factor without the judge attempting to draw a connection between that finding and future rehabilitation or dangerousness. On appellate review, this listing of factors without discussing the weight of each is often cited as proper justification for upholding trial court sentences, as though the mere perception of remorselessness enhances the seriousness of the alleged crime.[180] Even when no further explanation of the factors is offered, it is clear that perceived remorselessness plays an active role in aggravating juvenile sentences.

C. Sentencing Discrepancies

A brief examination of sentencing discrepancies in joint trials demonstrates that a perceived lack of remorse can have profound effects on a juvenile's disposition. This suggests that while judges may not always explain their findings of remorselessness thoroughly, they give great weight to their determinations. For instance, in an Illinois case, fourteen-year-old Morris Denton was convicted of murder and sentenced to forty years in prison despite having no prior convictions.[181] Denton's co-defendant, only a few months younger, received a twenty-five-year sentence despite a prior armed robbery conviction.[182] The trial court found Denton's co-defendant "sincerely remorseful" but refused to believe Denton's expression of remorse.[183] Similarly,

177. *In re* Calvin L., 920 N.Y.S.2d 408, 409 (App. Div. 2011).

178. *Id.*

179. State v. Hill, No. 22714–2–II, 1999 WL 39483, at *1 (Wash. Ct. App. Jan. 29, 1999).

180. *Id. See also In re* La-Me M., 896 N.Y.S.2d 67, 68 (App. Div. 2010) ("The placement was a proper exercise of discretion that was the least restrictive alternative consistent with appellant's needs and those of the community, given the seriousness of the crime as well as appellant's lack of remorse and pattern of behavioral problems.").

181. People v. Denton, 628 N.E.2d 900, 906 (Ill. App. Ct. 1993).

182. *See id.* at 906–07.

183. *Id.* at 907.

in *People v. Mendez*, an appellate court upheld a twenty-five year sentence for a sixteen-year-old who played a role in burning down a Bronx social club.[184] Mendez's co-defendants, including an adult who helped orchestrate the crime, all received lighter sentences. This was due in part to the court's finding that Mendez showed a "complete lack of any sense of remorse or guilt."[185]

As these cases illustrate, judicial perceptions of remorse can drastically influence sentencing decisions. Expressing remorse may greatly benefit a juvenile client. This may lead some to ask the question: "If juveniles *can* express remorse, why should they not be punished for *failing* to do so?" While this question is answered more fully below, in short, the problem is that judges cannot trust what they perceive to be remorselessness and thus should not rely on it in sentencing. Two different juvenile co-defendants may express different emotions, not because they are *experiencing* different levels of remorse, but because they may differ in their social and psychological ability to *express* remorse due to the unformed nature of their brains and social skills. Thus, this question relies on the dangerous assumption that juveniles can express remorse in a manner similar to adults, an assumption which psychological and sociological studies have seriously questioned.[186]

V.
WHAT'S WRONG WITH JUVENILE REMORSELESSNESS

Criminal court judges frequently use a perceived lack of remorse as an aggravating sentencing factor. Its absence supposedly indicates that an offender is not ready for rehabilitation or is not capable of expressing the appropriate moral response to her wrongdoing. Judges in juvenile courts are no different. Despite the continued judicial consideration of remorselessness as a sentencing factor, very little empirical information exists on the relation between recidivism and remorse.[187] Not only is the connection tenuous, but remorselessness itself may not be so easily ascertained in juvenile offenders. Adult interpretations of remorselessness are often inaccurate and fail to consider relevant factors. As one legal scholar suggests, "[C]ourts interpret lack of remorse in subjective and psychologically naïve ways, without regard for defense mechanisms, developmental stages, or the ambiguity that inheres in human behavior."[188] Though the use of remorselessness in sentencing juveniles is prevalent, that does not mean it is justified.

The infirmities of perceived remorselessness discussed below are unique to juveniles. Because of their limited psychological development and susceptibility

184. People v. Mendez, 430 N.Y.S.2d 57 (App. Div. 1980).

185. *Id.* at 60.

186. *See infra* Part V.

187. PROEVE & TUDOR, *supra* note 32, at 120.

188. Duncan, *supra* note 110, at 1493 (exploring the degree to which judges consider remorse through descriptive examples of instances in which judges consider a juvenile's remorse).

to outside influence, juveniles are unlikely to express the same showing of remorse that courts may expect of an adult offender.[189] Rather than indicating future dangerousness, limited rehabilitative potential, or an eschewing of moral responsibility, juvenile remorselessness may suggest nothing more than an offender's age. In turn, using perceived remorselessness as an aggravating sentencing factor erroneously punishes a youth for something that they cannot be expected to show.

For many reasons, a juvenile's supposed remorselessness is an inaccurate predictor of genuine emotions and an inaccurate proxy for determining future criminality. Adult perceptions of juvenile behaviors are subject to misinterpretation.[190] For some youth, their developmental immaturity may preclude the remorseful expression a judge would expect from an adult offender.[191] For others who do experience remorse, adolescent sociological pressures may chill their expression, encouraging the offender to instead adopt a more calloused appearance.[192] Finally, no matter the reason, the perceived absence of remorse in a juvenile offender is simply not as indicative of future dangerousness or moral culpability as it may be for an adult due to their as yet-unformed character as noted by the Supreme Court.[193]

Using a perceived lack of remorse to aggravate a juvenile's sentence arbitrarily subjects a youthful offender to greater punishment for unreliable reasons. This practice is more than unsound; in light of recent Supreme Court decisions requiring that unique characteristics of youth be considered in the sentencing of juveniles, it is also unconstitutional.[194] Post-arrest behavior, such as the supposedly remorseless conduct described above, is no less influenced by the frailties of youth than is the commission of crimes. Because relying on remorselessness is a uniquely inaccurate practice when evaluating youthful offenders, its use to aggravate their sentences should be declared unconstitutional.

A. Adult Perceptions of Juvenile Remorselessness Are Subject to Biases and Misinterpretation

In general, relying on outward expressions of behavior is a poor proxy for measuring internal emotions.[195] This difficulty is exacerbated when emotionally mature adults attempt to decipher the outward behaviors of a juvenile

189. *See infra* Part V.B.

190. *See infra* Part V.A.

191. *See infra* Part V.B.2.

192. *See infra* Part V.B.1.

193. *See* Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012); Graham v. Florida, 130 S. Ct. 2011, 2026 (2010); Roper v. Simmons, 543 U.S. 551, 570 (2005).

194. *See, e.g.*, *Miller*, 132 S. Ct. 2455; *Graham*, 130 S. Ct. 2011; *Roper*, 543 U.S. 551.

195. *See, e.g.*, Paul Ekman, *Facial Expression and Emotion*, AM. PSYCHOLOGIST, Apr. 1, 1993, at 384, 387–88, *available at* http://www.radford.edu/~jaspelme/_private/gradsoc_articles/facial%20expressions/Ekman%201993%20Am%20psych.pdf.

undergoing confusing developmental growth.[196] Inaccuracies arise both from adult misperceptions and juvenile expressions, as "many youth are not intellectually and emotionally equipped to meet the high expectations of judges and victims who expect offenders to demonstrate sincere remorse."[197] A sentencing practice that depends on inaccurate predictions based on perceptions made unreliable by the unique factors of youth thus eschews the consideration of youth's unique nature demanded by the Supreme Court.

Judicial assessments of juvenile behavior are inherently subjective and often highly erroneous.[198] This is particularly so for judges who normally sit in adult court and so may evaluate the behavior of an occasional juvenile against the behavior they expect of an adult. Even when represented by counsel, a juvenile is likely to behave inconsistently with what a judge may expect or demand from adult offenders. Youth have a limited understanding of the criminal legal system, they are unlikely to work effectively with their lawyers, they do not easily grasp long-term consequences, they are prone to impulsiveness, and they are reluctant to trust legal actors, including their own defense counsel.[199] Recognizing these numerous limitations, it is unreasonable to compare a youth's behavior in court to that expected from an adult.

For juvenile court judges, even regular exposure to juveniles may not rectify the inaccuracies of their flawed perceptions of remorse. Simply because a judge routinely determines that youth are remorseless, basing this finding on the same set of unsupported characteristics does not make that judge's predictions any more accurate. Consequently, judicial reliance on in-court behavior to aggravate juvenile sentences is often erroneous. As explained below, a perceived lack of remorse likely indicates only a youth's developmental immaturity, susceptibility to sociological pressures, or still-developing character. In turn, aggravating a sentence using this perception is not based on an accurate reflection of culpability, but rather on the unique conditions of youth—the exact opposite of what the Supreme Court demands.

In *Roper*, the Supreme Court pointed out that even trained psychologists admit the difficulties of accurately differentiating between a juvenile's depravity of character and transient immaturity.[200] The leading diagnostic tool for these professionals, the DSM-V, further substantiates the unreliability of using perceived remorselessness as a predictive factor. According to the DSM-V, psychiatrists and psychologists should not diagnose anyone under eighteen-years-old with Antisocial Personality Disorder (APD).[201] Demonstrated lack of

196. *See, e.g.*, Duncan, *supra* note 110, at 1499.

197. Henning, *supra* note 109, at 1169–70.

198. Ward, *supra* note 23, at 140.

199. *Graham*, 130 S. Ct. at 2032.

200. Roper v. Simmons, 543 U.S. 551, 573 (2005)

201. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, § 301.7 (5th ed. 2013) (APD is commonly known as psychopathy, or sociopathy) [hereinafter DSM-V].

remorse is a diagnostic criterion of adult APD and a common indicator of APD is a pervasive pattern of continued criminality.[202] In this sense, the DSM-V recognizes the possibility that remorseless adults may be prone to criminal behavior, or in other words, future dangerousness. Nevertheless, the clinical equivalent of APD for youth under the age of eighteen, known as Conduct Disorder, does not list a lack of remorse as a diagnostic criterion.[203] One of the reasons for this incongruity is that behaviors that may be deemed abnormal for adults are considered normal features of adolescence.[204] For developmental reasons, adolescents may display less grief and have a shorter sadness span than adults, and thus appear remorseless.[205] Because of the difficulties in accurately perceiving juvenile remorselessness, and its inaccuracies as a predictive tool, psychologists hesitate to make predictive assessments of a juvenile's future behavior based on reckless or remorseless behavior committed as a youth.[206] For these reasons, it is particularly troubling when non-scientifically-trained judges rely on perceived remorselessness as a basis for punishment.

Furthermore, racial and other biases taint adult perceptions of juvenile behaviors, especially expressions of remorse. For example, an empirical study has found that probation officers attribute criminality to different sources based on a youth's race. White youth may escape individual blame for their criminality, as probation officers often point to environmental and family factors as contributing to misconduct.[207] On the other hand, when working with African

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202. *See id.* at 659–60.

203. DSM-V, *supra* note 201, § 312.8. Conduct Disorder is the diagnostic equivalent of Antisocial Personality Disorder for youth under the age of eighteen. Neither the fourth nor the fifth edition of the DSM lists a "lack of remorse" as a diagnostic criteria for Conduct Disorder. However, the fifth edition does identify a minority subtype of people with Conduct Disorder who exhibit "limited prosocial emotions." *Id.* at 469. These individuals must experience at least two specified characteristics persistently over at least twelve months and in multiple relationships and settings. One such characteristic is a "lack of remorse or guilt." *Id.* Thus, even in the DSM-V, remorselessness is used only as one of several factors in identifying a sub-group of people, already diagnosed with Conduct Disorder, who exhibit limited prosocial emotions. Furthermore, the DSM-V warns that characteristics such as remorselessness cannot be assessed in a clinical interview; rather, psychologists should only conclude that an individual lacks remorse by looking at multiple sources of information, including "reports by others who have known the individual for extended periods of time and across relationships and settings (e.g., parents, teachers, co-workers, extended family members, peers)." *Id.* at 471–72.

204. SANDRA JEAN BELL, YOUNG OFFENDERS AND YOUTH JUSTICE: A CENTURY AFTER THE FACT 145 (2006).

205. *See* Duncan, *supra* note 110, at 1472–73.

206. Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003).

207. Brief for the American Psychological Association as Amicus Curiae in Support of Respondent at 27, Roper v. Simmons, 543 U.S. 551 (2005) (citing George S. Bridges & Sara Steen, *Racial Disparities in Official Assessments of Juvenile Offenders: Attributional Stereotypes as Mediating Mechanisms*, 63 AM. SOC. REV. 554, 559, 561–564 (1998) (summarizing regression analysis of 233 probation officer reports controlling for variables such as age, sex, offense, and prior record)).

American youth, these same probation officers are more likely to explain an offender's delinquency as rooted in personal defects, such as remorselessness.[208] Misperceptions such as these are amplified when the cultural values of certain racial and ethnic groups limit expressions of remorse by these youth.[209] For instance, cultural values may prohibit required displays of remorse on the child's behalf, and the judge's own cultural values may hinder her ability to accept displays of remorse from a member of a different culture.[210] In this sense, adults other than judges are of no greater help in identifying a genuine lack of remorse, as biases and misunderstandings can easily taint the legitimacy of a claim about any particular youth's allegedly remorseless character.

More generally, adults tend to retain negative impressions of juvenile defendants, feeling particularly threatened by them.[211] At least one contributing factor to this phenomenon is the role played by the media in advancing a sort of "moral panic" regarding youth and crime.[212] In the mid-1990s, a news article by John Dilulio forged the image of a juvenile super-predator.[213] This fictitious youthful offender supposedly roved the streets in "wolf-packs," murdering, raping, robbing, assaulting, and getting high without considering the consequences of the behavior, and, of course, without showing any remorse.[214] This notion of the super-predator was quickly refuted by the academic community, and eventually even Dilulio backpedaled from his theory, apologizing, albeit somewhat insincerely, for any unintended consequences.[215]

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208. *See id.*

209. Ward, *supra* note 23, at 136 ("Cultural values inculcated in certain racial/ethnic minorities may prohibit such required displays of remorse, just as a judge's cultural values may preclude him or her from perceiving a valid expression of remorse from a member of a different racial/ethnic group.").

210. *Id.*

211. *See* IRA M. SCHWARTZ, *The Facts and the Myths of Juvenile Crime, in* (IN)JUSTICE FOR JUVENILES: RETHINKING THE BEST INTERESTS OF THE CHILD 23, 23–26 (1989). *See also* Brief of the Coalition for Juvenile Justice as Amicus Curiae in Support of Respondent at 16, Roper v. Simmons, 543 U.S. 551 (2005) (citing CJJ, 1997 ANNUAL REPORT, *False images? The News Media and Juvenile Crime* 8–9 (1997)); OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, BALANCED AND RESTORATIVE JUSTICE FOR JUVENILES 5, 38 (1997).

212. BELL, *supra* note 204, at 26–28.

213. *See* Andrea Wood, *Cruel and Unusual Punishment: Confining Juveniles with Adults After* Graham *and* Miller, 61 EMORY L.J. 1445, 1491 (2012) (citing John J. Dilulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23).

214. John J. Dilulio, Jr., *The Coming of the Super-Predators*, WKLY. STANDARD, Nov. 27, 1995, at 23.

215. Elizabeth Brown, *Race, Space and Crime: The City, Moral Panics, and "Risky" Youth, in* MORAL PANICS OVER CONTEMPORARY CHILDREN AND YOUTH 203, 207–08 (Charles Krinsky ed., 2008). *See also* Brief of Jeffrey Fagan, Deborah Baskin, Frank R. Baumgartner, Katherine Beckett, Donna Bishop, Alfred Blumstein, Robert Brame, Todd R. Clear, Simon A. Cole, Philip J. Cook, Francis T. Cullen, John Dilulio, Jr., Kenneth A. Dodge, James Alan Fox, David Garland, Marie Gottschalk, David A. Green, David Greenberg, Craig Haney, Bernard E. Harcourt, Karen Heimer, David S. Kirk, Mark A.R. Kleiman, Lauren J. Krivo, Aaron Kupchik, Charis E. Kurbin, Janet L. Lauritsen, Glenn Cartman Loury, Terry A. Maroney, Tracey L. Meares, Edward P. Mulvey, Daniel Nagin, Andrew Papachristos, Raymond Paternoster, John Pfaff, Michael L. Radelet, Richard

Even so, fears of youthful offenders remain entrenched in the public psyche.[216] Additionally, part of the perceived threat posed by juveniles may derive from the very idea that adults are not great predictors of juvenile behavior or readers of juvenile emotions. Evidence of adults' fear can be seen in the prosecution's remarks during the sentencing phase of the last juvenile capital trial ever held. The State argued that seventeen-year-old Christopher Simmons's age should be an *aggravating*, not mitigating, factor in seeking the death penalty.[217] This type of argument plays into the misperception that a juvenile is somehow more dangerous, more damned, and more culpable than an adult offender: a conclusion which is directly contradicted by the psychological findings recognized by the Supreme Court in its constitutional holdings.

B. Using Perceptions of Remorselessness to Aggravate a Juvenile's Sentence Does Not Comport with What We Know About Youth

Even if judges were able to accurately identify indicators of remorselessness, and those indicators reflected a juvenile's true emotional state, using a lack of remorse to aggravate juvenile sentences does not comport with the reasoning that underlies this practice for adult offenders. A juvenile's lack of remorse does not accurately reflect their future dangerousness and punishing them as if it does fails to recognize that "incorrigibility is inconsistent with youth."[218] Furthermore, a failure to express "morally appropriate behavior" does not indicate a youth's increased moral blameworthiness, but may in fact indicate the exact opposite: moral immaturity. Youth are less capable of both feeling and expressing the pain associated with remorse that courts demand from adult defendants as a result of both developmental limitations and sociological pressures.

Rosenfeld, Robert J. Sampson, Carla Shedd, Simon I. Singer, Jonathan Simon, Michael Tonry, Valerie West, James Q. Wilson, Christopher Winship, Franklin E. Zimring as Amici Curiae In Support Of Petitioners at 7–9, Miller v. Alabama, 132 S. Ct. 2455 (2012) (No. 10-9647).

216. *See, e.g.*, SCHWARTZ, *supra* note 211, at 23–26. *See also* Erin McClam, *2 Teens Charged with First-Degree Murder in Ballplayer's Killing in Oklahoma*, NBC NEWS (Aug. 20, 2013, 7:26 PM), http://usnews.nbcnews.com/_news/2013/08/20/20102447-2-teens-charged-with-first-degree-murder-in-ballplayers-killing-in-oklahoma?lite ("The three teens are being held in individual cells at the Stephens County jail, Sheriff Wayne McKinney told NBC News. He said that there has been an escalation in major crimes committed by people under 18 in recent years . . . . 'That is alarming that we're seeing those type of crimes . . . . I don't think it's unique. It's something we're starting to see nationwide.'").

217. Roper v. Simmons, 543 U.S. 551, 558 (2005) ("In rebuttal, the prosecutor gave the following response: 'Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary.'").

218. Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012) (quoting Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. Ct. App. 1968)).

1. Sociological Pressures Often Inhibit Juvenile Expressions of Remorse

A juvenile's still-developing character and susceptibility to outside influences[219] make it unreasonable to expect the same public showing of remorse that courts demand from adults. While a courtroom's physical and procedural barriers make it difficult for adults to fully express remorse,[220] these problems are greatly exacerbated for juvenile offenders.[221] The opprobrious gaze of one's own family may inhibit an offender's expression of remorse, which presumes an admission of responsibility.[222] Such admissions may be particularly difficult for a youth, "occasioned by an unwillingness to admit wrong to his (often few) supporters."[223] Juvenile defendants, susceptible to outside pressures, may thus fail to show remorse simply due to a natural fear of the personal and immediate consequences. Failing to recognize these sociological reasons behind judicial perceptions of remorselessness avoids the constitutionally required considerations of youth—reduced culpability, increased susceptibility to outside pressures, and yet-developed character.[224]

As the *Roper* Court noted, judges should recognize that "juveniles still struggle to define their identity," and that their "risky or antisocial behaviors are fleeting; they cease with maturity as individual identity becomes settled."[225] A developing sense of identity plays a significant role in a juvenile's lack of expressed remorse. Cultural pressures discourage youth from showing signs of weakness, and often value the adoption of a tough, or "badass," appearance.[226] Adolescents, who have just passed out of childhood, are fearful of a perceived regression and thus are more likely to suppress childlike behaviors such as crying.[227] Although many judges would likely find a "badass" demeanor to be inconsistent with genuine remorse, these behaviors can hardly be considered permanent character traits or even reflective of actual emotions.

Furthermore, juveniles who have been incarcerated prior to their adjudication may have been encouraged or forced by circumstance to adopt a hardened demeanor, unlikely to be reflective of their true emotion.[228] Juveniles

219. *See Roper*, 543 U.S. at 569–70.

220. Bibas & Bierschbach, *supra* note 6, at 105 (discussing cutting deals outside of court, communications between attorneys without defendants, and a lack of emphasis on mining the value of remorse during proceedings focusing on the efficient resolution of cases).

221. Henning, *supra* note 109, at 1150 (pointing to factors such as a defendant's limited speaking time, discomfort in the court, and embarrassment from so much attention).

222. Epstein, *supra* note 19, at 86.

223. *Id.* at 78.

224. *Roper*, 543 U.S. at 569–70.

225. *Roper*, 543 U.S. at 570 (quoting Steinberg & Scott, *supra* note 206, at 1014).

226. Duncan, *supra* note 110, at 1500 (citing JACK KATZ, SEDUCTIONS OF CRIME: MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL 80 (1988)).

227. *See* Benjamin Garber, *Mourning in Adolescence: Normal and Pathological*, 12 ADOLESCENT PSYCHIATRY 371, 384 (1985).

228. Epstein, *supra* note 19, at 86.

may boast about their crimes, not because they are inherently callous and coldhearted, but because bragging seems like a reasonable manner by which to gain the peer acceptance that is vital for their developing identities.[229] Youth facing the threat of incarceration may be especially likely to adopt an outward expression of toughness because popular media portrays a hardened character as a necessary survival technique in order to avoid psychological, physical, and sexual assault in prison.[230] Again, while these sociological pressures affect all potential offenders, juveniles are particularly "susceptible to influence and to psychological damage."[231]

A stark example of this principle comes from the case of sixteen-year-old Ed Tilley,[232] convicted of attempted murder. On review, an appellate court found no error in the judge's determination that Tilley lacked remorse and should thus be transferred to adult court.[233] Unfortunately, what the judge did not know was that Tilley, a self-proclaimed "coward," had intentionally acted tough in court because he was fearful of eventually encountering the sexual abuse he had seen in the popular movie *Bad Boys*.[234] As a result of judicial perceptions of his remorselessness, Ed Tilley was transferred to adult court and received a sentence of twenty-two to sixty-five years in prison.[235] The aggravation of Tilley's sentence, based on perceived remorselessness, reflects a punishment for his attempt to avoid a greater harm—an attempt that backfired with devastating consequences in part because of a judicial misinterpretation of a youthful cry for a help.

2. Developmental Limitations Reduce the Accuracy of Perceived Remorselessness

A juvenile's lack of remorse does not indicate the same deviation from appropriate moral behavior as it may for adult offenders. Whereas judges expect adults to display for the community their internal pain and suffering, juvenile offenders may be unlikely to express this because of their unique susceptibility to sociological pressures, as described above. Of equal importance, developmental limitations may inhibit juvenile expression of remorse because they are unable both to fully experience the emotion and to accurately project it.

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229. *See, e.g.*, *Roper*, 543 U.S. at 557 ("Simmons . . . was bragging about the killing, telling friends he had killed a woman 'because the bitch seen my face.'").

230. *See, e.g.*, Duncan, *supra* note 110, at 1512 n.272 (letter from Edward Tilley to Martha Grace Duncan).

231. *Roper*, 543 U.S. at 569.

232. State v. Tilley, No. CA-9059, 1993 WL 385318 (Ohio Ct. App. Sept. 20, 1993) (as discussed above in *supra* Part IV.A.2.c).

233. *Id.* at *1–3.

234. Duncan, *supra* note 110, at 1512 n.272 (letter from Edward Tilley to Martha Grace Duncan).

235. *See* Cheryl Curry, *Man Shot with Stolen Gun Tells What It's Like to Be Paralyzed: Gun Show's Promoter and Teen-Age Thieves Are Target of Civil Suit*, AKRON BEACON J., May 11, 1995, at C1. *See also* Duncan, *supra* note 110, at n.243.

Focusing on a juvenile's supposed lack of remorse fails to take advantage of the opportunity to teach youthful offenders the importance of empathy. As rehabilitation is the reigning hallmark of juvenile courts, increasing punishment before treatment based on perceived remorselessness "makes critical sentencing decisions based on incomplete data and unreliable assumptions."[236] Since this unreliability arises from the conditions of youth, such willful blindness runs afoul of *Roper*, *Graham*, and *Miller*'s demands that children be sentenced in accordance with their youthful status.

a. Courts Cannot Expect Developing Youth to Express a Learned Emotion

Using remorselessness as an aggravating factor presumes that a juvenile offender has the capacity to display this emotion.[237] Remorse encompasses both an inner feeling as well as its outward expression.[238] Judges necessarily have access only to this later piece of the emotive puzzle. And, "[t]he performance [of remorse] is not an easy one: interactions with judges and probation officers are fraught with peril for defendants and may implicate much deep-seated racial, cultural, class, and gender baggage. To convey humility and sincere regret under such circumstances cannot be a simple matter. Performance in the formal setting of the courtroom may be particularly problematic."[239] These problems are undoubtedly exacerbated when youthful offenders are expected to express remorse.

Even presuming that an adult can navigate this dilemma, youthful offenders have a particular disadvantage in expressing such expected emotions. Programs in Texas and Florida recognize this difficulty unique to youth and have developed curricula aimed at teaching youthful offenders empathy and remorse.[240] Acknowledging that such emotions can be taught demands the recognition that they are acquired, and not innate.[241] Because youth have had less time than adults to practice the social expressions of their internal emotions, it is unreasonable to expect that a juvenile would express remorse as an adult might.[242] More so, very young offenders, or those with particular developmental

236. Henning, *supra* note 109, at 1153.

237. Epstein, *supra* note 19, at 84–85.

238. *See id.* at 84.

239. Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines*, 91 NW. U. L. REV. 1507, 1555 n.56 (1997).

240. *See* Sharon K. Hamric-Weis, *The Trend of Juvenile Justice in the United States, England, and Ireland*, 13 DICK. J. INT'L L. 567, 577 (1995) (describing the empathy training goals of The Giddings Capital Offender Program in Giddings, Texas); Henning, *supra* note 109, at 1152 (describing Florida's Impact of Crime Curriculum which required the teaching of empathy and remorse).

241. Duncan, *supra* note 110, at 1522.

242. Duncan, *supra* note 110, at 1485 ("[R]emorse has to do with propriety and etiquette as well as with inner feelings. If the expression of remorse is acquired behavior, then we should be

immaturity, may not fully understand their wrongdoing.[243] Remorselessness in these instances may reasonably indicate that the offender did not comprehend the gravity of the inflicted harm.[244] A lack of remorse may simply be the result of a juvenile's limited range of developed emotions and ability to express them in a socially acceptable manner.[245] Thus, some scholars suggest that adults simply cannot infer a child's true emotions from in-court behaviors or appearances.[246] Similar to the intellectually disabled individuals protected from the death penalty by *Atkins v. Virginia*,[247] an adolescent's "demeanor may create an unwarranted impression of lack of remorse for their crimes."[248] Juveniles may thus adopt a "mask of apparent indifference as self-protection against the slings and arrows of their own turbulent feelings."[249] Without adequate training, it is likely that an adult would misinterpret these outward behaviors as a sign of the defendant's supposed remorselessness rather than her developmental immaturity.

Additionally, offenders who are less able to comprehend their crimes are less likely to demonstrate remorse.[250] A juvenile's romanticized perceptions of the world may leave her feeling as if she had no choice other than the one she made.[251] In turn, it is unlikely that she will show remorse in the courtroom as "[i]t can be difficult to experience guilt when you believe you had no alternative."[252] Some may argue that this failure to accept responsibility demands harsh punishment because it indicates a lack of rehabilitative potential. However, this rationale misses the opportunity to not only teach expressions of

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especially troubled about demanding remorse in juvenile offenders. They have had fewer years to learn that there is 'a time to weep and a time to laugh.'"). *See also* GEORGE H. ORVIN, UNDERSTANDING THE ADOLESCENT 82 ("It is normal for the adolescent to be able to feel genuine remorse for his or her misdeeds. However, failing to *show* remorse is not always proof of its absence.").

243. PROEVE & TUDOR, *supra* note 32, at 143.

244. John Martin Rich, *Moral Education and the Emotions*, 9 J. OF MORAL EDUC. 81, 82 (1980) (in evaluating perceived juvenile remorselessness, "it is reasonable to say that the individual has not fully grasped the concept of harm" or may not have a well developed concept of the crime committed).

245. Henning, *supra* note 109, at 1148–49.

246. *Id.* at 1150.

247. Atkins v. Virginia, 536 U.S. 304 (2002) (prohibiting the death penalty for persons with intellectual disabilities).

248. Brief for Respondent at 33, Roper v. Simmons, 543 U.S. 551 (2005).

249. *Id.* (quoting Duncan, *supra* note 110, at 1490, 1500) (internal quotation marks omitted).

250. Bibas & Bierschbach, *supra* note 6, at 108. *See also* Atkins v. Virginia, 536 U.S. 304, 321 (2002).

251. *See, e.g.*, People v. Eliason, 833 N.W.2d 357, 363, 362 (Mich. Ct. App. 2013) ("[D]efendant indicated that he was contemplating either committing suicide or shooting Jesse that night, but decided to kill Jesse because he was not ready to die."). See also Thomas v. Commonwealth, 419 S.E.2d 606, 618–19 (Va. 1992), in which seventeen-year-old Douglas Christopher Thomas was charged with shooting and killing his girlfriend's parents after she expressed that she "wished to get rid of [them]" in part because they threatened to break up the young relationship.

252. Duncan, *supra* note 110, at 1490.

remorse, but also to help youth learn to take responsibility.[253] After all, the "rehabilitative ideal" lies at the very center of the juvenile justice system.[254] Teaching youth pro-social behaviors, rather than punishing them for their inability to express these behaviors correlates strongly with *Roper*'s finding that punishment may not be proportional when "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."[255] In turn, because juveniles are recognized as having diminished culpability, it would be inconsistent to expect them to show remorse and then punish them for not doing so.

In *Roper*, for example, Christopher Simmons's immaturity and limited capacity to fully understand his crime was reflected in his suggestion that he and "his friends could get away with it because they were minors."[256] A trial judge might read a lack of remorse into this statement, supposedly evidenced by the defendant's being sorry only about getting caught and not about the tragedy of the offense.[257] The youth may in turn receive a longer and harsher sentence than a similarly situated defendant who never made such a remark. But, on what grounds would the judge base such a decision? The seeming callousness of Simmons's remark could be read as remorselessness, or it could also be read as demonstrating a common type of youthful immaturity: a sense of egocentricity,[258] invincibility,[259] and disregard for the finality of death.[260] The judge could ask Simmons to explain the emotions accompanying his statements, but, as described above, even this direct inquiry would not likely yield an accurate or reliable response. The one thing Simmons's statement does show is that he neither expected nor understood that his actions would lead the State to seek to terminate his life. Ultimately, it would be paradoxical to use this supposed remorselessness, a reflection only of immaturity and thus diminished culpability, to aggravate the youthful offender's sentence.

253. Henning, *supra* note 109, at 1151–52.

254. *See* Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

255. Roper v. Simmons, 543 U.S. 551, 571 (2005).

256. *Id.* at 556 (internal quotation marks omitted).

257. *Cf. Tilley*, 1993 WL 385318, at *2 (equating the juvenile defendant's misplaced sorrow over the loss of his girlfriend, as opposed to his act of shooting two men, with remorselessness).

258. *See, e.g.*, David Elkind, *Egocentrism in Adolescence*, 38 CHILD DEV. 1025, 1029–32 (1967).

259. *See, e.g.*, Mirah A. Horowitz, *Kids Who Kill: A Critique of How The American Legal System Deals With Juveniles Who Commit Homicide*, 63 L. & CONTEMP. PROBS. 133, 169–70 (2000); Stanford v. Kentucky, 492 U.S. 361, 405 (1989) (Brennan, J., dissenting) (citation omitted).

260. *See, e.g.*, Amicus Brief for the Am. Soc'y for Adolescent Psychiatry and the Am. Orthopsychiatric Ass'n for the Petitioner, Thompson v. Oklahoma, 108 S. Ct. 2687 (1988) (No. 86-6169). *See also* Duncan, *supra* note 110, at 1479 nn.45–51.

b. Remorselessness as a Pain Avoidance Technique

Even when experiencing internal sorrow, juveniles may refrain from showing remorse in order to avoid the associated emotional discomfort. Remorse itself is a type of painful suffering.[261] Its expression releases anguish and agony that accompany the acknowledgment of a crime.[262] Youth are particularly attuned to pain avoidance as emotional distress hurts them more than it does adults.[263] In turn, juveniles may fail to show remorse as a byproduct of denial or a defense mechanism against the unpleasantness of tragedy.[264] Youth may avoid showing remorse in order to suppress their own anxieties about wrongdoing as a type of preservation of the self against the external world.[265] To punish them for doing so would inappropriately penalize their natural immaturity and inability to cope with internal suffering.

One way that juveniles cope with this internal pain is through humor.[266] Judges, however, may perceive juvenile humor as an inappropriate demonstration of remorselessness.[267] As a North Carolina court observed, a "laugh itself . . . does not support [a] court's conclusion that the defendant was without remorse."[268] The court made this particularly astute observation in finding that in-court laughter may warrant reprimand, but not a finding of remorselessness.[269] Beyond legal confines, the use of humor as pain avoidance

261. Bibas & Bierschbach, *supra* note 6, at 124–25.

262. *See, e.g.*, Duncan, *supra* note 110, at 1472 (describing the anguish of remorse as "akin to being bitten repeatedly by one's own conscience"); Robbins, *supra* note 21, at 1141 ("Remorse exacts a punishment within the wrongdoer, much like guilt, but with greater force . . . .").

263. Duncan, *supra* note 110, at 1478–79 (citing Martha Wolfenstein, *How Is Mourning Possible?*, 21 PSYCHOANALYTIC STUDY OF THE CHILD 93, 101 (1966)).

264. *Id.* at 1472.

265. Charles H King, *The Ego and the Integration of Violence in Homicidal Youth*, 45 AM. J. OF ORTHOPSYCHIATRY 134, 141 (1975).

266. Duncan, *supra* note 110, at 1485–86.

267. *See, e.g.*, Commonwealth v. Archer, 722 A.2d 203, 207 (Pa. Super. Ct. 1998) (quoting the lower court's reasoning for denying de-certification as based on a perception of remorselessness because the defendant had laughed and chatted following his arrest).

268. State v. Parker, 373 S.E.2d 558, 559 (N.C. Ct. App. 1988) (holding that in-court laughter, cited by the trial judge as an aggravating factor, was not sufficient justification for the ten-year sentence). *See also* JAMES GOODMAN, STORIES OF SCOTTSBORO 306 (1995) (describing when two of the Scottsboro Boys started laughing in court when they learned each other's punishments as one had just received his third death sentence for a crime he did not commit).

269. The observations of the North Carolina appellate court are worth quoting at length:

> But the factor in aggravation as to defendant's lack of remorse for his crime was erroneously found . . . . The only evidence recorded in support of the court's finding that defendant is unremorseful is that during the sentencing proceeding defendant laughed while the prosecutor was reading statements elicited by the police that were contradicted by his testimony as to how the sexual encounter started, and his statement that he laughed because the statements read were mostly lies. Thus, the only support for the court's finding that defendant had no remorse is the laugh itself and defendant's statement that he laughed for another reason. While this evidence warrants the reprimand that the court administered it does not support the court's conclusion that the

is hardly a novel suggestion, as even blues singers have long observed the need to "laugh[] just to keep from crying."[270]

In a less lighthearted fashion, some juveniles try to avoid recognizing a painful event altogether. In Pennsylvania, a judge found that a nine-year-old defendant, on trial for murder, should be transferred to the adult system due to his lack of remorse.[271] The judge's decision relied on the child's statement that, "[i]f you don't think about it, you won't be sad."[272] Here, it is evident that denying reality would be more comforting than acknowledging a horrible situation.

Rebecca Hopfer's case, discussed above in Part IV, provides another chilling example of misguided judicial reliance on a juvenile's failure to show remorse. Rebecca, a junior in high school, had managed to keep her accidental pregnancy a secret from friends and family. As a result, she gave birth to her child at home, by herself, sitting on the bathroom floor. While her mother showered in an adjacent bathroom, Rebecca cut the umbilical cord and flushed the afterbirth down the toilet. She then wrapped the child in blankets and trash bags, took it out to the garage, and placed the bundle in a garbage bin. An Ohio appellate court upheld Rebecca's transfer to the adult criminal system based in part on her failure to show remorse over her loss.[273] This finding provides a glaring example of judicial failure to consider youthful immaturity. Demonstrating remorse over her actions would require that Rebecca not only acknowledge the reality of her loss but also her personal responsibility for the crime. These horrible events would be difficult for anyone to accept, but especially so for a juvenile, too scared to tell her family about her pregnancy in the first instance. As such, the courts seemingly demanded from Rebecca a moral response that she was not emotionally equipped to give. While judges relied on her lack of remorse as an indication of her permanently deviant character,[274] it would be much more accurate to describe her actions as an immature pain avoidance technique.

> defendant was without remorse; the only finding that it could support is that he laughed because some of the statements were false. If he did not laugh for that reason, why he laughed is entirely speculative so far as the evidence shows. Some of the many possibilities are that he laughed out of mere nervousness or meanness, or because he was an immature adolescent in the toils of the law for the first time, or because he had no remorse for his crime. One thing that is not speculative, though, but known to everyone that has spent much time in court is that defendants and other witnesses often laugh or smile at being contradicted.

Parker, 373 S.E.2d at 559.

270. DOC WATSON, YOU DON'T KNOW MY MIND (Capitol Records 1975) ("When you see me laughing/I'm laughing just to keep from crying.").

271. Commonwealth v. Kocher, 602 A.2d 1308, 1312 (Pa. 1992).

272. *Id.*

273. State v. Hopfer, 679 N.E.2d 321, 328, 330 (Ohio Ct. App. 1996).

274. *Id.* at 330–31 (upholding the trial court's perception of the defendant's "lack of remorse and skewed value system to conclude that she would not be amenable to rehabilitation or treatment

c. Failure to Express Remorse Is Not Predictive of a Juvenile's Criminality or Future Dangerousness

A perceived lack of remorse is a poor predictor of a juvenile's chronic criminal behavior.[275] Sentencing juveniles based on predictions of future dangerousness fails to take into account the youthful development factors that the Supreme Court held justified striking down the death penalty and other harsh sentencing schemes for juveniles.[276] Juvenile remorselessness does not indicate irrevocable, chronic, or even future criminality.[277] California's high court has denied the introduction of expert testimony as to the future dangerousness of individuals because such predictions are too unreliable.[278] Sentencing youthful offenders due to their purported remorselessness, which is an inaccurate proxy for future dangerousness, is not a reliable consideration in juvenile sentencing.[279] Doing so runs the risk of erroneously depriving a youth of her liberty. At the worst extreme, misinterpretations of juvenile remorselessness carry the threat of irreversible consequences, as life without the possibility of parole is still a potentially constitutional punishment for juveniles convicted of homicide.[280]

Empirical data on remorselessness and future dangerousness is sparse even for adults, and does not suggest a strong scientific connection.[281] A Texas study of inmates sentenced to death examined prosecutorial and expert predictions of future dangerousness, based in part on perceived remorselessness.[282] In 95% of the cases, these predictions were refuted by empirical data regarding actual post-

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within the juvenile penal system").

275. Duncan, *supra* note 110, at 1474.

276. *See* Roper v. Simmons, 543 U.S. 551 (2004); Graham v. Florida, 130 S. Ct. 2011, 2030 (2010); Miller v. Alabama, 132 S. Ct. 2455 (2012).

277. Epstein, *supra* note 19, at 85.

278. *See, e.g.*, People v. Murtishaw, 631 P.2d 446, 466–67 (Cal. 1981).

279. *See* Roper v. Simmons, 543 U.S. 551, 569 (2005) (acknowledging that the differences between youth and adults make certain classifications of youthful offenders unreliable).

280. Fortunately, a determination of remorselessness can no longer contribute to a juvenile death sentence, though that was not always the case. *See* Thomas v. Commonwealth, 419 S.E.2d 606, 618–19 (Va. 1992) ("Thomas argues that the prosecutor's remark about lack of remorse 'had no relevance . . . and only served to further inflame and prejudice the jury.' We disagree with Thomas . . . . [I]t is 'obviously proper' for a jury in a capital case to consider testimony of the defendant's lack of 'regret or remorse' in determining 'dangerousness.'"). However, in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the Supreme Court did not, for now, entirely foreclose the possibility of life without parole sentences for juveniles. The Court did observe that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon," as courts must consider "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at 2469.

281. PROEVE & TUDOR, *supra* note 32, at 120 (acknowledging that there are no clear and settled findings on the connection between remorselessness and recidivism).

282. Epstein, *supra* note 19, at 85. *See also* TEX. DEFENDER SERV., DEADLY SPECULATION: MISLEADING TEXAS CAPITAL JURIES WITH FALSE PREDICTIONS OF FUTURE DANGEROUSNESS (2004), *available at* http://www.texasdefender.org/images/publications/DEADLYSP.pdf [hereinafter DEADLY SPECULATION].

sentencing behavior.[283] Similarly, a meta-analysis of sexual offender recidivism studies found that a low clinical presentation of remorse, among other variables measuring "psychological maladjustment," did not correlate with sexual recidivism and had only a small relation to general recidivism.[284] Another study shows that clinical assessments of remorse do not correlate significantly with future recidivism.[285]

Legal scholars note the gap and weakness in expert knowledge relating to youthful remorselessness. Professor Martha Grace Duncan observes, "[T]he problems of evaluating remorsefulness cannot be solved merely by mandating the use of mental health experts [whose] opinions are not sacrosanct."[286] If psychological experts trained in identifying remorse cannot accurately predict an individual's recidivism,[287] then it is unlikely that judges or juries would be any more accurate. Nor would training fact-finders on the frailties of perceived remorselessness necessarily solve these problems. As Professor Jules Epstein notes:

> [E]ven if juries could be instructed to avoid an unreliable use of this evidence (i.e., to not use it to predict future dangerousness . . .), the dilemma remains—what is at the root of this apparent remorselessness—a true hardness of heart; a flawed, interrupted or not-yet complete neurological and emotional development; dissembling; or a perverse attempt at warding off the pain of responsibility? In their own way, remorseless words or demeanor may be as insolubly ambiguous as silence.[288]

Not only is remorse a poor predictor of future criminality in general, but making such determinations about a youth's character based on her current behavior does not comport with the constitutional requirements of *Graham* and its progeny.[289] For adults, a lack of remorse is used to indicate limited

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283. Epstein, *supra* note 19, at 85. *See also* DEADLY SPECULATION, *supra* note 282.

284. R. Karl Hanson & Monique T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. OF CONSULTING AND CLINICAL PSYCHOL. 348, 357 (1998) (noting that remorselessness may have a "small relationship to general [as opposed to sexual] recidivism").

285. RALPH C. SERIN, DONNA L. MAILLOUX & STEVE HUCKER, THE UTILITY OF CLINICAL AND ACTUARIAL RISK ASSESSMENTS FOR OFFENDERS IN PRE-RELEASE PSYCHIATRIC DECISION-MAKING 11, 12 (2000), *available at* http://www.csc-scc.gc.ca/research/092/r95_e.pdf. Table 2 demonstrates that the clinical assessment of remorse was not statistically significant in predicting overall recidivism or violent recidivism. *Id.*

286. Duncan, *supra* note 110, at 1517.

287. Roper v. Simmons, 543 U.S. 551, 573 (2005) ("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.").

288. Epstein, *supra* note 19, at 86.

289. Graham v. Florida, 130 S. Ct. 2011, 2026 (2010) (quoting *Roper*, 543 U.S. at 569–70) (internal quotation marks omitted) (holding that juveniles are less deserving of the most severe punishments because they have lessened culpability due in part to the fact that their "characters are not as well formed" as those of adults). *See also* Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012)

rehabilitative potential, often evidenced by a lifelong pattern of criminality. Recognizing that juveniles are most in need of rehabilitation, punishing them for perceived remorselessness amounts to administering punishment based on their developmental or sociological needs, rather than on their true blameworthiness.[290] Furthermore, characteristics underlying remorselessness, such as egocentrism and a lack of empathy, are so common to adolescent development that they simply do not have the same predictive value for future behavior as they may for adults.[291]

Relying on subjective factors to aggravate a juvenile's sentence risks erroneous deprivation of her liberty and denies her the opportunity to demonstrate growth and maturity.[292] As *Graham* held, the risk of inaccurate judicial determinations of incorrigibility[293] violates a juvenile's constitutional protections.[294] Similar to the determinations of incorrigibility that accompany an LWOP sentence, judicial determinations of remorselessness require a presumption about a juvenile's future character. Thus, using perceived remorselessness to aggravate a youth's sentence runs the same risk of erroneous punishment that *Graham* held to be unconstitutional.

C. Use of Remorselessness to Aggravate Juvenile Sentences Is Unconstitutional

Juveniles have a right to have their youth considered in sentencing practices. The Supreme Court recognizes that youth are different from adults for the

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(holding that making irrevocable judgments about youthful offenders is "at odds with a child's capacity for change").

290. *Graham*, 130 S. Ct. at 2030 ("[J]uvenile offenders . . . are most in need of and receptive to rehabilitation.").

291. Duncan, *supra* note 110, at 1522. Robert D. Hare, *The Hare Psychopathy Checklist Revised* (Toronto, Ontario: Multi-Health Systems, 1991) (describing characteristics indicative of psychopathy in adults that may otherwise be normal traits of immature adolescents). *See also* MACARTHUR FOUND. RESEARCH NETWORK ON ADOLESCENT DEV. AND JUVENILE JUSTICE, ASSESSING JUVENILE PSYCHOPATHY: DEVELOPMENTAL AND LEGAL IMPLICATIONS, *available at* http://www.adjj.org/downloads/4536issue_brief_4.pdf. The study reports a decline in juveniles' scores on psychopathy tests over time, as compared to adults. One logical conclusion is that the measurements stem from adolescents' increasing maturity. Consequently, "[b]ecause many of these conditions are normal and often transient developmental characteristics of adolescence [as compared to adulthood] it may be a mistake to use these as markers of an irredeemable character . . . . [T]here is currently little empirical support for using assessments of psychopathy to inform long-term decisions . . . . [and] it is imperative that the assessments used to make potentially life-altering decisions be based on accurate and valid indicators." *Id.*

292. *Cf. Graham*, 130 S. Ct. at 2032 ("The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential. . . . Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation.").

293. *Id.* at 2029 ("[I]ncorrigibility is inconsistent with youth.").

294. *Id.* ("Even if the State's judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset. A life without parole sentence improperly denies the juvenile offender a chance to demonstrate growth and maturity.").

purpose of criminal sentencing.[295] This is first demonstrated in the Court's categorical bans on specific punishments for juvenile offenders: *Roper* banned the death penalty for any juvenile crime[296] and *Graham* similarly banned the use of LWOP for any juvenile non-homicide offense.[297] In banning these punishments, the Court found that neither punishment served its underlying penological purposes of retribution or deterrence when applied to juvenile offenders.[298]

The Supreme Court's juvenile sentencing decisions have been driven by a growing appreciation for the ways in which youth are cognitively different from adults. As described above, the Court has expressed concern that youth are susceptible to peer pressure, developmentally immature, and simply not yet formed in their character.[299] *Roper* and *Graham* explain that these findings are not only relevant, but in fact necessary considerations when evaluating the culpability of a juvenile's criminal act.[300] *Miller* reiterates that the Constitution requires consideration of "the background and mental and emotional development of a youthful defendant."[301] It is no longer acceptable to treat a juvenile the same as an adult for the purpose of sentencing.[302]

The Court recognizes youth as a special consideration in contexts beyond categorical bans on the harshest punishments.[303] In *Graham*, the Court insisted that considerations of youth were applicable to all criminal procedure, not only to categorical challenges of specific punishments.[304] The idea that juveniles

295. *See, e.g.*, *id.* at 2031 (noting that youth must be considered at sentencing, a stage of the criminal process at which "no judicial responsibilities are more difficult").

296. *See* Roper v. Simmons, 543 U.S. 551, 575 (2005).

297. *See Graham*, 130 S. Ct. at 2030.

298. *See Roper*, 543 U.S. at 572 (concluding that "neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders"); *Graham*, 130 S. Ct. at 2030 ("In sum, penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders.").

299. *See* Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012) (Breyer, J., concurring) ("[C]ompared to adults, juveniles have a lack of maturity and an underdeveloped sense of responsibility; they are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed.") (quoting *Graham*, 130 S. Ct. at 2026).

300. *See Roper*, 543 U.S. at 570; *Graham*, 130 S. Ct. at 2026.

301. *Miller*, 132 S. Ct. at 2467 (quoting Eddings v. Oklahoma, 455 U.S. 104, 116 (1982)).

302. *See id.* at 2464 ("[C]hildren are constitutionally different from adults for purposes of sentencing.").

303. *See id.* at 2466 (extending considerations of youth beyond the sentence itself to the actual sentencing procedures).

304. *See Graham*, 130 S. Ct. at 2031 ("[C]riminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."). *See also* Guggenheim, *supra* note 84, at 492 ("The substantive right in this situation is a juvenile's right not to be treated invariably as an adult for sentencing purposes, not that the sentence itself violates the child's substantive right. In order to determine what sentence is proper to impose on the juvenile, there must be a hearing on the question at which the state must bear its burden of proving that the juvenile deserves the same sentence that the legislature would impose automatically on an adult."); *id.* at 499 ("*Graham* does not rule out the possibility that juveniles and adults may receive identical sentences but merely

cannot be as deserving of a given sanction as an adult is equally applicable "for the harshest sentences courts can impose as for lesser sentences."[305] The extension of *Roper*'s reasoning to non-capital cases represents "a new constitutional principle: Juveniles are different."[306] Recent scholarship contends that youthful factors should be considered beyond the punishment as well, both in reevaluating mandatory sentencing procedures and transfer decisions.[307] So too should these considerations extend to judicial evaluations of a juvenile's post-arrest or in-court behavior.

Judicial evaluations of a juvenile's behavior in making sentencing decisions cannot ignore the well-recognized developmental limitations characteristic of youth. As explained above, judges often cite their interpretations of youthful behavior as indicating supposed remorselessness.[308] They rely on this perceived remorselessness as predictive of either future dangerousness or reflective of an inappropriate moral response. Even if this supposition were acceptable for adults, the same reasoning cannot be true for youthful offenders. The categorical bans of *Roper* and *Graham* represent the idea that a juvenile's criminal act is not determinative proof of her character.[309] In turn, a juvenile's punishment cannot reflect merely the fact of the charged crime, but it must also be based on the considerations of an offender's youthful status and the accompanying frailties. These include the sociological and developmental pressures explained above that inhibit expressions of remorse.[310] The logic of *Graham* simply forbids treating juveniles as if they were the same as adults, at least with regards to criminal proceedings.

The developmental issues at play in juvenile behavior mean that judicial perceptions of remorselessness in youth are less accurate than perceptions of adult remorselessness. Sociological pressures limit a youth's expression of remorse.[311] In addition, these expressions are hindered by developmental limitations ranging from an inability to fully appreciate the sensation of remorse, to inadvertent pain avoidance techniques that result in the suppression of otherwise existing emotions.[312] Thus, adult interpretations of perceived remorselessness are frequently misguided. Such perceptions are inaccurate predictors of genuine emotion and inaccurate proxies for future dangerousness.

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requires consideration of the differences between juveniles and adults prior to sentencing.").

305. Guggenheim, *supra* note 84, at 490.

306. *Id.* at 463 (internal quotation marks omitted).

307. *See, e.g.*, Michelle Marquis, Graham v. Florida*: A Game-Changing Victory for Both Juveniles and Juvenile-Rights Advocates*, 45 LOY. L.A. L. REV. 255, 260, 288 (2011); Guggenheim, *supra* note 84, at 464; Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 133 (2010).

308. *See supra* Part IV.

309. *See Graham*, 130 S. Ct. at 2029 (challenging possibility of accurately determining a youth's incorrigibility based on their criminal act).

310. *See supra* Part V.

311. *See supra* Part V.B.1.

312. *See* Part V.B.2.

Basing sentencing decisions on such attenuated misinformation is doubly troubling. Consequently, judges should refrain from using perceived remorselessness in sentencing.

The use of perceived remorselessness in sentencing juveniles violates their right to be sentenced in consideration of their youth. The Supreme Court has effectively mandated that courts give consideration to youthful characteristics at all stages of the criminal process.[313] This includes sentencing. The inaccuracies of perceived juvenile remorselessness arise from the very factors of youthful immaturity that the Court has demanded should play a mitigating role. Sentencing a youthful offender based on her inability to adequately express remorse thus punishes the youth for that which she cannot be expected to give. This practice is unsupportable and unconstitutional as a basis for punishing juveniles.

D. Possible Remedies

Even more difficult than recognizing the frailties of perceived remorselessness may be recognizing a potential remedy that would apply if sentencing juveniles based on remorselessness were deemed unconstitutional. Training judges to properly evaluate juveniles' behavior in light of their unique developmental stages might provide a solution. However, as previously discussed, training judges might not be a cure-all because even trained psychologists recognize the difficulties of accurately perceiving the true motives behind juveniles' outward behaviors, such as expressed remorselessness.[314] Yet training judges to beware of how they perceive certain behaviors as remorseless and how to avoid relying on these perceptions in sentencing would certainly be a good start. Judges who preside over juvenile offenders should understand the constitutionally recognized cognitive differences between youth and adults.

However, it is unlikely that even trained judges will be able to stop themselves from unconsciously considering remorselessness when imposing sentences. Another possible remedy would be to ban explicit considerations of remorse by judges. However, judges could easily avoid discussing remorselessness outright while still basing their decisions on their perceptions, thus tailoring judicial opinions to constitutional requirements without realizing any effect on the actual outcome of cases. Despite this danger, banning explicit considerations of remorselessness might at least give youthful offenders legitimate grounds for appeal when judges fail to follow this prescribed rule.

In a similar vein, legislatures could try to resolve the problem of juvenile judges relying on perceptions of remorselessness by explicitly recognizing that a "lack of remorse" cannot be treated as an aggravating sentencing factor. If

313. *Graham*, 560 U.S. at 76 ("An offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.").

314. *See supra* Part V.A.

judges are told not only not to consider remorse, but also to explicitly ignore their perceptions of remorse in determining sentences, then one could hope that they would respect this legal edict. Those judges who deviate would quickly learn to cease relying on inappropriate considerations when remorselessness-based sentences are sent back on appeal. It will be a difficult process to stop personal biases and assumptions from influencing the bench, but disallowing specific findings and guiding judges towards others may help the process along. There is no easy solution to the problem, but a combination of the proposed remedies would likely reduce the number of instances where young people are unconstitutionally punished for behavior that is a poor indicator of their true feelings or future dangerousness. At the very least, efforts should be made to make judges aware of the fallibility of their perceptions of remorselessness.

VI.
CONCLUSION

Using perceived remorselessness to sentence a juvenile makes considerably less sense than it does for adults, and in many situations it makes no sense. When the Supreme Court's reasoning in the *Roper*, *Graham*, and *Miller* decisions is properly analyzed, it leads inexorably to the conclusion that sentencing juveniles based on perceptions of remorselessness is unconstitutional. The Supreme Court recognizes that the unique qualities of youth demand consideration in criminal proceedings, especially during sentencing. Youthful immaturity, sociological pressures, and adult biases and fears about youth all contribute to the possible inaccuracies of perceived remorselessness. Not only are juveniles' outward behaviors not necessarily expressive of their internal emotions, but even internal emotions do not accurately predict future behavior. To draw inferences about future criminality, lack of rehabilitative potential, or moral deservingness from a perceived lack of remorse in a child is unfounded at best, and unconstitutional at worst. The Supreme Court has demanded that the difference between adults and children be taken into account when sentencing youthful offenders, and a legal system that is routinely indifferent to this distinction is unjust.