MENDING THE FEDERAL SENTENCING GUIDELINES APPROACH TO CONSIDERATION OF JUVENILE STATUS

In a series of recent cases, the Supreme Court has reaffirmed the profound significance of a juvenile offender's age in sentencing,[1] seemingly rendering youth status[2] a mandatory sentencing consideration as a constitutional matter — in at least some cases — and under the statutory sentencing directive.[3] Still, as a matter of policy, the Federal Sentencing Guidelines (Guidelines) — the required starting point for sentencing courts in federal cases and the benchmark for assessing the reasonableness of a sentence for appellate courts[4] — discourage consideration of an offender's youth and related circumstances in determining whether to depart from the recommended statutory sentencing range.[5] Though after *United States v. Booker*[6] the Guidelines have been advisory only,[7] the Court has recognized that even advisory Guidelines can, at times, exert an impermissible anchoring effect on sentencing courts.[8]

This Note argues that Congress and the United States Sentencing Commission (Commission) should take seriously both the letter and

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[1] *See* Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) ("*Miller* . . . established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" (quoting Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012))); *Miller*, 132 S. Ct. at 2464 ("*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing."); Graham v. Florida, 560 U.S. 48, 92 (2010) (Roberts, C.J., concurring in the judgment) (noting a "general presumption of diminished culpability that *Roper* indicates should apply to juvenile offenders"); Roper v. Simmons, 543 U.S. 551, 572–73 (2005) ("The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.").

[2] Under most state and federal laws, a "juvenile" for sentencing purposes is an offender convicted of an act that was committed before his or her eighteenth birthday. *See, e.g.*, 18 U.S.C. § 5031 (2012).

[3] *See id.* § 3553(a). Section 3553(a) requires sentencing judges to consider "the history and characteristics of the defendant" in "impos[ing] a sentence sufficient, but not greater than necessary" to achieve the statutory purposes of sentencing. *Id.*

[4] *See* Peugh v. United States, 133 S. Ct. 2072, 2087 (2013) ("District courts must begin their sentencing analysis with the Guidelines in effect at the time of the offense and use them to calculate the sentencing range correctly; and those Guidelines will anchor both the district court's discretion and the appellate review process . . . .").

[5] *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.12 (U.S. SENTENCING COMM'N 2015) [hereinafter GUIDELINES] (prohibiting courts from considering "[l]ack of guidance as a youth and similar circumstances"); OFFICE OF GEN. COUNSEL, U.S. SENTENCING COMM'N, DEPARTURE AND VARIANCE PRIMER 30 (2013) (listing age as a "Discouraged Ground[] for Departures").

[6] 543 U.S. 220 (2005).

[7] *See id.* at 246.

[8] *Cf. Peugh*, 133 S. Ct. at 2078 (holding that the Ex Post Facto Clause is violated when an offender is sentenced under an advisory Guideline that became effective after the individual committed an offense even though the statutorily authorized sentencing range remained the same).

spirit of the Court's recent juveniles-are-different cases, which favor a return to a rehabilitative approach to young offenders. Congress should address apparent conflicts between its statutory sentencing schemes and these recent cases by expanding the range of sentencing options for juvenile offenders convicted in federal court, and the Commission should promulgate new rules regarding calculation of sentences for juveniles convicted as adults in federal court. Further, until such rules are promulgated, this Note contends that appellate courts should hesitate to presume reasonable within-Guideline sentences for juvenile offenders absent evidence that a sentencing court has considered age.

This Note proceeds in four parts. Part I provides a brief history of the Guidelines, from development through the Court's attempts to clarify their place post *Booker*. Part II describes the history of the treatment of juvenile offenders in federal courts and details the Court's recent juveniles-are-different sentencing jurisprudence. Part III argues that, for various reasons of law and policy, both Congress and the Commission should offer new guidance on how courts should approach the process of sentencing juvenile offenders convicted as adults. Finally, Part IV recommends statutory changes and amendments to the Guidelines.

I. A BRIEF HISTORY OF THE GUIDELINES

This Part provides a brief history of the development and evolving role of the Guidelines. Section I.A charts the embrace of a determinate sentencing regime. Section I.B briefly details the Court's decision in *Booker* and describes the Court's attempts at clarifying the muddle — and the place of the Guidelines — in the years after *Booker*.

A. From Indeterminate Sentences to Mandatory Guidelines

For about a century until 1984, well-established tradition afforded federal district court judges wide latitude to sentence convicted criminal offenders.[9] Predicated on "the offender's possible, indeed probable, rehabilitation"[10] and the notion that trial court judges "'see[] more and sense[] more' than the appellate court"[11] and the legislature, the indeterminate-sentencing system allowed sentencing judges to define the scope and extent of punishment with little intervention from appel-

[9] *See* Mistretta v. United States, 488 U.S. 361, 363 (1989) ("For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing."); *see also* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9–37 (1998).

[10] *Mistretta*, 488 U.S. at 363.

[11] *Id.* at 364 (quoting Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 663 (1971)).

late courts.[12] But beginning in 1933, empirical studies tracked marked disparities in judges' sentencing practices that could not be explained by reference to the characteristics of defendants or their crimes.[13] Judges' idiosyncratic preferences carried the day, and approaches to sentencing varied within and across jurisdictions.[14] Researchers and judges began to question both the rehabilitative potential of prisons[15] and the propriety of offering judges such broad, unguided sentencing discretion.[16]

In 1975, Senator Edward Kennedy introduced legislation to address disparities in sentencing.[17] Nine years later, the 98th Congress enacted and President Reagan signed, as part of the Comprehensive Crime Control Act of 1984[18] (CCCA), the Sentencing Reform Act of 1984[19] (SRA). Regarded by some as ushering in "the most dramatic change in sentencing law and practice in our Nation's history,"[20] the SRA largely repudiated the rehabilitative goal of imprisonment,[21] practically abol-

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[12] *See* Koon v. United States, 518 U.S. 81, 96 (1996) ("Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal." (first citing Dorszynski v. United States, 418 U.S. 424, 431 (1974); then citing United States v. Tucker, 404 U.S. 443, 447 (1972))).

[13] *See, e.g.*, Frederick J. Gaudet et al., *Individual Differences in the Sentencing Tendencies of Judges*, 23 J. CRIM. L. & CRIMINOLOGY 811 (1933); *see also* Ilene H. Nagel, Foreword, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 897 & n.82 (1990) (collecting studies).

[14] S. REP. NO. 98-225, at 38 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3221 ("Every day federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances."); Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1687–89 (1992) (describing the various approaches judges adopted in determining how to arrive at sentences).

[15] *See, e.g.*, Francis A. Allen, *The Decline of the Rehabilitative Ideal in American Criminal Justice*, 27 CLEV. ST. L. REV. 147 (1978).

[16] Then-Professor Marvin Frankel's critiques were among the most influential. *See generally, e.g.*, Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

[17] *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 230–36 (1993) (discussing congressional activity on sentencing reform in the 1970s).

[18] Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended in scattered sections of 18 U.S.C.).

[19] Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

[20] U.S. SENTENCING COMM'N, THE SENTENCING REFORM ACT OF 1984: PRINCIPAL FEATURES AFFECTING GUIDELINE CONSTRUCTION, http://www.ussc.gov/research/research-and-publications/simplification-draft-paper-2 [https://perma.cc/N7LG-74DS].

[21] *See* 28 U.S.C. § 994(k) (2012) ("The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant . . . ."); *see also* S. REP. NO. 98-225, at 38 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3221 ("[A]lmost everyone involved in the criminal justice system now doubts that rehabilitation can be induced reliably in a prison setting . . . .").

ished parole at the federal level,[22] and established a right to appellate review of sentences.[23] To replace the indeterminate system, the SRA created the Commission[24] and directed the Commission to develop an appropriate sentencing range for "each category of offense involving each category of defendant."[25]

Under the Commission's promulgated Guidelines, district courts follow a three-step process. At the first step, the court calculates the applicable Guideline range, including any appropriate sentencing enhancements. For this step, the Commission devised a sentencing table which focuses primarily on two factors: the seriousness of an offense[26] and the offender's prior criminal history.[27] On the sentencing table, a judge is to find the point at which the base offense level intersects with the offender's criminal history category — a sentencing range.[28] At the second step, the court may consider motions for departure from this range. As enacted, the SRA required sentencing courts to select a sentence from within the Guideline range unless "there exist[ed] an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission."[29] Critically, in determining whether circumstances existed that might justify departure from the Guidelines, courts could "consider only the sentencing guidelines, policy statements, and official commentary of

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[22] *See* Pub. L. No. 98-473, tit. II, § 218(a)(5), 98 Stat. 2027 (1984) (repealing 18 U.S.C. ch. 311, §§ 4201–4218 (1982)). Supervised release, a term of conditional release to be served after — not in lieu of — imprisonment, replaced parole. *See* 18 U.S.C. § 3583 (2012).

[23] *See* 18 U.S.C. § 3742.

[24] 28 U.S.C. § 991(a).

[25] *Id.* § 994(b)(1). In establishing the categories of offenses, Congress directed the Commission to consider, among other things and to the extent relevant, "the circumstances under which the offense was committed" and "the deterrent effect a particular sentence may have on . . . others." *Id.* § 994(c). In establishing categories of defendants, the Commission was to consider — again, only to the extent deemed relevant — age, education, role in the offense, and criminal history, among other things. *Id.* § 994(d). It appears the Commission determined that age was not a relevant consideration as age is not accounted for in the Guideline tables.

[26] To determine the seriousness of the offense — the Guidelines provide forty-three levels — judges are directed to begin with the base offense level assigned to each type of crime and to some specific offense characteristics. U.S. SENTENCING COMM'N, AN OVERVIEW OF THE FEDERAL SENTENCING GUIDELINES 1, http://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf [https://perma.cc/NX6X-HD4X]. Next, judges are to adjust the offense level up or down based on factors including an offender's minimal participation in an offense, an offender's knowledge that the victim was particularly vulnerable, an offender's acceptance of responsibility, the rules for multiple counts, or an offender's efforts to obstruct justice. *See* GUIDELINES, *supra* note 5, §§ 3A1.1–3E1.1.

[27] U.S. SENTENCING COMM'N, *supra* note 26, at 2.

[28] *Id.* at 3.

[29] 18 U.S.C. § 3553(b) (2012).

the Sentencing Commission."[30] Finally, at step three, a court may consider the recommended Guideline range and § 3553(a), which requires that judges "impose a sentence sufficient, but not greater than necessary" to satisfy the purposes of punishment and mandates considerations — seemingly apart from the Guidelines and policy statements offered by the Commission — of "the nature and circumstances of the offense and the history and characteristics of the defendant."[31]

B. Challenges to the SRA and the Use of the Guidelines Today

Though the SRA survived early challenges,[32] a series of cases beginning in 2000 disrupted application of the Commission-designed framework.[33] The most significant challenges came in companion cases *United States v. Booker* and *United States v. Fanfan*.[34] A fractured Court held that the Guidelines are subject to the rule set out in *Apprendi v. New Jersey* and *Blakely v. Washington* — the Sixth Amendment requires a jury, rather than a judge, to find any facts that increase the possible range of sentences for an underlying crime.[35] But instead of striking down the SRA or the Guidelines, the Court determined that the Sixth Amendment problem could be remedied by excising the provisions that made the Guidelines mandatory and those that set forth a de novo standard of appellate review of departures from the Guidelines.[36] In place of the de novo standard, federal courts of appeals were told to review sentences for "reasonableness."[37] Most critically, the Court declared that "district courts, while not bound to apply

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[30] *Id.*; *see also* Williams v. United States, 503 U.S. 193, 201 (1992) ("Where . . . a policy statement prohibits a district court from taking a specified action, the statement is an authoritative guide to the meaning of the applicable Guideline.").

[31] 18 U.S.C. § 3553(a)(1).

[32] *See* Mistretta v. United States, 488 U.S. 361 (1989) (upholding the constitutionality of the Guidelines).

[33] In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), a case arising in the state court system, the Supreme Court held that the Fourteenth Amendment right to due process and the Sixth Amendment right to trial by jury required that any fact, other than a defendant's prior conviction, that increases the penalty for a crime above the statutory maximum must be proved to a jury beyond a reasonable doubt. *Id.* at 490. Four years later, the Court applied *Apprendi* to a state analogue to the SRA. In *Blakely v. Washington*, 542 U.S. 296 (2004), the Court held that where a state's sentencing procedure required the finding of additional facts to support sentencing a defendant to a term of imprisonment beyond the maximum of the standard range authorized for that crime, those facts must be proved to a jury beyond a reasonable doubt. *See id.* at 301–05. The Court made clear that it had not addressed the constitutionality of the Guidelines under *Apprendi*. *Id.* at 305 n.9. Still, some circuit courts doubted that the Guidelines could be meaningfully distinguished from those at issue in *Blakely*. *See, e.g.*, United States v. Ameline, 376 F.3d 967, 974 (9th Cir. 2004) ("We join the Seventh Circuit in holding that there is no principled distinction between the Washington Sentencing Reform Act at issue in *Blakely* and the [Guidelines]." (footnote omitted)).

[34] 543 U.S. 220 (2005).

[35] *See id.* at 236–37, 244 (Stevens, J., delivering the opinion of the court in part).

[36] *Id.* at 259 (Breyer, J., delivering the opinion of the court in part).

[37] *Id.* at 261–63.

the Guidelines, must consult those Guidelines and take them into account when sentencing,"[38] an approach that the Court acknowledged was "not the system Congress enacted," but which "nonetheless continue[d] to move sentencing in Congress' preferred direction."[39]

Following *Booker*, the Court rendered a series of decisions regarding how judges should apply the now-advisory Guidelines. In *Rita v. United States*,[40] the Court held that appellate courts may apply a nonbinding presumption of reasonableness when reviewing within-Guideline sentences.[41] Then in *Gall v. United States*,[42] the Court held that appellate courts were not permitted to assume that sentences outside of the Guideline range were unreasonable, but could consider the extent of deviation from the Guideline range.[43] Beyond simply "calculating the applicable Guidelines range,"[44] district courts must also "giv[e] both parties an opportunity to argue for whatever sentence they deem appropriate,"[45] and must "consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party."[46] Accordingly, sentencing courts were barred from presuming reasonable within-Guideline sentences.[47] That same Term, in *Kimbrough v. United States*,[48] the Court held that district courts are free to disagree with and disregard the policy choices reflected in the Guidelines[49] and may determine that the Guideline recommendation is "greater than necessary" under § 3553.[50]

The upshot of the Court's post-*Booker* decisions is that while the Guidelines and the Commission's policy statements no longer have the force of law, the Guidelines remain a vital — and required — starting

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[38] *Id.* at 264.

[39] *Id.*

[40] 551 U.S. 338 (2007).

[41] *Id.* at 347. The *Rita* Court reasoned that, though a presumption of reasonableness might encourage sentencing judges to impose within-Guideline sentences, such an approach did not violate the Sixth Amendment and might support Congress's goal of promoting uniformity and consistency in sentencing. *Id.* at 352–55. After all, the Guidelines sought "to embody the § 3553(a) considerations . . . [and] it is fair to assume that [they], insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives." *Id.* at 350.

[42] 552 U.S. 38 (2007).

[43] *Id.* at 47.

[44] *Id.* at 49.

[45] *Id.*

[46] *Id.* at 49–50.

[47] *Id.* at 50.

[48] 552 U.S. 85 (2007).

[49] *See id.* at 91.

[50] *See id.* at 110 ("[I]t would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the [Commission's policy choice] yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case."). Even "a categorical disagreement with and variance from the Guidelines is not suspect." Spears v. United States, 555 U.S. 261, 264 (2009).

point for all federal sentencing. In short, a sentencing court must still calculate a criminal history level and offense level and use that information to determine the advisory Guideline range. Only then is a court free to adjust — upward or downward — based on its judgment that the Commission's recommendation does not account for all of the relevant § 3553 factors. On review, an appellate court must "ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, [or] failing to consider the § 3553(a) factors."[51]

II. A BRIEF HISTORY OF JUVENILE PROSECUTIONS IN FEDERAL COURT

This Part provides a brief history of juvenile-justice policy, with particular emphasis on the shifting positions on consideration of adolescence in federal courts. Section II.A describes the creation of separate state juvenile-justice systems and later federal efforts to keep juveniles out of federal courtrooms. Section II.B describes the Commission's guidance on the sentencing of juvenile offenders. Section II.C explains the Supreme Court's recent juveniles-are-different sentencing jurisprudence.

A. History of the Creation of a Separate Juvenile-Justice System

Children have been viewed and treated differently under American law since the early 1800s.[52] Separate state juvenile-justice systems were created during this era.[53] These systems focused on rehabilitating offenders under the age of eighteen, saving these children — whose parents or guardians were unable or unwilling to do so — from the stigma of being branded criminals.[54]

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[51] *Gall*, 555 U.S. at 51.

[52] *See generally* Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970). Early in American history, state law explicitly prescribed differential treatment for children under the age of seven, who were believed to lack the maturity to appreciate their potentially criminal behavior. *See* CHARLES DOYLE, CONG. RESEARCH SERV., RL30822, JUVENILE DELINQUENTS AND FEDERAL CRIMINAL LAW: THE FEDERAL JUVENILE DELINQUENCY ACT AND RELATED MATTERS 1 (2004). From ages seven to thirteen, states presumed children innocent, but the presumption was rebuttable. *Id.*

[53] *See* NAT'L COMM'N ON LAW OBSERVANCE & ENF'T, THE CHILD OFFENDER IN THE FEDERAL SYSTEM OF JUSTICE 2 (1931) [hereinafter WICKERSHAM COMM'N REPORT] ("The creation and development of the juvenile court in the American States has been made possible by a line plainly drawn between child and adult in the State law. The child offender is generally dealt with on a noncriminal basis and has been protected from prosecution and conviction for crime.").

[54] *See* Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 109 (1909) ("[T]o save [a child] from the brand of criminality, the brand that sticks to it for life; to take it in hand and instead of first stigmatizing and then reforming it, to protect it from the stigma, — this is the work

But as juvenile-justice systems popped up in states across the country into the 1930s, the federal government continued to treat juvenile offenders just as it treated adults.[55] Recognizing that the acts for which children were being convicted would likely have been treated as juvenile delinquency cases in state courts[56] and that the average federal court was not equipped to "give the case of the child offender the peculiar consideration which it should receive,"[57] a Commission led by former Attorney General George Wickersham recommended that the federal government withdraw from prosecuting juveniles.[58] The Federal Juvenile Delinquency Act of 1938[59] (FJDA) codified these recommendations, and amendments made to the FJDA by the Juvenile Justice and Delinquency Prevention Act of 1974[60] barred the federal government from prosecuting juvenile delinquency unless the Attorney General certified that either (1) a state court did not have jurisdiction over the matter or refused to accept authority over the matter or (2) the state lacked the services to address the needs of the juvenile.[61]

In 1950, Congress enacted a robust alternative sentencing system designed to treat and rehabilitate, rather than to punish, youth offenders.[62] The Federal Youth Corrections Act[63] (FYCA), which included provisions applicable to juveniles under eighteen years of age and for young adult offenders as old as twenty-six, expanded the universe of sentencing options[64] and required rehabilitative treatment in facilities

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which is now being accomplished by dealing even with most of the delinquent children through the court that represents the *parens patriae* power of the state . . . .").

[55] *See* WICKERSHAM COMM'N REPORT, *supra* note 53, at 2 ("This clear distinction [between child and adult] . . . has never been made in the Federal Law. The child approaches the courts of the United States on the same footing as the adult.").

[56] *See id.* ("The great majority of juvenile offenders against the Federal laws are typical delinquency cases. It is only by accident that they have fallen within the Federal jurisdiction.").

[57] *Id.* at 3; *see also id.* at 3–5; *id.* at 155 ("Our problem is not solely to secure the welfare of the child offender and the protection of society by means of administrative changes but to enunciate the more fundamental principle that childhood has a status distinct from that of the adult.").

[58] *Id.* at 154.

[59] Pub. L. No. 75-666, 52 Stat. 764, 764–66 (codified as amended at 18 U.S.C. §§ 5031–5042 (2012)).

[60] Pub. L. No. 93-415, 88 Stat. 1109 (codified as amended in scattered sections of 18 and 42 U.S.C.).

[61] *Id.* § 502, 88 Stat. at 1134 (codified at 18 U.S.C. § 5032); William S. Sessions & Faye M. Bracey, *A Synopsis of the Federal Juvenile Delinquency Act*, 14 ST. MARY'S L.J. 509, 518 (1983).

[62] *See* Fred C. Zacharias, *The Uses and Abuses of Convictions Set Aside Under the Federal Youth Corrections Act*, 1981 DUKE L.J. 477, 477, 483.

[63] Ch. 1115, 64 Stat. 1089 (1950) (codified as amended at 18 U.S.C. §§ 5005–5026 (1976)) (repealed 1984).

[64] Under the FYCA, a juvenile offender could be placed on probation if the court found that he did not need commitment, 18 U.S.C. § 5010(a); given a six-year indeterminate rehabilitative sentence, *id.* §§ 5010(b), 5017(c); given a rehabilitative sentence of more than six years, but not to exceed the prescribed statutory sentencing, if a judge found that the offender would not derive

separate from adults when "practical."[65] The FYCA also provided a route for youth offenders to have their convictions set aside.[66]

As part of a wave of shifts to a determinate sentencing regime, the FYCA was repealed in 1984 when Congress enacted the CCCA, which abolished federal parole and established the Commission.[67] The CCCA also authorized federal prosecutions of juveniles when the Attorney General — or, in practice, an assistant U.S. Attorney — certifies that the case holds "a substantial Federal interest."[68]

The mid-1980s and 1990s ushered in even coarser treatment of youth due to the rise in popularity of the myth of the juvenile "superpredator," purported "radically impulsive, brutally remorseless youngsters, including ever more pre-teenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs and create serious communal disorders."[69] Though the pundits who spun these theories turned out to be wrong about the future of crime,[70] cultural lore around the superpredator claim contributed to Congress enacting and President Clinton signing the Violent Crime Control and Law Enforcement Act of 1994[71] (VCCLEA). Among other things, the VCCLEA authorized the federal prosecution of juveniles as adults for certain crimes of violence[72] and increased penalties for juveniles in possession of a handgun or ammunition.[73]

The chief consequence of these developments was that while most youth were not prosecuted in the federal system,[74] the few youth of-

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enough benefit from the six-year sentence, *id.* § 5010(c); or given an adult sentence, if the court found that the rehabilitative sentence would not benefit the youth offender, *id.* § 5010(d).

[65] 18 U.S.C. § 5011.

[66] 18 U.S.C. § 5021. *See generally* Zacharias, *supra* note 62.

[67] Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended in scattered sections of 18 U.S.C.); *see also* Ed Bruske, *Youth Act Repealed*, WASH. POST (Oct. 13, 1984), https://www.washingtonpost.com/archive/local/1984/10/13/youth-act-repealed/bc7189d0-1f2e-4881-a633-6b938d053fe7 [https://perma.cc/DAX2-BNV7].

[68] § 1201, 98 Stat. at 2149–50 (codified at 18 U.S.C. § 5032).

[69] *See* WILLIAM J. BENNETT ET AL., BODY COUNT 27 (1996); *see also* Clyde Haberman, *When Youth Violence Spurred "Superpredator" Fear*, N.Y. TIMES (Apr. 6, 2014), http://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html [https://perma.cc/VB84-4VZE].

[70] *See, e.g.*, Elizabeth Becker, *As Ex-Theorist on Young "Superpredators," Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001), http://www.nytimes.com/2001/02/09/us/as-ex-theorist-on-young-superpredators-bush-aide-has-regrets.html [https://perma.cc/4FFQ-2EF4].

[71] Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of the U.S. Code); *cf.* Jesse Byrnes, *Clinton Regrets Using Term "Superpredator" in 1996 Crime Speech*, THE HILL: BRIEFING ROOM BLOG (Feb. 25, 2016, 5:19 PM), http://thehill.com/blogs/blog-briefing-room/news/270811-clinton-i-shouldnt-have-used-the-superpredator-remark [https://perma.cc/5A2L-JJBT].

[72] *E.g.*, § 140001, 108 Stat. at 2031 (codified at 18 U.S.C. § 5032); § 140006, 108 Stat. at 2032 (codified at 18 U.S.C. § 5038).

[73] *See* § 110201, 108 Stat. at 2010–12 (codified at 18 U.S.C. §§ 922, 924).

[74] Because of the FJDA, the Department of Justice prosecutes few juveniles. The exact number of individuals federally prosecuted each year for crimes committed when the offender was

fenders who were — whether because a federal prosecutor used her discretion to waive the youth into the adult system[75] or because no jurisdiction accepted authority over the youth[76] — appeared before judges who had little experience in juvenile justice. Such youth also faced tougher penalties and longer sentences, and, if convicted, often served those sentences farther from home than if those same youth had been prosecuted or treated in a state system.[77] Further, and perhaps more significantly, as noted in the Congressional Research Service's manual *Juvenile Delinquents and Federal Criminal Law*,[78] "[j]uveniles transferred for trial as adults in federal court are essentially treated as adults, with few distinctions afforded or required because of their age. Even the [Guidelines] instruct sentencing judges that an offender's youth is not ordinarily a permissible ground for reduction of the otherwise applica[ble] sentencing guideline range."[79]

B. Guidelines: Youth-Related Guidance

The Commission offers only two pieces of generally applicable youth-related guidance,[80] both of which discourage consideration of age and neither of which provide guidance for circumstances in which consideration of youth may be appropriate or desirable. First, section 5H1.12 provides that "[l]ack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing are not relevant

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under the age of eighteen is not regularly recorded. *See* WILLIAM ADAMS ET AL., URBAN INST., TRIBAL YOUTH IN THE FEDERAL JUSTICE SYSTEM, at ix (2011), https://www.ncjrs.gov/pdffiles1/bjs/grants/234549.pdf [https://perma.cc/3T8A-48TB]. As of December 5, 2015, the Bureau of Prisons was responsible for seventy-one juvenile inmates, forty-five of whom were serving terms of incarceration and twenty-six of whom were serving terms of supervised release. U.S. DEP'T OF JUSTICE, REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING 61 (2016).

[75] *See, e.g.*, United States v. Smith, 178 F.3d 22, 26 (1st Cir. 1999) (holding that the U.S. Attorney's certification of substantial federal interest in juvenile delinquency matter is an unreviewable act of prosecutorial discretion and noting that courts review the decision to transfer a juvenile to adult prosecution under the deferential abuse-of-discretion standard). *But see* United States v. Under Seal, 819 F.3d 715, 717, 728 (4th Cir. 2016) (affirming the district court's denial of government's motion to transfer juvenile for prosecution as an adult and holding that prosecution could not constitutionally proceed because the only two authorized penalties were death and mandatory life imprisonment).

[76] This problem particularly affects Native youth. *See* ADAMS ET AL., *supra* note 74, at ix ("Tribal youth represented about 40-55% of all juveniles in the federal system . . . ."); *see also* Amy J. Standefer, Note, *The Federal Juvenile Delinquency Act: A Disparate Impact on Native American Juveniles*, 84 MINN. L. REV. 473 (1999).

[77] *See generally* Laura K. Langley, *Giving Up on Youth: The Dangers of Recent Attempts to Federalize Juvenile Crime*, 25 U. LA VERNE C.L. J. JUV. L. 1 (2005).

[78] DOYLE, *supra* note 52.

[79] *Id.* at 16–17.

[80] The Commission offers a third age-related policy specific to child crimes and sexual offenses. Section 5K2.22 provides that "[a]ge may be a reason to depart downward only if and to the extent permitted by § 5H1.1." GUIDELINES, *supra* note 5, § 5K2.22.

grounds in determining whether a departure is warranted."[81] Second, age is listed as a "[d]iscouraged [g]round[] for [d]eparture[]," a category of characteristics that the Commission has determined are not typically relevant in setting an outside-of-the-proposed-Guideline-range sentence.[82] The Commission provides that age, including youth, "may be relevant in determining whether a departure is warranted, if considerations based on age, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines."[83]

C. The Supreme Court's Juveniles-Are-Different Sentencing Jurisprudence

The Commission's take on youth appears to be out of step with the Supreme Court's recent juveniles-are-different sentencing jurisprudence, which suggests that youth status should frequently — and perhaps always — be a consideration for sentencing courts. The juvenile sentencing revolution began in 2005 with the landmark decision in *Roper v. Simmons*.[84] In *Roper*, the Court held that execution of individuals who were under eighteen years old at the time of their capital crime was prohibited by the Eighth Amendment.[85] Though relatively narrow in its holding, the *Roper* Court issued some broader observations about the nature of youth — observations that had widespread implications and ushered in a cultural and legal shift in the treatment of youth who commit crimes. The *Roper* Court documented three overarching differences between juveniles under eighteen and adults that the Court believed "demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders."[86] First, youth tend to lack maturity and have "an underdeveloped sense of responsibility."[87] Second, juveniles tend to be more susceptible to negative influences and peer pressure.[88] Third, "the character of a juvenile is not as well formed as that of an adult."[89] Based on these differences, the

[81] *Id.* § 5H1.12. *But cf.* United States v. Rivera, 192 F.3d 81, 84–85 (2d Cir. 1999) ("[T]he Guidelines foreclose any downward departure for lack of youthful guidance . . . [but] a downward departure may be appropriate in cases of extreme childhood abuse." *Id.* at 84.)

[82] OFFICE OF GEN. COUNSEL, *supra* note 5, at 30.

[83] GUIDELINES, *supra* note 5, § 5H1.1.

[84] 543 U.S. 551 (2005).

[85] *Id.* at 568.

[86] *Id.* at 569.

[87] *Id.*

[88] *Id.* (citing Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.")).

[89] *Id.* at 570.

Court reasoned that juveniles had diminished capacity,[90] and that, as a result, "it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults."[91]

Relying on *Roper*, the Court in 2010 held in *Graham v. Florida*[92] that the Eighth Amendment prohibited imposition of life without the possibility of parole on a juvenile who did not commit homicide and, thus, that sentencing courts must give juvenile nonhomicide offenders sentenced to life without parole a "meaningful opportunity to obtain release."[93] The Court noted that even assuming that some juvenile nonhomicide offenders possess "'sufficient psychological maturity, and at the same time demonstrat[e] sufficient depravity,' to merit a life-without-parole (LWOP) sentence, it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change."[94]

Just two years later, the Court further extended the reach of *Roper*. In *Miller v. Alabama*,[95] the Court held that mandatory life imprisonment without parole for those under the age of eighteen at the time of their crimes violated the Eighth Amendment.[96] Writing for the Court, Justice Kagan noted that "*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing."[97] Justice Kagan reiterated that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes."[98] She further noted that:

> By removing youth from the balance . . . [mandatory penalty schemes] prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. [Doing so would] contravene[] *Graham*'s (and also *Roper*'s) foundational prin-

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[90] *See id.* ("The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.").

[91] *Id.* at 571.

[92] 560 U.S. 48 (2010).

[93] *Id.* at 75. The Court deemed a categorical rule necessary because of the inadequacy of two alternative approaches: relying on the judgment of prosecutors to address the constitutional issues in sentencing, *see id.* at 75–77, or holding that the Eighth Amendment requires courts to take a case-by-case proportionality approach, weighing the offender's age against the seriousness of the crime, *see id.* at 77–79.

[94] *Id.* (quoting *Roper*, 543 U.S. at 572).

[95] 132 S. Ct. 2455 (2012).

[96] *Id.* at 2469.

[97] *Id.* at 2464.

[98] *Id.* at 2465.

ciple: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.[99]

Recently, in *Montgomery v. Louisiana*,[100] the Court deemed *Miller*'s pronouncement a new substantive constitutional rule — one that "prohibits 'a certain category of punishment for a class of defendants because of their status or offense'"[101] — that, under the Constitution, must have a retroactive effect.[102] Writing for the Court, Justice Kennedy declared that "*Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence."[103]

Though the specific holdings of the juveniles-are-different quartet were limited to death penalty and LWOP cases, there may be reason to believe that the Court's observations about the nature of adolescence apply just as vigorously to at least some noncapital and non-LWOP crimes. First, the same immaturity, impulsivity, and susceptibility to influence that the Court noted might lead a juvenile offender to commit a violent crime might also lead a juvenile to commit any other adult crime for which she could face federal charges. Psychological, sociological, and criminological evidence demonstrates[104] — and the Court's sweeping language arguably suggests — as much.[105] The ju-

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[99] *Id.* at 2466.

[100] 136 S. Ct. 718 (2016).

[101] *Id.* at 732 (quoting Penry v. Lynaugh, 492 U.S. 302, 330 (1989)).

[102] *Id.*

[103] *Id.* at 734. Though both *Miller* and *Montgomery* purported to draw "a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption," *id.*, *Montgomery* still spoke in broad terms about how juveniles, as a class, should be treated in sentencing. *Miller*, the *Montgomery* Court wrote, "did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'" *Id.* (quoting *Miller*, 132 S. Ct. at 2465); *see also The Supreme Court, 2015 Term — Leading Cases*, 130 HARV. L. REV. 377, 377 (2016) (arguing that *Miller* was "more naturally read as a procedural rule of individualized sentencing for juveniles" and that *Montgomery* should have held that *Miller*'s procedural rule was "animated by a watershed principle . . . that 'kids are different' under the Eighth Amendment").

[104] *See, e.g.*, Brief for the American Medical Association and the American Academy of Child and Adolescent Psychiatry as *Amici Curiae* in Support of Neither Party at 14–36, *Miller*, 132 S. Ct. 2455 (Nos. 10-9646, 10-9647); Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & FAM. STUD. 11, 80 (2007) (discussing proposal for "'youthful offender' sentencing system for young adult offenders convicted in criminal courts of misdemeanors and low-level felonies" based on youths' "developmental immaturity"); Stephen J. Morse, *Immaturity and Irresponsibility*, 88 J. CRIM. L. & CRIMINOLOGY 15, 53 (1997); Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 812–17 (2005). *But see* Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 116–18 (2009).

[105] Take the *Miller* Court on *Roper*'s and *Graham*'s — admittedly nonlegal — underpinnings: "*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we

risprudential shift capped off by *Roper* can and should be understood as describing a class of defendants — defined by the nature of the person rather than the crime — for which the justifications for punishment are categorically weaker.[106]

Second, as Professors Carol Steiker and Jordan Steiker have observed, though the Court once treated the capital sentencing process as separate and distinct from the noncapital system, this difference appears to be eroding, and the juveniles-are-different cases appear to be at the fore of the shift.[107] As they explain: "*Graham* essentially imported the proscription against disproportionate punishment from the Court's capital jurisprudence into its non-capital jurisprudence and transformed a 'death-is-different' doctrine into a more general limitation on excessive sentences."[108] And *Miller*, they argue, "further blurs the boundaries of capital and non-capital doctrine, perhaps pointing toward a unitary Eighth Amendment jurisprudence" with respect to juveniles if not adult offenders.[109] The kids-are-different cases can and should be read as a progressive doctrinal broadening that will encompass a more complete class of juvenile offenders.

Third, several state high courts and a handful of federal courts of appeals have held that a juvenile's age must be considered where multiple sentences can cumulatively constitute a term of natural life im-

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explained, 'they are less deserving of the most severe punishments.'" *Miller*, 132 S. Ct. at 2464 (quoting Graham v. Florida, 560 U.S. 48, 68 (2010)).

[106] The Court's jurisprudence and practices around sentencing of individuals with intellectual disabilities are instructive in some respects but nonetheless provide an imperfect lens through which to consider whether and how to limit "juvenile status" consideration for youth offenders. In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court held that executing people with intellectual disabilities violated the Eighth Amendment. *See id.* at 321. The *Atkins* Court reasoned that such offenders "by definition [have] diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand others' reactions," and "in group settings . . . are followers rather than leaders." *Id.* at 318. Those factors undermined, for the Court, the retribution and deterrence justifications in the specific context of capital sentencing.

To be sure, at least some of the Court's arguments about kids being different seem to echo the reasoning in *Atkins*. But some are distinct enough to illustrate why the two lines of cases might justifiably be viewed and limited differently. Perhaps most significantly, the juveniles-are-different line of cases turns, at least in part, on the temporary nature of juvenile status. The *Miller* Court did not merely note that youth offenders are immature, have trouble controlling their impulses, and more, but also emphasized the likely "prospect that, as the years go by and neurological development occurs, [these] 'deficiencies will be reformed.'" *Miller*, 132 S. Ct. at 2465 (citing *Graham*, 560 U.S. at 67). A sentence that does not account for the probable self-correction that maturity will bring to youth offenders likely overincapacitates and overdeters and is thus "greater than necessary" in violation of 18 U.S.C. § 3553(a) (2012).

[107] *See* Carol S. Steiker & Jordan M. Steiker, Miller v. Alabama*: Is Death (Still) Different?*, 11 OHIO ST. J. CRIM. L. 37 (2013).

[108] *Id.* at 38.

[109] *Id.* at 39.

prisonment without parole.[110] In so doing, these courts have rightly recognized that "[t]here is more to *Miller*"[111] than its explicit holding forbidding mandatory life without parole. Instead, the "logic of *Miller*" extends to, at least, discretionary, de facto life sentences where a term beyond that of a natural life may be imposed.[112] In light of these decisions, there is good reason to wonder whether the explicit limiting principle that the *Miller* Court attempted to cast onto its juveniles-are-different holdings — applying *Roper* and *Graham* to the "harshest" and "most severe" punishments — will prove unadministrable. The lower limit of the "harshest" and "most severe" punishments is, after all, blurry.

III. THE COMMISSION SHOULD PROMULGATE RULES INSTRUCTING FEDERAL JUDGES ABOUT HOW TO CONSIDER AGE IN SENTENCING JUVENILE OFFENDERS

This Part argues that the Commission should promulgate rules instructing federal judges about how and when to consider age in sentencing offenders for crimes committed as juveniles. Section III.A offers a preliminary note about the current constitutional inapplicability of some statutory mandatory minimum sentences to juveniles convicted in federal court, an issue that Congress itself will likely need to address. Section III.B details why the Commission's current policy statements discouraging consideration of youth seem to be in tension with courts' statutory sentencing obligations under 18 U.S.C. § 3553. Section III.C argues that federal transfer provisions and wholly discretionary, case-by-case variance provide insufficient guidance for judges sentencing juvenile offenders.

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[110] *See e.g.*, McKinley v. Butler, 809 F.3d 908 (7th Cir. 2016). *See generally* Kelly Scavone, Note, *How Long Is Too Long?: Conflicting State Responses to De Facto Life Without Parole Sentences After* Graham v. Florida *and* Miller v. Alabama, 82 FORDHAM L. REV. 3439 (2014); *Since March, Courts in AZ, IL, and GA Have Reversed JLWOP Sentences*, FAIR PUNISHMENT PROJECT (Apr. 7, 2016), http://fairpunishment.org/since-march-courts-in-az-il-and-ga-have-reversed-jwlop-sentences [https://perma.cc/ZL3E-LZG8]. Notably, the Supreme Court, relying on *Miller*, has also vacated discretionary LWOP sentences for juvenile offenders. *See* Blackwell v. California, 133 S. Ct. 837 (2013) (mem.); Mauricio v. California, 133 S. Ct. 524 (2012) (mem.); Guillen v. California, 133 S. Ct. 69 (2012) (mem.); Lyle Denniston, *A Puzzle on Juvenile Sentencing*, SCOTUSBLOG (Nov. 16, 2012, 5:20 PM), http://www.scotusblog.com/2012/11/a-puzzle-on-juvenile-sentencing [https://perma.cc/6XMS-7QVM].

[111] *McKinley*, 809 F.3d at 910.

[112] *Id.* at 911; *see also* State v. Valencia, 370 P.3d 124, 127–28 (Ariz. 2016); State v. Riley, 110 A.3d 1205, 1218–19 (Conn. 2015); Veal v. State, 784 S.E.2d 403, 410–12 (Ga. 2016); People v. Nieto, 52 N.E.3d 442, 454–55 (Ill. 2016).

A. There Is No Constitutional Juvenile-Offender Application of Statutory Schemes for Which Life in Prison Without Parole Is the Mandatory Minimum Sentence

The *Roper-Graham-Miller-Montgomery* quartet left at least two things clear: offenders may never be sentenced to death for crimes committed while they were juveniles, and sentencing judges must consider the age of offenders before sentencing them to mandatory life in prison without the possibility of parole for offenses committed before their eighteenth birthdays. Because the Supreme Court had categorically eliminated mandatory death sentences decades before the juvenile sentencing revolution,[113] judges could easily implement the first of these rules. The second, however, stands in some tension with a line of cases upholding mandatory LWOP sentences for adult offenders and presents a problem for juvenile sentencing that Congress itself, rather than the Commission, likely must solve.

With regard to adult offenders, the Supreme Court has upheld mandatory sentences, including life without the possibility of parole. In *Harmelin v. Michigan*,[114] the Court rejected individualized consideration outside of the capital sentencing context, reasoning that the "qualitative difference between death and all other penalties" justified the refusal to extend such consideration.[115] Since *Harmelin*, lower courts have been required to sentence offenders to at least the statutory mandatory minimum, except in very rare circumstances,[116] even where the sentencing judge considers the statutory minimum substantively unreasonable for the particular defendant.[117] Post-*Miller*, however, a judge cannot constitutionally apply a mandatory minimum LWOP sentence to a juvenile offender. She must, at least, consider affording the possibility of parole even where doing so is not allowed by the letter of the statute and is, thus, not a constitutionally authorized punishment.

The *Miller* Court dismissed the notion that its new rule was in tension with *Harmelin*, noting that "*Harmelin* had nothing to do with children and did not purport to apply its holding to the sentencing of

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[113] *See* Gregg v. Georgia, 428 U.S. 153, 199 n.50 (1976).

[114] 501 U.S. 957 (1991). The *Harmelin* Court upheld a mandatory LWOP sentence for possession of more than 650 grams of cocaine. *Id.* at 960, 996.

[115] *Id.* at 995.

[116] *See* United States v. Castaing-Sosa, 530 F.3d 1358, 1360 (11th Cir. 2008) (per curiam) ("It is well-settled that a district court is not authorized to sentence a defendant below the statutory mandatory minimum unless the government filed a substantive assistance motion pursuant to 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1 or the defendant falls within the safety-valve of 18 U.S.C. § 3553(f).").

[117] *Cf.* United States v. Angelos, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004) (imposing what the court called an "unjust, cruel, and even irrational" mandatory minimum sentence and calling on the President to commute the sentence to one "more in accord with just and rational punishment").

juvenile offenders" and reiterating the vague precept that "a sentencing rule permissible for adults may not be so for children."[118] But this explanation fails to provide much guidance for a federal district court judge faced with the — admittedly rare — task of sentencing a juvenile offender where the statutory minimum sentence is life without the possibility of parole.

Recently, the Fourth Circuit confronted such a case. In *United States v. Under Seal*,[119] the Fourth Circuit affirmed a district court's denial of a motion to transfer a juvenile for prosecution as an adult for murder in aid of racketeering where the mandatory statutory penalty was either death or life imprisonment.[120] In so doing, the court noted that district courts do not have discretion to sentence a defendant to less than the statutory mandatory minimum, rejecting the government's argument that the court could sever the statutory provision that could not be constitutionally applied and instead sentence the defendant to a term of years.[121] The Fourth Circuit observed:

> Congress unambiguously informed individuals that murder in aid of racketeering was punishable by death or mandatory life imprisonment. Congress provided for no other penalty. However, a juvenile like the Defendant could not be sentenced to either of those punishments after *Miller*. Nor would that juvenile have notice at the time of the alleged crime that he could be subject to any other punishment, such as imprisonment to a term of years.[122]

The court concluded that "prosecution [could] not constitutionally proceed."[123]

Under Seal highlights a critical tension between determinate sentencing regimes, like the VCCLEA, that sweep in adult and juvenile offenders alike in the name of eschewing individualized consideration as weak on crime, and the Court's recent juveniles-are-different sentencing jurisprudence. A court now has two options: excise the unconstitutional statutory provisions and sentence a juvenile based on the discretionary judgment of the sentencing judge without connection to the statutory penalty[124] — a solution fraught with separation of powers concerns[125] — or refuse to allow the prosecution of juveniles to

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[118] Miller v. Alabama, 132 S. Ct. 2455, 2470 (2012).
[119] 819 F.3d 715 (4th Cir. 2016).
[120] *Id.* at 717, 728.
[121] *See id.* at 720–21.
[122] *Id.* at 726.
[123] *Id.* at 728.
[124] *Cf.* United States v. Booker, 543 U.S. 220, 245 (2005) (striking down the provision of the federal sentencing statute that made the Guidelines mandatory).
[125] *Cf.* F. Andrew Hessick & Carissa Byrne Hessick, *The Non-Redelegation Doctrine*, 55 WM. & MARY L. REV. 163 (2013).

continue. Perhaps neither option is ideal,[126] and, working with the Commission, Congress should make clear how courts should approach sentencing in these cases.

B. Current Policy Statements Discouraging Consideration of Youth Cannot Be Squared with Statutory Requirements Mandating that Judges Consider All Relevant Offender Characteristics

Recall that under 18 U.S.C. § 3553(a), judges are required to "impose a sentence sufficient, but not greater than necessary" to satisfy the purposes of punishment and that, in selecting a particular sentence, a court must consider — seemingly apart from the Guidelines and policy statements offered by the Commission — "the nature and circumstances of the offense and the history and characteristics of the defendant."[127] The Court has made clear that a sentencing judge commits procedural error if she fails to consider the § 3553(a) factors.[128]

First, the *Roper-Miller-Graham-Montgomery* series provides strong evidence that juvenile status is a "characteristic of the defendant" for the purposes of § 3553(a) such that failure to consider juvenile status would constitute procedural error. Though none of the juveniles-are-different sentencing cases proceeded to the Supreme Court from a lower federal court — and thus none explicitly interpreted § 3553(a) — the opinions' sweeping language about the nature of youth suggests that juvenile status is an always-relevant offender characteristic and would be regarded as a § 3553(a) "characteristic" in federal court.

Under § 3553(a), a federal judge should be required to consider youth status regardless of the crime for which a juvenile offender was convicted. The Court's observations about the nature of youth — including associated features of immaturity, impulsivity, and susceptibility to influence — apply with no less force in nonhomicide crimes. Just as those features might lead a juvenile to participate in a gang-related murder, they might also lead a young person to participate in other crimes for which the statutorily authorized penalty is not as harsh as the penalties considered in *Roper* and *Graham*. Such crimes would seem even less likely to reflect depravity or incorrigibility, and would instead seem to reflect exactly the characteristics that the Court deemed relevant in sentencing juvenile offenders in *Roper* and its progeny.

Second, and relatedly, the Court has made clear that the "distinctive attributes of youth diminish the penological justifications for im-

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[126] *Cf.* IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 138 (John Ladd trans., 2d ed. 1999) ("The law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal from punishment or by reducing the amount of it . . . .").

[127] 18 U.S.C. § 3553(a) (2012).

[128] *See* Gall v. United States, 552 U.S. 38, 51 (2007).

posing the harshest sentences on juvenile offenders, even when they commit terrible crimes."[129] A court applying the Guidelines without considering ratcheting a sentence down based on youth applies a system premised on the sufficient and necessary penological purposes of sentencing the typical offender: an adult. The resultant sentence for a youth offender convicted as an adult then is likely "greater than necessary" under § 3553(a) when youth status is not accounted for.

Third, and perhaps most critically, some Guidelines suggest only a sentence of life in prison. For example, for a juvenile with no past criminal history — and thus a criminal history level of I — who is convicted of first-degree murder, the Guidelines recommend only life in prison.[130] To be sure, under *Graham* and *Miller*, a court has no choice but to consider youth. But how should a judge account for youth? Does youth status presumptively entitle a juvenile offender to the opportunity for parole? When should a judge consider a term-of-years sentence instead of a life sentence? The Guidelines don't say. Nor has the Court provided concrete guidance.

C. *Federal Transfer Provisions and Case-By-Case Variance Provide Insufficient Guidance for Judges Sentencing Juvenile Offenders*

Case-by-case variance and federal transfer provisions provide insufficient guidance for sentencing judges. First, though a sentencing judge "may not presume that the Guidelines range is reasonable,"[131] a judge concerned with having his sentence reversed on appeal is still likely to adhere to the Guidelines-recommended sentencing range — where such a range would not itself pose constitutional problems — rather than explicitly introduce the more vague § 3553(a) considerations.[132] And though as a formal matter *Booker* increased sentencing discretion, judges have failed to take advantage of this discretion.[133]

Second, in light of the currently in-effect policy statements discouraging consideration of age, a judge who might otherwise regard youth as a § 3553(a) consideration and depart from the Guidelines range on that basis might worry that her sense of an appropriate consideration conflicts with the Commission's and may decline to depart.

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[129] Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012).

[130] *See* GUIDELINES, *supra* note 5, § 2A1.1.

[131] *Gall*, 552 U.S. at 50.

[132] *See* U.S. SENTENCING COMM'N, NATIONAL COMPARISON OF SENTENCE IMPOSED AND POSITION RELATIVE TO GUIDELINE RANGE (2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/TableN.pdf [https://perma.cc/X6GQ-D978] (finding that in 2014, judges explicitly invoked the § 3553 factors in only 20.2% of sentencing decisions).

[133] *See id.* According to the Commission, about 46% of sentences imposed in federal courts in 2014 were within the Guidelines range. *See id.* While 52% of sentences fell below the Guidelines range, the majority of those departures were government-sponsored deviations. *See id.*

Third, the Court's reasoning when it eschewed the government-suggested, case-by-case proportionality approach to juvenile capital-case sentencing applies with equal force here:

> [E]ven if [a court] were to assume that some juvenile nonhomicide offenders might have 'sufficient psychological maturity, and at the same time demonstrat[e] sufficient depravity' to merit a life without parole sentence, it does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.[134]

The post-*Booker* Guidelines are a testament to Congress's ongoing interest in promoting consistency — that is, its interest in a determinate sentencing regime that sentences offenders who commit similar crimes to similar sentences. Failure to provide guidance on the sentencing of youth in federal courts undermines this interest. As the Court suggested in *Miller*, juvenile offenders are a particular category of offenders. The Commission is missing an opportunity to promote uniformity in sentencing — and to motivate states to amend their processes for sentencing juveniles — by failing to provide courts with a systematic way of considering juvenile status.

Finally, behavioral economics research on choice architecture buttresses concerns about the Commission's current guidance on youth status. In *Nudge*,[135] Professors Richard Thaler and Cass Sunstein highlight the influence of "rules of thumb"[136] and the role of anchoring.[137] Anchoring establishes an initial exposure to a number that then serves as a point of reference for future calculations.[138] Once armed with an anchor, a decisionmaker tends to adjust upward or downward based on that initial anchoring number, without regard for whether the anchor itself is appropriate.[139] Anchoring is, on the one hand, essential to consistency in sentencing. The point of the Guidelines is, in effect, to anchor sentences toward a common nucleus of considerations.[140] But with respect to juvenile sentencing — a class of offenders that is both much smaller than and categorically different from the vast majority of offenders — it is worth asking whether the Sentencing Guidelines exert an inappropriate anchoring influence.

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[134] Graham v. Florida, 560 U.S. 48, 77 (2010) (citations omitted) (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005)).

[135] RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE (2009).

[136] *Id.* at 22.

[137] *See id.* at 22–31.

[138] *See id.* at 23.

[139] *See id.* at 23–24.

[140] *See* Rita v. United States, 551 U.S. 338, 348 (2007) (noting that "one of the Commission's basic objectives" is to craft Guidelines "meeting . . . the purposes of sentencing as set forth in [§ 3553(a)(2)]" (alteration in original) (quoting 28 U.S.C. § 991(b) (2012))).

In *Peugh v. United States*,[141] the Court implicitly commented on the problems associated with an inappropriate anchor. The Court held that even though the Guidelines are themselves advisory, the Ex Post Facto Clause is violated when a defendant is sentenced under current Guidelines providing a higher sentencing range than Guidelines in effect at the time of the offense.[142] The Court reasoned that the penalty for the defendant's offense had effectively been enhanced because the issuance of a new formula for calculating sentences created a "significant risk" of a higher sentence[143] — that is, even though the statutory sentencing terms remained unchanged, a sentence would likely be anchored by the Guidelines' formula. As the Court has repeatedly recognized, the purposes for punishing a juvenile offender are, as a matter of course, simply different from those at play in punishing the typical adult offender. Here too, the Guidelines appear to impermissibly anchor judges to sentences that may not be appropriately applied to juvenile offenders.

IV. RECOMMENDATIONS

This Part provides preliminary recommendations for Congress and for the Commission to reform the Guidelines' current treatment of youth status to align with the commands of *Roper* and its progeny and the statutory sentencing obligations under § 3553(a).

First, in an ideal world, the juveniles-are-different cases would inspire robust front-end assessment of transfer to adult status and provisions allowing the conviction of juveniles in federal courts. The Court's recent hesitance about the application of formerly accepted penalties to juveniles should not merely lead to narrow consideration of the specific provisions at issue in those particular cases. Instead, Congress should first reconsider now-antiquated, pre-*Roper* laws that brought juveniles under the jurisdiction of federal courts. Congress should consider reenacting an FYCA–like regime, under which judges could have substantial authority to tailor a sentence to the needs of a particular juvenile offender. Such a scheme could still be tailored to promote uniformity and consistency within the category of youth offenders.

Second, Congress should address, with an additional provision of § 3553, the issue highlighted in *Under Seal*. Such a provision would make clear how judges should sentence a juvenile when the statutory minimum penalty cannot be constitutionally applied to that juvenile. A provision could, for example, require a judge to impose a term-of-

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[141] 133 S. Ct. 2072 (2013).
[142] *See id.* at 2078.
[143] *Id.* at 2088.

years sentence unless a juvenile's crimes do not reflect the transience of youth, an approach that might encourage — and honor the Court's preference for — robust consideration of youth status.

Third, and relatedly, Congress should provide a definition for § 3553(a)'s "offender characteristics" and make clear what factors should be or cannot be considered. At present, a judge is required to apply both the Guidelines and § 3553(a) in developing a penalty, but because § 3553(a) does not make clear what might be considered, it may be neglected as a means of guiding sentencing.

To be sure, if implemented, these suggestions would require judges to do significantly more weighing of the individual facts of a given juvenile offender's youth status and how that status bears on the offender's culpability, receptiveness to deterrence, and capacity for rehabilitation. But concerns about judges' capacity to weigh such factors evenly can be partially alleviated with a fourth change: the Commission should develop a robust and clear primer on the sentencing of juvenile offenders. The Court has made clear that juvenile status is not just one relevant offender characteristic, but also a particularly powerful characteristic that changes our cultural and legal conceptions of which types of punishments are appropriate and which are wholly off the table. The Commission should excise provisions of the Guidelines that discourage consideration of youth and instead encourage robust consideration of youth, not just in identifying an offender's criminal history score or in coming up with an offense level, but as a process separate from application of the standard sentencing table.

Finally, higher courts might use the presumption of reasonableness in appellate review as a means of prompting these changes. As discussed in section I.A, in *Rita* the Supreme Court held that appellate courts may apply a nonbinding presumption of reasonableness when reviewing within-Guidelines sentences.[144] Until Congress and the Commission address the tension between *Roper* and its progeny and the youth-related guidance currently offered in the Guidelines, appellate courts should deny a presumption of reasonableness to within-Guidelines sentences when there is no evidence that a sentencing court considered youth in sentencing an offender who committed a crime as a juvenile. The federal sentencing regime has not yet precisely accounted for the Court's juvenile sentencing revolution. Doing so requires that courts, Congress, and the Commission take seriously both the letter and spirit of these juveniles-are-different cases.

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[144] *Rita*, 551 U.S. at 353.