

**THE RELATIONSHIP BETWEEN CHILDHOOD CONDUCT DISORDER AND  
ANTISOCIAL PERSONALITY DISORDER IN ADULTHOOD: AN ARGUMENT  
IN FAVOR OF MANDATORY LIFE SENTENCES WITHOUT PAROLE FOR  
JUVENILE HOMICIDE OFFENDERS**

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**INTRODUCTION**

In a series of decisions over the last two decades, the United States Supreme Court has consistently ruled that juvenile offenders should not get as severe punishments as adults who have committed the same crimes. The Court has banned the death penalty for juvenile offenders<sup>1</sup> and barred a life sentence without parole for juvenile offenders convicted of crimes other than murder.<sup>2</sup> In *Miller v. Alabama*, the Court took this ban a step further by holding that the Eighth Amendment prohibits a sentencing scheme that requires life in prison without parole for juvenile homicide offenders.<sup>3</sup> The Eighth Amendment prohibits cruel and unusual punishment and guarantees that individuals will not be subjected to excessive sanctions.<sup>4</sup> The holding is relevant to juvenile offenders whom the state has decided will be tried as adults. Adult criminal courts mandate required minimum penalties for certain offenses, while juvenile courts can only impose limited sentencing on offenders.<sup>5</sup> While the holding does not explicitly ban the possibility of a juvenile homicide offender receiving a life without parole sentence, the dissent points out that the majority itself states that it does not expect very many juvenile offenders to receive a sentence that would require them to stay in prison for the rest of their lives after this decision.<sup>6</sup>

In the majority opinion, Justice Kagan writes that a sentence of life without parole precludes consideration of a juvenile's chronological age and what she calls the "hallmark features" of youth, including: "immaturity, impetuosity, and failure to appreciate risks and consequences[.]" suggesting that juvenile offenders, because of their premature development,

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<sup>1</sup> See *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

<sup>2</sup> See *Graham v. Florida*, 560 U.S. 48, 82 (2010).

<sup>3</sup> *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012).

<sup>4</sup> U.S. CONST. amend. VIII.

<sup>5</sup> See *Miller*, 132 S. Ct. at 2474–75.

<sup>6</sup> *Id.* at 2481 (Roberts, C.J., dissenting).

have a greater chance of rehabilitation than their adult counterparts.<sup>7</sup> This paper will challenge the majority's assumption based on the scientific evidence of the connection between childhood conduct disorder and antisocial personality disorder in adulthood and present an argument supporting mandatory life without parole sentences for juvenile homicide offenders tried in adult courts. This paper will examine the facts of *Miller* and the Court's reasoning in prohibiting automatic life sentences without parole for juvenile homicide offenders. The paper will then assess antisocial personality disorder and its prevalence among the prison population and analyze the connection between antisocial personality disorder in adult offenders and childhood conduct disorder in juvenile offenders. Finally, this paper will propose a scheme to evaluate juvenile offenders early on in the judicial process to ensure that only those offenders with the highest potential for recidivism will be susceptible to a mandatory sentence of life without parole.

#### I. *MILLER V. ALABAMA: FACTS OF THE CASE*

The Supreme Court's decision that the Eighth Amendment prohibits a sentencing scheme that requires life in prison without parole for juvenile homicide offenders actually stems from two cases decided together: *Miller v. Alabama* and *Jackson v. Hobbs*. In both cases, a fourteen year old male offender was sentenced to life without parole by the lower court for his involvement in a murder, although the facts of each case differ.<sup>8</sup>

One night in 2003, Evan Miller was at home with a friend when his neighbor, Cole Cannon, came over to make a drug deal with Miller's mother.<sup>9</sup> Miller and his friend followed Cannon back over to his trailer, where the three smoked marijuana and played drinking games.<sup>10</sup> When Cannon passed out, Miller stole his wallet and split the \$300 he found inside with his friend.<sup>11</sup> However, when Miller attempted to place the wallet back in Cannon's pocket, he awoke and grabbed at Miller.<sup>12</sup> Miller's friend hit Cannon over the head with a baseball bat to force Cannon to let go of his friend, and once Miller was free, he picked up the baseball bat and repeatedly struck Cannon in the head and ribs.<sup>13</sup> Miller told Cannon "I am God, I've come to take your life."<sup>14</sup> In order to cover up the evidence of the

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<sup>7</sup> *Id.* at 2468.

<sup>8</sup> *See id.* at 2461–63.

<sup>9</sup> *Id.* at 2462.

<sup>10</sup> *Id.*

<sup>11</sup> *Miller v. Alabama*, 132 S. Ct. at 2462.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (quoting *Miller v. State*, 63 So. 3d 676, 689 (Ala. Crim. App. 2009), *rev'd*, *Miller v. Alabama*, 132 S. Ct. 2455 (2012)).

2015] Childhood Conduct Disorder & Antisocial Personality Disorder 243

crime, Miller then set the trailer on fire while Cannon was still alive.<sup>15</sup> Cannon eventually died from his injuries and smoke inhalation.<sup>16</sup> Miller was charged as an adult with murder in the course of arson, a crime that carries a mandatory minimum punishment of life without parole in the state of Alabama.<sup>17</sup>

Kuntrell Jackson, on the other hand, was charged with capital felony murder and aggravated robbery.<sup>18</sup> In November of 1999, Jackson and two of his friends decided to rob a video store in Arkansas.<sup>19</sup> Knowing that his friend, Derrick Shields, was carrying a sawed off shotgun in his coat sleeve, Jackson waited outside in the get-away vehicle as Shields entered the video store.<sup>20</sup> Inside the store, Shields pointed the gun at the store clerk, Laurie Troup, and demanded that she give up the money.<sup>21</sup> Troup refused, and Jackson eventually entered the store.<sup>22</sup> It was disputed at trial whether Jackson then warned Troup that “[w]e ain’t playin’,” or if he instead told his friends, “I thought you all was playin’.”<sup>23</sup> When Troup threatened to call the police, Shields shot and killed her, and the three boys fled the store empty-handed.<sup>24</sup> A jury convicted Jackson of both of his charged crimes in criminal court, and he received the mandatory sentence of life without parole.<sup>25</sup>

## II. *MILLER V. ALABAMA*: MAJORITY REASONING, PRECEDENT STRAND ONE

In a 5–4 decision, the Supreme Court reversed and remanded the sentencing of Miller and Jackson, finding that the Eighth Amendment prohibits a sentencing scheme that requires life in prison without the possibility of parole for juvenile homicide offenders.<sup>26</sup> In its decision, the Court relied on two lines of precedent to support its belief that juvenile offenders should be treated differently than their adult counterparts.<sup>27</sup> The first strand of precedent has “adopted categorical bans on sentencing practices based on mismatches between culpability of a class of offenders and the severity of a penalty.”<sup>28</sup> The Court gives examples of decisions rendering imposi-

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 2462–63.

<sup>17</sup> Miller, 132 S. Ct. at 2462–63; *see* ALA. CODE §§ 13A-5-40(9), 13A-6-2(c) (1982).

<sup>18</sup> *Id.* at 2461.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* (citing Jackson v. State, 194 S.W.3d 757, 759 (Ark. 2004)).

<sup>22</sup> *Id.* at 2461.

<sup>23</sup> Miller, 132 S. Ct. at 2461 (quoting Jackson, 194 S.W.3d at 760).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 2457–58.

<sup>27</sup> *Id.* at 2464.

<sup>28</sup> *Id.*

tion of the death penalty on mentally retarded defendants<sup>29</sup> or on individuals for non-homicide crimes as violations of the Eighth Amendment.<sup>30</sup> Then it points out that several of the decisions in this strand of precedent deal specifically with juvenile offenders because of “their lesser culpability.”<sup>31</sup>

The Court thusly turns its focus to *Roper v. Simmons* and *Graham v. Florida*. *Roper* and *Graham* established that adults and children should be considered constitutionally different for the purpose of criminal sentencing.<sup>32</sup> Because children have “diminished culpability” and a more promising chance of reform and rehabilitation, they do not deserve the most severe punishments.<sup>33</sup> *Roper* and *Graham* rely on several gaps between juveniles and adults, including the belief that a child’s character is not as well formed as an adult’s because his traits are not as fixed and his actions are less likely to be “evidence of irretrievabl[e] deprav[ity].”<sup>34</sup> The Court goes on to reason that according to studies showing “fundamental differences between juvenile and adult minds,”<sup>35</sup> that characteristics of juveniles, including “transient rashness, proclivity for risk, and inability to assess consequences”<sup>36</sup> lessen the culpability of a juvenile offender and enhance the prospect that as neurological development occurs over the years, these “deficiencies will be reformed.”<sup>37</sup> Therefore, the Court rules that a sentence of life without parole would require “mak[ing] a judgment that [a juvenile offender] is incorrigible”—but “incorrigibility is inconsistent with youth.”<sup>38</sup> A sentence of life without parole reflects “an irrevocable judgment” about a juvenile offender’s “value and place in society,”<sup>39</sup> that is “at odds with a child’s capacity for change.”<sup>40</sup> Therefore, the majority holds that a mandatory scheme of life sentence without parole for juvenile homicide offenders is unconstitutional.<sup>41</sup>

However, another branch of research suggests that these criminal behaviors seen in the childhood and adolescence of these juvenile offenders are, in reality, a predictor of further criminal activity in adulthood. In fact,

<sup>29</sup> Miller, 132 S. Ct. at 2463 (citing *Atkins v. Virginia*, 536 U.S. 304 (2002)).

<sup>30</sup> *Id.* (citing *Kennedy v. Louisiana*, 554 U.S. 407 (2008)).

<sup>31</sup> *Id.* at 2464.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005)).

<sup>35</sup> Miller, 132 S. Ct. at 2464 (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)).

<sup>36</sup> *Id.* at 2465.

<sup>37</sup> *Id.* (quoting *Graham*, 560 U.S. at 69).

<sup>38</sup> *Id.* at 72–73 (quoting *Workman v. Commonwealth*, 429 S.W.2d 374, 378 (Ky. 1968)).

<sup>39</sup> *Id.* at 74.

<sup>40</sup> *Id.*

<sup>41</sup> Miller, 132 S. Ct. at 2475.

## 2015] Childhood Conduct Disorder &amp; Antisocial Personality Disorder 245

offenders who start their criminal careers early in life commit crimes more frequently than their late-onset counterparts.<sup>42</sup> Moreover, psychological research has shown a connection between conduct disorder in childhood and adolescence and antisocial personality disorder and psychopathy in adulthood. Most concerning, a study of 137 juvenile homicide offenders revealed that a stunning 71% of these offenders had been rearrested within ten years of release—over 30% had reoffended after only one year.<sup>43</sup> All criminal history risk factors, including previous number of offenses, age at first offense, and age at homicide offense influenced the recidivism prevalence significantly.<sup>44</sup> Specifically, the younger the juvenile at the time of the first offense, the higher the likelihood of recidivism<sup>45</sup>—directly refuting the majority’s beliefs in *Miller*. Further, “disturbingly, over recent decades, age at first offense has been decreasing, and recidivism is thus becoming more likely.”<sup>46</sup>

High recidivism rates are significantly costly to our society. Perhaps these behaviors exhibited by juvenile offenders should be used as indicators of future criminal conduct that can be stopped with the use of mandatory life sentences without parole instead of characteristics of prematurely developed minds. If the justice system could draw the line between juvenile offenders who have a high potential for violent criminal behavior in adulthood and those who do not early in the criminal justice process, the mandatory life without parole sentence for juvenile homicide offenders tried as adults could stand, likely leading to significant decreases in recidivism rates of these high-risk offenders.

### III. ANTISOCIAL PERSONALITY DISORDER

One such factor of a high potential for recidivism is the presence of antisocial personality disorder. The fourth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) defines antisocial personality disorder as a “pervasive pattern of disregard for and violation of the rights of others occurring since age 15.”<sup>47</sup> This disregard for the rights of others is indicated by the failure to conform to social norms, deceitfulness, impulsivity, irritability, aggressiveness, reckless disregard for safety

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<sup>42</sup> See Heng Choon Chan & Wing Hung Chui, *Psychological Correlates of Violent and Non-Violent Hong Kong Juvenile Probationers*, 30 BEHAV. SCI. & L. 103, 112 (2012).

<sup>43</sup> Anne M. Vries & Marieke Liem, *Recidivism of Juvenile Homicide Offenders*, 29 BEHAV. SCI. & L. 483, 492 (2011).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 496 (citing Cindy Cottle et al., *The Prediction of Criminal Recidivism in Juveniles: A Meta-Analysis*, 28 CRIM. JUST. & BEHAV. 367 (2001)).

<sup>46</sup> *Id.* at 496.

<sup>47</sup> See AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 301.7 [hereinafter DSM-IV] (4th ed.1994).

of others and of self, consistent irresponsibility, and lack of remorse.<sup>48</sup> While the prevalence rates of this disorder in the general population are slight at 2–3%,<sup>49</sup> the prevalence rate among prison inmates can escalate to as high as 40–60%.<sup>50</sup>

Antisocial personality disorder and the term “psychopathy” are often used interchangeably.<sup>51</sup> However, there is a slight distinction between these terms. Antisocial personality disorder emphasizes observable characteristics, such as criminal activities, while psychopathy refers to more subjective characteristics.<sup>52</sup> “Research on adult offenders has shown that psychopathic offenders are responsible for a disproportionate amount of crime.”<sup>53</sup> Most serious crime is committed by a small proportion of the criminal population: 5% of criminally active subjects are responsible for over half of the offenses recorded.<sup>54</sup> In a study by Nagin and his colleagues that followed 403 male offenders from ages eight to thirty-two found that one group of offenders, labeled “high-level chronics,” offended at a higher rate throughout the entire observational period.<sup>55</sup> Members of this group displayed anti-social behavior, and the crime rates escalated the earlier in age the offenders began their criminal activities.<sup>56</sup> This group was much more likely to have started their criminal careers at an early age, and those that started offending by the age of eleven or twelve had the highest average number of arrests per offender.<sup>57</sup> The most serious violent offenses seen in the study were committed by this antisocial group during their adult years.<sup>58</sup>

The relationship between antisocial personality disorder and violent re-offending is so well established that the presence of the disorder has been incorporated as a risk assessment tool.<sup>59</sup> Another study on this subject reveals that the score on the Psychopathy Checklist-Revised (PCL-R) is the “single best predictor of violent recidivism” of criminals released from prison.<sup>60</sup> The PCL-R is used as an actuarial tool for predicting the risk of

<sup>48</sup> *Id.* at 649–50.

<sup>49</sup> P. Moran, *The Epidemiology of Antisocial Personality Disorder*, 34 SOC. PSYCHIATRY EPIDEMIOLOGY 231, 232 (1999).

<sup>50</sup> *Id.* at 234.

<sup>51</sup> DSM-IV, *supra* note 47, at 645.

<sup>52</sup> *See id.* at 647.

<sup>53</sup> Grant T. Harris et al., *The Construct of Psychopathy*, 28 CRIME & JUST. 197, 198–99 (2001).

<sup>54</sup> *Id.* at 198.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> Sophie Davison & Aleksander Janca, *Personality Disorder and Criminal Behaviour: What Is the Nature of the Relationship?*, 25 CURRENT OPINION PSYCHIATRY 39, 39 (2012).

<sup>60</sup> Harris et al., *supra* note 53, at 199.

## 2015] Childhood Conduct Disorder &amp; Antisocial Personality Disorder 247

violent recidivism.<sup>61</sup> Furthermore, treatment of individuals with antisocial personality disorder has not been shown to be effective in treating many of the violent aspects of the disorder. In treatment experiments among prison inmates with the disorder, medicinal treatments have shown limited improvements in aggression, but these improvements were limited to impulsive acts of aggression.<sup>62</sup> The treatments had no effect on pre-meditated aggressive behaviors.<sup>63</sup> Perhaps the disorder has proven to be very difficult to treat because there is “evidence supporting a heritable component to life-long, persistent, antisocial[]” behavior.<sup>64</sup>

#### IV. ANTISOCIAL PERSONALITY DISORDER: CONNECTION WITH CONDUCT DISORDER

The DSM-IV requires something of antisocial personality disorder that it does not demand of any other personality disorder: it stipulates that an Axis I disorder—childhood conduct disorder—must be present before the Axis II disorder—antisocial personality disorder—can be diagnosed.<sup>65</sup> The DSM-IV defines conduct disorder as a “pattern of behavior in which the basic rights of others or major age-appropriate societal norms or rules are violated.”<sup>66</sup> These violations include: aggression to people or animals (ranging from bullying to forcing others into sexual activity), destruction of property, deceitfulness, theft, and serious violation of the rules.<sup>67</sup> Conduct disorder is classified as “Childhood-Onset Type” if the behaviors occur before age ten, and classified as the “Adolescent-Onset Type” if the behavior occurs after age ten.<sup>68</sup> Estimated prevalence of the disorder ranges from 6–16% in boys and 2–9% in girls.<sup>69</sup> Conduct disorder is one of the most costly disorders for society.<sup>70</sup>

An early age of onset of criminal behavior has been found to be a reliable predictor of chronic or persistent offending as well as criminal versatility.<sup>71</sup> Likewise, Life Course Persistence models propose that early con-

<sup>61</sup> Davison & Janca, *supra* note 59.

<sup>62</sup> L.H. Ripolli et al., *Evidence-Based Pharmacotherapy for Personality Disorders*, 14 INT’L J. NEUROPSYCHOPHARMACOLOGY 1257, 1260 (2011).

<sup>63</sup> *Id.*

<sup>64</sup> Harris et al., *supra* note 53, at 214; *see generally* Laura A. Baker et al., *Behavioral Genetics: The Science of Antisocial Behavior*, 69 LAW & CONTEMP. PROBS. 7 (2006).

<sup>65</sup> *See* DSM-IV, *supra* note 47, at § 301.7.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Charles W. Mathias et al., *Behavioral Measures of Impulsivity and the Law*, 26 BEHAV. SCI. & L. 691, 696 (2008).

<sup>70</sup> *Id.*

<sup>71</sup> G.D. Walters et al., *Antisocial Personality Disorder with and Without Antecedent Childhood Conduct Disorder: Does It Make a Difference?*, 24 J. PERSONALITY DISORDERS 258, 260 (2010).

duct disorder constitutes a vital link in the series of developmental events that can lead to severe adult antisocial behavior.<sup>72</sup> Childhood-onset conduct disorder is strongly related to an increased risk for antisocial behavior, substance abuse disorders, aggression, and other mental health disorders by young adulthood.<sup>73</sup> Data shows that 25–40% of youths diagnosed with conduct disorder will develop antisocial personality disorder in adulthood.<sup>74</sup> Individuals with childhood-onset conduct disorder are “particularly prone to coming into contact with the legal system during childhood and continuing into adolescence and adulthood.”<sup>75</sup> Studies of children diagnosed with conduct disorder have outlined four factors that are especially predictive of chronic delinquency: frequent childhood antisocial behaviors, criminal versatility, early age of onset of criminal behavior, and the presence of antisocial behavior in more than one setting.<sup>76</sup>

Furthermore, the Psychopathy Check List: Youth Version (PCL-YV) “is a modification of the PCL-R that has been developed for adolescent offenders.”<sup>77</sup> In studies of incarcerated adolescent offenders, high scores on this test of antisocial behaviors were significantly related to having more common acts of violent delinquent behavior, institutional charges, recidivism, and shorter lengths of time to reoffending.<sup>78</sup> Most importantly, attempted treatment of conduct disorder and antisocial behaviors among these individuals did not prevent future offenses.<sup>79</sup> This data suggests that antisocial and psychopathic traits are evident and entrenched by mid-adolescence, and juveniles that exhibit these traits do not benefit from rehabilitative treatment.<sup>80</sup>

To this point, a unique study in 1995 focused on the recidivism rates of 128 juvenile homicide offenders, some of whom were treated in prison and some of whom were not.<sup>81</sup> Treatment included individual, group, family, drug, and alcohol counseling, life skills development, and job preparation.<sup>82</sup> Within only a year after release, the treatment appeared to have some success, as only 22% of the treated individuals faced rearrest

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<sup>72</sup> *Id.*

<sup>73</sup> Mathias et al., *supra* note 69, at 697.

<sup>74</sup> CONDUCT DISORDERS: A PRACTITIONER’S GUIDE TO COMPARATIVE TREATMENTS 4 (W. Michael Nelson et al. eds. 2006).

<sup>75</sup> Mathias et al., *supra* note 69, at 697.

<sup>76</sup> Harris et al., *supra* note 53, at 206.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 206–07.

<sup>79</sup> *Id.* at 207.

<sup>80</sup> *Id.*

<sup>81</sup> Vries & Liem, *supra* note 43, at 485 (discussing a study of juvenile homicide offenders by Howell).

<sup>82</sup> *Id.*



compared to 40% of the untreated offenders.<sup>83</sup> However, three years post-release, the difference between the groups nearly disappeared: 35% of the treated group had been rearrested compared to 39% of the untreated group.<sup>84</sup> Juveniles who received specialized treatment in prison fared almost no better than those untreated offenders in the long-run, further supporting the idea that many antisocial traits have been entrenched by adolescence and juvenile offenders showing these traits in severity are unlikely to be rehabilitated.<sup>85</sup> This refutes the Court's suggestion that these juvenile offenders, because of their premature development, have a greater chance of rehabilitation than their adult counterparts. It is important to attempt to distinguish these offenders who will not, in fact, respond positively to treatment and a second chance at freedom early in the criminal justice process to cut down these significant recidivism rates of juvenile homicide offenders.

#### V. CRIMINAL BEHAVIOR IN JUVENILE OFFENDERS IS AN INDICATOR OF FUTURE CRIMINAL BEHAVIOR IN ADULTHOOD

Research suggesting that antisocial traits are entrenched by mid-adolescence and that an early age of onset of criminal behavior is a reliable predictor of chronic offending and criminal versatility refutes the research cited in *Miller* that an early age of criminal behavior enhances the prospect that these deficiencies will be reformed as neurological development occurs over time. Studies suggest that "chronic antisocial behavior beginning in early childhood is the most diagnostic feature of psychopathy and that aggression, risk taking, and callousness, especially that apparent before adolescence . . . may be good indicators of the underlying construct" of antisocial personality disorder across a lifetime.<sup>86</sup> There are strong indications that impulsivity and "engaging in risky behaviors can be predicted and influenced in early development."<sup>87</sup> A longitudinal study by Caspi and his colleagues found that personality traits and temperaments in childhood development histories were related to health-risk behaviors in adulthood, including violent crime.<sup>88</sup> Participants in this study were assessed for temperament styles and personality traits at age three and again at ages eighteen and twenty-one.<sup>89</sup> The results showed that "undercontrolled children (described as irritable, impulsive, and impersistent), at age 3 were

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 485–86.

<sup>86</sup> *See, e.g.,* Harris et al., *supra* note 53, at 218.

<sup>87</sup> Jonathan Roberti, *A Review of Behavioral and Biological Correlates of Sensation Seeking*, 38 J. RES. PERSONALITY 256, 264 (2004).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

predictive of involvement in health-risk behaviors at age 21.”<sup>90</sup> Personality traits including low control, low social closeness, and high levels of aggression were predictive of engaging in health-risk (e.g. substance abuse, risky sexual behaviors, etc.) behaviors at age twenty-one.<sup>91</sup> These personality traits seem to be already embedded at the age of three and continue to follow individuals throughout life.<sup>92</sup> “[P]ersonality refers to relatively *consistent patterns* of thinking, feeling, and behaving manifested by individuals,” and is relatively stable over time.<sup>93</sup> The stability and heritability of personality over time helps to explain the relative stability and heritability of anti-social behaviors over time.<sup>94</sup>

Most interestingly, “juvenile behaviors can be reliably observed before the individual begins to disguise them in adulthood,” and therefore, future violent offenders can be more readily identified in their youth rather than later in life when an offender may be up for parole.<sup>95</sup> Observing these traits in juvenile offenders does not necessarily present the “hallmark features” of adolescence that can be rehabilitated over time, as the Court writes, but instead can indicate the potential for chronic criminal behavior in adulthood that in fact, shows very little response to treatment over time. In fact, in a survey of juvenile probationers regarding their self-anticipated propensity to re-offend, an early-onset age of delinquent behavior was the single most significant predicting factor of self-anticipated recidivism risk for violent juvenile probationers.<sup>96</sup> Furthermore, findings in this study also indicate that juveniles who have a “low social bond level but a high impulsivity level,” known characteristics of anti-social personality disorder, are likely to possess higher self-anticipated recidivism risks.<sup>97</sup> The relationship between psychopathy and violent criminal behavior is consistently supported, and psychopathy is a “robust predictor of violent recidivism.”<sup>98</sup>

Impulsive personality styles, specifically, “serve[] to maintain anti-social behavior across the life span through a variety of person-

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Shayne E. Jones et al., *Personality, Antisocial Behavior, and Aggression: A Meta-Analytic Review*, 39 J. CRIM. JUST. 329, 329 (2011) (emphasis added).

<sup>94</sup> *Id.*

<sup>95</sup> Harris et al., *supra* note 53.

<sup>96</sup> Chan & Chui, *supra* note 42, at 114.

<sup>97</sup> *Id.* at 115.

<sup>98</sup> Marta Wallinius et al., *Facets of Psychopathy Among Mentally Disordered Offenders: Clinical Comorbidity Patterns and Prediction of Violent and Criminal Behavior*, 198 PSYCHIATRY RES. 279, 280 (2012).

## 2015] Childhood Conduct Disorder &amp; Antisocial Personality Disorder 251

environment interactions.”<sup>99</sup> While it holds true that, as the Supreme Court points out, impulsivity and impetuosity is normative behavior during normal childhood development and is related to neurobiological changes in the brain’s organization and function, some children and adolescents engage in abnormally high levels of impulsivity that are especially prominent and severe.<sup>100</sup> The neurobiological changes in the brains of developing children underlie their inability to refrain from impulsive behavior defined by both a drive for novel experiences and by an underdeveloped inhibitory control mechanism, but individuals display these characteristics differently.<sup>101</sup> While all developing children and adolescents may be victim to these neurobiological changes, there is a fundamental difference between individuals who engage in impulsive behaviors such as risky sexual behavior or driving fast cars, and those individuals who engage in murder. Prominent impulsivity and lack of self-control is “the *property of individuals*” that explains their likelihood to engage in anti-social acts.<sup>102</sup> Severe impetuosity is considered a “key component of psychopathy,”<sup>103</sup> not a hallmark of youth as Justice Kagan argues.

Looking again at the cases of Evan Miller and Kuntrell Jackson, both boys had been diagnosed with conduct disorder. Jackson, in fact, had a criminal record that dated back to before he was ten years old and was diagnosed by a forensic psychologist as having conduct disorder, childhood-onset.<sup>104</sup> Miller was diagnosed with multiple disorders, including conduct disorder, attention-deficit disorder, and personality disorder.<sup>105</sup> Miller also exhibited substance abuse problems from an early age.<sup>106</sup> Both Miller and Jackson exhibit traits that are highly correlated to antisocial personality disorder in adulthood and high rates of recidivism, violent behavior, and shorter lengths of time before reoffending. Therefore, a mandatory life sentence without parole would ensure that these juvenile offenders with a high potential to reoffend cannot, in fact, continue their criminal behavior in our society. The Court stated itself in *Graham* that there is a fine “line between

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<sup>99</sup> Irina Komarovskaya et al., *The Role of Impulsivity in Antisocial and Violent Behavior and Personality Disorders Among Incarcerated Women*, 34 CRIM. JUST. & BEHAV. 1499, 1502 (2007).

<sup>100</sup> Mathias et al., *supra* note 69, at 697; *see generally* Benjamin J. Shannon et al., *Premotor Functional Connectivity Predicts Impulsivity in Juvenile Offenders*, 108 PROC. NAT’L ACAD. SCI. U.S. AM. 11241 (2011).

<sup>101</sup> Mathias et al., *supra* note 69, at 697.

<sup>102</sup> Komarovskaya et al., *supra* note 99 (emphasis added).

<sup>103</sup> *Id.*

<sup>104</sup> Brief for Respondent, Ray Hobbs at 2–3, *Jackson v. Hobbs*, 132 S. Ct. 2455 (2012) (No. 10-9647).

<sup>105</sup> *Miller v. State*, 63 So. 3d 676, 689 (Ala. Crim. App. 2010), *rev’d*, *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

<sup>106</sup> *Id.* at 683.

homicide and other serious violent offenses against the individual.”<sup>107</sup> The whole point of drawing this line between juvenile homicide offenders and other juvenile offenders is to show that juvenile homicide offenders are different and should be treated differently. While it may hold true that juvenile offenders who do not exhibit diagnoses of conduct disorder and other anti-social behavior have a better prospect of rehabilitation than their adult counterparts, juvenile offenders that do exhibit these traits most likely do not. Thus, in order for a mandatory life sentence for juvenile homicide offenders who are tried in adult courts to stand constitutionally, there must first be a careful examination of juvenile offenders that are transferred to adult courts.

#### VI. *MILLER V. ALABAMA*: MAJORITY REASONING, PRECEDENT STRAND TWO

The majority opinion in *Miller* further backed its decision to ban mandatory life sentences without parole for juvenile homicide offenders based on a second strand of precedent stemming from an idea presented in *Graham*.<sup>108</sup> *Graham* likened life without parole for juveniles to the death penalty itself.<sup>109</sup> Looking at the line of precedent regarding the death penalty, the Court has prohibited mandatory imposition of the death penalty and required that the sentencing authorities consider the characteristics of the defendant and the details of his offense before sentencing the offender to death.<sup>110</sup>

The Court in *Graham* writes that juvenile life sentences are analogous to capital punishment because not only will the juvenile die in prison, but also he will inevitably serve “more years and a greater percentage of his life in prison than an adult offender.”<sup>111</sup> The comparison evokes the line of precedent that demands individualized sentencing when imposing the death penalty, and makes this precedent relevant when sentencing juveniles to life without parole.<sup>112</sup> The Court argues that a mandatory sentence of life without parole does not take certain factors of the juvenile’s situation into consideration before sentencing, including: his chronological age, the hallmark features of youth (failure to appreciate risks and consequences, immaturity, and impetuosity), the family and home environment, and the way peer pressure may have encouraged him to commit the crime.<sup>113</sup>

#### VII. A PROPOSED INDIVIDUAL EVALUATION SCHEME

<sup>107</sup> *Graham v. Florida*, 560 U.S. 48, 69 (2010).

<sup>108</sup> *See Miller v. Alabama*, 132 S. Ct. 2455, 2463–64 (2012).

<sup>109</sup> *Graham*, 560 U.S. at 69.

<sup>110</sup> *Miller*, 132 S. Ct. at 2467.

<sup>111</sup> *Graham*, 560 U.S. at 70.

<sup>112</sup> *See Miller*, 132 S. Ct. at 2467.

<sup>113</sup> *Id.*

## 2015] Childhood Conduct Disorder &amp; Antisocial Personality Disorder 253

Alabama and Arkansas, on the other hand, argue that individualized consideration before sentencing a juvenile to life imprisonment without parole is unnecessary because the individualized circumstances come into play when the court decides to try a juvenile offender as an adult.<sup>114</sup> To this argument, the majority contends that most states lack a mechanism for judicial evaluation of juveniles tried in adult courts and are usually silent in regard to “standards, protocols, or appropriate considerations for decision-making.”<sup>115</sup>

This paper suggests that the proper solution in this situation would be a mandated mechanism to evaluate juveniles at the stage in deciding whether to try the offender in juvenile or adult court. If the justice system could draw the line between juvenile offenders who have a high potential for violent criminal behavior in adulthood and those who do not at this stage in the criminal justice process, the mandatory life without parole sentence for juvenile homicide offenders tried as adults could stand. While it may be time-consuming to conduct an individual analysis of the totality of the circumstances surrounding each homicide offender to determine eligibility to be tried as an adult and receive a mandatory sentence of life without parole, in reality, it seems like a more just system than the bright line over/under eighteen rule. Receiving a sentence of life without parole should be based on a multitude of circumstances, traits, and behaviors as discussed above, not whether or not the offender committed the murder before or after the stroke of midnight on his eighteenth birthday. Children do not turn into adults overnight; each individual’s maturity and culpability level is different depending on the stage of his life, not the date on which he was born. Furthermore, while creating costs up front, this system has the potential to negate future costs of unsuccessful treatments, reoffending and recidivism, and threats to society.

The evaluation mechanism must include a psychological test such as the PCL-YV that can help to predict violent recidivism rates in an individual. The evaluation must include a close examination of the possibility of a diagnosis of conduct disorder in the offender, specifically regarding the four factors that are most connected with chronic delinquency: frequent childhood antisocial behaviors, criminal versatility, early age of onset of criminal behavior, and the presence of antisocial behavior in more than one setting. Those scoring high on the PCL-YV with a history of conduct disorder can then be sent to criminal court to be tried as an adult and receive a mandatory sentence of life without parole if convicted of the murder, as these offenders show the highest potential for violent recidivism. Those offenders who score low on the test and do not show a history of conduct dis-

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<sup>114</sup> *Id.* at 2470.

<sup>115</sup> *Id.* at 2474.

order can then be tried in juvenile court. The system should only try those juvenile offenders with the most serious potential for violent recidivism and the lowest chance of rehabilitation in the adult system. This scheme would benefit society in allowing only those juvenile offenders most deserving of a mandatory life sentence without parole to be tried in adult court, while giving those offenders with a greater possibility of rehabilitation a chance to reform in the juvenile system.

### CONCLUSION

As the dissent points out, by relying on the assumption that the juvenile mind is more receptive to rehabilitation than its adult counterpart, the majority is allowing members of our society to be “exposed to the risk that these convicted murderers, if released from custody, will murder again.”<sup>116</sup> There is significant research that suggests that antisocial traits are entrenched by mid-adolescence and that an early age of onset of criminal behavior is a reliable predictor of chronic offending and criminal versatility. By mandating an evaluation mechanism for states to decide early in the process which juveniles should be tried as adults and which offenders should stay in the juvenile system, the courts would ensure that only those juvenile offenders with the highest potential for violent recidivism and lowest potential for rehabilitation would be subject to a mandatory life sentence without parole. This scheme would both protect society from being exposed to the risk of convicted murderers who are likely to offend again, and allow juvenile offenders who may have a better prospect of rehabilitation to remain in the juvenile system.

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<sup>116</sup> *Id.* at 2490 (Alito, J., dissenting).