

**“BE A LIE IF I TOLD YOU THAT I NEVER THOUGHT OF DEATH”: USING JUDICIAL DISCRETION TO CONSIDER ANTICIPATED EARLY DEATH DURING SENTENCING**

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ABSTRACT

*Prevalent in “street” culture for generations, the idea that youth who are subject to daily violence internalize that chaos into an expectation of dying young is fairly new to social-legal settings. “Anticipated early death” has been advanced as a theory in recent years by researchers who argue that youth exposed to this violence and chaos early in their lives respond to these traumatic experiences by endorsing the belief that they will die early. As a result, youthful offenders who believe that they will die young are more likely to engage in risky and/or criminal behaviors both early in life and across their lifespan.*

*The juvenile legal system has been built upon the idea that youthful offenders are capable of change. This assumption is probably best exemplified by the line of cases surrounding the malleability of youth and the inappropriate nature of mandatory long-term punishments (i.e., the death penalty and life in prison without the possibility of parole) that do not acknowledge the potential for rehabilitation. Thus, juveniles are provided resources and presumptions not afforded to individuals in the adult system.*

*Youthful offenders who operate under the assumption that they will die young, however, may be over the age of eighteen and thus not eligible for these benefits. As such, judges should use their discretion*

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*to consider anticipated early death during sentencing for all youthful offenders. Furthermore, because anticipated early death can be conceptualized as a criminal thinking style—a way of thinking that increases one’s likelihood of engaging in criminal or risky behavior—it is something that can be targeted through therapeutic intervention with the purpose of reducing recidivism and promoting public safety.*

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#### INTRODUCTION

“I figured I’d be dead by now.” “My friends are all dead or incarcerated.” “Something’s gotta change, or I’ll end up in the ground or in a cell.” As a psychological clinician, I have heard variations of each of these statements from the majority of my clients who have been involved with the criminal legal system.

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Many of them have seen their friends and families die young from gun violence and, as a result, their worldview has been altered. However, they are not alone; the theme of dying young has been referenced, and sometimes glorified, in popular culture.

Artists, particularly rap artists, have integrated this morbid reality into their lyrics:<sup>1</sup>

We wasn't supposed to make it past twenty-five  
Joke's on you we still alive<sup>2</sup>

or

Only the good soldiers die youngz  
Over chips they'll leave you drippin witcha side numb  
Come out the fort with your torches up and ride Dunn  
No one survives with a shy gun inside slums.<sup>3</sup>

Chinx Drugz, a thirty-one-year-old rapper from New York, had his song "Die Young" released posthumously by a drive-by shooting;<sup>4</sup> he sang:

If I die  
Probably die as a young n\*\*\*a.<sup>5</sup>

On the same track, CokeBoy Zack rapped:

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1. What follows is a selection of the varied and soulful lyrics from rappers on the topic of dying young. Though a full review of the rich lyrics in the rap and hip-hop communities commenting on early, violent death is beyond the scope of this Note, other noteworthy lyrics include: "Tell me, why the legends always gotta die quick?" RODDY RICCH, *Die Young*, on FEED THA STREETS II (Bird Vision Entertainment & Atlantic Records 2018); and

I seen the realest and the illest die  
The cycle continues, so many times the good ones  
The young ones  
So many misunderstood ones . . . .

GANG STARR, *Eulogy*, on THE OWNERZ (Virgin/EMI Records 2003). In *Eulogy*, the artists go on to name dozens of friends and artists who have lost their lives to the streets. *Id.*

2. KANYE WEST, *We Don't Care*, on THE COLLEGE DROPOUT (Def Jam & Roc-A-Fella 2004).

3. KOOL G RAP, *Good Die Young*, on THE GIANCANA STORY (Koch Records 2002).

4. Justin Wm. Moyer, *Chinx Drugz, N.Y. Rapper, Dead at 31 after Drive-By Shooting*, WASH. POST (May 18, 2015, 12:43 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2015/05/18/chinx-drugz-new-york-rapper-dead-at-31-from-gunshot-wound/>.

5. CHINX FEAT. COKEBOY ZACK, FRENCH MONTANA & MEET SIMS, *Die Young*, on WELCOME TO JFK (eOne Music 2015).

Live fast and die young n\*\*\*a  
 Know the consequences come with it.<sup>6</sup>

Tupac Shakur, who was famously killed in a drive-by at the age of twenty-five,<sup>7</sup> rapped

Be a lie if I told you that I never thought of death  
 My n\*\*\*as, we the last ones left but life goes on

the same year he was killed.<sup>8</sup> Before he was murdered at the age of thirty-two,<sup>9</sup> DeShaun “Proof” Holton wrote,

When he took my homie Snook was only in  
 eleventh grade  
 Now I hope to see his face at the Heaven gates.<sup>10</sup>

When society takes a minute to listen, the chorus of lived experience and trauma that results from expecting an early and violent death is deafening.

These lyrics reflect a fatalistic view of death and dying that is often born from experience. In 2017, the rate of death by homicide in the United States was 6.2 deaths per 100,000 people.<sup>11</sup> However, this rate varies drastically when data are categorized by gender and race. The rate of homicide increases

6. *Id.*

7. Kevin Powell, *Tupac Shakur: 1971–1996*, ROLLING STONE (Oct. 31, 1996, 5:00 AM), <https://www.rollingstone.com/music/music-news/tupac-shakur-1971-1996-91045/>.

8. 2PAC, *Life Goes On*, on ALL EYEZ ON ME (Interscope Records & Death Row Records 1996).

9. Jessica Robertson, *D12 Rapper Proof Fatally Shot*, ROLLING STONE (Apr. 11, 2006, 2:48 PM), <https://www.rollingstone.com/music/music-news/d12-rapper-proof-fatally-shot-97200/>.

10. D12, *Good Die Young*, on D12 WORLD (Interscope Records & Shady Records 2004). Other artists on the track discussed similar themes, paying homage to Karnail “Bugz” Pitts, a member of the group who was killed at the age of twenty-one. See *Detroit MC Bugz Slain: Bugz of the Dirty Dozen Is Shot to Death, Federation Records to Hold Tribute Concert*, ROLLING STONE (June 3, 1999, 4:00 AM) <https://www.rollingstone.com/music/music-news/detroit-mc-bugz-slain-88436/>. Kon Artis rapped:

But I guess that’s the way things go  
 I was blessed to see twenty-four

and Proof said:

To get tats for my fallen homies? I ain’t got enough skin.

D12, *supra*.

11. NAT’L CTR. FOR HEALTH STAT., TABLE 5: AGE-ADJUSTED DEATH RATES FOR SELECTED CAUSES OF DEATH BY SEX, RACE, AND HISPANIC ORIGIN: UNITED STATES SELECTED YEARS 1950–2017, at 1 (2018), <https://www.cdc.gov/nchs/data/hus/2018/005.pdf>.

to 9.8 deaths per 100,000 for males,<sup>12</sup> and though only 2.9 out of 100,000 non-Hispanic or Latino white Americans died from murder,<sup>13</sup> the rate nearly doubles to 5.2 per 100,000 for Hispanic or Latino Americans,<sup>14</sup> and is more than seven times higher, at 21.4 per 100,000, for Black Americans.<sup>15</sup> Homicide is the ninth leading cause of death for Hispanic or Latino American men,<sup>16</sup> the seventh leading cause of death for Black Americans,<sup>17</sup> and the fourth leading cause of death for Black American men.<sup>18</sup> For young people aged fifteen to twenty-four, homicide is the third leading cause of death in America.<sup>19</sup> Young Black men are killed in the United States at grossly disproportionate rates to other citizens. Those who grow up in low-income urban areas are “at a greater risk for traumatic exposure, violent injury, and premature death” than any other demographic.<sup>20</sup> This type of violence is uniquely traumatic in that it is chronic, inescapable, and unpredictable, resulting in increased psychological damage upon the youth impacted.<sup>21</sup>

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12. *Id.*

13. *Id.* at 2.

14. *Id.* at 4.

15. *Id.* at 3.

16. In 2017, 2,588 Hispanic or Latino American men were murdered. NAT'L CTR. FOR HEALTH STAT., TABLE 6: LEADING CAUSES OF DEATH AND NUMBERS OF DEATH BY SEX, RACE, AND HISPANIC ORIGIN: UNITED STATES, 1980 AND 2017, at 5 (2018), <https://www.cdc.gov/nchs/data/hus/2018/006.pdf>.

17. In 2017, 10,073 Black Americans were murdered. *Id.* at 2.

18. In 2017, 8,643 non-Hispanic or Latino Black American men were murdered. *Id.* at 4. Of note, homicide is not one of the top ten leading causes of death for non-Hispanic or Latino white Americans nor non-Hispanic or Latino white American men. *Id.* at 3, 6.

19. In 2017, 4,905 people aged 15–24 were murdered in the United States. NAT'L CTR. FOR HEALTH STAT., TABLE 7: LEADING CAUSES OF DEATH AND NUMBERS OF DEATHS, BY AGE: UNITED STATES, 1980 AND 2017, at 2 (2018), <https://www.cdc.gov/nchs/data/hus/2018/007.pdf>. While still listed, homicide dropped to the fifth leading cause of death for individuals aged 25–44 and was not listed as one of the top ten causes of death for individuals over the age of 45. *Id.* at 2–3.

20. See Jocelyn R. Smith & Desmond U. Patton, *Posttraumatic Stress Symptoms in Context: Examining Trauma Responses to Violent Exposures and Homicide Death Among Black Males in Urban Neighborhoods*, 86 AM. J. ORTHOPSYCHIATRY 212, 212–13 (2016) (finding higher incidence of the relevant causes of trauma than in “middle-class youth growing up in suburban areas” and, in particular, higher rate of homicide than any other demographic studied).

21. One study participant described an incident that occurred when he was nineteen years old, where “I told my cousin I loved him and gave him a hug and walked out and the next thing I know, he gone, you know . . . that’s crazy.” *Id.* at 216.

When the expectation of dying young is accepted as a part of life, those impacted may integrate a fatalistic worldview into their belief system as a coping mechanism for dealing with the constant tragedy and chaos. Recently, social science researchers have studied this phenomenon under the framework of “anticipated early death.”<sup>22</sup> This theory argues that youth who have been exposed to violence and chaos early in life can internalize the fear of death and attempt to take back some control over their lives by submitting to the belief that they will be killed prematurely.<sup>23</sup>

Under the framework of anticipated early death, youthful offenders who believe that they will die young do not live without fear of death; rather, these individuals engage in risky and/or criminal behaviors *because* they believe that they will die or be killed prematurely and have accepted as inescapable the most drastic consequence of all—dying young.<sup>24</sup> Anticipated early death thus runs counter to many of the assumptions made about youth involved in the legal system. It reflects a way of thinking that makes a calculated, as opposed to rash, decision regarding choices and consequences that can often result in antisocial behavior, such as criminal activities.<sup>25</sup> The legal

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22. See, e.g., Timothy Brezina, Erdal Tekin & Volkan Topalli, “*Might Not Be a Tomorrow*”: A Multimethods Approach to Anticipated Early Death and Youth Crime, 47 CRIMINOLOGY 1091, 1093 (2009); Arna L. Carlock, *Live Fast, Die Young: Anticipated Early Death and Adolescent Violence and Gang Involvement 1–2* (2016) (Ph.D dissertation, University of Albany) (ProQuest); Alex R. Piquero, “*Take My License n’ All that Jive, I Can’t See . . . 35*”: Little Hope for the Future Encourages Offending Over Time, 33 JUST. Q. 73, 74 (2016); Marie Skubak Tillyer, *Victimization, Offending, and Perceived Risk for Early Violent Death*, 42 CRIM. JUST. & BEHAV., 529, 539 (2015).

23. See, e.g., Tillyer, *supra* note 22, at 539 (finding prior victimization and witnessing violence can increase the risk of developing an anticipated early death); Tara D. Warner & Raymond R. Swisher, *The Effect of Direct and Indirect Exposure to Violence on Youth Survival Expectations*, 55 J. ADOLESCENT HEALTH, 817, 821 (2014) [hereinafter Warner & Swisher, *Effects of Exposure to Violence*] (finding those who experienced physical abuse are more likely to develop an anticipated early death); Carlock, *supra* note 22, at 11 (finding dangerous and unpredictable environments may be associated with the development of an anticipated early death).

24. Carlock, *supra* note 22, at 141–43.

25. See Daniel S. Nagin & Raymond Paternoster, *Enduring Individual Differences and Rational Choice Theories of Crime*, 27 LAW & SOC’Y REV. 467, 468–69 (1993) (providing an explanation of rational choice theory); Dana L. Haynie, Brian Soller & Kristi Williams, *Anticipating Early Fatality: Friends’, Schoolmates’ and Individual Perceptions of Fatality on Adolescent Risk Behaviors*, 43

system has long recognized youth as a separate class of offenders than adults because of their immaturity, irrational decision-making, and, perhaps most saliently, their potential for change.<sup>26</sup> However, hard and often arbitrary lines have been drawn to distinguish the youthful offender from the adult offender. Adolescents and young adults tend to fall into the former category, where growth and change are still possible, yet those over the age cut-off (often set at eighteen years old) are seen as more inflexible and less capable of the same metamorphosis.<sup>27</sup>

Furthermore, even if an offender is under the age of eighteen, some are seen as “incorrigible” or “irreparably corrupt” given their offending histories and perceived future risk and thus not capable of the same change as their peers.<sup>28</sup> If a youthful offender is either over eighteen or deemed “irreparably corrupt,” they face harsher sentences, are offered fewer resources and fewer opportunities to demonstrate any change they do make.<sup>29</sup> However, identifying those who anticipate an early death may also offer an opportunity for growth and intervention. If engaging in criminal activity is a choice influenced by the belief that one will die or be killed prematurely, then interventions that target this belief system could drastically alter the calculus underlying that choice.

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J. YOUTH & ADOLESCENCE 175, 189 (2014) (applying rational choice theory to anticipated early death).

26. See, e.g., Alexandra O. Cohen, Richard J. Bonnie, Kim Taylor-Thompson & BJ Casey, *When Does a Juvenile Become an Adult: Implications for Law and Policy*, 88 TEMP. L. REV. 769, 779–83 (2016).

27. See *Roper v. Simmons*, 543 U.S. 551, 574 (2005) (“The age of 18 is the point where society draws the line for many purposes between childhood and adulthood.”).

28. See *Miller v. Alabama*, 567 U.S. 460, 473, 479–80 (2012); *Montgomery v. Louisiana*, 136 S. Ct. 718, 735 (2016). See generally Jaymes Fairfax-Columbo, Sarah Fishel & David DeMatteo, *Distinguishing “Incorrigibility” from “Transient Immaturity”: Risk Assessment in the Context of Sentencing/Resentencing Evaluations for Juvenile Homicide Offenders*, 5 TRANSLATIONAL ISSUES PSYCH. SCI. 132 (2019).

29. For example, those over eighteen or those deemed “irreparably corrupt” can be sentenced to life in prison without the possibility of parole. See *Miller*, 567 U.S. at 479–80; *Montgomery*, 136 S. Ct. at 735; Fairfax-Columbo et al., *supra* note 28, at 132.

As a result, whether a youthful offender anticipates an early death should be considered among the mitigating factors during sentencing. If the youth anticipated an early death, it would offer an alternative explanation to “incorrigibility” for an extensive or violent offending history. Anticipated early death also impacts an individual’s risk of future violence, as anticipating an early death is not a stable trait or mindset—(1) it changes as the individual advances past the age at which they previously believed they would die and (2) is a cognitive thinking style that can be targeted and mitigated through therapeutic treatment.<sup>30</sup> Furthermore, anticipated early death has been conceptualized in the literature as believing one would be “killed by age 21” or that they would not “live to age 35.”<sup>31</sup> As such, this phenomenon impacts young adults in addition to traditionally “juvenile” offenders and creates an argument for differential sentencing past the age of legal adulthood.

This Note blends social science and legal precedent to argue that the presence of anticipated early death should be considered during sentencing for youthful offenders, including those the legal system currently considers to be “adults” (i.e., over eighteen years old). Part I discusses the legal foundation for considering juveniles a different class of offender than adults. Part II outlines the role of judicial discretion in sentencing and the factors historically considered in the

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30. See Sarah Fishel, *Anticipated Death and Offending Patterns: A Retrospective Self-Report Study* (June 28, 2019) (manuscript at 6) [hereinafter Fishel, M.S. Thesis] (M.S. thesis, Drexel University) (on file with the Drexel University Library System); Tara D. Warner & Raymond R. Swisher, *Adolescent Survival Expectations: Variations by Race, Ethnicity, and Nativity*, 56 J. HEALTH & SOC. BEHAV. 478, 485–86 (2015) [hereinafter Warner & Swisher, *Adolescent Survival Expectations*]; Naomi N. Duke, Carol L. Skay, Sandra L. Pettingell & Iris W. Borowsky, *Adolescent Perception of Premature Risk for Death: Contributions from Individual and Environmental Contextual Factors*, 9 ACAD. PEDIATRICS 256, 261 (2009).

31. The conceptualization of anticipated early death in this manner is based largely off of the design of the National Longitudinal Study of Adolescent to Adult Health, which provided this early definition. See generally KATHLEEN M. HARRIS & J. RICHARD UDRY, NATIONAL LONGITUDINAL STUDY OF ADOLESCENT TO ADULT HEALTH (ADD HEALTH) (1994–2008) (2016), <https://www.icpsr.umich.edu/icpsrweb/DSDR/studies/21600/summary>; see also Fishel, M.S. Thesis, *supra* note 30 (manuscript at 6) (providing a thorough review of how anticipated early death has been conceptualized and operationalized in social science literature).

sentencing process. Part III introduces the theory of anticipated early death and examines the links between the theory and offending patterns observed in research. Finally, Part IV presents the proposed solution and an argument for considering anticipated early death during the sentencing phase for juvenile and young adult offenders, including a review of possible interventions to mitigate anticipating an early death as a risk factor for future offending. It also presents the argument for revisiting and expanding the definition of “juvenile” to increase the age limit and reflect the current state of neuroscientific, psychological, and sociological research.

## I. JUVENILES AS A UNIQUE CLASS OF OFFENDER

### A. *A Brief History of the Juvenile Legal System*

The United States has always recognized a distinction between young children who came before the legal system and their adult counterparts. Traditionally, children under the age of seven were not held culpable for crimes they may have committed.<sup>32</sup> In 1899, advocates for justice reform established the first juvenile court, located in Cook County, Illinois.<sup>33</sup> The

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32. NAT’L RSCH. COUNCIL & INST. OF MED., *JUVENILE CRIME, JUVENILE JUSTICE* 157 (Joan McCord, Cathy S. Spatz & Nancy A. Crowell eds., National Academy Press 2001) [hereinafter *JUVENILE CRIME, JUVENILE JUSTICE*]. Today, only twenty-two U.S. states and territories have statutes designating the minimum age for criminal responsibility, which ranges from the age of six in North Carolina to the age of twelve in Massachusetts and California (with some exceptions in the latter state). *Minimum Age for Delinquency Adjudication—Multi-Jurisdiction Survey*, NAT’L JUV. DEFENDER CTR., [hereinafter *Delinquency Adjudication*], <https://njdc.info/practice-policy-resources/state-profiles/multi-jurisdiction-data/minimum-age-for-delinquency-adjudication-multi-jurisdiction-survey> (Jan. 22, 2020). See, e.g., N.C. GEN. STAT. ANN. § 7B-1501(7)(a) (West 2020) (“Any juvenile . . . less than 16 . . . but at least 6 . . .”), MASS. GEN. LAWS ANN. Ch. 119, § 52 (West 2021) (defining a “delinquent child” as “a child between 12 and 18 years of age who commits” an offense), CAL. WELF. & INST. CODE § 602 (West 2021) (“any minor who is between 12 . . . and 17 . . . when [they] violate[] any law” and “any minor under 12” who has committed murder, rape by force, sodomy by force, oral copulation by force, or sexual penetration by force, “is within the jurisdiction of the juvenile court”).

33. NAT’L RSCH. COUNCIL, *REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH* 33 (Richard J. Bonnie, Robert L. Johnson, Betty M. Chemers & Julie A. Schuck eds., 2013) [hereinafter *REFORMING JUVENILE JUSTICE*]; *JUVENILE CRIME, JUVENILE JUSTICE*, *supra* note 32, at 157.

purpose of this system was to acknowledge the differences between youth and adults and respond to their needs in a more age-appropriate way.<sup>34</sup> As such, the new system recognized the diminished capacity of children and adolescents under the age of sixteen, focused on a model of rehabilitation rather than punishment—for example, sending children to “reformatory schools” rather than prisons—and gave great discretion to the presiding judge in determining the appropriate sanction.<sup>35</sup> However, the original system left much to be desired. Although juveniles adjudicated through the system were spared from the adversarial adult system, they were also no longer given the same procedural rights, such as the right to an attorney or to trial by jury, and were, instead, subjected entirely to judicial discretion.<sup>36</sup>

The questionable success of the system and concerns over juveniles’ due process rights led to the decisions of *Kent v. United States*<sup>37</sup> and *In re Gault*.<sup>38</sup> The Court in *Kent* determined that juveniles have both a right to hearings deciding the system in which they would be adjudicated and to competent counsel for said hearings.<sup>39</sup> A year later, *In re Gault* addressed growing concerns over the lack of other due process rights granted to juveniles. The Court expanded rights to include: (a) the right to legal counsel for all hearings,<sup>40</sup> (b) to know the charges against

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34. See JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 32, at 157.

35. See *Kent v. United States*, 383 U.S. 541, 554 (1966) (“The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility . . . .”); JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 32, at 154, 157.

36. See REFORMING JUVENILE JUSTICE, *supra* note 33, at 34; JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 32, at 154.

37. 383 U.S. 541 (1966).

38. 387 U.S. 1 (1967).

39. *Kent*, 383 U.S. at 562.

40. *In re Gault*, 387 U.S. at 41 (“We conclude . . . that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile’s freedom is curtailed, the child and his parents must be notified of the child’s right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.”).

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the juvenile,<sup>41</sup> (c) to confront and cross-examine witnesses,<sup>42</sup> (d) to invoke their Fifth Amendment right against self-incrimination,<sup>43</sup> (e) to receive a transcript of the hearing,<sup>44</sup> and (f) the right to appeal.<sup>45</sup> Other cases decided during this period of reform also granted juvenile defendants the equivalent of the adult due process standards, for example the right to have the charges against them proven beyond a reasonable doubt<sup>46</sup> and protection against double jeopardy.<sup>47</sup> However, other decisions from the same period indicated that judicial decision-makers wanted the juvenile system to remain distinct from the adult system: most notably, in *McKeiver v. Pennsylvania*, the Court denied juveniles the right to trial by jury.<sup>48</sup> Despite these reforms narrowing the *procedural* divide between the juvenile and adult systems, the *purpose* of the juvenile system remained rooted in the idea of rehabilitation.

The rehabilitative purpose of the juvenile system was not called into question for another decade. The rise in violent crime rates in the 1980s and 1990s led to public panic about so-called “superpredators”—a generation of children supposedly without empathy whom the public was told would go on to commit violent crimes without remorse or regard for the

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41. *Id.* at 33–34 (“[Due Process] does not allow a hearing to be held in which a youth’s freedom and his parents’ right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet.”).

42. *Id.* at 57 (“[A]bsent a valid confession, a determination of delinquency and an order of commitment to a state institution cannot be sustained in the absence of sworn testimony subjected to the opportunity for cross-examination in accordance with our law and constitutional requirements.”).

43. *Id.* at 49 (“[J]uvenile proceedings to determine ‘delinquency,’ which may lead to commitment to a state institution, must be regarded as ‘criminal’ for purposes of the privilege against self-incrimination.”).

44. *Id.* at 58.

45. *Id.*

46. *In re Winship*, 397 U.S. 358, 368 (1970).

47. *Breed v. Jones*, 421 U.S. 519, 541 (1975).

48. 403 U.S. 528, 545 (1971) (“Despite all these disappointments, all these failures, and all these shortcomings, we conclude that trial by jury in the juvenile court’s adjudicative stage is not a constitutional requirement.”).

consequences of their actions.<sup>49</sup> Legislatures responded to the panic by re-popularizing and expanding the practice of transferring juvenile cases to adult courts, de-emphasizing the importance of mitigating factors in juvenile cases, and lowering the age of entry to allow for defendants as young as fifteen years old to be prosecuted in the adult criminal system.<sup>50</sup> Additionally, laws expanded sentencing options for judges, removed some of the confidentiality measures that protected youth during their hearings, and emphasized victims' rights in these cases.<sup>51</sup> In contrast to the earlier cases designed to grant additional procedural rights to juvenile defendants, these cases reflected a general change in public attitude away from rehabilitation towards a system that emphasizes punishment.

### B. *A Modern Approach to Juveniles in the Legal System*

Today, reduction in the violent crime rates,<sup>52</sup> data exposing the myth of the "superpredator,"<sup>53</sup> the expense of mass incarceration,<sup>54</sup> and research showing both the limited efficacy

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49. This phrase was coined by John DiIulio in a magazine article in 1995 and subsequently popularized by the media. See John J. DiIulio, *The Coming of the Super-Predators*, WEEKLY STANDARD, Nov. 27, 1995, archived at WASH. EXAMINER, <https://www.washingtonexaminer.com/weekly-standard/the-coming-of-the-super-predators>; Carroll Bogert & LynNell Hancock, *Analysis: How the Media Created a 'Superpredator' Myth that Harmed a Generation of Black Youth*, NBC NEWS (Nov. 20, 2020, 6:00 AM) <https://www.nbcnews.com/news/us-news/analysis-how-media-created-superpredator-myth-harmed-generation-black-youth-n1248101>.

50. See REFORMING JUVENILE JUSTICE, *supra* note 33, at 38–40.

51. NAT'L CTR. FOR JUV. JUST., JUVENILE OFFENDERS AND VICTIMS: 2014 NATIONAL REPORT 86 (Melissa Sickmund & Charles Puzzanchera eds., 2014) [hereinafter JUVENILE OFFENDERS AND VICTIMS].

52. See, e.g., WHAT THE DATA SAYS (AND DOESN'T SAY) ABOUT CRIME IN THE UNITED STATES, [https://www.pewresearch.org/fact-tank/2020/11/20/facts-about-crime-in-the-u-s/ft\\_20-11-12\\_crimeintheus\\_2/](https://www.pewresearch.org/fact-tank/2020/11/20/facts-about-crime-in-the-u-s/ft_20-11-12_crimeintheus_2/) (Nov. 20, 2020); Lara A. Bazelon, *Exploding the Superpredator Myth: Why Infancy is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 163 (2000).

53. See, e.g., *The Superpredator Myth, 25 Years Later*, EQUAL JUST. INITIATIVE (Apr. 7, 2014), <https://eji.org/news/superpredator-myth-20-years-later/>.

54. See, e.g., *Mass Incarceration Costs \$182 Billion Every Year, Without Adding Much to Public Safety*, EQUAL JUST. INITIATIVE (Feb. 6, 2017), <https://eji.org/news/mass-incarceration-costs-182-billion-annually/>; John Pfaff, *The Incalculable Costs of Mass Incarceration*, THE APPEAL (Sept. 20, 2018), <https://theappeal.org/the-incalculable-costs-of-mass-incarceration/>.

of punitive measures<sup>55</sup> and heightened efficacy of rehabilitative measures on juvenile recidivism<sup>56</sup> have led to a careful reconsideration of the “tough on crime” policies and legislation of the last few decades.<sup>57</sup> In the 1980s, case law began to acknowledge juveniles, because of their age and immaturity, as a unique class of offender.<sup>58</sup> Despite the growing fear of the “superpredator,” the Supreme Court has most clearly acknowledged the malleability of the juvenile offender in cases involving the most violent fact patterns and the most serious crimes, beginning with its death penalty jurisprudence and, more recently, expanding the distinction to cases involving the sentence of life in prison without parole. Though a thorough review of the case law is beyond the scope of this Note, a brief overview of the jurisprudence that incorporates social science to argue for differential treatment of youthful offenders follows.

The first notable case in the line of juvenile death penalty jurisprudence is *Eddings v. Oklahoma*.<sup>59</sup> In 1977, sixteen-year-old Eddings killed a police officer when he and a few of his friends were pulled over while running away from home.<sup>60</sup> After finding Eddings guilty of the homicide, the lower court considered Eddings’s age during sentencing, but determined

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55. See, e.g., ALEX PIQUARO & LAURENCE STEINBERG, MACARTHUR FOUND., REHABILITATION VERSUS INCARCERATION OF JUVENILE OFFENDERS: PUBLIC PREFERENCES IN FOUR MODELS FOR CHANGE STATES (2008), [https://www.macfound.org/media/article\\_pdfs/willingnesstopayfinal.pdf](https://www.macfound.org/media/article_pdfs/willingnesstopayfinal.pdf); 5 *Things About Deterrence*, NAT’L INST. OF JUST. (Jun. 5, 2016), <https://nij.ojp.gov/topics/articles/five-things-about-deterrence>; JOSH ROVNER, SENT’G PROJ., HOW TOUGH ON CRIME BECAME TOUGH ON KIDS: PROSECUTING TEENAGE DRUG CHARGES IN ADULT COURTS 10 (2016), <https://www.sentencingproject.org/wp-content/uploads/2016/12/How-Tough-on-Crime-Became-Tough-on-Kids.pdf>.

56. See, e.g., Mary D. Pan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 631–32 (2012).

57. JUVENILE CRIME, JUVENILE JUSTICE, *supra* note 32, at 155–56; see also Bazelon, *supra* note 52, at 187–90 (discussing how children lack the analytical reasoning abilities necessary to make meaningful moral choices).

58. See David DeMatteo, Alice Thornewill & Sarah Fishel, *Overview of U.S. Supreme Court and State Court Decisions Impacting Juvenile Justice*, in ROUTLEDGE ENCYCLOPEDIA OF PSYCHOLOGY IN THE REAL WORLD (Regan A. R. Gurung ed., forthcoming) [hereinafter DeMatteo et al., *Court Decisions*] (manuscript at 9) (on file with author).

59. 455 U.S. 104 (1982).

60. *Id.* at 105–06.

that the aggravating circumstances of the crime outweighed this mitigating factor and sentenced the youth to death.<sup>61</sup> The Supreme Court overturned Eddings's sentence, emphasizing not only his age, but also the fact that the traumatic circumstances of his youth compounded the weight that should have been given to his age.<sup>62</sup> Though the Court did not opine on the constitutionality of the death penalty for youth directly, its emphasis on Eddings's childhood and his age set the groundwork for the following jurisprudence that did address these questions directly.

The constitutionality of the death penalty for minors was finally addressed in 1988—after decades of use, the execution of dozens of children, and with approximately thirty people on death row for crimes they committed as juveniles.<sup>63</sup> In *Thompson v. Oklahoma*, the Supreme Court held that the imposition of the death penalty for defendants who were under the age of sixteen at the time of the offense was unconstitutional.<sup>64</sup> In its decision, the Court cited some of the differences between the young defendant and the adult defendant for coming to its conclusion, specifically noting “inexperience, less education, and less intelligence” as factors that distinguished youthful offenders from their adult counterparts.<sup>65</sup>

However, the next year the Court drew a firm boundary around its previous decision in *Thompson* with its decision in *Stanford v. Kentucky*.<sup>66</sup> The Court heard the consolidated cases of Stanford, a seventeen-year-old who had been convicted of murder, among other offenses, and sentenced to death, and Wilkins, a sixteen-year-old similarly convicted and also

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61. *Id.* at 106–10.

62. *Id.* at 116–17.

63. For an overview of juvenile death penalty cases prior to 1988, see *History of the Juvenile Death Penalty*, WASH. POST (July 19, 1988), <https://www.washingtonpost.com/archive/lifestyle/wellness/1988/07/19/history-of-the-juvenile-death-penalty/d2ebf62e-3c6f-4f9b-b673-d6d607e0154a>.

64. 487 U.S. 815, 838 (1988).

65. *Id.* at 835.

66. 492 U.S. 361, 380 (1989).

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sentenced to death.<sup>67</sup> Instead of expanding its previous decision to prohibit executing all juveniles under the age of eighteen, the Court held fast to its constitutional cut-off of sixteen, and specifically noted that if a defendant was a minor above the age of sixteen, it was constitutional for courts to impose the death penalty.<sup>68</sup>

The constitutionality of sentencing minors between the ages of sixteen and eighteen to death was not re-heard before the Supreme Court for almost two decades—until *Roper v. Simmons*, which involved a seventeen-year-old who had been sentenced to death.<sup>69</sup> While Simmons was appealing his sentence, the Supreme Court decided *Atkins v. Virginia*, which held that executing the “mentally retarded” violated the Eighth and Fourteenth Amendments’ prohibition of cruel and unusual punishment, partially due to the reduced capacity—and therefore legal culpability—of the intellectually disabled.<sup>70</sup> Simmons filed a subsequent appeal, arguing in part that if those with reduced mental capacity could not constitutionally be executed, then the death penalty was also unconstitutional for *all* minors.<sup>71</sup>

The Supreme Court heard the case and overturned its previous decision, ruling that execution was an unconstitutional sentence for defendants who committed their crime when they were under the age of eighteen.<sup>72</sup> The Court cited “[a] lack of maturity and an undeveloped sense of responsibility,”<sup>73</sup> the fact that “juveniles are more vulnerable or susceptible to . . . peer pressure,”<sup>74</sup> and “that the character of a juvenile is not as well formed as that of an adult” in that their

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67. *Id.* at 365–67.

68. *Id.* at 380 (“We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age.”).

69. 543 U.S. 551, 556 (2005).

70. 536 U.S. 304, 318–21 (2002).

71. *Roper*, 543 U.S. at 559.

72. *Id.* at 578.

73. *Id.* at 569 (quoting *Johnson v. Texas*, 506 U.S. 350, 367 (1993)).

74. *Id.* (citing *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)).

“personality traits . . . are more transitory, less fixed,” as factors contributing to the decision.<sup>75</sup> The Court relied heavily on neuropsychology and psychology research to come to its conclusion, a departure from previous case law.<sup>76</sup>

Five years later, *Graham v. Florida* applied this discussion regarding age and maturity to the sentence of life in prison without the possibility of parole.<sup>77</sup> Graham, a seventeen-year-old who had been arrested for armed robbery and charged with violations of the terms and conditions of his previous probation, was sentenced to life in prison.<sup>78</sup> Since Florida had abolished its parole system in previous years, without an executive pardon Graham had effectively been sentenced to life in prison without the possibility of parole for a crime he had committed at seventeen.<sup>79</sup> Graham appealed to the Supreme Court, arguing that the lengthy sentence violated his Eighth Amendment rights against cruel and unusual punishment.<sup>80</sup> The Court applied similar reasoning as it had in *Roper* and held that a sentence of life in prison without parole for juvenile offenders convicted of non-homicide offenses was unconstitutional.<sup>81</sup>

The most recent decisions<sup>82</sup> expanding this line of jurisprudence came with the Court’s decisions in *Miller v.*

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75. *Id.* at 570.

76. *See id.* at 568–70. *See* Laurence Steinberg, *Adolescent Brain Science and Juvenile Justice Policymaking*, 23 *PSYCH., PUB. POL’Y, & L.* 410, 415–16 (2017); KIRK HEILBRUN, DAVID DEMATTEO, CHRISTOPHER KING & SARAH FILONE, *EVALUATING JUVENILE TRANSFER AND DISPOSITION: LAW, SCIENCE, AND PRACTICE* 47, 241–42 (2017); DeMatteo et al., *Court Decisions*, *supra* note 58 (manuscript at 11).

77. 560 U.S. 48, 52–53 (2010).

78. *Id.* at 53–57.

79. *Id.* at 57; *see also* JUVENILE OFFENDERS AND VICTIMS, *supra* note 51, at 92.

80. *Graham*, 560 U.S. at 58.

81. *Id.* at 68, 82.

82. It should be noted that this jurisprudence may not yet be settled: in late 2020, the Court heard arguments in a case that reconsiders current precedent. *See Jones v. Mississippi*, 140 S. Ct. 1293 (2020) (granting certiorari); *Jones v. Mississippi*, SCOTUSBLOG (Nov. 3, 2020) <https://www.scotusblog.com/case-files/cases/jones-v-mississippi/>; Amy Howe, *Case Preview: Court to Consider Life Sentences for Juveniles—Again*, SCOTUSBLOG (Nov. 2, 2020, 2:15 PM), <https://www.scotusblog.com/2020/11/case-preview-court-to-consider-life-sentences-for-juveniles-again/>. On the other hand, the Supreme Court of Washington just extended the rulings discussed in this section. *See In re Pers. Restraint of Monschke*, No. 96772-5, slip op. at 34 (Wash.

*Alabama*<sup>83</sup> and *Montgomery v. Louisiana*.<sup>84</sup> In the former, Miller, a fourteen-year-old, was found guilty of arson and murder: crimes with associated mandatory minimum sentences of life in prison without the possibility of parole.<sup>85</sup> Miller appealed, arguing that his sentence violated his Eighth Amendment rights.<sup>86</sup> In response, the Court expanded its previous finding regarding the differences between juvenile and adult offenders and held that juveniles could not be sentenced under a scheme that mandatorily imposed life in prison without the possibility of parole.<sup>87</sup> The Court noted, however, that this was not an indiscriminate ban on the sentence; life in prison without the possibility of parole could still be imposed on juveniles when deemed appropriate based on the facts of the case at hand if they were determined to be “incorrigible” or “irreparabl[y] corrupt[ ],” and thus beyond rehabilitation.<sup>88</sup> In *Montgomery v. Louisiana*, the Court retroactively applied *Miller* and required resentencing hearings for the over 2,300 youth mandatorily sentenced to life without parole under previous jurisprudence.<sup>89</sup>

### C. The Argument Against the Strict Age Designation

These growing protections for adolescents faced with the most severe penalties available in the American legal system have also been met with criticism. The most relevant for the purposes of this analysis is the argument against the strict age

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Mar. 11, 2021) (en banc) (“Just as courts must exercise discretion before sentencing a 17-year-old to die in prison, so must they exercise the same discretion when sentencing an 18-, 19-, or 20-year-old.”).

83. 567 U.S. 460, 465 (2012).

84. 136 S. Ct. 718, 725 (2016).

85. *Miller*, 567 U.S. at 465–69.

86. *Id.* at 469.

87. *Id.* at 479; DeMatteo et al., *Court Decisions*, *supra* note 58 (manuscript at 12).

88. *Miller*, 567 U.S. at 473, 479–80 (2012); *see also* Fairfax-Columbo et al., *supra* note 28, at 133.

89. *Montgomery*, 136 S. Ct. at 737; JOSH ROVNER, SENT’G PROJECT, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW 3 (2021), <https://www.sentencingproject.org/publications/juvenile-life-without-parole/>. In Pennsylvania, for example, 464 “juvenile lifers” were resentenced post-*Miller*, 260 of whom were released back into society. *Juvenile Lifers Information*, PA. DEP’T OF CORR., <https://www.cor.pa.gov/About%20Us/Initiatives/Pages/Juvenile-Lifers-Information.aspx> (Mar. 31, 2021).

cut-off for what the Court considers an “adolescent.” In her dissent in *Roper v. Simmons*, Justice O’Connor argued that the majority “fail[ed] to establish that the differences in maturity between 17-year-olds and young ‘adults’ are both universal enough and significant enough to justify a bright-line prophylactic rule against capital punishment of the former.”<sup>90</sup> She further noted that the imposition of a strict age—here, the difference between someone being seventeen years and 364 days as opposed to eighteen years old at the time of the offense—at which execution was suddenly an available consequence is “indefensibly arbitrary.”<sup>91</sup>

However, rather than arguing that some eighteen-year-olds are not suddenly mature when the clock strikes midnight on the eve of their birthday, Justice O’Connor spent the majority of her dissent arguing for the possibility that a seventeen-year-old may in fact have the maturity to be sentenced to death.<sup>92</sup> Nevertheless, hidden in the dissent, Justice O’Connor makes the note that the imposition of a strict age cut-off “quite likely will protect a number of offenders who are mature enough to deserve the death penalty *and may well leave vulnerable many who are not.*”<sup>93</sup> The underlying assumption in this argument is that judges and juries have the tools and experiences necessary to make the distinction between the “irreparably corrupt” seventeen-year-old and the immature eighteen-year-old and sentence each appropriately.<sup>94</sup>

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90. 543 U.S. 551, 601 (2005) (O’Connor, J., dissenting). The Supreme Court of Washington made many of these arguments in its opinion extending the *Miller/Montgomery* ruling to defendants up to the age of twenty. See generally *In re Pers. Restraint of Monschke*, No. 96772-5 (Wash. Mar. 11, 2021) (en banc).

91. *Roper*, 543 U.S. at 601.

92. *Id.* at 588–607.

93. *Id.* at 601–02 (emphasis added).

94. *Id.* at 602–03 (arguing that during sentencing “juries are required to give appropriate mitigating weight to the defendant’s immaturity, his susceptibility to outside pressures, [and] his cognizance of the consequences of his actions”).

## II. SENTENCING

Although a thorough discussion of state and federal sentencing guidelines and structures is beyond the scope of this Note, an overview of a few relevant issues pertaining to sentencing follows.

### A. *The Role of Judicial Discretion in Sentencing*

Early American courts largely designated both the fact-finding and sentencing responsibilities to the jury.<sup>95</sup> As the legal system grew in complexity the power of discretion in sentencing changed hands from the jury to the judge—the sole applier of the law.<sup>96</sup> In this nineteenth- and early-twentieth-century age of indeterminate sentencing, judges were given all the facts available without restrictions—such as those currently imposed by the Federal Rules of Evidence—and determined the punishment as they saw fit.<sup>97</sup> A period of almost limitless discretion lasted until the Federal Sentencing Guidelines were introduced in 1987.<sup>98</sup> Introduced during the height of the moral panic regarding increased crime, the Guidelines removed almost all judicial discretion from sentencing, opting instead to create a complex system of “points” and numbers, which created a grid of harsh and firm sentences for judges to calculate based on the crime and defendant’s offending history, rather than reason.<sup>99</sup> Though *United States v. Booker*,<sup>100</sup> decided in 2005, brought back some discretion by labeling the Guidelines as

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95. J. Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 692–93 (2010).

96. *Id.* at 694.

97. *Id.* at 694–95; C. Peugh, Note, *Mending the Federal Sentencing Guidelines Approach to Consideration of Juvenile Status*, 130 HARV. L. REV. 994, 995 (2017).

98. U.S. SENT’G COMM’N, U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2018) [hereinafter SENTENCING GUIDELINES].

99. For a description of how sentencing tables work, see Peugh, *supra* note 97, at 997. See also Gertner, *supra* note 95, at 701–02; Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729, 731 (2012).

100. 543 U.S. 220 (2005). For further discussion on *Booker* and its progeny, see Gertner, *supra* note 95, at 704–07 and Fischman & Schanzenbach, *supra* note 99, at 733–34.

“advisory,” expanding court dockets and pressure from the appellate process ensure that judges follow the Guidelines more often than not.<sup>101</sup>

Today, the Guidelines discourage sentencing discretion based on the age of the offender, while also noting that in some cases, age may be a relevant consideration for sentencing.<sup>102</sup> This is somewhat at odds with the Supreme Court’s jurisprudence, examined above, that holds juveniles as a separate class of offender than their adult counterparts, even with respect to the most severe crimes and punishments (e.g., death penalty eligible crimes).<sup>103</sup> We have already seen the return of judicial discretion in regard to these cases. For example, after the decision in *Montgomery*,<sup>104</sup> 2,310 juvenile “lifers” who were convicted under mandatory life in prison without the possibility of parole statutes became eligible to be resentenced.<sup>105</sup> As of June 2019, more than 500 of those eligible for resentencing hearings have been released and many more have received lesser sentences, indicating that when given the opportunity to use discretion, courts will do so.<sup>106</sup>

### B. *The Use of Mitigating and Aggravating Circumstances*

One area in which judges may practice discretion is in the application of mitigating and aggravating circumstances to the sentencing decision. Typically, aggravating circumstances are treated as marks against the defendant and can lead to “upward departures” from the Guidelines that result in harsher punishment.<sup>107</sup> However, mitigating circumstances, such as age

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101. J. Nancy Gertner, *Judicial Discretion in Federal Sentencing—Real or Imagined?*, 28 FED. SENT’G REP. 165, 165–66 (2016).

102. SENTENCING GUIDELINES, *supra* note 98, § 5H1.1; *see also* Peugh, *supra* note 97, at 1003.

103. *See supra* Section I.B.

104. *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

105. ROVNER, *supra* note 89.

106. Liliana Segura, *Henry Montgomery Paved the Way for Other Juvenile Lifers To Go Free. Now 72, He May Never Get the Same Chance*, INTERCEPT (June 2, 2019, 8:00 AM), <https://theintercept.com/2019/06/02/henry-montgomery-juvenile-life-without-parole>.

107. SENTENCING GUIDELINES, *supra* note 98, § 5K2.0.

or immaturity, are less restricted. Rather than factoring into a mathematical application against the defendant, mitigating circumstances are simply “weighed” against the aggravating circumstances and facts of the offense.<sup>108</sup>

The presentation of mitigating factors is typically where the defendant is most humanized—even in trials for the worst crimes. For example, mitigating factors that must be considered in the sentencing of juvenile defendants to life in prison without the possibility of parole, outlined in *Miller*,<sup>109</sup> include, but are not limited to: (a) the defendant’s chronological age at the time of the offense, maturity, and failure to appreciate risks and consequences; (b) the family and home environment; (c) the circumstances of the offense; (d) whether peer pressure played a role in the conduct of the defendant; (e) the effect youth may have on the defendant’s ability or capacity to engage appropriately and beneficially with legal actors; and (f) the defendant’s capacity for rehabilitation and change.<sup>110</sup> Considering the defendant’s age as a mitigating factor recognizes that youth have less criminal culpability than their adult counterparts, while still ensuring that harmful acts are punished, if somewhat less harshly.<sup>111</sup>

### *C. Risk and Amenability*

One of most integral considerations in a sentencing decision is the risk of harm to society. In a nation where mass

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108. 18 U.S.C. § 3553(b)(1) (“[T]he court shall impose a sentence” in accordance with the guidelines “unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.”).

109. *Miller v. Alabama*, 567 U.S. 460, 477–78 (2012).

110. *Id.*; see also THE CAMPAIGN FOR THE FAIR SENT’G OF YOUTH, *INDIVIDUALIZED SENTENCING OF YOUTH FACING LIFE WITHOUT PAROLE: A JUDICIAL BENCH CARD* (2016), [https://cfsy.org/wp-content/uploads/Bench-Card\\_Individualized-Sentencing-of-Youth-Facing-Life-without-Parole.pdf](https://cfsy.org/wp-content/uploads/Bench-Card_Individualized-Sentencing-of-Youth-Facing-Life-without-Parole.pdf) (“This bench card is a resource for trial judges with jurisdiction over criminal cases in which a defendant is eligible for life without parole for a crime committed when the defendant was under the age of 18. The bench card provides a brief synopsis of relevant U.S. Supreme Court decisions and related considerations for sentencing and resentencing.”).

111. Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 L. & INEQ. 263, 316–17 (2013).

incarceration has led to prison overcrowding,<sup>112</sup> and lowering the overall incarcerated population has become a key policy issue,<sup>113</sup> the question remains: which individuals are at the greatest risk for recidivating?<sup>114</sup> The Model Penal Code has endorsed utilizing assessments of risk to either divert or reduce the sentences of lower-risk offenders; however, the use of risk assessments in sentencing is advisory, not mandatory.<sup>115</sup> Legal decision-makers consider these assessments in order to craft sentences that most effectively mitigate such risks. However, they are often doing so without the necessary tools to come to an informed decision or disregard such tools in lieu of their own judgment, which can lead to unpredictable sentences.<sup>116</sup> For example, in a study of almost 100 judges making sentencing decisions in Virginia, judges ranged drastically in their agreement with—and implementation of—recommendations for alternative sentences based on the findings of risk assessments, ranging from 7% agreement to 85%, and averaging 41% agreement.<sup>117</sup> There are also problems with current risk assessment tools, namely: (1) the social science

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112. See, e.g., AM. C.L. UNION, OVERCROWDING AND OVERUSE OF IMPRISONMENT IN THE UNITED STATES (2015), <https://www.ohchr.org/Documents/Issues/RuleOfLaw/OverIncarceration/ACLU.pdf> (submission to the Office of the United Nations High Commissioner for Human Rights).

113. See, e.g., DENNIS SCHRANTZ, STEPHEN T. DEBOR & MARC MAUER, SENT'G PROJECT, DECARCERATION STRATEGIES: HOW 5 STATES ACHIEVED SUBSTANTIAL PRISON POPULATION REDUCTIONS (2018), <https://www.sentencingproject.org/wp-content/uploads/2018/09/Decarceration-Strategies.pdf>.

114. John Monahan, Anne L. Metz & Brandon L. Garrett, *Judicial Appraisals of Risk Assessment in Sentencing*, 36 BEHAV. SCI. L. 565, 565 (2018). Though largely a rhetorical question, recent research has suggested that the link between crime severity and risk of recidivism is not as straightforward as previously thought. For example, when released after their *Miller/Montgomery* resentencing hearings, 1% of the individuals originally sentenced to life without parole as juveniles in Philadelphia have been reconvicted for a new crime, compared to the national rate of approximately 30%. TARIKA DAFTARY-KAPUR & TINA M. ZOTTOLI, MONTCLAIR STATE UNIV., RESENTENCING OF JUVENILE LIFERS: THE PHILADELPHIA EXPERIENCE 2 (2020), <https://www.msuddecisionmakinglab.com/philadelphia-juvenile-lifers>.

115. Brandon Garrett & John Monahan, *Assessing Risk: The Use of Risk Assessment in Sentencing*, JUDICATURE, Summer 2019, <https://judicature.duke.edu/articles/assessing-risk-the-use-of-risk-assessment-in-sentencing/>.

116. *Id.*

117. *Id.*

community does not have good data on the validity of long-term risk assessment,<sup>118</sup> and (2) some research has indicated that widely-used risk assessments may be racially biased.<sup>119</sup>

Along with risk, judges are tasked with considering the defendant's amenability to treatment. Amenability to treatment, or past/perceived openness to rehabilitation, is often used as a proxy to determine whether the judge believes the defendant has the capacity to change.<sup>120</sup> Since its emergence in 1990, the Risk-Need-Responsivity (RNR) model has been the gold standard for determining treatment amenability and mitigating criminal risk.<sup>121</sup> Under the RNR model, individuals should be: (1) assessed to determine their specific *risk* factors (i.e., dynamic or static characteristics and situations that are associated with greater risk for criminal offending), (2) targets for treatment are then specifically matched to the criminogenic *needs* of the individual, which (3) are also matched based on the *responsivity* style of the individual, to ensure personality is also taken into consideration.<sup>122</sup>

This model has proven influential with both researchers and policy makers, and it has been expanded and applied to the unique treatment needs of legally-involved individuals from various demographic backgrounds, with differing levels of involvement in the system, and different levels of perceived risk.<sup>123</sup> As such, the most empirically validated assessments of

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118. Fairfax-Columbo et al., *supra* note 28, at 137.

119. See generally Rachael T. Perrault, Gina M. Vincent & Laura S. Guy, *Are Risk Assessments Racially Biased?: Field Study of the SAVRY and YLS/CMI in Probation*, 29 PSYCH. ASSESSMENT 664 (2017) (describing the concerns of racial bias in risk assessment tools and analyzing two specific risk assessment tools for racial bias).

120. James L. Loving & Nicholas S. Patapis, *Evaluating Juvenile Amenability to Treatment: Integrating Statutes and Case Law into Clinical Practice*, 7 J. FORENSIC PSYCH. PRAC. 67, 75–77 (2007).

121. D. A. Andrews, James Bonta & R.D. Hoge, *Classification for Effective Rehabilitation: Rediscovering Psychology*, 17 CRIM. JUST. & BEHAV. 19, 20 (1990) [hereinafter Andrews, Bonta & Hoge (1990)] (describing the RNR model). See also D. A. Andrews, James Bonta & J. Stephen Wormith, *The Risk-Need-Responsivity (RNR) Model: Does Adding the Good Lives Model Contribute to Effective Crime Prevention?* 38 CRIM. JUST. & BEHAV. 735, 735–36 (2011) (addressing the response and critique to their initial RNR publication, twenty years later).

122. Andrews, Bonta & Hoge (1990), *supra* note 121, at 20.

123. See generally sources cited *supra* note 121.

treatment amenability include the questions: (1) What puts this individual at risk? (2) What associated needs can be addressed through treatment? and (3) What treatment best fits those needs? These questions are essential to rehabilitation and should encompass and, therefore, address the mindset of the individual when they committed the offense.

### III. ANTICIPATED EARLY DEATH

#### A. *The Theory*

Anticipated early death posits that individuals who believe that they will die young or be killed prematurely are more likely to engage in risky behaviors because of this belief.<sup>124</sup> This construct is similar to others such as fatalism, future discounting, or perceived survival expectations.<sup>125</sup> However, anticipated early death can be distinguished from the other theories in that it explains *why* fatalism or future discounting is present for the youth—precisely because they believe they will die young. Introduced for the first time in 2009,<sup>126</sup> the literature on anticipated early death has remained in its early stages: less than twenty authors have conducted original research on the subject, and the majority of researchers used the same data pool, posing its own limitations.<sup>127</sup> Despite its fairly recent development as a stand-alone theory, anticipated early death has gained attention in the social sciences for its association

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124. See *supra* notes 22–27 and accompanying text.

125. See, e.g., Haynie et al., *supra* note 25 (fatalism); Samantha S. Clinkinbeard, *What Lies Ahead: An Exploration of Future Orientation, Self-Control, and Delinquency*, 39 CRIM. JUST. REV. 19 (2014) (future orientation); Warner & Swisher, *Effects of Exposure to Violence*, *supra* note 23 (perceived survival expectations).

126. The first publication regarding “anticipated early death” was authored by Brezina and colleagues. See Brezina et al., *supra* note 22, at 1091.

127. For a discussion on the methodological limitations of this research, see Fishel, M.S. Thesis, *supra* note 30 (manuscript at 13–14). Of note, one additional study, not mentioned in the Fishel piece, has since been published utilizing a new data pool. See Kevin T. Wolff, Jonathan Intravia, Michael T. Baglivio & Alex R. Piquero, *Adherence to the Street Code Predicts an Earlier Anticipated Death*, 57 J. RSCH. CRIME & DELINQ. 139, 151–53 (2020).

with risky and criminal behaviors.<sup>128</sup> Before addressing the research on the connection between anticipated early death and criminal behavior, I first turn to the theoretical frameworks underpinning said research.

Exposure to unpredictability and chaos early in one's life can lead one to the conclusion that the future will be highly unpredictable and difficult to exert control over. This lack of perceived control, in turn, impacts decision-making: if someone does not believe that he has command over his future, cannot see a future in which he will live to see the consequences of his actions, or believes that he will die young regardless of his present behaviors, he is more likely to take unnecessary risks than someone who believes the opposite.<sup>129</sup> Under a self-control framework, there is no incentive to exercise self-control and delay gratification by taking measures to reduce risk and plan for a future that those who anticipate an early death do not believe will occur.<sup>130</sup> Similarly, researchers have viewed this phenomenon as a result of a rational risk-reward calculation. When viewed as a rational choice, anticipating an early death may lead individuals to consciously discount the future and any long-term consequences that may come from risky behaviors that produce short-term rewards.<sup>131</sup>

The development of anticipated early death has been linked to a variety of factors. As mentioned, the construct has been associated with dangerous and unpredictable environments during early childhood development.<sup>132</sup> Direct and indirect exposure to violence—specifically, experiencing prior violent

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128. *See infra* Section III.B.

129. This phenomenon has been explained using self-control theory. *See generally* MICHAEL R. GOTTFREDSON & TRAVIS HIRSCHI, *A GENERAL THEORY OF CRIME* (1990) (explaining self-control theory); *see also* Piquero, *supra* note 22, at 74 (applying self-control theory to anticipated early death).

130. Piquero, *supra* note 22, at 74; Clinkinbeard, *supra* note 125, at 30–31.

131. *See supra* note 25 and accompanying text. Nagin and Paternoster, *supra* note 25, provide an explanation of rational choice theory, and Haynie et al., *supra* note 25, apply rational choice theory to anticipated early death.

132. Jessica M. Craig, *The Potential Mediating Impact of Future Orientation on the ACE-Crime Relationship*, 17 *YOUTH VIOLENCE & JUV. JUST.* 111, 111–15, 122 (2019).

victimization, childhood physical abuse or other adverse childhood experiences, witnessing serious violence, and/or engaging in violent behaviors—can increase the risk of anticipating an early death.<sup>133</sup> Furthermore, though positive and large peer networks have been associated with higher life expectancy and a more positive future orientation, gang membership and adherence to “street culture” has been associated with developing an anticipated early death.<sup>134</sup>

Even more troubling, research has suggested that anticipated early death is developed differentially among youth based on race, ethnicity, and socioeconomic status. Although one in four Black or Hispanic youth and one in three American Indian youth endorsed anticipating an early death, only one in ten white youth endorsed the same.<sup>135</sup> Some researchers have hypothesized that this differential endorsement could be the result of segregated neighborhoods, finding that when grouped by neighborhood, Black and Hispanic youth were more likely to anticipate an early death than their white peers.<sup>136</sup> They also found that neighborhood poverty was associated with higher levels of youth endorsement of anticipated early death, even after taking into consideration other factors such as the youth’s mental and physical health (which may also impact anticipating an early death), exposure to violence, personal violence, and other socioeconomic and demographic variables.<sup>137</sup> Non-Hispanic whites have been found to have lower levels of

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133. See *supra* note 23 and accompanying text; see also Craig, *supra* note 132, at 123–24.

134. Tillyer, *supra* note 22, at 536–37; Wolff et al., *supra* note 127, at 168; Gregory M. Zimmerman, Carter Rees & Chelsea Farrell, *Contextual Determinants of Adolescent Perceived Early Fatality*, 45 J. YOUTH & ADOLESCENCE 1546, 1556 (2016).

135. Michael D. Resnick, Renee E. Sieving, Iris W. Borowsky, Marjorie Ireland & Heather Libbey, *Knockin’ on Heaven’s Door: Behaviors and Social Contexts of US Adolescents Who Anticipate Early Death*, 30 J. ADOLESCENT HEALTH 102, 102–03 (2002).

136. Raymond R. Swisher & Tara D. Warner, *If They Grow Up: Exploring the Neighborhood Context of Adolescent and Young Adult Survival Expectations*, 23 J. RSCH. ON ADOLESCENCE 678, 687 (2013) [hereinafter Swisher & Warner, *If They Grow Up*].

137. *Id.* at 690–91.

anticipated early death than almost all racial, ethnic, and immigrant groups.<sup>138</sup>

### B. *Anticipated Early Death and Criminal Offending*

Where some may step away from risky or dangerous situations before they escalate, or mentally weigh the choices and consequences before them, youth who anticipate an early death are more likely to step into that situation with a cavalier attitude towards the consequences. This belief system is associated with later risk-taking behaviors such as delinquency, violent offending, and involvement in gang activities.<sup>139</sup> Research has also brought together the concept of anticipated early death and subsequent risky behaviors such as criminal offending. Less than 5% to 25% of individuals researched endorsed anticipating an early death.<sup>140</sup> Though it varies widely, this rate identifies a somewhat sizeable population that is at risk for engagement in delinquent behaviors that may extend into early adulthood.<sup>141</sup> Research that has looked into whether anticipated early death or offending comes first has supported the idea that anticipated early death predicts future risk-taking behaviors such as delinquency, rather than violence of gang activity preceding the development of anticipated early death.<sup>142</sup>

High levels of anticipated early death in peer and community settings have also been associated with an individual's likelihood of engaging in criminal activity. For example, high

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138. Tara D. Warner & Raymond R. Swisher, *Adolescent Survival Expectations: Variations by Race, Ethnicity, and Nativity*, 56 J. HEALTH & SOC. BEHAV. 478, 486 (2015).

139. See Lauren D. Brumley, Sara R. Jaffee & Benjamin P. Brumley, *Pathways from Childhood Adversity to Problem Behaviors in Young Adulthood: The Mediating Role of Adolescents' Future Expectations*, 46 J. YOUTH & ADOLESCENCE 1, 9 (2017); Carlock, *supra* note 22, at 139–41.

140. This wide statistical gap may be due to the varied populations surveyed on the subject (i.e., general populations vs. those at high risk for anticipating an early death). See, e.g., Brezina et al., *supra* note 22, at 1101; Naomi N. Duke, Iris W. Borowsky, Sandra L. Pettingell, Carol L. Skay & Barbara J. McMorris, *Adolescent Early Death Perception: Links to Behavioral and Life Outcomes in Young Adulthood*, 25 J. PEDIATRIC HEALTH CARE 224, 225, 229 (2011).

141. See Brezina et al., *supra* note 22, at 1119.

142. See Carlock, *supra* note 22, at 141–43.

levels of anticipated early death of an individual and within an individual's peer group are positively associated with that individual's likelihood of engaging in both violent and non-violent delinquency, even after controlling for individual covariates (i.e., age, race/ethnicity, family structure, socioeconomic status, school socioeconomic status, school setting, school size, and geographic region) and the individual's prior risk-taking behaviors.<sup>143</sup> Though Haynie and colleagues found that peer levels of delinquency accounted for a large portion of the variance in the relationship between anticipated early death and violent delinquency, no variables fully accounted for the variance between peer levels of anticipated early death and individual involvement in non-violent delinquency.<sup>144</sup> Furthermore, other research has indicated the presence of anticipated early death by the age of twenty-one mediated the effect of previously noted determinants, such as childhood adversity, on violent offending and non-violent delinquency patterns, even after controlling for baseline violent behavior.<sup>145</sup>

Other researchers have argued that anticipating an early death not only impacts an individual's likelihood to initiate engagement in criminal activities, but also the prevalence of criminal offending across his or her lifetime.<sup>146</sup> A recent study using seven years of data from serious youthful offenders who were enrolled in the Pathways to Desistance program in Maricopa County, Arizona and Philadelphia County, Pennsylvania, found a positive relationship between anticipated early death and chronic offending patterns.<sup>147</sup>

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143. See Naomi M. Duke, Carol L. Skay, Sandra L. Pettingell & Iris W. Borowsky, *Adolescent Perception of Premature Risk for Death: Contributions from Individual and Environmental Contextual Factors*, 9 ACAD. PEDIATRICS 256, 259–60 (2009); Kathleen Mullan Harris, Greg J. Duncan & Johanna Boisjoly, *Evaluating the Role of "Nothing to Lose" Attitudes on Risky Behavior in Adolescence*, 80 SOC. FORCES 1005, 1029, 1032–33 (2002); Haynie et al., *supra* note 25, at 189.

144. See Haynie et al., *supra* note 25, at 178.

145. Brumley et al., *supra* note 139, at 9–11.

146. Carlock, *supra* note 22, at 141–43; Piquero, *supra* note 22, at 79, 86–90.

147. Piquero, *supra* note 22, at 81–82.

Carlock posited that individuals who exhibit anticipated early death are less likely to be discouraged from criminal activity due to threat of punishment because they are less likely to believe they will live long enough to experience the consequences of their actions.<sup>148</sup> Therefore, not only has anticipated early death been associated with the initiation of delinquency and criminal offending early in life, but also with repeated and chronic offending over time.

### *C. Anticipated Early Death as a Dynamic Trait*

Perhaps most importantly, anticipating an early death is not a stable trait—it changes over time. Scholars have used multiple psychological and sociological frameworks to explain the instability of this way of thinking. Using life history theory,<sup>149</sup> authors argue that the unpredictability of one's future and truncated personal lifespan estimates can lead individuals to integrate that history into their framework and thus further discount the future and live daily without regard for long-term consequences.<sup>150</sup> However, when that individual approaches or surpasses an age he never thought that he would live to see, his perspective and outlook on life necessarily has to change.<sup>151</sup> A self-control theorist<sup>152</sup> would argue that anticipating an early death similarly promotes criminal or delinquent behaviors because those with that worldview have fewer incentives to

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148. Carlock, *supra* note 22, at 143 (“Criminal justice agencies’ strategies to reduce violence and gang activity often emphasize deterrence from criminal behavior . . . . However, such strategies will fail if individuals do not fear those consequences. This may occur when one feels that he or she has nothing to lose and/or no future to look forward to. Many youths embody this ‘live fast, die young’ mentality, particularly those already at risk of delinquency due to other risk factors.”).

149. For background on the “life history theory” see Aurelio José Figueredo, Geneva Vásquez, Barbara H. Brumbach, Stephanie M.R. Schneider, Jon A. Sefcek, Ilanit R. Tal, Dawn Hill, Christopher J. Wenner & W. Jake Jacobs, *Consilience and Life History Theory: From Genes to Brain to Reproductive Strategy*, 26 DEV’L REV. 243–251 (2006).

150. Brezina et al., *supra* note 22, at 1094; Carlock, *supra* note 22, at 143; Swisher & Warner, *If They Grow Up*, *supra* note 136, at 690–91.

151. Brezina et al., *supra* note 22, at 1094.

152. Self-control theory was pioneered by Gottfredson & Hirschi. See generally GOTTFREDSON & HIRSCHI, *supra* note 129.

plan for the long-term or exercise discretion.<sup>153</sup> On the other hand, a rational choice theorist<sup>154</sup> may instead argue that the individual who anticipates an early death more carefully weighs his choices and the associated consequences of engaging in criminal activity, deciding that because he does not think he will live long enough to see the consequences of his actions, or that he is living on “borrowed time” anyway, he should make a more reasoned decision to engage in the criminal activity and reap the short-term benefits (e.g., pride, respect, money, revenge).<sup>155</sup>

Perhaps anticipated early death can best be described as a cognitive thinking style. Cognitive thinking styles are patterns of thought that individuals have that impact the way that we interact with the world.<sup>156</sup> For some, their cognitive thinking styles can place them at higher risk for engaging in criminal behaviors.<sup>157</sup> Researchers have developed a number of measures to identify specific criminogenic thinking styles via self-report and objective assessment for the purpose of targeting them via cognitive interventions and, in turn, reducing risk of future recidivism.<sup>158</sup> Absent from these current measures, however, is anticipated early death as a criminogenic thinking style, which is perhaps best attributed to its recent emergence as a construct

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153. Piquero, *supra* note 22, at 93–94.

154. See Nagin & Paternoster, *supra* note 25, at 469.

155. Haynie et al., *supra* note 25, at 176–77.

156. David J. A. Dozois & Aaron T. Beck, *Cognitive Therapy*, in ACCEPTANCE AND MINDFULNESS IN COGNITIVE BEHAVIORAL THERAPY 26, 27–30 (James D. Herbert & Evan M. Forman eds., 2011).

157. Marije E. Keulen-de Vos, David P. Bernstein, Silke Vanstiplen, Vivienne de Vogel, Tanja P.C. Lucker, Mariet Slaats, Marloes Harkoorn & Arnoud Arntz, *Schema Modes in Criminal and Violent Behaviour of Forensic Cluster B PD Patients: A Retrospective and Prospective Study*, 21 LEGAL & CRIMINOLOGICAL PSYCH. 56, 58 (2016).

158. See Damon Mitchell & Raymond Chip Tafrate, *Conceptualization and Measurement of Criminal Thinking: Initial Validation of the Criminogenic Thinking Profile*, 56 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 1080, 1081–83 (2012), for a review of common criminal thinking instruments. The Psychological Inventory of Criminal Thinking Styles (PICTS), perhaps one of the most prolific of these measurements, has been associated with risk of future recidivism. Glenn D. Walters, *Predicting Recidivism with the Psychological Inventory of Criminal Thinking Styles and Level of Service Inventory-Revised: Screening Version*, 35 L. & HUMAN BEHAV. 211, 216–18 (2011).

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in the field.<sup>159</sup> Adding just a few questions to these current measures to include anticipated early death would provide a simple avenue for assessing the construct in already validated and widely accepted legal settings. It would also obscure the purpose of the questions, thus reducing the likelihood of youthful offenders “faking bad” to receive differential treatment. Thus, regardless of the mechanism by which anticipating an early death may impact criminal offending patterns, the result is a way of thinking that can be targeted and mitigated through therapeutic intervention and is not indicative of an individual’s “irreparable corruption.”

#### IV. THE PROPOSED SOLUTION

##### A. *Anticipated Early Death Should Be Considered During Sentencing*

Anticipating an early death is no excuse for committing serious crimes. Those who anticipate an early death should not be given license to commit crimes until they realize that they may defy the odds and live to adulthood. However, an informed discussion regarding the impact anticipating an early death has on the already reduced decision-making capabilities of young adults should be incorporated into the sentencing process.

##### 1. *The overarching argument*

As judicial discretion makes its way back into sentencing post-*Booker*, judges can begin to ask about anticipated early death in their own risk assessments, and psychologists and other assessors can evaluate the role, if any, anticipating an

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159. See Mitchell & Tafrate, *supra* note 158, at 1081; see also *supra* text and sources accompanying note 22 (discussing the recent and novel framework of anticipated early death).

early death had on the defendant's decision-making around the time of the offense.<sup>160</sup>

If, taken together, data indicates that the individual anticipated an early death, and the trauma associated with the development and maintenance of this mindset impacted his or her delinquent behavior, judges should consider its presence when determining the appropriate sentence for the individual. The Court in *Miller v. Alabama* held that mandatory penalties "preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it" and, as a result, declared one such penalty unconstitutional.<sup>161</sup> Anticipating an early death is a characteristic attendant to the offender's age, and thus should be considered a mitigating factor.

Though typically jurisdictions offer a "catch-all" category for mitigating factors that do not fit into their listed and accepted factors,<sup>162</sup> policy should make abundantly clear that psychological factors such as anticipating an early death should be considered by the legal decision makers. Courts are already beginning to recognize the impact of criminal thinking styles on individual behavior. For example, federal supervised release programs began using social science to inform their treatment of supervisees in the 1970s.<sup>163</sup> Federal courts currently use the Federal Post-Conviction Risk Assessment (PCRA) apparatus, which considers criminal thinking styles, to help guide sentencing and supervision decisions.<sup>164</sup> Given the data on the association between anticipated early death and later offending patterns,<sup>165</sup> legal decision-makers should adjust the tools

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160. For a discussion regarding risk assessment procedures, see generally KIRK HEILBRUN, DAVID DEMATTEO, STEPHANIE BROOKS HOLLIDAY & CASEY LADUKE, *FORENSIC MENTAL HEALTH ASSESSMENT: A CASEBOOK* (2014).

161. *Miller v. Alabama*, 567 U.S. 460, 476 (2012).

162. *See, e.g.*, 18 U.S.C. § 3553(b)(1).

163. Richard G. Kopf, *Federal Supervised Release and Actuarial Data (Including Age, Race, and Gender): The Camel's Nose and the Use of Actuarial Data at Sentencing*, 27 *FED. SENT'G REP.* 207, 208 (2015).

164. *Id.* at 209.

165. *See supra* Section III.B.

already available to them, such as the PCRA, to inform the intervention or alternative sentence individuals receive. Specificity in designating anticipated early death as a separate mitigating factor or cognitive thinking style can open the door for the individual to receive the necessary resources to rehabilitate his cognitive processes and mitigate his risk of recidivism.

2. *This consideration should be extended to individuals over the age of eighteen*

Of note, in the previous section regarding the proposed solution, the term “juvenile” is absent. This is because juveniles under the age of eighteen are not the only individuals that are susceptible to the effects of anticipating an early death.<sup>166</sup> The literature notes that anticipation of an early death can impact decision-making until an individual is in his or her late twenties.<sup>167</sup> The elasticity of youthful cognitions has not gone unnoticed by the Court. In *Eddings v. Oklahoma*, the Court argued that “youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.”<sup>168</sup> In *Graham v. Florida*, the Court noted “parts of the brain involved in behavior control continue to mature through late adolescence.”<sup>169</sup> The Court in *Miller v. Alabama* expanded its reasoning in *Roper v. Simmons* by noting that “findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child’s

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166. See Steinberg, *supra* note 76, at 413–15 (discussing the scientific correlation between age and risk-taking and finding “adolescents and individuals in their early 20s are more likely . . . to engage in risky behavior”).

167. This anticipation is evidenced by the operationalization of the construct (i.e., the Add Health questions regarding being “killed by age 21” or not “liv[ing] to age 35”). HARRIS & UDRY, *supra* note 31. See also Quynh C. Nguyen, Jon M. Hussey, Carolyn T. Halpern, Andres Villaveces, Stephen W. Marshall, Arjumand Siddiqi & Charles Poole, *Adolescent Expectations of Early Death Predict Young Adult Socioeconomic Status*, 74 SOC. SCI. & MED. 1452, 1458–60 (2012); Cecilia M. Santostefano, *Juvenile Justice Reform in New York: Prosecuting the Adolescent Brain*, 34 SYRACUSE J. SCI. & TECH. 122, 135–37 (2018).

168. 455 U.S. 104, 115 (1982).

169. 560 U.S. 48, 68 (2010).

'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'"<sup>170</sup>

Just as psychological literature has championed expanding the age at which one is considered a juvenile based on brain sciences,<sup>171</sup> the research on anticipated early death adds one more datapoint to the argument that people over the age of eighteen are malleable just like their younger counterparts.<sup>172</sup> Historically, courts have acknowledged this extended period of adolescent malleability.<sup>173</sup> The Federal Youth Corrections Act, passed in 1950, focused on juvenile sentencing schemes that emphasized rehabilitation over punishment.<sup>174</sup> Of particular importance, Congress, even back then, applied the act to "youth" under the age of twenty-six.<sup>175</sup> As such, these recommendations for considering anticipated early death as a mitigating factor during sentencing, and targeting the phenomenon during treatment should apply to these ever so slightly older defendants, too.

Anticipating an early death can impact youth into their late adolescence and early adulthood. As such, the definition of "youth" should be expanded to cover these periods. The mechanism for which age should be considered can be flexible. Some scholars, the American Bar Association, and the MPC have argued for a "youth discount" in sentencing procedures, wherein sentencers apply a categorical reduction in sentence length, that may apply well to this solution.<sup>176</sup> Proponents argue that the youth discount "enables young offenders to survive

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170. 567 U.S. 460, 472 (2012) (quoting *Graham*, 560 U.S. at 68 (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2005))).

171. See Caren Harp, *Adolescent Brain Science: Proceed with Caution*, JUV. JUST. INFO. EXCH. (May 8, 2017), <https://jjie.org/2017/05/08/adolescent-brain-science-proceed-with-caution> ("[N]euroimaging studies have shown that adolescents' brains continue to develop through age 18, and into their mid-20s.").

172. See *supra* notes 31, 146, and accompanying text.

173. See *supra* Section I.C.

174. Peugh, *supra* note 97, at 1000–01.

175. *Id.* at 1001.

176. Feld, *supra* note 111, at 322, 325–26.

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serious mistakes with the possibility of reconstructing their lives.”<sup>177</sup>

In a world of sentencing guidelines and mandatory minimums, the solution must be something that judges can and will apply. In an ideal world of fair and unbiased judicial discretion, cognitive thinking styles such as anticipated early death should always be taken into consideration during sentencing. However, given the research on the subject indicating that anticipating an early death may impact behavior into early adulthood, judges should be allowed to demonstrate flexibility in their sentencing and risk appraisal to address these concerns for offenders throughout this time period—extending the courtesy of assumed cognitive and behavioral elasticity to those over the age of eighteen.<sup>178</sup>

### *B. Interventions that Target Anticipated Early Death*

Anticipating an early death can be categorized as a cognitive thinking style and targeted for change through mental health interventions. Psychology has put forth a number of empirically validated therapies that are specifically crafted to help individuals change the way they think.<sup>179</sup> Most popular is Cognitive Behavioral Therapy (CBT). While this therapy covers a wide range of treatment targets and therapeutic strategies, the main focus of CBT is to target and alter maladaptive behaviors and cognitions.<sup>180</sup> Capitalizing and building on the RNR model, a CBT approach would ask the individual to identify specific cognitions that increase their risk of recidivating.<sup>181</sup> Then, mental health practitioners work with the client to evaluate and address the maladaptive thinking styles, such as anticipated

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177. *Id.* at 328.

178. It is beyond the scope of this Note to review the vast literature necessary to recommend a specific “cutoff” or age range at which this courtesy should end.

179. James D. Herbert & Evan M. Forman, *The Evolution of Cognitive Behavior Therapy: The Rise of Psychological Acceptance and Mindfulness*, in *ACCEPTANCE AND MINDFULNESS IN COGNITIVE BEHAVIOR THERAPY* 3, 3 (James D. Herbert & Evan M. Forman eds., 2011).

180. *Id.*

181. See Dozois & Beck, *supra* note 156, at 30–33.

early death, to alter future behaviors.<sup>182</sup> This method of intervention that incorporates the RNR model also acknowledges that not all individuals with trauma, and not all individuals who anticipate an early death, commit violent offenses.<sup>183</sup>

If one goal of the criminal system is to reduce recidivism through sanctioning, when anticipated early death is identified as a risk, that risk should be met with proper mitigation strategies to minimize the risk for future offending. CBT has been validated as an efficacious treatment strategy for use on forensic populations.<sup>184</sup> Regardless of whether the therapy is “brand name” or just utilizes evidence-based components, such as targeting criminogenic thinking styles, CBT has been shown to reduce recidivism for adult and juvenile offenders.<sup>185</sup> It has also been validated in correctional programs on ethnically-diverse populations.<sup>186</sup> CBT has even been shown to be effective for reducing recidivism rates in high-risk offenders.<sup>187</sup>

Because anticipated early death is dynamic in nature and follows the peak and valley of the age-crime curve,<sup>188</sup> when youthful offenders are often peaking in their criminal activities between the ages of seventeen and twenty-five, they are at the age where they are also naturally second-guessing their original

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182. *See id.*

183. *See id.*

184. *See generally* RAYMOND CHIP TAFRATE & DAMON MITCHELL, *FORENSIC CBT: A HANDBOOK FOR CLINICAL PRACTICE* (2013).

185. Nana A. Landenberger & Mark W. Lipsey, *The Positive Effects of Cognitive-Behavioral Programs for Offenders: A Meta-Analysis of Factors Associated with Effective Treatment*, 1 J. EXPERIMENTAL CRIMINOLOGY 451, 470–72 (2005); Cody Warner, Timothy Conley & Riley Murphy, *Criminal Thinking Shifts Among Male Prisoners Participating in a Cognitive-Based Education Programme*, 28 CRIM. BEHAV. & MENTAL HEALTH 152, 155–56 (2018).

186. Amelia M. Usher & Lynn A. Stewart, *Effectiveness of Correctional Programs with Ethnically Diverse Offenders: A Meta-Analytic Study*, 58 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 209, 222–25 (2012).

187. Nina Papalia, Benjamin Spivak, Michael Daffern & James R. P. Ogloff, *A Meta-Analytic Review of the Efficacy of Psychological Treatments for Violent Offenders in Correctional and Forensic Mental Health Settings*, 26 CLINICAL PSYCH. SCI. & PRAC., Apr. 22, 2019, at 1, 19–22.

188. For an overview of the literature on the age-crime curve and its theoretical development, see Michael Rocque, Chad Posick & Justin Hoyle, *Age and Crime*, in THE ENCYCLOPEDIA OF CRIME & PUNISHMENT 31, 31–37 (Wesley G. Jennings ed., 2016).

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assumptions regarding their estimated lifespan and realizing that they may “beat the odds.” Furthermore, research on trauma (such as early exposures to violence) has discussed the importance of bringing a trauma-informed perspective into the treatment of juvenile offenders in order to reduce likelihood of chronic offending.<sup>189</sup> By capitalizing on the malleability of the youthful offender and using empirically validated methods such as trauma-informed interventions that address cognitive thinking styles, current research suggests that anticipated early death could efficiently and effectively be targeted and mitigated.

#### CONCLUSION

In *Graham*, the Court argued that youthful offenders should be given “a chance to demonstrate maturity and reform,” and further proposed that a “juvenile should not be deprived of the opportunity to achieve maturity of judgement and self-recognition of human worth and potential.”<sup>190</sup> Social science research has indicated that some youthful offenders commit criminal, and sometimes violent, acts partially because they do not think that they will live long lives. Whether anticipating an early death impacts criminal offending patterns because of self-control issues, whether it is a rational choice, or whether it is based in the offenders’ own perceptions of their life framework is yet to be determined. However, what is clear in the growing research is that anticipating an early death is associated with increased levels of criminal and violent offenses and impacts the youth involved with the justice system.<sup>191</sup>

The juvenile justice system has been crafted to respond specifically to rehabilitative concerns such as cognitive thinking

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189. See Bryanna Han Fox, Nicholas Perez, Elizabeth Cass, Michael T. Baglivio & Nathan Epps, *Trauma Changes Everything: Examining the Relationship Between Adverse Childhood Experiences and Serious, Violent and Chronic Juvenile Offenders*, 46 *CHILD ABUSE & NEGLECT* 163–164, 170–71 (2015).

190. *Graham v. Florida*, 560 U.S. 48, 79 (2010).

191. See, e.g., Brezina et al., *supra* note 22, at 1092–93.

styles.<sup>192</sup> As such, they are something that should be taken into consideration during the sentencing phase of trials. Judicial discretion should be used to consider anticipating an early death as a mitigating factor that warrants a downward departure from traditional sentencing schemes. Furthermore, anticipated early death should be assessed for and targeted in risk reducing strategies. Therapeutic interventions such as CBT have already been shown to address similar thinking styles and reduce recidivism rates for this population.<sup>193</sup> As such, this treatment modality can be expected to have a similarly efficacious impact on targeting and changing the cognitions and behaviors of youth who anticipate an early death.

Furthermore, anticipated early death has been shown to impact youthful offenders beyond their adolescence.<sup>194</sup> As such, the sentencing departures and resources offered to youth traditionally limited to those under the age of eighteen at the time of the offense should be expanded to all youthful offenders who exhibit the symptoms of this thinking style. If the goal of the justice system is to reduce recidivism, thus protecting public safety, and the courts have acknowledged the transient nature of youthful immaturity, why not offer these recidivism-reducing strategies to all youthful offenders? If the goal is truly, as the Court in *Graham* stated, to avoid depriving offenders of “the opportunity to achieve maturity of judgement and self-recognition of human worth and potential,”<sup>195</sup> then why should this therapeutic jurisprudence stop when the clock strikes midnight on the defendant’s eighteenth birthday?

The difference between someone who is “immature” as opposed to “irreparably corrupt” should not be the difference of a few minutes. It certainly should not be the difference between life and death, regardless of whether death is imposed as the punishment itself, or the youthful offender is punished

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192. See *supra* Section I.A.

193. Landenberger & Lipsey, *supra* note 185, at 472.

194. See *supra* Section IV.A.2.

195. *Graham*, 560 U.S. at 79.

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to what can effectively amount to death by incarceration, especially when their conduct can be traced to a mindset borne from trauma that can be rehabilitated. If judges were to use their discretion to consider whether the defendant anticipated dying young, and acted out because of that maladaptive assumption, we may be able to use the tools provided to us by the therapeutic jurisprudence that is present in the system to save our youth from realizing too late that they have a long life ahead of them.