Cruel and Unusual: The Effect of *Miller v. Alabama* on the Indefinite Civil Confinement of Juvenile Sex Offenders

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**ABSTRACT**

The juvenile justice system in the United States was developed on the premise that individuals under the age of eighteen who commit crimes do not act with the same degree of responsibility as their adult counterparts and should therefore be treated differently. The development of a separate criminal justice system for children focuses on three factors: (1) a recognition that their behavior is very strongly influenced by their social and familial environment; (2) a concern that the limited autonomy of their behavior makes punishment unfair; and (3) a belief that, because of their vulnerability to being influenced by their environments, it is possible to modify their behavior and prevent future crimes as adults. In 2012, the Supreme Court held, in *Miller v. Alabama*, that mandatory life sentences without parole for juvenile offenders violate the Eighth Amendment’s prohibition on cruel and unusual punishment. While the Supreme Court has put an end to life imprisonment without parole, there are still juvenile offenders who are civilly confined indefinitely as sexually dangerous persons. This Note will examine the similarities and differences between juvenile civil confinement and juvenile life without parole, and establish that indefinite civil confinement of juveniles is, and should be held, unconstitutional under the Eighth Amendment’s prohibition on cruel and unusual punishment.

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I. INTRODUCTION

In June 2012, the Supreme Court held in *Miller v. Alabama* that life without parole for juvenile offenders is unconstitutional and constitutes cruel and unusual punishment in violation of the Eighth Amendment.¹ The crux of the Court’s holding in *Miller* was the idea that juveniles are different from adult offenders and should therefore be treated differently within the criminal justice system.² This notion influenced the separation of the juvenile and adult justice systems that began in Illinois, and developed under the premise that individuals under the age of eighteen who commit crimes do not act with the same degree of responsibility as their adult counterparts and should therefore be treated differently.³

This Note will argue that the Supreme Court, in light of its holding in *Miller v. Alabama*, should find the indefinite civil confinement of sexually dangerous juveniles unconstitutional as cruel and unusual punishment in violation of the Eighth Amendment. Part II will provide a brief overview of the juvenile justice system and the civil confinement of sexually dangerous persons. Part III will review the purpose and ideology behind the separate juvenile justice system. Part IV will provide a concise history of the civil commitment of sexually dangerous persons, as well as what states still confine juvenile sexually dangerous persons. Part V will include a detailed analysis of the case law that culminated in the final holding of unconstitutionality in *Miller v. Alabama*, and argue that the similarities between civil commitment and life without parole warrant a holding by the Supreme Court that indefinite civil confinement of juveniles should be held unconstitutional. Part VI will conclude this Note.

II. THE HISTORY OF CIVIL CONFINEMENT OF SEXUALLY DANGEROUS PERSONS

The civil confinement of sexually dangerous persons has garnered much attention in the last few years due to its reliance on an individual’s likeli-

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². *Id.* at 2464.
The commitment to mental health facilities of persons who repeatedly committed sexual offenses began in the late 1930s. By 1960, twenty-six states and the District of Columbia had enacted some form of sexually dangerous person statute. Massachusetts’s law defines a sexually dangerous person as “any person who has been . . . convicted of or adjudicated as a delinquent juvenile or youthful offender by reason of a sexual offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in sexual offenses if not confined to a secure facility . . . .” Currently, eleven states still confine juvenile offenders as sexually dangerous persons.

The legislative intent of Massachusetts General Law Chapter 123A (The Civil Confinement Statute) demonstrates that the goal of the statute is to protect the public from individuals “whose mental condition, as determined prior to the release from incarceration, might lead to further sexual offenses.” Proceedings under The Civil Confinement Statute were designed to concentrate on a defendant’s mental condition at the time of the petition and hearing and how the condition might affect the public if the individual

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7. MASS. GEN. LAWS ch. 123A, § 1 (2010); In re Dutil, 768 N.E.2d 1055, 1059 (Mass. 2002) (quoting § 1) (“[A]ny person whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive sexual misconduct by either violence against any victim, or aggression against any victim under the age of sixteen years, and who, as a result, is likely to attack or otherwise inflict injury on such victims because of his uncontrolled or uncontrollable desires.”).


was released into the community.\textsuperscript{10} According to precedent, the requirement of a mental illness or abnormality distinguishes civil confinement from further punishment and was ruled constitutional by the Supreme Court.\textsuperscript{11}

Six months prior to an individual’s scheduled release from a correctional facility, section 12(a) of The Civil Confinement Statute requires facilities holding individuals convicted of sexual offenses to notify the District Attorney and Attorney General.\textsuperscript{12} If either the District Attorney or the Attorney General determines that the individual is likely to be sexually dangerous, they may petition the Commonwealth, with sufficient facts, to have the offender confined.\textsuperscript{13} Under section 12(e) of The Civil Confinement Statute, prior to a hearing for probable cause, the court may temporarily commit the offender to the Massachusetts Treatment Center pending disposition of the petition.\textsuperscript{14}

Pursuant to The Civil Confinement Statute, the Commonwealth may petition the court to commit an individual to the Massachusetts Treatment Center upon a showing that the defendant is a sexually dangerous person.\textsuperscript{15} In order to meet this burden, the Commonwealth must demonstrate three elements beyond a reasonable doubt:

$(1)$ the defendant has been convicted of a “[s]exual offense,” as defined in G.L. c. 123A, § 1; $(2)$ [the defendant] suffers from a ’[m]ental abnormality’ or ’[p]ersonality disorder,’ as those terms are defined in § 1; and $(3)$ as a result of such mental abnormality or personality disorder, the defendant is ‘likely to engage in sexual offenses if not confined to a secure facility.’\textsuperscript{16}

In the determination of sexually dangerous persons, the definition of “mental abnormality” is split into medical and legal prongs.\textsuperscript{17} The medical

\textsuperscript{10} Ferreira, 852 N.E.2d at 1090.


\textsuperscript{12} Ch. 123A, § 12(a).

\textsuperscript{13} Id. § 12(b).

\textsuperscript{14} Id. § 12(e).

\textsuperscript{15} Id.

\textsuperscript{16} Commonwealth v. Almeida, 985 N.E.2d 402, 404 (Mass. App. Ct. 2013) (quoting § 1) (describing the test used to evaluate sexual dangerousness). Under ch. 123A, § 1, a mental abnormality is defined as “a congenital or acquired condition of a person that affects the emotional or volitional capacity of the person in a manner that predisposes that person to the commission of criminal acts to a degree that makes the person a menace to the health and safety of other persons.” Id.

\textsuperscript{17} Id. at 404-05 (quoting Commonwealth v. Suave, 953 N.E.2d 178, 183 (Mass. 2011)).
portion is satisfied when a defendant suffers from a mental disorder, as defined in section 1, while the legal aspect hinges on whether the disorder certifies the defendant a “menace" to the health and safety of other persons.” The Commonwealth must demonstrate, beyond a reasonable doubt, that the “defendant’s predicted sexual offenses will instill in his victims a reasonable apprehension of being subjected to a contact sex crime.”

In order to protect the procedural due process interests of the individual, The Civil Confinement Statute requires strict adherence to the formal proceedings. Six months prior to the release of the individual, the Commonwealth may petition to have the offender committed to the Massachusetts Treatment Center. At the initial hearing, the Commonwealth must establish probable cause that the individual is a sexually dangerous person. If this is not established, the proceedings go no further and the individual is released. If probable cause is established, the individual remains in custody to serve his sentence or is temporarily committed for the duration of the hearing. After the initial hearing, “[a] person convicted of a sexual offense can only be committed as a sexually dangerous person after a commitment period of not longer than sixty days for examination and diagnosis under the supervision of two qualified examiners.” The examiners subsequently file a report to the court detailing their findings of whether they believe the individual is sexually dangerous. After the examinations are conducted, the individual has a right to a hearing to adjudicate the matter of civil confinement.

At the civil confinement hearing, evidence of psychiatric and psychological records, along with reports of the qualified examiners, can be introduced into evidence. The individual has a right to counsel, a jury, and procedural protections typically afforded to defendants in a criminal pro-

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18. Id. at 405 (quoting § 1). “Menace” has been defined as a term to “connote a person whose conduct will objectively put his victim in fear of bodily harm by reason of a battery and, specifically, a contact sex crime.” Suave, 953 N.E.2d at 183.
19. Id.
21. MASS. GEN. LAWS ch. 123A, § 12(e).
22. Id.
23. Id.
24. Id.
27. See § 2A.
28. § 14(c).
ceeding.\textsuperscript{29} If a finding is entered that the defendant is sexually dangerous, the individual is immediately committed to the Massachusetts Treatment Center.\textsuperscript{30} The offender has the opportunity, annually, to petition the court for habeas corpus if he/she no longer suffers from the mental illness that prevents him/her from controlling their impulses.\textsuperscript{31} If the court finds that the individual no longer suffers from the mental abnormality or illness that caused the likelihood of future sexual offenses, the individual is released.\textsuperscript{32}

In 1997, the Supreme Court addressed the constitutionality of civil commitment statutes for sexually dangerous persons in \textit{Kansas v. Hendricks}.\textsuperscript{33} For the first time, Kansas invoked the Sexually Violent Predator Act to commit Leroy Hendricks, an individual with a long history of sexually molesting children, who was scheduled for release.\textsuperscript{34} Hendricks challenged his mandatory commitment with claims of substantive due process, double jeopardy, and ex post facto grounds.\textsuperscript{35}

The Supreme Court first addressed petitioner’s substantive due process claim that indefinite civil confinement infringed upon and violated his due process rights.\textsuperscript{36} The Court immediately discarded this claim by stating that they had “consistently upheld involuntary commitment statutes provided the confinement [took] place pursuant to proper procedural and evidentiary standards.”\textsuperscript{37} Furthermore, the requirement of a mental abnormality satisfied substantive due process by limiting the imposition of “civil [commitment] to those who suffer[ed] from a volitional impairment [that] render[ed] them dangerous beyond their control.”\textsuperscript{38}

Petitioner next argued that the commitment statute violated double jeopardy because the Act established criminal proceedings via confinement and therefore constituted punishment.\textsuperscript{39} The Court addressed this claim by first examining the statutory construction of the Act and ultimately determined that it was the intent of the Kansas legislature “to create a civil proceeding, [as evident] by [the] placement of the Act within the probate code, [rather than] the criminal code, as well as [the] description of the Act as creating a

\textsuperscript{29} § 14(a)-(b).
\textsuperscript{30} § 14(d).
\textsuperscript{31} § 9.
\textsuperscript{32} \textit{Id}.
\textsuperscript{33} \textit{See Kansas v. Hendricks, 521 U.S. 346, 356 (1997)}.
\textsuperscript{34} \textit{Id.} at 350.
\textsuperscript{35} \textit{Id}.
\textsuperscript{36} \textit{Id.} at 358.
\textsuperscript{37} \textit{Id.} at 357.
\textsuperscript{38} \textit{Id}.
\textsuperscript{39} \textit{Id.} at 361.
The Court went on to state that the Act did not implicate the two primary objectives of criminal punishment—retribution and deterrence—and therefore was civil, and not criminal, in nature.

The Court concluded its analysis by foreclosing the double jeopardy and ex post facto claims. The Court found no violation of double jeopardy because of the non-punitive nature of the Act as well as the fact that the use of prior convictions was not retroactive, but used for evidentiary purposes only. In the end, the Court held that the Kansas Sexually Violent Predator Act comported with due process requirements and neither ran afoul of double jeopardy principles nor constituted an exercise in impermissible ex post facto lawmaking.

III. JUVENILE SYSTEM V. ADULT SYSTEM

The separate juvenile justice system began in 1899 in the state of Illinois. It eventually spread throughout the country encouraging different procedures and sentences regarding the punishment of juveniles. The system was developed on the premise that individuals under the age of eighteen who commit crimes should be treated differently due to the fact that they do not act with the same degree of responsibility as their adult counterparts. Children are considered "psychological works-in-progress in that they are not fully equipped with the tools critical to pragmatic decision-making." The development of a separate criminal justice system for children focused on three factors: (1) a recognition that their behavior is very strongly influenced by their social and familial environment; (2) a concern that the limited autonomy of their behavior makes punishment unfair; and (3) a belief that, because of their vulnerability to being influenced by their environments, it is possible to modify their behavior and prevent future
crimes as adults.\textsuperscript{49}

Research has shown that while adolescent thinking roughly mirrors that of adults at the age of sixteen, there are multiple other psychological and social characteristics that influence their behavior and warrant separate treatment in juvenile court.\textsuperscript{50} These factors include: shortsighted decision-making; poor impulse control; and vulnerability to peer pressure.\textsuperscript{51} Studies have shown that adolescents are less likely to consider future consequences in the midst of decision-making; juveniles weigh short-term consequences more heavily than longer ones and are therefore less sensitive to risks and more sensitive to rewards.\textsuperscript{52} This lack of foresight, when combined with the desire for short-term rewards, can affect the adolescent’s ability to correctly weigh risks and benefits when it comes to crime.\textsuperscript{53} The inability to control impulses further affects a juvenile’s decision-making skills.\textsuperscript{54} Adolescents have been shown to be more likely than adults to be impulsive and to experience more mood swings.\textsuperscript{55} The substantial influence of peer pressure further affects an adolescent’s ability to weigh the risks and benefits of potential crimes.\textsuperscript{56} When all three factors combine, the logical result is that a young offender possesses less mental culpability than that of an adult

\textsuperscript{49} Grisso, supra note 3, at 1-2, 4.

\textsuperscript{50} Laurence Steinberg, Juveniles in the Justice System: New Evidence From Research on Adolescent Development 2-4 (2007), available at http://www.familyimpactseminars.org/s_wifis25c01.pdf; Grisso, supra note 3, at 18 (“Even when adolescents’ cognitive capacities are similar to those of adults, theory suggests that they will employ those abilities with less dependability in new, ambiguous, or stressful situations, because the abilities have been acquired more recently and are less well established.”).

\textsuperscript{51} See Steinberg, supra note 50; Scott & Grisso, supra note 3, at 175 (“Because of inexperience and immature judgment, youths will make many mistakes during this period.”); Gargi Talukder, Decision-Making is Still a Work in Progress for Teenagers, Brain Connection (Mar. 20, 2013), http://brainconnection.positscience.com/decision-making-is-still-a-work-in-progress-for-teenagers/.

\textsuperscript{52} See Grisso, supra note 3, at 19; Scott & Grisso, supra note 3, at 174 (“When analyzed in this doctrinal framework, developmental differences affecting decision-making are likely to be substantial enough to provide categorical excuse from responsibility only for very young juveniles, who are qualitatively different from adults in moral, cognitive, and social development.”); Shukla, supra note 3.

\textsuperscript{53} Shukla, supra note 3.

\textsuperscript{54} Id.

\textsuperscript{55} See Steinberg, supra note 50; Cornelia Pechmann et al., Impulsive and Self-Conscious: Adolescents’ Vulnerability to Advertising and Promotion, 24(2) J. of Pub. Pol’y & Mktn. 202, 202 (2005).

\textsuperscript{56} See Peter K. Smith et al., Understanding Children’s Development 405-08 (4th ed. 2003) (outlining various stages of development during which the child’s thought processes change significantly in response to environmental stimuli); Rightmer, supra note 3, at 22; Scott & Grisso, supra note 3, at 155-76.
whose psychological maturity is well developed.\textsuperscript{57} It therefore follows that this lack of psychological maturity requires a separate juvenile system that considers these factors in the adjudication of juvenile crimes and the appropriate legal response.

Under the present statute, Massachusetts defines a youthful offender as a “person who is subject to an adult or juvenile sentence for having committed, while between the ages of fourteen and eighteen, an offense against a law of the Commonwealth which, if he were an adult, would be punishable by imprisonment in the state prison.”\textsuperscript{58} The Massachusetts statute advocates for rehabilitative and treatment-orientated programs to help children who commit crimes.\textsuperscript{59} Although adjudication in criminal court is typically reserved for violent offenders, under certain circumstances the juvenile may be transferred to be tried as an adult.\textsuperscript{60} In all other cases, the Department of Youth Services determines the placement of children through guidelines established by the Massachusetts Classification Policy.\textsuperscript{61} Under this policy, a three-member classification panel decides whether the juvenile should be placed with the Department of Youth Services in a secure treatment facility or should be treated in one of its community-based programs.\textsuperscript{62} In evaluating the placement of the juvenile, the classification panel focuses on the risk of danger the youth poses to the community.\textsuperscript{63} If the determination is made that the child does not pose a great threat and will benefit from treatment, the panel will place the child in a community-based program.\textsuperscript{64} On the contrary, if it is determined that the juvenile poses a threat to the community, the individual will be placed in the appropriate secure treatment facility.\textsuperscript{65}

\begin{itemize}
\item \textsuperscript{57} STEINBERG, supra note 50; see St. Vincent, supra note 3, at 11-13.
\item \textsuperscript{58} MASS. GEN. LAWS ch. 119, § 52 (2013).
\item \textsuperscript{59} Id. § 1; see also Franciszka A. Monarski, Rehabilitation vs. Punishment: A Comparative Analysis of the Juvenile Justice Systems in Massachusetts and New York, 21 SUFFOLK U. L. REV. 1091, 1092 (1987).
\item \textsuperscript{60} MASS. GEN. LAWS ch. 119, §§ 74, 72A (2013).
\item \textsuperscript{62} MASS. GEN. LAWS ch. 119, § 58; BOS. BAR ASS’N, supra note 61.
\item \textsuperscript{63} § 58.
\item \textsuperscript{64} Id.; 109 MASS. CODE REGS. 4.04 (2014); see also BOS. BAR ASS’N, supra note 61.
\item \textsuperscript{65} BOS. BAR ASS’N, supra note 61.
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IV. INDEFINITE CIVIL CONFINEMENT: THE NEW LIFE WITHOUT PAROLE

A. Life Without Parole for Juveniles is Unconstitutional

The Supreme Court’s holding in *Miller v. Alabama* is the culmination of a long line of precedent that establishes the Eighth Amendment’s ban on cruel and unusual punishment in the context of juvenile life without parole.66 Each case explored the parameters of cruel and unusual punishment, as provided by the Eighth Amendment, and gradually established a three-part test utilized to determine the constitutionality of various criminal punishments.67 The precedent began with *Thompson v. Oklahoma*, which dealt with the execution of a minor for his commission of murder at the age of seventeen.68

1. *Thompson v. Oklahoma*

Thompson was convicted of first-degree murder and sentenced to death for his participation in the brutal murder of his former brother-in-law.69 The evidence demonstrated that the victim was shot twice; his throat, chest, and abdomen had been cut; and his body was chained to a concrete block and tossed into a river.70 The Supreme Court granted certiorari to answer the question of whether the execution of the death penalty would violate the constitutional prohibition against the infliction of cruel and unusual punishment because the petitioner was only fifteen at the time of his offense.71

The Court first reviewed the relevant legislative enactments, jury determinations, the juvenile’s culpability, and whether the application of the death penalty to the class of juvenile offenders contributed to the social purposes served by the death penalty (retribution and deterrence).72 The Court concluded that: (1) all of the legislation examined was consistent with the experience of mankind that the normal fifteen-year-old was not prepared to assume the full responsibility of an adult; and (2) of the thousands of juries that had tried cases, only eighteen to twenty defendants un-

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68. See *Thompson*, 487 U.S. at 818-19, 858.
69. Id. at 818.
70. Id. at 819.
71. Id. at 818-19.
72. Id. at 833-34.
der the age of sixteen were sentenced to the death penalty.\textsuperscript{73}

In answering the third and final inquiry, the Court stated that they had already endorsed the proposition that less culpability should attach to a crime that is committed by a juvenile than to a comparable crime committed by an adult.\textsuperscript{74} The Court ultimately concluded that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under sixteen years of age at the time of his or her offense.\textsuperscript{75}

2. \textit{Stanford v. Kentucky}

Stanford, at the age of seventeen, and his accomplice repeatedly raped and sodomized Barbel Poore during and after their commission of a robbery at a gas station where she worked as an attendant.\textsuperscript{76} They then drove her to a secluded area near the station, where Stanford shot her pointblank in the face.\textsuperscript{77} Petitioner Heath Wilkins committed the murder of Nancy Allen, a separate crime on the same appeal, when he was approximately sixteen-years-old.\textsuperscript{78} The record indicates that while Wilkins’ accomplice held Allen, Wilkins stabbed her repeatedly and then left her to die on the floor.\textsuperscript{79}

The Court began its analysis by looking to the standards of modern American society in order to determine whether the imposition of capital punishment upon individuals under the age of sixteen was contrary to the evolving standards of decency that “mark the progress of a maturing society.”\textsuperscript{80} The Court concluded that the statutes passed by society’s elected representatives, in this case, did not establish the degree of national consensus the Court previously had thought sufficient to label a particular punishment cruel and unusual.\textsuperscript{81} The Court concluded that due to a lack of discernment in either historical or modern societal consensus forbidding the imposition of capital punishment on any person who murders at sixteen or seventeen years of age, such punishment did not offend the Eighth Amendment’s

\textsuperscript{73}. \textit{Id.} at 832 (leading to the conclusion that the imposition of the death penalty on a fifteen-year-old was generally abhorrent to the community).

\textsuperscript{74}. \textit{Id.} at 835 (reasoning that the application of the sentence of death to juvenile offenders, under the age of sixteen, did not further the two principal penological purposes of the death penalty: retribution and deterrence of capital crimes by prospective offenders).

\textsuperscript{75}. \textit{Id.} at 838.


\textsuperscript{77}. \textit{Id.}

\textsuperscript{78}. \textit{Id.} at 366.

\textsuperscript{79}. \textit{Id.}

\textsuperscript{80}. \textit{Id.} at 369.

\textsuperscript{81}. \textit{Id.} at 371 (reasoning that of the thirty-seven states that permitted capital punishment, only fifteen declined to impose it on sixteen-year-old offenders and only twelve declined to impose it on seventeen-year-old offenders).
prohibition against cruel and unusual punishment.82

3. **Roper v. Simmons**

Christopher Simmons, at the age of seventeen, along with his friend Benjamin entered the home of Shirley Crook, kidnapped her and took her to a state park, where they dumped her bound body from a bridge into the river below.83 The Supreme Court began its analysis of the juvenile death penalty by reviewing enactments of legislatures in order to review “objective indicia of consensus.”84 Then, the Court determined whether, in their own judgment, the death penalty was “a disproportionate punishment for juveniles.”85 The Court stated that the “evidence of national consensus against the death penalty for juveniles” was similar to the evidence *Atkins v. Virginia*86 “held sufficient to demonstrate a national consensus against the death penalty for the intellectually disabled.”87

Continuing with their analysis, the Court moved on to the Eighth Amendment and its limitation of capital punishment to certain serious offenders.88 Applying this principle to juveniles, the Court discussed the three general differences between juveniles under the age of eighteen and adults: (1) scientific and sociological studies confirm, “a lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults. These qualities often result in impetuous and ill-considered actions and decisions”; (2) juveniles are more vulnerable and susceptible to negative influences and outside pressures, explained by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment; and (3) the character of a juve-

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82. *Id.* at 380.
84. *Id.* at 564.
85. *Id.*
86. *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding that executions of intellectually disabled criminals were cruel and unusual punishments prohibited by the Eighth Amendment).
87. Thirty states prohibited the juvenile death penalty, comprised of twelve that have rejected the death penalty altogether and eighteen that maintained it but, by express provision or judicial interpretation, excluded juveniles. See *Roper*, 543 U.S. at 564. The Court continued by stating that although the number of states that abandoned capital punishment was smaller than the number of states that abandoned capital punishment for the mentally retarded, no state that previously prohibited capital punishment for juveniles had reinstated it. *Id.* at 566. The author has changed “mentally retarded” to “intellectually disabled” although the former is utilized in the Court’s opinion. “Intellectually disabled” is the correct terminology according to the American Psychiatric Association. See James C. Harris, *New Terminology for Mental Retardation in DSM-5 and ICD-11*, 26 CURRENT OPINION IN PSYCHIATRY 260, 260 (2013), available at http://www.medscape.com/viewarticle/782769.
nile is not as well formed as that of an adult. The Court concluded that these differences rendered suspect any conclusion that a juvenile falls amongst the worst offenders and concluded that the penological justifications of retribution and deterrence applied to juveniles with lesser force. The Court concluded the Eighth and Fourteenth Amendments forbid the imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed.

4. Graham v. Florida

At the age of sixteen, petitioner Graham, and three other school-age youths assaulted a restaurant manager in their attempt to rob a barbeque restaurant. Graham pleaded guilty and accepted a deal to serve concurrent three-year terms of probation, but less than a year later he was arrested again for his participation in a home robbery. At this point in the line of constitutional precedent, the Supreme Court employed the use of the well-established test: first, the consideration of the objective indicia of society’s standards, as expressed in legislative enactments and state practice, to determine whether there was a national consensus against the sentencing practice at issue and then, in the exercise of its own independent judgment, the Court determined whether the punishment in question violated the Constitution.

The Court found that only eleven jurisdictions nationwide imposed life sentences without parole on juvenile non-homicide offenders. The Court then exercised its independent judgment through consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question, and further considered whether the challenged sentencing practice served legitimate penological goals. In their examination of the offenders, the Court stated that Roper already established that due to juveniles’ lessened culpability, they were less deserving of the most severe punishments and no recent data had been provided to reconsider those observations.
5. **Miller v. Alabama**

In November 1999, petitioners Kuntrell and Jackson, then fourteen-years-old, decided to rob a video store and killed the store clerk. Petitioner Evan Miller, like Jackson, was fourteen-years-old when he murdered a neighbor after repeatedly striking him with a baseball bat and setting his trailer on fire. The Eighth Amendment’s prohibition of cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions. The Court viewed this concept of proportionality according to “the evolving standards of decency that mark the progress of a maturing society.” The Court then concluded that the two lines of precedent, *Graham* and *Roper*, led to the conclusion that mandatory life-without-parole sentences for juveniles violated the Eighth Amendment.

The Court addressed the second question by asking whether “objective indicia of society’s standards, as expressed in legislative enactments and state practice,” showed a national consensus against a sentence for a particular class of offenders. It then went on to conclude that their decision mandated only that a sentence follow a certain process – considering an offender’s youth and attendant circumstances – before imposing a particular penalty and that most states authorized the death penalty or life without parole for juveniles only through the combination of two independent statutory provisions. In the end, the Court stated that *Graham*, *Roper*, and their individualized sentencing decisions made it clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.

**B. Kansas v. Hendricks: Civil Confinement is Not Punishment, or is it?**

While the Supreme Court has considered the issue of life without parole sentences for juvenile offenders, it has not considered the issue of indefinite juvenile civil confinement. However, the Court has ruled the practice of civil commitment for adult sexually dangerous persons to be constitutional—the mental abnormality requirement satisfies substantive due pro-

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99. Id. at 2462 (adjudicating the appeals of Kuntrell, Jackson, and Miller together within one case).
102. Id. at 2464.
103. Id. at 2470.
104. Id. at 2472.
105. Id. at 2475.
106. Id. at 2548.
cess claims and the non-punitive nature of the statutes preclude double
jeopardy and ex post facto claims.107 The Court’s holding, regarding civil
commitment statutes for adult sexually dangerous persons, serves as moti-
vation and justification to hold that the indefinite civil commitment of ju-
venile offenders is unconstitutional.108

1. Kansas v. Hendricks: The Beginning of the End for Sexually
Dangerous Persons

The Supreme Court’s holding in Kansas v. Hendricks has allowed for
the indefinite civil confinement of innumerable sexual offenders operating
under the all-important guise of public safety.109 While the Supreme Court
has held that civil commitment statutes satisfy substantive due process re-
quirements, a closer examination of the topic suggests otherwise in regards
to indefinite civil confinement.110

a. Due Process

In disposing of the petitioner’s due process claim, the Court quickly
dismissed any argument regarding freedom from physical restraint found at
the core of liberty simply by referring to their long line of precedent.111 The
Court discussed the prerequisite of a finding of dangerousness in order to
initiate civil commitment proceedings and stated that the statute “requires
proof of more than a mere predisposition to violence; rather, it requires ev-
idence of past sexually violent behavior and a present mental condition that
creates a likelihood of such conduct in the future if the person is not inca-
pacitated.”112 The Court attempted to legitimize the statute’s requirement
of a likelihood of future dangerousness by stating that a finding of danger-
ousness alone was insufficient to justify indefinite involuntary commit-

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108. Id. at 358.
109. Id. at 360-61.
110. Brief for American Civil Liberties Union et. al. as Amici Curiae in Support of Re-
111. Hendricks, 521 U.S. at 356 (“A[n individual’s constitutionally protected interest
in avoiding physical restraint may be overridden even in the civil context . . . .”); see also
Addington v. Texas, 441 U.S. 418, 433 (1979) (holding that in order to meet due process
demands, the standard for use in commitment for mental illness must “inform the fact finder
that proof must be greater than the preponderance-of-the-evidence standard applicable to
other categories of civil cases”); Falk, supra note 4, at 124 (“The U.S. Supreme Court has
noted that states ‘have traditionally exercised broad power to commit persons found to be
mentally ill.’”) (quoting Jackson v. Indiana, 406 U.S. 715, 736 (1972)). But see Foucha v.
Louisiana, 504 U.S. 71, 83-86 (1992) (holding that the continued confinement of petitioner
after no evidence of mental illness violated due process).
112. Hendricks, 521 U.S. at 357-58 (emphasis added).
ment. This finding of dangerousness, according to the Court, must be supplemented by proof of some additional factor, “such as mental illness or mental abnormality.” The Court used the requirement of a mental abnormality to justify the indefinite civil confinement of individuals who have already paid their debt to society by way of their previous incarceration in a correctional facility.

Due to the fact that freedom from physical restraint is at the core of every citizen’s due process liberty interest, the Court must provide more justification for the indefinite infringement upon one’s liberty interest than the requirement of a mental illness or abnormality. The Court does not even bother to proceed with a strict-scrutiny balancing test of the statute, but instead simply relies on established precedent to quickly dismiss the petitioner’s constitutional claim. A strict-scrutiny analysis is required when any fundamental right—a right that is deeply rooted in the nation’s history and implicit in the concept of ordered liberty—is implicated. Because free-

113. Id. at 358; see also O’Connor v. Donaldson, 422 U.S. 563, 575 (1975) (noting that a “finding of ‘mental illness’ alone cannot justify a State’s locking a person up against his will . . .”).
114. Hendricks, 521 U.S. at 358 (internal quotation marks omitted).
115. Id. (reasoning that the mental abnormality sufficiently narrowed the applicability of the statute to only those individuals who suffered from a mental illness).
116. Id. at 356. Even the Court acknowledged, in its opinion, that freedom from physical restraint is at the core of the liberty interest protected by the Due Process Clause. Id. However, it went on to state that this interest “was not absolute and may be overridden even in the civil context.” Id.; Falk, supra note 4, at 133 (“Hendricks locates an individual’s freedom from physical restraint at the core of the liberty protected by the Due Process Clause, but concludes that involuntary civil confinement of a class of dangerous persons is not contrary to ordered liberty.”).
117. See Planned Parenthood v. Casey, 505 U.S. 833, 934 (1992) (holding the right not to have children was fundamental and therefore implicated strict scrutiny); Buck v. Bell, 274 U.S. 200, 207 (1927) (holding the right to children fundamental therefore implicating strict scrutiny); Pierce v. Soc’y of Sisters of The Holy Names of Jesus & Mary, 268 U.S. 510, 534-35 (1925) (holding that parents’ right to educate their children was fundamental and therefore deserved strict scrutiny); see also Falk, supra note 4, at 133 (“Hendricks neither discusses whether civil commitment implicates a fundamental right nor indicates what standard of review should guide the Court’s analysis . . . . Hendricks locates an individual’s freedom from physical restraint at the core of the liberty protected by the Due Process Clause, but concludes that involuntary civil confinement of a class of dangerous persons is not contrary to ordered liberty.”).
118. Compare Korematsu v. United States, 323 U.S. 214, 216, 219-20 (1944) (holding that interment of persons of Japanese descent was sufficiently narrowly tailored to survive strict scrutiny due to the legitimate interest in protecting against espionage), with Saenz v. Roe, 526 U.S. 489, 502-03, 509, 511 (1999) (holding that the state could not limit the maximum welfare benefits available to newly arrived residents because it infringed upon their right to travel, without a sufficiently legitimate interest or narrowly tailored means). See
dom from restraint is at the heart of each individual’s liberty interest and is deeply rooted in this nation’s history, the civil confinement of individuals must be subjected to strict scrutiny. Therefore, the question becomes whether the commitment standard is narrowly tailored to further a compelling state interest. Indefinite civil confinement of an individual is the most severe infringement upon their right of freedom from physical restraint. While public safety is of paramount concern to states, indefinite civil confinement of individuals, premised on the likelihood of future sexual offenses, is not narrowly tailored to the public safety interest of the state.

b. “Civil” is Criminal

Simply because the Kansas Legislature preemptively thought to disguise its criminal statute as a civil one by placing the Act within the probate code as well as describing it as a civil commitment procedure, does not conclusively establish that the statute is purely civil in nature. The Court states, “[n]othing on the face of the statute suggests that the legislature sought to


119. Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (“When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”); see Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (finding that the institution of family is deeply rooted in our nation’s history and therefore requires strict scrutiny); see also Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (defining the right at stake in civil commitment as the “freedom from bodily restraint” and located that right at “the core of the liberty protected by the Due Process Clause”); Addington v. Texas, 441 U.S. 418, 425 (1979) (recognizing that “commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection”); Falk, supra note 4, at 132 ("Traditionally, the framework for resolving substantive due process claims first inquires whether the challenged law deprives an individual of a fundamental right, and then proceeds to analyze whether the deprivation survives the appropriate standard of review. Hendricks departs from this principled approach, invoking substantive due process, but disregarding the established framework.").

120. See Zablocki, 434 U.S. at 388 (finding that the state’s interest is not compelling when the methods of furthering those interests unnecessarily interfered with the fundamental right to marry); Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring) (quoting McLaughlin v. Florida, 379 U.S. 184, 196 (1964)) (“The law must be shown ‘necessary, and not merely rationally related, to the accomplishment of a permissible state policy.’").

121. Hendricks, 521 U.S. at 358; see also JOSHUA DRESSLER, BLACK LETTER OUTLINES: CRIMINAL LAW 1 (Frank R. Strong et al. eds., 2d ed. 2005), available at http://scontent.westlaw.com/images/content/DresslerCrimLaw.pdf (“What distinguishes a criminal from a civil sanction . . . . is the judgment of community condemnation that accompanies and justifies its imposition. A ‘crime’ is . . . limited to conduct that, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.”).
create anything other than a civil commitment scheme designed to protect
the public from harm.\textsuperscript{122} Criminal statutes, by their nature, are intended to
protect the public from harm by placing criminals behind bars away from
society.\textsuperscript{123} This does not negate the fact that they are punitive in nature –
designed to teach criminals a lesson and to separate them from law-abiding
citizens outside the prison walls.\textsuperscript{124}

The Court states “the Act does not implicate either of the two primary
objectives of criminal punishment: retribution or deterrence.”\textsuperscript{125} They find
the purpose of the Act is not retributive because it does not affix culpability
for prior criminal conduct and it is not deterrent because commitment is
based on a mental abnormality rather than on an individual’s criminal in-
tent.\textsuperscript{126}

This argument is incorrect: the statute punishes prior criminal con-
duct.\textsuperscript{127} Although the statute ostensibly is intended to prevent future
crimes, it does so by incarcerating the individuals, thereby “punishing”
them for their past crimes by not releasing them back into society after
serving their sentences.\textsuperscript{128} The Court uses the fact that individuals confined
under the sexually dangerous persons statutes are not subjected to the more
restrictive conditions placed on state prisoners, but instead experience the

\textsuperscript{122.} Hendricks, 521 U.S. at 361.

\textsuperscript{123.} See Matthew Lippman, Contemporary Criminal Law: Concepts, Cases, and
Controversies 3 (Jerry Westby et al. eds., 3d ed. 2012) (noting, as an example, that New
York Criminal Code’s basic purpose is “[t]o prohibit conduct that unjustifiably or inexcu-
sably causes or threatens substantial harm to individuals as well as to society”).

\textsuperscript{124.} See Richard Garside, The Purpose of the Criminal Justice System, CTR. FOR CRIME
AND JUST. STUD. (Mar. 17, 2008), http://www.crimeandjustice.org.uk/resources/purpose-
criminal-justice-system; see also David J. Shestokas, The Purpose of Criminal Punishment,
DAVID J. SHESTOKAS (Oct. 25, 2012), http://www.shestokas.com/general-law/criminal-
law/the-purpose-of-criminal-punishment/.

\textsuperscript{125.} Hendricks, 521 U.S. at 361-62.

\textsuperscript{126.} Id. at 361 (stating that prior criminal conduct is used solely for evidentiary pur-
poses, either to demonstrate that a mental abnormality exists or to support a finding of future
dangerousness).

\textsuperscript{127.} Id. at 377-80 (Breyer, J., dissenting) (pointing out ways in which civil commit-
ment pursuant to the Act resembles traditional punishment: people are confined against their
will; one of the Act’s goals is to prevent harm to others; and it uses “people, procedures, and
standards traditionally associated with criminal law”); see also Eli M. Rollman, “Mental Ill-
ness”: A Sexually Violent Predator is Punished Twice for One Crime, 88 J. CRIM. L. &
CRIMINOLOGY 985, 985-86 (1998) (arguing that Kansas v. Hendricks was wrongly decided
and the Act’s primary goal is punishment).

\textsuperscript{128.} See Hendricks, 521 U.S. at 377-80 (Breyer, J., dissenting); Rollman, supra note
127, at 1011-12 (“The obvious objective of the Act was the removal from the community of
certain persons who are thought likely to commit a crime . . . . Like criminal imprisonment,
the result of civil commitment is involuntary incarceration, and that incarceration is a basic
objective of the Act.”).
same conditions as any involuntarily committed patient in the state mental institution, to justify their conclusion that civil commitment statutes are not punitive in nature. The Act in *Hendricks* bears too many similarities to criminal statutes to be held civil in nature by the Supreme Court: the obvious purpose of the Act is to remove these individuals from the community to preserve public safety; the confinement triggered by the Act is imposed only on those individuals who have committed a crime; and the procedures and standards required by the Act closely resemble those associated with criminal law.

The Court justifies the indefinite civil commitment of individuals who have already satisfied their criminal punishments solely on the basis that the statutes require a mental abnormality or personality disorder. According to the Court, this requirement sufficiently construes the statute narrowly in order to prevent an over-encompassing commitment of individuals and precludes any argument that the statutes are punitive in nature—because a person with a mental abnormality does not have control over their behavior or the mental culpability to understand and control their sexual impulses. However, the cold reality of civil commitment statutes is that the majority of these individuals, due to their mental abnormalities, will never be released from civil confinement because, for most of them, their illnesses will never subside. The requirement of a mental illness or abnormality limits the group of individuals that qualify for commitment, but the means by which the court evaluates future behavior are insufficiently tailored to satisfy strict scrutiny. The standard of “likely” does not limit the scope of individuals subject to civil confinement; it negates the purpose of the mental illness requirement by expanding the number of individuals possibly subjected to civil commitment.

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132. *Id.* at 358.
c. Predicting the Future: An Unacceptable Standard for Indefinite Confinement

The reliance by civil commitment statutes upon the likelihood of future dangerousness runs afool of both the criminal and civil justice systems. Essentially, civil commitment statutes punish individuals for crimes that they have not yet committed and perhaps, might never commit, based on a generalized and over-encompassing fear of this group of individuals. Within civil commitment statutes, there is no provision defining what specifically constitutes a sufficient likelihood that the individual will commit a future sexual offense. The courts have been clear that dangerousness alone cannot support civil commitment; there must be some connection between the disorder and a risk of future sexual offenses. In order to demonstrate this relationship, the courts have relied on expert testimony from mental health professionals and their predictions about the future behavior of individuals with a history of sexual crimes. The reliance by the judicial system on medical diagnoses is not only unreliable but also difficult to translate into a legal standard. Furthermore, courts have failed to identify how future dangerousness should be evaluated or why the presence of a mental abnormality or illness is imperative to sexual dangerousness.

135. Id. ("By committing individuals based solely on perceived dangerousness, the Statute in effect sets up an Orwellian ‘dangerousness court,’ a technique of social control fundamentally incompatible with our system of ordered liberty guaranteed by the constitution . . . "); Falk, supra note 4, at 137 ("This justification of preventing future crimes, however, conflicts with an essential precept of Anglo-American criminal law that forbids imprisoning a person who has not committed a crime but who may be likely to violate the law."); see Alan M. Dershowitz, Preventive Confinement: A Suggested Framework for Constitutional Analysis, 51 TEX. L. REV. 1277, 1278 (1973) (quoting FRANCIS WHARTON, WHARTON’S CRIMINAL LAW § 2 (12th ed. 1932)) ("If the [preventative] theory be correct . . . then punishment should precede, and not follow, crime. The State must explore for guilty tendencies, and make a trial to consist in the psychological investigation of such tendencies. This contradicts one of the fundamental maxims of English common law, by which not a tendency to crime, but simply crime itself, can be made the subject of a criminal issue.").

136. See Wakefield, supra note 133 (criticizing the use of civil commitment laws and pointing out the stigmatization of sex offenders).

137. See generally Prentky et al., supra note 138, at 357.


139. See generally Prentky et al., supra note 138, at 357.

proceedings. Medical experts have stated, “the risk thresholds for invoking [sexually violent predator] commitments are vague, and courts have failed to set standards that can be implemented reliably, relying instead on un-operationalized terms such as ‘likely.’”141 The very experts brought in to testify regarding the future dangerousness of the individual sought to be committed do not have confidence in these diagnostic tools, or believe they should be relied upon to subject these individuals to indefinite confinement, and the legal community should echo their skepticism.142

C. Application of Eighth Amendment to the Civil Commitment of Juvenile Offenders

Indefinite civil commitment, like life without parole, should be held unconstitutional by the Supreme Court as a violation of the Eighth Amendment’s restriction on cruel and unusual punishment.143 In order to determine whether there is a violation of the Eighth Amendment, the Court applies a two-prong test: first, it looks to the objective indicia of society’s standards, as expressed in legislative enactments and state practice, to determine whether there is a national consensus against the sentencing practice at issue; then, the Court determines, in the exercise of its own independent judgment, whether the punishment in question violates the Constitution.144 This second prong requires (a) consideration of the culpability of the class of offenders at issue in light of their crimes and characteristics along with (b) the severity of the punishment in question.145 Finally,

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141. Wakefield, supra note 133, at 372.
142. See Hamilton, supra note 140, at 734 (“[M]any legal and mental health practitioners and researchers who work in the sex offender area . . . warn against the use of actuarial tests in legal settings because significant limitations with the tests make their use questionable in light of the significant deprivation of liberty they may facilitate.”).
143. See Miller v. Alabama, 132 S. Ct. 2455 (2012); see also Rollman, supra note 127, at 985 (arguing that Kansas v. Hendricks was wrongly decided and the Act’s primary goal is punishment); Alison G. Turoff, Throwing Away the Key on Society’s Youngest Sex Offenders, 91 J. CRIM. L. & CRIMINOLOGY 1127, 1127 (arguing that sexually violent predator laws for juveniles violate both the Due Process and Equal Protection Clauses of the Fourteenth Amendment).
144. See Roper v. Simmons, 543 U.S. 551, 575 (2005) (holding that application of the death penalty to juveniles under the age of eighteen violated the Eighth Amendment); see also Miller, 123 S. Ct. at 2455 (holding the mandatory life imprisonment without parole for juveniles under the age of eighteen at the time of their crimes violates the Eighth Amendment). Contra Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (holding that the Eighth and Fourteenth Amendments do not forbid the execution of sixteen and seventeen-year-old juvenile offenders).
145. See Graham v. Florida, 560 U.S. 48, 82 (2010) (holding that life without parole for the non-homicidal juvenile offender violates the Eighth Amendment); see also Roper, 543 U.S. at 575 (holding that application of the death penalty to juveniles who were under
the Court also considers whether the challenged sentencing practice serves legitimate penological goals. Applying the test for Eighth Amendment violations to the practice of indefinite civil confinement of juvenile sexually dangerous persons confirms that indefinite civil commitment constitutes cruel and unusual punishment under the Eighth Amendment.

1. First Prong: Is there a National Consensus Against Indefinite Civil Commitment of Juveniles?

In order to determine whether there is a violation of the Eighth Amendment’s prohibition on cruel and unusual punishment, one must first examine the “objective indicia of society’s standards, as expressed in legislative enactments and state practice, to determine whether there is a national consensus against the sentencing practice at issue.” In *Roper*, the Court found that out of the thirty states that prohibit the juvenile death penalty, twelve have rejected it all together while eighteen maintain it, but by express provision and judicial interpretation, exclude juveniles. Similarly, in *Graham*, the Court found that only eleven jurisdictions nationwide imposed life sentences without parole on juvenile non-homicide offenders, while twenty-six states, the District of Columbia, and the Federal Government did not impose them despite statutory authority to do so.

Sexually dangerous persons statutes exist in seventeen states. Some of these states already allow for the commitment of juveniles under their sexually dangerous persons statutes, while other states have considered or are currently considering expanding their existing civil commitment statutes to include juveniles. For example, Arizona and Florida stipulate that offenders must be at least eighteen years of age before they are eligible for consideration for civil commitment, while Illinois, Washington, and Wisconsin explicitly state that juveniles may be subject to commitment at any age. Therefore, only five states, out of the seventeen that have enacted the age of eighteen when they committed their offense, violated the Eighth Amendment).

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civil commitment statutes, allow for the commitment of juveniles under their sexually dangerous persons statutes. 154 This number is significantly lower than the legislative enactments found in both *Roper* and *Graham*, in which the Court found both met the standard for establishing a national consensus against the sentencing practice at issue. 155 On the existence of sexually dangerous persons statutes alone, it appears that the Court would find that the evolving standards of decency express a national consensus against the indefinite civil confinement of juvenile sex offenders.

2. Second Prong: Whether, in the Court’s Opinion, Indefinite Civil Confinement of Juveniles Violates the Constitution?

After an examination of the objective indicia of society’s standards, the Court next determines, in the exercise of its own independent judgment, whether the punishment in question violates the Constitution. 156 This requires not only a consideration of the culpability of the offenders at issue in light of their crimes and characteristics, but also the severity of the punishment in question. 157 To fully determine whether the punishment in question violates the Constitution, the Court also considers whether the challenged sentencing practice serves legitimate penological goals. 158 In *Roper v. Simmons*, the Court first analyzed the culpability of juvenile offenders and established that research has shown juveniles are different from adult offenders. 159 These same differences were applied to the Court’s analysis in *Graham v. Florida*. 160 This precedent establishes that juveniles are in fact different and are “less deserving of the most severe punishments,” a standard that applies in the context of civil confinement as well. 161

Noting that the differences between juvenile and adult offenders warrant the conclusion that juveniles are less deserving of the most severe punishments, the Court then considers the severity of the punishment at issue. 162 In *Graham*, the Court recognized that “defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of

155. *See Graham v. Florida*, 560 U.S. 48, 69 (2010) (holding that life without parole for the non-homicidal juvenile offender violates the Eighth Amendment); *see also Roper v. Simmons*, 543 U.S. 551, 575 (2005) (holding that application of the death penalty to juveniles who were under the age of eighteen when they committed their offense, violated the Eighth Amendment).
156. *See Graham*, 560 U.S. at 69; *see also Roper*, 543 U.S. at 568.
158. *Id.*
159. *Id.* at 569-70.
162. *See Roper*, 543 U.S. at 568.
the most serious forms of punishment than are murderers," and "it follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability." Like life without parole, the civil confinement of juvenile sexually dangerous persons is often not limited to a specific term of years. Rather, juvenile offenders often serve, in addition to their sentences, indefinite terms of civil commitment as they are only permitted release upon a showing that they no longer suffer from the mental abnormality that prevents them from controlling their sexual urges.

Advocates for the civil commitment of juvenile offenders argue that because the statute provides an opportunity for release, the confinement is not disproportionate to the offense. However, precedent established by the Supreme Court denotes otherwise. In *Miller v. Alabama*, upon finding that juvenile life without parole sentences were unconstitutional, the Court stated “[a] state is not required to guarantee eventual freedom, but must provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” While the civil confinement statutes of each state provide the opportunity for release once a year, they only do so upon a showing that the individual no longer suffers from the mental illness that prevents the individual from controlling their impulses. This requirement presents a formidable obstacle to the individual who petitions for release because in order to be confined in the first place, it must be shown that the defendant suffers from a mental abnormality or personality disorder.

This requirement of a mental abnormality or personality disorder realistically precludes any claim that the individual is no longer a danger to the community. The types of disorders included within the statutory definition, and those found to establish the need for confinement are not of the type that are easily treated or cured. Furthermore, the precedent of *Hendricks* and *Young* suggest that non-amenability to treatment does not bar the civil commitment of individuals: “Not all mental conditions are treatable. For

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164. *Id.*
165. CTR. FOR SEX OFFENDER MGMT., *supra* note 150.
167. *See id.*
171. *See, e.g.*, *id.* § 1.
those individuals with untreatable conditions there is no federal constitutional bar to their civil confinement, because the State has an interest in protecting the public from dangerous individuals with treatable as well as untreatable conditions.174 This suggests that the purpose of civil commitment statutes is not treatment of the sexually dangerous individuals, but the protection of the public from the possibility of future sexual offenses. Though figures are limited, at least fifty-two adults are currently indefinitely committed as sex offenders as a result of the crimes they committed when they were juveniles175 and over 2700 adult sex offenders are being held indefinitely.176 Even these limited statistics demonstrate that there is no meaningful opportunity to obtain release from civil confinement.177 Civil confinement of juvenile sex offenders is incredibly similar to sentences of life without parole and should therefore be held unconstitutional.

Finally, the Court should consider whether the penological justifications are met by the sentencing practice at issue.178 While the Supreme Court has ruled on the non-punitive nature of civil confinement statutes for adults, no ruling has yet been made regarding the civil commitment of juvenile offenders.179 Proceeding under this lack of established precedent in the area of juveniles, the statutes establishing civil commitment do not meet the penological justifications of deterrence or retribution.180 While the statutes claim to provide treatment to those who are civilly confined, many of the mental abnormalities that juveniles and adults suffer from are not easily treatable.181 In Roper, the Court determined that the death penalty for juveniles did not meet the penological justification of retribution: “[r]etribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”182 The Court also stated “the ab-

176. Davey & Goodnough, supra note 133.
177. See, e.g., Sharp v. Weston, 233 F.3d 1166, 1172 (9th Cir. 2000) (“Based on the numerous inadequacies noted by the district court, we find no error in the court’s conclusion that, taken as a whole, SCC still does not provide the type of treatment program that is constitutionally required for civilly-committed persons—one that gives residents a realistic opportunity to be cured or improve the mental condition for which they were confined.”).
179. See Hendricks, 521 U.S. at 346.
181. See supra Part II.C; see, e.g., Hendricks, 521 U.S. at 365.
182. Roper, 543 U.S. at 571.
sence of evidence of deterrent effect is one of special concern because the same characteristics that render juveniles less culpable than adults suggests as well that juveniles will be less susceptible to deterrence.\textsuperscript{183} The deterrent effect on juveniles is even less apparent in the area of civil confinement due to the fact that the individuals committed must suffer from a mental abnormality that impairs their ability to control their future sexual offenses.\textsuperscript{184}

In other words, if the entire purpose of civil commitment statutes is to protect the general public from the threat of future sexual offenses by sex offenders, and there is a requirement that these individuals suffer from a mental abnormality that precludes their ability to control their impulses, there is no basis in the conclusion that the statutes have a deterrent effect because, according to these same statutes, in order to be considered a sexually dangerous person, the individual must exhibit a lack of control over his sexual impulses as a result of this mental abnormality.\textsuperscript{185} Therefore, if the individual has a lack of control over his sexual impulses, the threat of civil commitment does not deter these individuals from committing future sexual offenses.

V. CONCLUSION

The juvenile justice system was founded upon the principle that juvenile offenders are different than their adult counterparts and should therefore be treated differently.\textsuperscript{186} Indefinite civil confinement is similar to life without parole and is, along with the death penalty, one of the most severe punishments available. The recent decision by the Supreme Court in \textit{Miller v. Alabama} signifies a step in the right direction for the juvenile system.\textsuperscript{187} However, in order to provide juveniles with the best chance at rehabilitation, indefinite civil confinement, like life without parole, must be declared unconstitutional as well. Well-established precedent dictates that juveniles have a lessened culpability and are less deserving of the most severe punishments and the severity of civil commitment mirrors that of life without parole.\textsuperscript{188} Not only does indefinite civil confinement mirror life without par-
role, in that it denies juveniles the possibility of rehabilitation and release, it fails the Eighth Amendment test to determine whether it violates the restriction on cruel and unusual punishment.\textsuperscript{189} There is a national consensus against the indefinite civil commitment of juveniles\textsuperscript{190} and the Supreme Court, in the exercise of its own independent judgment, should find that it violates the Constitution. Juvenile offenders, with their lessened culpability,\textsuperscript{191} are less deserving of the punishment of indefinite civil confinement. Our legal system and social justice in the United States will not evolve to the necessary standard of decency as long as courts continue to indefinitely confine juvenile offenders.

\textsuperscript{189.} See supra Part IV.C.1.

\textsuperscript{190.} \textit{Roper}, 543 U.S. at 564 (“The evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence Atkins held sufficient to demonstrate a national consensus against the death penalty for the mentally retarded.”).

\textsuperscript{191.} \textit{Id.} at 569-70.