



## NOTE

## Fallacious Reasoning: Revisiting the *Roper* Trilogy in Light of the Sexual-Abuse-to-Prison Pipeline

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**Abstract.** *Roper v. Simmons* and its progeny fundamentally altered juvenile justice jurisprudence. In the aftermath of these cases, scholars devoted research to the force behind the Supreme Court's requirement that children have "a meaningful opportunity for release," state judicial and legislative responses to the cases, and possible extensions of these cases to abolish certain juvenile sentencing and confinement practices.

This Note takes a different tack. The *Roper* trilogy's central principle declares juveniles to be distinct from adults in terms of cognitive and socioemotional development. The trilogy then makes these differences relevant to criminal liability and punishment. But these differences come into greater relief for adolescents, particularly girls, who have suffered trauma in the form of sexual abuse. This Note thus examines the *Roper* trilogy's application to girls who have been sexually abused and subsequently swept into the criminal justice system, the so-called sexual-abuse-to-prison pipeline.

In finding that these adolescents are meaningfully different from their peers in their socioemotional and cognitive development, not to mention different from adults, this Note argues that we should change juvenile justice law to conform to the *Roper* trilogy's "children are different" principle. These girls' unique circumstances require alterations to jury instructions and broader latitude for adolescent psychologists to contextualize their

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actions and behaviors. Moreover, to the extent that mens rea analysis is intended to determine actual criminal culpability, that analysis should similarly evolve to account for these girls' histories of sexual abuse.

But the analysis cannot stop here. Broader research is urgently needed to extend this analysis to children of all genders who have survived childhood sexual abuse. And adolescents who have suffered other types of trauma similarly deserve to have their actions understood in light of their experiences.

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## Introduction

For decades, the Supreme Court has recognized that cases involving juvenile defendants should be treated differently from cases involving adult defendants. While juveniles have a right “to appropriate notice, to counsel, to confrontation . . . , and the privilege against self-incrimination,” other constitutional protections may not be available.<sup>1</sup> In general, the juvenile court system differs from that for adult criminal defendants because of its “informality, flexibility, [and] speed.”<sup>2</sup> So, for example, juveniles are not entitled to a jury.<sup>3</sup> And juvenile judges act more in a parental capacity than do judges in adult criminal cases.<sup>4</sup> These examples conform to the principle espoused by Justice Breyer that it would be “fallacious reasoning” to “uncritically” apply adult law to children.<sup>5</sup> This Note will review how this “fallacious reasoning” admonition concerns the application of law to fundamentally different groups of children.

In a trilogy of cases decided from 2005 to 2012, the Supreme Court revamped its “children are different” principle and broke from precedent by prohibiting certain types of punishment for children. First, in *Roper v. Simmons*, the Court ruled that children were categorically different from adults for the purpose of sentencing and prohibited capital punishment for children who committed crimes while under eighteen years old.<sup>6</sup> Then, in *Graham v. Florida*, the Court held juvenile life without parole (JLWOP) unconstitutional for nonhomicidal crimes using the same “children are different” reasoning.<sup>7</sup> Finally, the Court extended *Graham’s* prohibition on mandatory JLWOP to include homicidal crimes in *Miller v. Alabama*,<sup>8</sup> a holding the Court later made retroactive in *Montgomery v. Louisiana*.<sup>9</sup> These cases caused tectonic shifts in sentencing, but the principle that children are different sweeps more broadly than sentencing practices or even rules of criminal procedure. As *Miller* acknowledged, “none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is

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1. *McKeiver v. Pennsylvania*, 403 U.S. 528, 533 (1971) (plurality opinion); *id.* at 545 (holding that juveniles are not entitled to trial by jury).

2. *Id.* at 534 (quoting *In re Winship*, 397 U.S. 358, 366 (1970)).

3. *Id.* at 545.

4. *Kent v. United States*, 383 U.S. 541, 554-55 (1966).

5. *Miller v. Alabama*, 567 U.S. 460, 492-93 (2012) (Breyer, J., concurring) (quoting *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring)) (arguing that the felony-murder doctrine should not be applied to children in the same way it is applied to adults).

6. 543 U.S. 551, 569-71, 578-79 (2005).

7. 560 U.S. 48, 68-69, 74, 82 (2010).

8. 567 U.S. 460, 477-79 (2012).

9. 136 S. Ct. 718, 736 (2016).

crime-specific.”<sup>10</sup> The self-conscious breadth of the decisions combined with the breadth of the underlying principle—that children are different in terms of criminal culpability—set the stage for broad policy changes.

In the wake of the trilogy, academic research seized on technical changes to the administration of juvenile justice.<sup>11</sup> Much of this research examined the meaning of *Graham*’s promise for juveniles to have a “meaningful opportunity to obtain release.”<sup>12</sup> Within this area of research, some scholars looked at the likelihood of juveniles obtaining parole in the context of current parole practices.<sup>13</sup> Other scholars queried whether sentences over a certain period of time, such as ninety years, without opportunity for parole constituted a de facto life sentence rendering them unconstitutional.<sup>14</sup> In a similar vein, many scholars seized on *Miller*’s promise that a sentence of life without parole will be

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10. *Miller*, 567 U.S. at 473.

11. For the purpose of this Note, juvenile justice refers broadly to the administration of justice involving those deemed “juvenile” by the court system for the purpose of criminal proceedings and sentencing.

12. *Graham*, 560 U.S. at 75.

13. See, e.g., Marsha L. Levick & Robert G. Schwartz, *Practical Implications of Miller v. Jackson: Obtaining Relief in Court and Before the Parole Board*, 31 LAW & INEQ. 369, 393-94, 397 (2013) (arguing that many states’ parole board practices violate the meaningful opportunity for release standard from *Miller* and *Graham* because they exclude juveniles convicted of certain heinous crimes that often result in life sentences); Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 398-400, 412-14 (2014) (analyzing nationwide parole practices and finding that they do not provide juveniles a meaningful opportunity for release); Elizabeth Scott et al., *Juvenile Sentencing Reform in a Constitutional Framework*, 88 TEMP. L. REV. 675, 709-11 (2016) (arguing the *Roper* trilogy’s “children are different” framework necessitates changes in parole practices); Sarah Sloan, Note, *Why Parole Eligibility Isn’t Enough: What Roper, Graham, and Miller Mean for Juvenile Offenders and Parole*, COLUM. HUM. RTS. L. REV., Winter 2015, at 243, 245 (arguing parole boards must be reformed to provide a strong presumption in favor of release for juvenile offenders to comply with the *Roper* trilogy).

14. See, e.g., Therese A. Savona, *The Growing Pains of Graham v. Florida: Deciphering Whether Lengthy Term-of-Years Sentences for Juveniles Can Equate to the Unconstitutional Sentence of Life Without the Possibility of Parole*, 25 ST. THOMAS L. REV. 182, 216 (2013) (arguing that *Graham* should be confined to de jure life without parole sentences and should not apply to de facto life sentences); Kelly Scavone, Note, *How Long Is Too Long?: Conflicting State Responses to De Facto Life Without Parole Sentences After Graham v. Florida and Miller v. Alabama*, 82 FORDHAM L. REV. 3439, 3478-79 (2014) (arguing that de facto life without parole sentences should be treated as indistinguishable from de jure life without parole sentences); Krisztina Schlessel, Note, *Graham’s Applicability to Term-of-Years Sentences and Mandate to Provide a “Meaningful Opportunity” for Release*, 40 FLA. ST. U. L. REV. 1027, 1053 (2013) (arguing that de facto life sentences should trigger *Graham*’s meaningful opportunity for release); Anton Tikhomirov, Comment, *A Meaningful Opportunity for Release: Graham and Miller Applied to De Facto Sentences of Life Without Parole for Juvenile Offenders*, 60 B.C. L. REV. (E. SUPP.) II.-332, II.-343 to -345 (2019) (reviewing the circuit split on the question whether *Montgomery* applies to de facto life sentences).

“random if not rare” and explored procedural changes to guarantee this assurance.<sup>15</sup> Before *Montgomery*, many scholars homed in on whether *Miller* was retroactive.<sup>16</sup> After *Montgomery*, scholars looked at the state of the *Miller*’s implementation.<sup>17</sup>

Finally, the trilogy invited many scholars to explore a capacious reading of the cases and potential sentencing changes.<sup>18</sup> Some scholars looked at whether

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15. See, e.g., Robert S. Chang et al., *Evading Miller*, 39 SEATTLE U. L. REV. 85, 87, 92-93, 99-100, 101-03 (2015) (attributing the patchwork *Miller* implementation across states to the decision’s unclear retroactivity and describing a variety of procedural approaches states have taken to ensure juveniles are not sentenced to mandatory life without parole); Jordon Calvert Greenlee, *Victims of Youth: Equitable Sentencing Reform for Juvenile Offenders in the Wake of Miller v. Alabama and Jackson v. Hobbs*, 33 LAW & INEQ. 263, 280 (2015) (arguing that state legislatures should abolish JLWOP entirely and require courts to examine a comprehensive list of mitigating factors for each child, among other reforms); Alice Reichman Hoesterey, *Confusion in Montgomery’s Wake: State Responses, the Mandates of Montgomery, and Why a Complete Categorical Ban on Life Without Parole for Juveniles Is the Only Constitutional Option*, 45 FORDHAM URB. L.J. 149, 162-72, 185-87 (2017) (reviewing the current patchwork of state and judicial responses to *Montgomery* and arguing that categorically banning JLWOP is the only outcome consistent with the logic of *Miller* and *Montgomery*); Kallee Spooner & Michael S. Vaughn, *Sentencing Juvenile Homicide Offenders: A 50-State Survey*, 5 VA. J. CRIM. L. 130, 158-59, 164, 167 (2017) (observing a patchwork of state responses to *Miller* and arguing for more sentencing guidelines so that life without parole punishments are not enacted arbitrarily); Kimberly Thomas, *Random if Not “Rare”? The Eighth Amendment Weakness of Post-Miller Legislation*, 68 S.C. L. REV. 393, 394, 401-05, 412-13 (2017) (arguing that many state laws passed to address *Miller*’s decision, while eliminating the automatic imposition of JLWOP, failed to provide sufficient safeguards to ensure juveniles are not de facto automatically given this sentence); Sara E. Fiorillo, Note, *Mitigating After Miller: Legislative Considerations and Remedies for the Future of Juvenile Sentencing*, 93 B.U. L. REV. 2095, 2107, 2123 (2013) (prescribing mitigating factors courts should consider in *Miller* resentencing hearings to ensure life without parole sentences are random if not rare); Robert Visca, Comment, *An Evolving Society: The Juvenile’s Constitutional Right Against a Mandatory Sentence of Life (and Death) in Prison*, 9 FIU L. REV. 159, 161-62 (2013) (arguing that, under *Miller*, courts should impose individualized sentences to allow juveniles to provide mitigating evidence so that states are not able to “side-step” *Miller*’s constitutional requirement).
  16. See, e.g., Chang et al., *supra* note 15, at 87; Nishi Kumar, Note, *Cruel, Unusual, and Completely Backwards: An Argument for Retroactive Application of the Eighth Amendment*, 90 N.Y.U. L. REV. 1331, 1336, 1367 (2015) (arguing for a retroactive application of *Miller*).
  17. See, e.g., Megan R. Pollastro, Note, *Where Are You, Congress? Silence Rings in Congress as Juvenile Offenders Remain in Prison for Life*, 85 BROOK. L. REV. 287, 296-97 (2019) (finding that states still fail to adhere to *Miller* and *Montgomery*’s standard of sentencing juveniles to JLWOP only when they are irreparably corrupt); Stephanie Singer, Note, *A Proposed Solution to the Resentencing of Juvenile Lifers in Pennsylvania Post Montgomery*, 10 DREXEL L. REV. 695, 729-30 (2018) (analyzing *Montgomery*’s retroactivity ruling in Pennsylvania).
  18. See, e.g., Cara H. Drinan, *The Miller Revolution*, 101 IOWA L. REV. 1787, 1789-90 (2016) (explaining how *Miller* invites a capacious reading and immediately requires broader procedural safeguards and the elimination of mandatory minimums, and also
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the trilogy should eliminate mandatory minimum sentences for juveniles.<sup>19</sup> Others reviewed how the trilogy could affect the analysis of confinement conditions.<sup>20</sup> Still others looked at transfer practices for juveniles between the juvenile and adult criminal systems and how the *Roper* trilogy might make these transfers more difficult.<sup>21</sup>

This Note takes a different tack. It concentrates on the *Roper* trilogy's central idea that a child's unique level of socioemotional ability and cognitive functioning affect culpability and are relevant to both criminal liability and punishment. The significance of these factors is particularly evident in the context of minors who have suffered trauma. No scholars to date have examined the implications of the trilogy in this setting. This Note examines the *Roper* trilogy's applicability to girls who have been sexually abused as minors and subsequently swept into the criminal justice system, the so-called sexual-abuse-to-prison pipeline." Although many other childhood experiences could be relevant to the "children are different" principle that underlies *Roper* and its progeny, sexual abuse is a unique type of trauma because of its

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reinvigorates challenges to mandatory transfers, sentencing guidelines, and conditions of confinement).

19. See, e.g., *id.* at 1790 (arguing that *Miller* should apply broadly to ban mandatory minimums for juveniles); Rachael Frumin Eisenberg, Comment, *As Though They Are Children: Replacing Mandatory Minimums with Individualized Sentencing Determinations for Juveniles in Pennsylvania Criminal Court After Miller v. Alabama*, 86 TEMP. L. REV. 215, 237 (2013) (arguing that Pennsylvania's application of *Miller* is at odds with the breadth of its underlying rationale and that Pennsylvania should ban mandatory minimums for juveniles tried as adults); Lindsey E. Krause, *One Size Does Not Fit All: The Need for a Complete Abolition of Mandatory Minimum Sentences for Juveniles in Response to Roper, Graham, and Miller*, 33 LAW & INEQ. 481, 482-84 (2015) (arguing that under the *Roper* trilogy, states should entirely eliminate mandatory minimum sentences for juveniles).
20. See, e.g., Lisa C. Castillo, Note, *No Child Left Alone: Why Iowa Should Ban Juvenile Solitary Confinement*, 100 IOWA L. REV. 1259, 1261-62 (2015) (drawing from the *Roper* trilogy's emphasis on juvenile rehabilitation to argue that the Eighth Amendment bans juvenile solitary confinement); Jessica Lee, Note, *Lonely Too Long: Redefining and Reforming Juvenile Solitary Confinement*, 85 FORDHAM L. REV. 845, 871-72 (2016) (arguing that the *Roper* and *Miller* analyses for juvenile sentencing are consistent a ban on solitary confinement for inmates under age twenty-five).
21. See, e.g., Christopher Slobogin, *Treating Juveniles Like Juveniles: Getting Rid of Transfer and Expanded Adult Court Jurisdiction*, 46 TEX. TECH L. REV. 103, 109-10 (2013) (arguing that *Roper*, *Graham*, and *Miller* do not provide a robust justification for eliminating transfers of juveniles to adult court); Rachel M. Fugett, Comment, *Stop Presumptive Transfers: How Forcing Juveniles to Prove They Should Remain in the Juvenile Justice System Is Inconsistent with Roper v. Simmons & Graham v. Florida*, 48 J. MARSHALL L. REV. 365, 368-74, 378, 383-86 (2014) (examining various mechanisms for the transfer of juveniles to the adult system and arguing that many of these mechanisms violate *Roper* and *Graham*); Ioana Tchoukleva, Note, *Children Are Different: Bridging the Gap Between Rhetoric and Reality Post Miller v. Alabama*, 4 CALIF. L. REV.: CIR. 92, 102 (2013) (arguing that *Miller's* rationale equally applies to banning automatic waivers to adult court).

pernicious effects.<sup>22</sup> And this Note focuses on girls' experience because the connection between girls experience higher rates of sexual abuse compared to boys.<sup>23</sup> Moreover the connection between girls with histories of sexual abuse and their subsequent involvement in the criminal justice system is more pronounced than is the connection for boys.<sup>24</sup> This is particularly true for girls of color.

Furthermore, a shift towards focusing on girls' experiences with the juvenile justice system provides a welcome reorientation away from the longstanding focus of juvenile justice policy and research on boys. Yet this Note does not foreclose further understanding of boys' experience of sexual abuse and subsequent incarceration. As Monique Morris emphasizes, "all girls experience injustice, and all of it matters. Boys, specifically boys of color, are incarcerated at unjustifiable rates. And that matters too. But addressing any of these shouldn't come at anyone else's expense."<sup>25</sup> Gender needs to play a larger role in the analysis of the criminal justice system and its need for reform. We cannot simply, as Morris puts it,

add ribbons and bows to a program, strategy, or agenda that has been developed in response to the circumstances of young men and assume that it will work for

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22. See Patricia K. Kerig, *Polyvictimization and Girls' Involvement in the Juvenile Justice System: Investigating Gender-Differentiated Patterns of Risk, Recidivism, and Resilience*, 33 J. INTERPERSONAL VIOLENCE 789, 792 (2018); Patricia K. Kerig & Stephen P. Becker, *Trauma and Girls' Delinquency*, in DELINQUENT GIRLS: CONTEXT, RELATIONSHIPS, AND ADAPTATION 119, 134-37 (Shari Miller et al. eds., 2012).
23. See MEDA CHESNEY-LIND & RANDALL G. SHELDEN, GIRLS, DELINQUENCY, AND JUVENILE JUSTICE 39-43 (4th ed. 2014); see also MALIKA SAADA SAAR ET AL., THE SEXUAL ABUSE TO PRISON PIPELINE: THE GIRLS' STORY 9 (n.d.), <https://perma.cc/KVJ8-NYF6>; Kerig & Patricia K. Kerig & Sheryl R. Schindler, Review, *Engendering the Evidence Base: A Critical Review of the Conceptual and Empirical Foundations of Gender-Responsive Interventions for Girls' Delinquency*, 2 LAWS 244, 253 (2013); Kerig, *supra* note 22, at 791; Kerig & Becker, *supra* note 22, at 134.
24. See Kim Taylor-Thompson, *Girl Talk—Examining Racial and Gender Lines in Juvenile Justice*, 6 NEV. L.J. 1137, 1143 (2006) ("Unlike abused and neglected males, girls who have been victims of physical and sexual abuse and neglect are at increased risk of arrest for violent offenses."); see also CHESNEY-LIND & SHELDEN, *supra* note 23, at 39; SAAR ET AL., *supra* note 23, at 9 (citing one study that found justice-involved girls were four times as likely to have been sexually abused than justice-involved boys); Shannon D. Chaplo et al., *Gender Differences in the Associations Among Sexual Abuse, Posttraumatic Stress Symptoms, and Delinquent Behaviors in a Sample of Detained Adolescents*, 10 J. CHILD & ADOLESCENT TRAUMA 29, 32-33 (2017) (finding that 50% of girls had self-reported sexual abuse in comparison to 9% of boys and that there was an indirect relationship between sexual abuse and later delinquent behaviors); Kerig & Schindler, *supra* note 23, at 253; Kerig & Becker, *supra* note 22, at 134 ("In every study in which sexual abuse or sexual assault is assessed, [detained] girls more frequently report being victimized than do [detained] boys.").
25. MONIQUE W. MORRIS, PUSHOUT: THE CRIMINALIZATION OF BLACK GIRLS IN SCHOOLS 175 (2016) (emphasis omitted).



young women. Just because young women and girls are affected by similar conditions as their male counterparts doesn't mean that they experience these conditions in the same way.<sup>26</sup>

The *Roper* trilogy recognized the legal significance of the unique experience of children compared with adults. But the juvenile justice system must also attend to the unique experience of sexually abused girls when determining their criminal liability and punishment so that we do not hold them responsible for behaviors beyond their control. The traditional focus on boys and men is particularly in need of reorientation in light of the fact that incarceration rates for girls are now growing faster than rates for boys.<sup>27</sup>

This Note also invites further research on the effects of sexual abuse on trans, nonbinary, and gender nonconforming youth. On average, individuals who identify as LGBTQ experience higher levels of sexual abuse as children in comparison to non-LGBTQ individuals.<sup>28</sup> And adolescents who identify as LGBTQ are disproportionately involved in the juvenile justice system.<sup>29</sup> So far, research on the sexual-abuse-to-prison pipeline has not thoroughly investigated the connection between the sexual abuse of trans, nonbinary, and gender non-conforming young people and subsequent rates of incarceration. Thus, this Note will directly address the experiences of cisgender girls with an urgent call for scholars to expand research into the experiences of LGBTQ adolescents as well as heterosexual cisgender boys and how those experiences affect subsequent rates of entry into the juvenile justice system.

Part I provides an overview of the *Roper* trilogy (*Roper*, *Graham*, and *Miller*) and other related cases (*Montgomery* and *J.D.B.*). While these cases state narrow holdings, their underlying principles have implications for the entire juvenile justice system by making a child's cognitive, psychological, and emotional maturity legally relevant. Nothing about these cases and the principles they espouse suggests that they are limited to the capital punishment, JLWOP, and *Miranda* contexts. And so, given the broad legal foundations and expansive rationales, their application to the sexual-abuse-to-prison pipeline is not only appropriate, but necessary.

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26. *Id.* at 182 (emphasis omitted). In the analysis that follows, research regarding the effects of sexual abuse on boys will not be ignored, but will not be the focus. This Note insists that the unique effects of sexual abuse should be understood in children of all genders.

27. CHESNEY-LIND & SHELDEN, *supra* note 23, at 2 (noting in 2014 that “increases in girls’ arrests dramatically outstripped those of boys for most of the last decade”); *see also*; Kerig, *supra* note 22, at 790-91; Sentencing Project, Fact Sheet: Incarcerated Women and Girls 4-5 (2019), <https://perma.cc/F7RJ-6TJJ>.

28. Laura Baams, *Disparities for LGBTQ and Gender Nonconforming Adolescents*, PEDIATRICS 2 (May 2018), <https://perma.cc/KYV8-8LAM>; *Sexual Assault in the Transgender Community: Chicken or Egg?*, OFF. FOR VICTIMS OF CRIME (June 2014), <https://perma.cc/D6ED-66Y3>.

29. SAAR ET AL., *supra* note 23, at 7.

Part II describes the connection between childhood sexual abuse of girls and their subsequent involvement in the juvenile justice system—the so-called sexual-abuse-to-prison pipeline.<sup>30</sup> A shattering 2015 report establishes that sexual abuse is one of the primary predictors of the subsequent rate of crime commission for young women.<sup>31</sup> And yet these subsequent crimes—often in the form of “survival crimes,”<sup>32</sup> technical violations,<sup>33</sup> status offenses,<sup>34</sup> and mutually combative intra-familial disputes<sup>35</sup>—are disproportionately low risk and better dealt with outside of the criminal justice system.<sup>36</sup> Thus, at present, the criminal justice system does far too little to account for the consequences of childhood abuse for girls and far too much to punish them for actions tied to the traumatic effects of sexual abuse. Furthermore, the disparate rate at which girls of color are caught in the sexual-abuse-to-prison pipeline must be squarely and directly addressed to disrupt this vicious cycle of incarcerating girls on account of past trauma.<sup>37</sup>

Part III examines reforms that can disrupt the pipeline. Jenny Carroll’s extensive work applying the *Roper* trilogy to mens rea analysis, as well as to expert qualifications and jury instruction, readily applies to the sexual-abuse-to-prison pipeline. Altering the mens rea analysis to take into account the documented behavioral effects of childhood sexual abuse would limit the accountability of girls who have suffered sexual abuse to actions that genuinely reflect criminal intent, rather than actions that are reflexive responses to the abuse. To assist with this more expansive and accurate use of mens rea analysis, expert witnesses should be allowed to testify about the effects of sexual abuse on a girl’s behavior.<sup>38</sup> Jury instructions for assessing guilt should similarly take this context into account.<sup>39</sup> Enlightening factfinders through expert testimony

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30. *Id.* at 5.

31. *Id.*

32. See PATRICIA K. KERIG & JULIAN D. FORD, TRAUMA AMONG GIRLS IN THE JUVENILE JUSTICE SYSTEM 5 (2014); Kerig & Schindler, *supra* note 23, at 252, 255.

33. “Technical violations” refer to actions that are criminalized because they violate a valid court order (VCO), such as running away from home despite a judge’s order to not run away.

34. “Status offenses” encompass actions that would not be illegal but for the age of the child, such as truancy or curfew violations.

35. SAAR ET AL., *supra* note 23, at 7; Kerig, *supra* note 18, at 792-93.

36. See Kerig, *supra* note 22, at 792-95.

37. See SAAR ET AL., *supra* note 23, at 5, 7, 9, 12, 13 fig. (documenting how the juvenile justice system criminalizes behavior of girls of color that results from sexual and physical abuse).

38. See *infra* Part III.B.

39. See *infra* Part III.B. Of course, jury instructions would apply only to adjudication of juveniles who are tried as adults. Adolescents who are tried in juvenile court do not

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and jury instructions could thus reduce the number of girls with histories of sexual abuse who become involved in the juvenile justice system.

But reform cannot stop there. While the *Roper* trilogy was confined to sentencing practices and procedural changes, ending the sexual-abuse-to-prison pipeline calls for substantive changes to criminal law. As a starting point, the juvenile system must reassess status offenses and other low-level crimes that disproportionately sweep in girls with histories of sexual abuse. And the system should change its response from punishment to rehabilitation with social services.<sup>40</sup> Because certain status crimes, like running away from home, have such a close nexus with childhood sexual abuse, preventing incarceration for these minor offenses can disrupt the sexual-abuse-to-prison pipeline.<sup>41</sup> Similarly, the prosecution of minor crimes like mutually combative domestic violence unnecessarily ensnares girls in the justice system; avoiding incarceration for such crimes can prevent this deleterious pattern.<sup>42</sup>

This Note concludes by emphasizing the need to more carefully examine culpability in juvenile jurisprudence. The *Roper* trilogy is properly read as an opportunity to reassess how the juvenile system determines culpability and, in particular, how to appreciate the effects of a child's life circumstances on the child's behavior and alleged criminality. This Note demonstrates how the *Roper* trilogy can usher juvenile jurisprudence into a new era.

## I. The *Roper* Trilogy

For too long the juvenile justice system has failed to acknowledge the experience and effects of sexual abuse for young women.<sup>43</sup> But the Court's *Roper* trilogy provides a welcome jurisprudential shift that can aid in disrupting the sexual-abuse-to-prison pipeline. This trilogy explicitly acknowledges that children's behavior as a result of experiences out of their control is relevant to legal decisions about diminished culpability and punishment. This recognition of the significance of children's experiences relative to those of adults applies a fortiori with respect to the experience of childhood sexual assault and the

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have a Sixth Amendment right to a jury trial under *McKeiver v. Pennsylvania*, 403 U.S. 528, 545 (1971) (plurality opinion).

40. See *infra* Part III.C.

41. SAAR ET AL., *supra* note 23, at 7, 23-25; Kerig, *supra* note 22, at 792-95.

42. See Kerig, *supra* note 22, at 792-93.

43. For more on the history of the juvenile justice system's treatment of young women, see, for example, Cynthia Godsoe, *Contempt, Status, and the Criminalization of Non-Conforming Girls*, 35 CARDOZO L. REV. 1091, 1096-97 (2014) (describing a historical study of "girls housed in a New York state reformatory in the early twentieth century" and concluding that "[t]he entire treatment of girls, no matter why they came under the court's jurisdiction, was sexualized").

deplorable pattern of punishing girls for these traumatic experiences. This Part details the evolution of law and social science supporting the *Roper* trilogy.

After decades of ignoring the behavioral, socioemotional, and cognitive differences between adults and children,<sup>44</sup> the new millennium ushered in a new era of juvenile jurisprudence. The Court’s *Roper* trilogy—*Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*—used the latest research on adolescents’ cognitive development to decide the constitutionality of penal sentences. These cases are noteworthy for their striking break from precedent in which the Court had previously stated it would only rely on “objective” evidence, which primarily consisted of federal and state laws or Eighth Amendment analyses of demonstrated behavior of prosecutors and juries.<sup>45</sup> In *Stanford v. Kentucky*, a 1989 case upholding the juvenile death penalty, the Court rejected the idea of using its own “subjective views” to determine the constitutionality of a sentence.<sup>46</sup> Although the *Roper* trilogy decisions also looked to the objective criteria outlined in *Stanford*,<sup>47</sup> the Court used its independent judgment and cited burgeoning cognitive research—by no means an objective criterion of national consensus—in the *Roper* trilogy, rendering its decisions groundbreaking. The dissents in *Miller* criticized the majority for ignoring objective criteria of national consensus in favor of JLWOP,<sup>48</sup> further demonstrating the relative strength of the Court’s independent judgment compared to objective criteria.

The *Roper* Court cited the cognitive immaturity of juveniles and the ways in which this immaturity leads to socioemotional immaturity, namely impulsive decisions, to support its conclusion that children should not be executed.<sup>49</sup> As the Court later explained in *Miller*, this scientifically documented cognitive immaturity matched one’s commonsense conclusion that youth are less culpable than adults.<sup>50</sup> The *Roper* Court also reasoned that the transient quality of youth rebuts the presumption that a heinous crime is

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44. For example, in *Stanford v. Kentucky*, a plurality of the Court stated that Eighth Amendment analysis on sentences should rest on objective criteria such as the consensus of state and federal statutes or “the behavior of prosecutors and juries.” 492 U.S. 361, 377 (1989) (plurality opinion), *abrogated by* *Roper v. Simmons*, 543 U.S. 551 (2005). The plurality concluded that Eighth Amendment jurisprudence should rest on constitutional text or “the demonstrable current standards of our citizens.” *Id.* at 379.

45. *See Rummel v. Estelle*, 445 U.S. 263, 274-75 (1980).

46. 492 U.S. at 369 (majority opinion) (quoting *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion)).

47. *See, e.g., Roper*, 543 U.S. at 564, 569.

48. *Miller v. Alabama*, 567 U.S. 460, 493-95 (2012) (Roberts, C.J., dissenting); *id.* at 508-09 (Thomas, J., dissenting); *id.* at 510-11 (Alito, J., dissenting).

49. 543 U.S. at 569.

50. 567 U.S. at 471 (majority opinion).

evidence of an “irretrievably depraved character” and thus sufficient basis for imposing execution.<sup>51</sup> In *Graham v. Florida*, the Court further cemented the “children are different” paradigm to justify more lenient sentencing for juveniles.<sup>52</sup> As in *Roper*, the *Graham* Court looked at scientific data to support the commonsense proposition that juveniles have a “lack of maturity and an underdeveloped sense of responsibility,” are “more vulnerable or susceptible to negative influences and outside pressures, including peer pressure,” and have characters that are “not as well formed.”<sup>53</sup> The Court reasoned that, while not “absolved of responsibility,” a juvenile was less culpable than an adult for his or her crime because of these characteristics.<sup>54</sup> Thus, a juvenile should not be sentenced to JLWOP for nonhomicidal crimes and instead must be given “some meaningful opportunity to obtain release.”<sup>55</sup>

Finally, in *Miller* the Court banned mandatory JLWOP even for homicidal offenses.<sup>56</sup> As in *Roper* and *Graham*, the Court relied on the distinctive attributes of youth—including risky and impulsive behavior, a limited ability to extricate oneself from “horrific, crime-producing settings,” and the transient nature of a child’s character—to support the proposition that children are “constitutionally different from adults for purposes of sentencing.”<sup>57</sup> The Court also clarified the application of *Graham*’s reasoning by explaining in *Miller* that “none of what [*Graham*] said about children . . . is crime-specific.”<sup>58</sup> Instead, the Court explained that sentencing children to the same sentence as an adult without taking into consideration the fundamental cognitive and maturity differences between adults and children “contravenes *Graham*’s (and also *Roper*’s) foundational principle: that imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.”<sup>59</sup> *Montgomery v. Louisiana* clarified that *Miller* applied retroactively.<sup>60</sup>

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51. 543 U.S. at 570.

52. 560 U.S. 48, 68, 74 (2010).

53. *Id.* at 68 (quoting *Roper*, 543 U.S. at 569-70). In particular, the *Graham* Court cited briefs from the American Medical Association and the American Academy of Child and Adolescent Psychiatry showing continued evidence of juveniles’ transient immaturity. *Id.* at 68; see also Brief for the American Medical Ass’n & the American Academy of Child & Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 16-24, *Graham*, 560 U.S. 48 (Nos. 08-7412 & 08-7621), 2009 WL 2247127; Brief for the American Psychological Ass’n et al. as Amici Curiae Supporting Petitioners at 19-22, *Graham*, 560 U.S. 48 (Nos. 08-7412 & 08-7621), 2009 WL 2236778.

54. *Graham*, 560 U.S. at 68.

55. *Id.* at 75.

56. *Miller v. Alabama*, 567 U.S. 460, 465, 489 (2012).

57. *Id.* at 471.

58. *Id.* at 473.

59. *Id.* at 474.

60. 136 S. Ct. 718, 734 (2016).

It also insisted that mandatory life without parole should be unconstitutional for the “vast majority of juvenile offenders” and only allowed when a child could be deemed “incorrigib[le].”<sup>61</sup>

The Court employed the *Roper* trilogy’s “children are different” rationale in *J.D.B. v. North Carolina*, applying this Eighth Amendment principle to *Miranda* custody analysis.<sup>62</sup> As in the *Miller* trilogy, the Court relied on the proposition that a child’s age “generates commonsense conclusions about behavior and perception” that “apply broadly to children as a class.”<sup>63</sup> The Court went on to underscore that children “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”<sup>64</sup> In addition, the Court noted “that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them” and so are not simply “miniature adults.”<sup>65</sup> The Court explained that children are in fact so different from adults that for the purpose of *Miranda* their age should be considered in the custody analysis.<sup>66</sup> To do otherwise would be “nonsensical.”<sup>67</sup> Although the Court noted age would not always be a determinative factor, “it is . . . a reality courts cannot simply ignore.”<sup>68</sup>

Looking at the *Roper* trilogy and related cases, it is apparent that the Court relied on a number of principles that are more broadly applicable to general juvenile jurisprudence. *Miller*’s admonition that courts cannot sentence juveniles “as though they were not children”<sup>69</sup> strengthens the conclusion that courts must consider a child’s limited development and maturity in sentencing. The breadth of this principle also shines through when the Court stated “none of what [*Graham*] said about children . . . is crime-specific,”<sup>70</sup> illustrating the ability of the Court to see how a child’s limited socioemotional and cognitive functioning affects the child in every circumstance, not just when committing

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61. *Id.* at 734.

62. 564 U.S. 261, 272-73 (2011). Under *Miranda* custody analysis, a suspect is entitled to be advised of his or her rights when in “custodial interrogation.” *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). To determine whether someone is in custody, courts look to the totality of the circumstances and to whether the individual felt free to leave given those circumstances. See *Thompson v. Keohane*, 516 U.S. 99, 112 (1995).

63. *J.D.B.*, 564 U.S. at 272 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting)).

64. *Id.* at 272 (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (plurality opinion)).

65. *Id.* at 273-74.

66. *Id.* at 274, 277.

67. *Id.* at 275.

68. *Id.* at 277.

69. *Miller v. Alabama*, 567 U.S. 460, 474 (2012).

70. *Id.* at 473.

the most heinous crimes. Similarly, *J.D.B.*'s instruction that a child's age is "a reality that courts cannot simply ignore"<sup>71</sup> confirms the presence of the underlying legal principle that courts must be aware of the context in which a child committed a crime. Finally, *Montgomery*'s judicial gloss on *Miller*, noting that only the very small minority of incorrigible youth should be sentenced to JLWOP, highlights the Court's opinion that children are categorically less culpable than adults and that this reduced culpability should inform sentencing.<sup>72</sup>

The Court's analysis of whether penological justifications support execution or JLWOP<sup>73</sup> further demonstrates the Court's use of commonsense, pragmatic principles to analyze sentencing, in contrast to the reasoning employed in *Stanford* and earlier juvenile cases.<sup>74</sup> Without the support of retributivism, deterrence, incapacitation, or rehabilitation, the *Graham* Court reasoned that "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense" and so violates the Eighth Amendment.<sup>75</sup> *Montgomery* also confirmed the importance of penological justifications to justify juvenile sentencing.<sup>76</sup>

The dissents in the *Roper* trilogy reveal just how expansive these cases are. As Justice Scalia explained in *Roper*, "the Court [does not] suggest a stopping point for its reasoning" underlying its categorical prohibition against executing minors.<sup>77</sup> In *Graham*, Justice Thomas forewarned that while the majority's decision claimed to be narrowly decided, the decision and concurrences "invite a host of line-drawing problems."<sup>78</sup> And Chief Justice Roberts picked up the baton in *Miller*, warning that the majority's prediction that JLWOP should be uncommon invited courts to bar all mandatory sentences for juveniles.<sup>79</sup> He criticized the majority, noting that this type of rationale had "no discernible end point."<sup>80</sup> He added that there would be no

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71. *J.D.B.*, 564 U.S. at 277.

72. *Montgomery v. Louisiana*, 136 S. Ct. 718, 734-35 (2016).

73. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 571-72 (2005).

74. *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989) (plurality opinion), *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005); see also *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

75. *Graham v. Florida*, 560 U.S. 48, 71 (2010).

76. 136 S. Ct. at 733.

77. 543 U.S. at 621 (Scalia, J., dissenting).

78. 560 U.S. at 123 (2010) (Thomas, J., dissenting).

79. 567 U.S. 460, 501 (2012) (Roberts, C.J., dissenting).

80. *Id.*

reason why the “juveniles are different” principle could not lead to preventing juveniles from ever being tried as adults.<sup>81</sup>

These criticisms, while hyperbolic, correctly identify how expansive the *Roper* trilogy is and why its break from purely objective, evidence-based criteria (such as surveys of current state laws and practices to reveal national consensus or lack thereof<sup>82</sup>) in Eighth Amendment analysis matters. Despite the radical predictions expressed above, given the slow pace of criminal justice reform, it is unlikely courts and legislatures will end adult sentencing for juveniles or mandatory minimums, as Chief Justice Roberts prophesized. But courts and legislatures should embrace a radical view of the *Roper* trilogy because of the high rates of recidivism and life-ruining consequences that follow incarceration at a young age.<sup>83</sup> The *Roper* trilogy invites lower courts to use cognitive research and insights into the behavior of adolescents in determining the fairness of sentencing. By relying on reputable sources for cognitive and socioemotional research, like the American Psychological Association and American Medical Association,<sup>84</sup> the Court signaled its willingness to view juvenile culpability with all the benefits of modern scientific research. The fact that the *Roper* trilogy’s reasoning is expressly not “crime-specific”<sup>85</sup> invites policymakers and lower courts to expand the *Roper* trilogy beyond the confines of execution and JLWOP.

## II. The Sexual-Abuse-to-Prison Pipeline

One important starting place in extending the *Roper* trilogy is reshaping the culpability analysis for and subsequent treatment of girls caught in the sexual-abuse-to-prison pipeline. Just like the adolescent petitioners in the trilogy, girls caught in the sexual-abuse-to-prison pipeline deserve a nuanced culpability analysis. Similar to the sentences reviewed in *Roper*, *Graham*, and *Miller*, the punishment of these girls often fails to serve any penological justification, raising Eighth Amendment concerns. This Part reviews the

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81. *Id.*

82. *See* *Stanford v. Kentucky*, 492 U.S. 361, 377 (1989) (plurality opinion), *abrogated by Roper*, 543 U.S. 551.

83. *See, e.g.*, RICHARD A. MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 5-12 (2011), <https://perma.cc/79Y3-KGNK> (detailing various types of physical abuse, excessive use of force, high rates of recidivism, and sexual abuse as a result of juvenile incarceration).

84. *Graham v. Florida*, 560 U.S. 48, 68 (2010) (citing Brief for the American Medical Ass’n & the American Academy of Child & Adolescent Psychiatry as Amici Curiae in Support of Neither Party, *supra* note 53, at 16-24; Brief for the American Psychological Ass’n et al. as Amici Curiae Supporting Petitioners, *supra* note 53, at 22-27).

85. *See Miller*, 567 U.S. at 473 (majority opinion).



literature supporting the existence of the sexual-abuse-to-prison pipeline and then applies the *Roper* trilogy's principles to this documented phenomenon.

A. Gender Disparity of Sexual Abuse and Its Effect on Adolescent Development

While both boys and girls suffer from sexual abuse, studies reveal a “robust gender disparity” between reported sexual abuse of girls and that of boys.<sup>86</sup> An estimated 70% of childhood sexual abuse victims are girls.<sup>87</sup> And while rates vary, one estimate found incarcerated girls are over four times more likely to have been sexually abused than incarcerated boys.<sup>88</sup> And research indicates that girls are victims of sexual violence at an earlier age than boys and that they are subject to this violence for a longer duration relative to other forms of abuse.<sup>89</sup>

These disproportionate rates of sexual abuse are even worse for girls of color. The Bureau of Justice Statistics estimated that, of girls and women ages twelve and older who identified as a single race, American Indian and Alaska Native girls and women experienced the highest rate of sexual assault (4.5%), with African American girls and women suffering the second highest rate (2.8%).<sup>90</sup>

Sexual abuse, in turn, affects girls' development as adolescents. Evidence shows that experiencing sexual abuse can contribute to instances of aggression, substance abuse problems, self-harm, and risky sexual behavior at higher rates than for girls generally.<sup>91</sup> Betrayal trauma, one subset of trauma from sexual abuse, may in turn contribute to girls' inability to form and maintain healthy relationships and may be further associated with intense, erratic, and difficult

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86. Chaplo et al., *supra* note 24, at 29.

87. CHESNEY-LIND & SHELDEN, *supra* note 23, at 39.

88. See SAAR ET AL., *supra* note 23; see also Taylor-Thompson, *supra* note 24, at 1143-44 (finding that in California, 92% of justice-involved girls reported physical or emotional abuse, with 56% reporting sexual abuse, and 40% reporting at least one instance of rape or sodomization).

89. Joe Watson, *Study Shows How Juvenile System Criminalizes Girls Who Are Victimized by Sexual Abuse*, PRISON LEGAL NEWS (Aug. 4, 2016), <https://perma.cc/ZUH4-9G6H>.

90. MICHAEL PLANTY ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, NCJ 240655, FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010, at 3 tbl.1 (2016), <https://perma.cc/H8AT-RSPC>. Additionally, girls and women ages twelve and older who identified as two or more races (excluding Hispanic or Latina origin) experienced the highest rate at 5.1%. *Id.*; see also MORRIS, *supra* note 25, at 121 (stating that African American girls experience among the highest rates of sexual abuse); Darkness to Light, *Child Sexual Abuse Statistics: The Issue of Child Sexual Abuse*, at 3 (n.d.), <https://perma.cc/9P3H-3MDR> (“African American children have almost twice the risk of sexual abuse than white children.”).

91. See Kerig, *supra* note 22, at 792.

interpersonal styles, affecting socioemotional development.<sup>92</sup> Sexual abuse of this intimate type “may have particular consequences for interpersonal development due to the uniquely intimate nature of the violation and the perversion of acts normally associated with affection, pleasure, and bonding into sources of degradation, shame, and fear.”<sup>93</sup> This is consistent with research that shows sexual trauma, for justice-involved girls most often in the context of a close personal relationship, has uniquely pernicious effects on their development including effects with direct relevance for delinquency such as “substance use, risk-taking behavior and sexual acting out.”<sup>94</sup>

This connection between cognitive and socioemotional well-being and sexual abuse mirrors more general research connecting adverse childhood experiences (ACEs) and subsequent brain and behavioral development. ACEs include experiences such as family violence, maltreatment, sexual abuse, and environmental deprivation<sup>95</sup> and have received a large amount of scholarly attention since the term was first put forward in 1998.<sup>96</sup> Individuals exposed to four or more ACE categories experience a four-fold increased risk of depression and a twelve-fold increased risk of attempted suicide compared to those who have been exposed to no ACEs.<sup>97</sup> This higher rate persists as children grow into adolescence and adulthood.<sup>98</sup>

While research has not pinned down the precise mechanism of interaction between ACEs and mental health disorders, nor between sexual abuse and subsequent delinquency, there are various neurobiological avenues through which exposure to ACEs could lead to mental health disorders.<sup>99</sup> Some

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92. *Id.* at 791-92.

93. *Id.* at 792.

94. *See id.* The precise connection between sexual abuse, post-traumatic stress disorder (PTSD), and incarceration is not the focus of this Note and is still subject to scholarly debate.

95. Katie A. McLaughlin et al., *Adverse Childhood Experiences and Brain Development: Neurobiological Mechanisms Linking the Social Environment to Psychiatric Disorders*, in *A LIFE COURSE APPROACH TO MENTAL DISORDERS* 249, 250-51 (Karestan C. Koenen et al. eds., 2013).

96. *See generally, e.g.*, Vincent J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 *AM. J. PREVENTIVE MED.* 245 (1998) (proposing that adverse childhood experiences such as sexual abuse are associated with several of the leading causes of death in adults).

97. *Id.* at 252 tbl.4.

98. McLaughlin et al., *supra* note 95, at 250.

99. There continues to be scholarly debate concerning the connection between sexual abuse and delinquency. For an overall summary of reviews on how sexual abuse affects development, see Robert Maniglio, *The Impact of Child Sexual Abuse on Health: A Systematic Review of Reviews*, 29 *CLINICAL PSYCHOL. REV.* 647, 647-48 (2009) (“While many studies and reviews have concluded that survivors of childhood sexual abuse are  
*footnote continued on next page*”)

research indicates that chronic stress exposure due to ACEs such as sexual abuse can lead to the inability of the hippocampus to properly manage stress and can damage this area of the brain, inhibiting memory formation and an individual's ability to adequately cope with stress even once the ACE has ceased.<sup>100</sup> Chronic stress also has the potential to damage the amygdala, affecting emotion regulation.<sup>101</sup> It should come as no surprise, then, that sexual abuse, an ACE, would have subsequent effects on cognitive development and mental health disorders.

### B. Sexual Abuse as a Pipeline to Prison

The relationship between sexual abuse and subsequent behavior explains why a disproportionate number of girls with histories of sexual abuse are incarcerated. Sexual abuse often leads to incarceration because behavior resulting from the abuse is overly criminalized.

In addition to experiencing increased rates of substance abuse and self-harm,<sup>102</sup> “when girls express anger, are ‘hard to handle,’ openly act on sexual desire, self-authorize their own behavior, use offensive or confrontational language, or behave with valor and frankness, they tend to receive negative attention from school and juvenile authorities.”<sup>103</sup> Girls who have been sexually abused are also more likely to engage in what is interpreted as risky sexual behavior, which then triggers a punitive response from officials and so primes entry into the juvenile justice system.<sup>104</sup> In one example that is reflective of many others, an incarcerated girl participated in criminal behavior as a direct result of the sexual abuse perpetrated by her mother's boyfriend. Julie, the fifteen-year-old, explained,

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highly likely to experience several adverse effects, strongly implying a causal relationship between child sexual abuse and the later development of psychopathology, others have been more cautious, arguing that outcomes are variable, rather than being consistently and intensely negative.” (citations omitted). *See also* Kerig, *supra* note 22, at 794-97 (recognizing that a better understanding of psychophysiological systems underlying girls' responses to trauma would help parse out the connection between multiple forms of trauma experienced by a girl, including sexual abuse, and justice involvement for girls).

100. *See* McLaughlin et al., *supra* note 95, at 250.

101. *See id.* at 250-51.

102. *See* Kerig, *supra* note 22, at 792.

103. Laurie Schaffner, *Female Juvenile Delinquency: Sexual Solutions, Gender Bias, and Juvenile Justice*, 9 HASTINGS WOMEN'S L.J. 1, 11-12 (1998) (internal quotation marks omitted) (footnotes omitted) (quoting Teresa Bernardez, *Adolescence Resistance and the Maladies of Women: Notes from the Underground*, in WOMEN, GIRLS, AND PSYCHOTHERAPY: REFRAMING RESISTANCE 213, 213-22 (Carol Gilligan et al. eds., 1991)).

104. Kerig & Schindler, *supra* note 23, at 255.

I was so pissed off after my mom's boyfriend raped me that I ran away from home. Me and my [25-year-old] boyfriend are gonna go get jobs in Las Vegas as soon as I get outta here. I didn't know the car I was in was stolen, I swear!<sup>105</sup>

This illustrates how a girl's response to sexual assault (the rape by her mother's boyfriend) can lead to sexual acting out and subsequent exposure to criminal behavior (unknowingly riding in a stolen car with her much older boyfriend).<sup>106</sup>

Outbursts by girls stemming from maltreatment and victimization at home are also associated with their arrest for violent offenses.<sup>107</sup> When girls are arrested for violent offenses, the victims of these are much more likely to be family members than when boys are arrested for these offenses.<sup>108</sup> This mirrors the fact that justice-involved girls are more likely than boys to come from "discordant" homes where they experience higher rates of family conflict.<sup>109</sup> And the underlying police reports from girls' arrests from domestic disputes underscore how mutual aggression may have precipitated these girls' arrests.<sup>110</sup>

For girls committing violent offenses, minor crimes, and status offenses alike, "the decision to arrest and detain girls . . . has been shown often to be based in part on the perception of girls' having violated conventional norms and stereotypes of feminine behavior, even when that behavior is caused by trauma."<sup>111</sup> Courts ignore sexual abuse as an underlying cause for behaviors such as violent activity, substance abuse, and post-traumatic stress responses such that girls are labeled as "perpetrators" instead of victims.<sup>112</sup> Behaviors like aggression and defiance can be helpful by staving off further victimization and yet, perversely, can also lead to further punishment or sanctions from authority figures who do not adequately recognize that such behaviors are responses to victimization,<sup>113</sup> especially when they are exhibited by girls of color.<sup>114</sup> Other behaviors, like running away or engaging in prostitution for

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105. Schaffner, *supra* note 103, at 14.

106. *Id.* at 14-15.

107. *See* Kerig, *supra* note 22, at 792.

108. *See id.*

109. KERIG & FORD, *supra* note 32, at 4.

110. *See* Kerig, *supra* note 22, at 792-93.

111. SAAR ET AL., *supra* note 23, at 7 (footnotes omitted).

112. *Id.* at 12; *see also* Schaffner, *supra* note 103, at 22 (explaining how adults dismiss aggression and "disassociative behaviors" as "teenage angst" rather than results of abuse).

113. *See* Kerig, *supra* note 22, at 798-99 (explaining that acting offensively or aggressively to deflect further victimization may assist girls in preventing further abuse but also may be misinterpreted by authority figures as behavior deserving of further sanctions); *see also* Kerig & Schindler, *supra* note 23, at 250.

114. *See* Kerig, *supra* note 22, at 798-99.

financial support, are also “understandable responses to traumatizing home environments” and yet can lead to involvement in the juvenile system.<sup>115</sup> For example, girls run away more often than boys because of higher rates of sexual abuse as well as stricter familial regulation of girls’ behavior.<sup>116</sup> Girls disproportionately comprise status offenders and are incarcerated more often than boys with more severe sanctions for these charges.<sup>117</sup> Courts and officials involved in the justice system can thus be not only unconsciously ignorant of a girl’s history of sexual abuse and the effects thereof, but even willfully blind to it.

Despite the *J.D.B.* Court’s warning that factfinders cannot ignore realities affecting a child’s development and decisionmaking,<sup>118</sup> the juvenile justice system generally ignores how a girl’s history of sexual abuse affects her subsequent criminal behavior. While truancy, bullying, and discipline are often discussed as ways in which girls are pushed out of school and into the juvenile justice system, “quite often ignored is how sexual violence can also become a pathway to confinement.”<sup>119</sup> And girls are too often punished for behaviors that are manifestations of their abuse or their attempts to escape it. This is all notwithstanding the fact that many girls, in contrast to boys, are “high needs, low risk,” meaning they have a high need for social services and yet pose a low threat to public safety in contrast to boys.<sup>120</sup> For example, girls are disproportionately justice-involved on account of status offenses, such as running away, substance abuse, and truancy, which pose very low public safety risks.<sup>121</sup> Yet most detained girls are “high needs” because they suffer from a

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115. Taylor-Thompson, *supra* note 24, at 1138-39.

116. Godsoe, *supra* note 43, at 1096 n.31, 1105.

117. *Id.* at 1103-04; *see also* Kerig, *supra* note 22, at 789-99 (explaining that once in court, girls are punished more harshly for behavior that is aggressive or assertive—behaviors that are closely associated with sexual abuse).

118. *See* *J.D.B. v. North Carolina*, 564 U.S. 261, 272, 277 (2011).

119. MORRIS, *supra* note 25, at 101.

120. *See* Godsoe, *supra* note 43, at 1092 & n.5 (explaining that the population of incarcerated girls is often “high needs, low risk” in comparison to boys and noting that while most boys are incarcerated for minor offenses, they “continue to comprise the vast majority of those minors arrested for violent and more serious offenses”); *see also* Kerig & Schindler, *supra* note 23, at 248-49.

121. SAAR ET AL., *supra* note 23, at 22 (explaining that girls are disproportionately justice-involved due to status offenses); *see also* Godsoe, *supra* note 43, at 1104-05 (explaining that status offenses pose a very low public safety risk).

variety of mental health disorders,<sup>122</sup> including PTSD and major depression.<sup>123</sup> And detained girls suffer from certain mental health disorders at rates higher than those for boys.<sup>124</sup>

Status offenses underscore the high-needs, low-risk quality of girls in contrast to boys.<sup>125</sup> Status offenses trap girls in the criminal justice system by bringing them in for low-level offenses like running away from home and then ratcheting up punishment when girls ignore court orders.<sup>126</sup> Girls often ignore court orders to stop running away, for example, because the orders do not address the underlying reasons for running away, such as higher rates of sexual abuse by family members and families' stricter control over girls' behavior in comparison to that of boys.<sup>127</sup> The status crimes girls are most often arrested for—running away, substance abuse, and truancy—are all associated with reactions to abuse.<sup>128</sup> Running away and curfew violations in particular “constitute a major portion of official female delinquency and . . . are far less prominent in male delinquency.”<sup>129</sup> “Girls are also disproportionately brought to court on a status offense for sexual conduct,”<sup>130</sup> demonstrating that courts ignore links between risky sexual behavior and sexual abuse. For example, in a study from Connecticut, where sex between young adolescents is a status offense, almost twice the number of cases were brought against girls as were brought against boys in the course of a year.<sup>131</sup> And girls are subsequently detained longer for status offenses “in the name of . . . services that often do not exist” within the juvenile justice system,<sup>132</sup> such as therapeutic or counseling services.

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122. SAAR ET AL., *supra* note 23, at 12 (finding that 80% of juvenile justice-involved girls suffer from one mental health disorder in comparison to 67% of boys).

123. *Id.* (noting that over 65% of justice-involved girls had experienced symptoms of PTSD sometime in their lives and that 29% of detained girls had experienced major depression).

124. *Id.* (noting that 11% of detained boys had experienced major depression).

125. See CHESNEY-LIND & SHELDEN, *supra* note 23, at 3, 12.

126. Godsoe, *supra* note 43, at 1093 & n.10, 1108-09; see also KERIG & FORD, *supra* note 32, at 4-5; Kerig, *supra* note 22, at 794-95.

127. Godsoe, *supra* note 43, at 1099-1101, 1105; see also Alecia Humphrey, *The Criminalization of Survival Attempts: Locking Up Female Runaways and Other Status Offenders*, 15 HASTINGS WOMEN'S L.J. 165, 176-77 (2004) (explaining how sexual abuse can bring girls into the juvenile justice system through status offenses).

128. SAAR ET AL., *supra* note 23, at 9-12 (explaining that sexual abuse experts list these behaviors as “warning signs that an adolescent has been abused and needs therapeutic intervention”); see also CHESNEY-LIND & SHELDEN, *supra* note 23, at 37; Kerig, *supra* note 22.

129. CHESNEY-LIND & SHELDEN, *supra* note 23, at 37.

130. Godsoe, *supra* note 43, at 1103.

131. *Id.*

132. See Jay D. Blitzman, *Gault's Promise*, 9 BARRY L. REV. 67, 89 (2007).

Child sex trafficking and commercial sexual exploitation provide another lens through which to view the sexual-abuse-to-prison pipeline. Girls who are sex trafficked are often brought in on charges of prostitution despite histories of abuse by family members or traffickers.<sup>133</sup> Child sex trafficking cases also bring gender and racial disparities into particularly sharp relief.<sup>134</sup> Many more young women are trafficked than are young men.<sup>135</sup> Of sex trafficking victims, 40% are African American.<sup>136</sup> In the most striking instance of this inequity, 92% of female victims of commercial sexual exploitation in Los Angeles County are African American.<sup>137</sup> The reports of sex trafficking demonstrate how powerless girls are dragged into it and how it can derail their lives. As one sixteen-year-old girl who had been trafficked explained,

I got into prostitution because the guy that raped me, he forced me on the track. Basically, I didn't go willingly at first, but ever since he did that to me, my whole life just changed, and that was at twelve years old. Ever since then, my life's been off-track.<sup>138</sup>

She explained that she worked in the sex industry because she didn't have anyone else to support her and when she successfully made money by herself, she "felt like a businesswoman."<sup>139</sup> This is a common story. As another formerly sexually trafficked girl explained,

before [sexually trafficked children] are actually put out on the streets, they're held hostage in houses for months at a time getting raped, getting drugs injected into their veins, and coke forced up their nose, just to get them hooked on these addictions just to drag them through the mud. Basically, beat them down, then put them on the stroll . . .<sup>140</sup>

Most commercially sexually exploited children "have experienced sexual or physical abuse or family trauma before entering the commercial sex industry."<sup>141</sup> Often, these girls are exploited by traffickers after running away from abuse, including sexual abuse, at home.<sup>142</sup>

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133. See Godsoe, *supra* note 43, at 1111-12 (explaining the link between prostitution and incarceration); *id.* at 1113 (articulating the link between sexual abuse and subsequent commercial sexual exploitation).

134. See *id.* at 1111-13.

135. See *Human Trafficking and Gender: Differences, Similarities and Trends*, COUNTER TRAFFICKING DATA COLLABORATIVE (2018), <https://perma.cc/QL9M-GHRV>.

136. MORRIS, *supra* note 25, at 102.

137. *Id.*

138. *Id.* at 106.

139. *Id.* at 107.

140. *Id.* at 117.

141. Godsoe, *supra* note 43, at 1113.

142. *Id.* at 1113-14.

As is predicted by the sexual-abuse-to-prison pipeline, girls who may have been trafficked as a result of running away from sexual abuse at home are then criminally prosecuted for committing prostitution.<sup>143</sup> This is despite the fact that the girls are below the age of consent in most states and clearly are victims of sexual exploitation.<sup>144</sup> Many states use these prosecutions to gain jurisdiction over commercially exploited children—in some cases to provide more therapeutic and counseling services through the juvenile justice system.<sup>145</sup> But the juvenile justice system, insofar as it focuses on status offenses, “remains largely punitive in nature” and often is unable to serve the victims of child sex trafficking.<sup>146</sup> The same lack of adequate services holds true for girls shuttled through the sexual-abuse-to-prison pipeline for other crimes.<sup>147</sup>

The gender disparities between sexual abuse and subsequent criminalized behavior are also associated with profound racial disparities. Considerable evidence shows that racial biases affect judicial decisions in ways that systematically disadvantage girls of color.<sup>148</sup> A disproportionately high number of incarcerated girls are African American, Latina, and Native American,<sup>149</sup> and the connection to the sexual-abuse-to-prison pipeline is partly responsible. As Monique Morris noted in the context of African American girls, the constant onslaught of being hypersexualized, objectified, and sexually assaulted can “not only entangle[] Black girls’ bodies but can also ensnare their minds,” leading to behavior that can trap them in the juvenile justice system.<sup>150</sup> And responses to trauma by girls of color are informed by systemic racism: “[G]irls of color are punished and further victimized for trying to cope with their victimization in ways that have been shaped by their culture; the wider society, gender, and racial stereotypes; and . . . dynamics of the trauma response.”<sup>151</sup> So when girls, especially girls of color, act aggressively as a defense mechanism to stave off further victimization, this

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143. *See id.* at 1111. Given the absurdity of incarcerating girls for crimes to which they cannot even consent, at least eleven states have decriminalized prostitution for underage girls. *See id.*

144. *Id.*

145. *Id.* at 1111-15.

146. *Id.* at 1112.

147. *Id.*

148. Francine T. Sherman, *Justice for Girls: Are We Making Progress?*, 59 UCLA L. REV. 1584, 1616-17 (2012) (explaining that decisionmakers in the juvenile justice system exhibit bias toward both youth of color and girls).

149. MORRIS, *supra* note 25, at 2; SAAR ET AL., *supra* note 23, at 7.

150. MORRIS, *supra* note 25, at 121.

151. Kerig, *supra* note 22, at 799.



behavior is seen as “disruptive” and “noncompliant.”<sup>152</sup> The criminal justice system then uses such behavior to justify sanctions that are “harsh and repressive” in comparison to those for white girls.<sup>153</sup>

### C. The Impact of the *Roper* Trilogy

The *Roper* trilogy has direct implications for the sexual-abuse-to-prison pipeline. Just as the Court found that juveniles exhibit behaviors resulting from cognitive and socioemotional immaturity, girls who have been sexually abused exhibit behaviors that result from cognitive and socioemotional coping based on their experiences. “[A]ggression, substance abuse, self-harm, running away, and risky sexual activity” are all documented responses to sexual abuse.<sup>154</sup> The *Roper* trilogy informs us that we should not punish children without recognizing their differences from adults. Neither should we punish adolescents whose behavior may be different from their peers due to sexual abuse. To punish these girls for conduct that is a recognized response to sexual abuse runs contrary to the commonsense conclusion that only the willful offender should be punished. Not only does common sense underscore these girls’ diminished culpability, studies into girls’ behavior and cognitive development also further supports this commonsense conclusion. Many of the antisocial behaviors girls demonstrate, like defiance and aggression, are coping responses to the abuse motivated by “a desire to regain the ability to feel safe and in control” and to also stave off further victimization.<sup>155</sup> Just as the *J.D.B.* Court warned that courts cannot “simply ignore”<sup>156</sup> a child’s age, neither should courts simply ignore a girl’s experience with childhood sexual abuse.

The *Graham* Court explained that “a sentence lacking any legitimate penological justification is by its nature disproportionate to the offense” in violation of the Eighth Amendment.<sup>157</sup> Here too, penological theories cannot justify the current treatment of girls caught in the sexual-abuse-to-prison pipeline. Reduced culpability undermines retributivism because girls should not be held to the same degree of culpability for behavior that stems from sexual abuse. Sexual abuse uniquely predicts recidivism for girls, undermining the notion that incarceration will deter these young women from future crime

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152. *Id.*

153. *Id.*

154. *Id.* at 792.

155. Julian D. Ford et al., *Pathways from Traumatic Child Victimization to Delinquency: Implications for Juvenile and Permanency Court Proceedings and Decisions*, JUV. & FAM. CT. J., Jan. 2006, at 13, 17.

156. *J.D.B. v. North Carolina*, 564 U.S. 261, 277 (2011).

157. *Graham v. Florida*, 560 U.S. 48, 71 (2010).

commission or rehabilitate them.<sup>158</sup> And girls who are incarcerated as a result of sexual abuse typically pose a low public safety risk at the initial time of incarceration, undermining purported justifications for incapacitation.<sup>159</sup> In *Roper*, the Court found that a child's ability to mature with time lowers his or her public safety risk as the child ages,<sup>160</sup> a phenomenon known as "aging out" of committing crimes.<sup>161</sup> So, girls with histories of sexual abuse not only age out of crime like juveniles generally, they also pose a lower public safety risk from the onset, doubly undermining the incapacitation rationale.

While incarceration could ostensibly rehabilitate girls if detention facilities offered effective therapeutic and counseling services to address sexual abuse, these services are rarely offered, or if they are, are usually ineffective.<sup>162</sup> Such services could include cognitive behavior therapies which offer potential for reducing recidivism for young people.<sup>163</sup> Yet "fewer than 5% of eligible high-risk juvenile offenders...are treated with an evidence-based treatment annually."<sup>164</sup> Given that girls with histories of sexual abuse are particularly in need of services,<sup>165</sup> this dismal rate of provision is troubling. Additionally, the models with the highest rates of success for improving outcomes for juveniles, Multisystemic Therapy and Functional Family Therapy, are both "intensive family treatment models for delinquent youth" that are most effective when they exist "as an alternative to incarceration or other residential placements."<sup>166</sup>

Not only do facilities fail to offer services to address the mental health needs of children, institutionalization is itself associated with further trauma to young people,<sup>167</sup> compounding the trauma that girls who have been

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158. See SAAR ET AL., *supra* note 23, at 18.

159. See Godsoe, *supra* note 43, at 1092.

160. *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (citing *Johnson v. Texas*, 509 U.S. 350, 368 (1993)).

161. For further discussion of this phenomenon, see generally Caitlin V.M. Cornelius et al., *Aging Out of Crime: Exploring the Relationship Between Age and Crime with Agent Based Modeling*, 2017 AGENT-DIRECTED SIMULATION SYMP. 1.

162. See, e.g., Blitzman, *supra* note 132, at 80-82 (discussing rehabilitative services offered to juveniles in several states).

163. See Dev. Servs. Grp., Inc., *Cognitive-Behavioral Treatment 1-3* (2010) (detailing the benefits of cognitive behavioral therapy for justice-involved youth generally), <https://perma.cc/DJY6-N2FR>.

164. MENDEL, *supra* note 83, at 18 (quoting Scott W. Henggeler & Sonja K. Schoenwald, *Evidence-Based Interventions for Juvenile Offenders and Juvenile Justice Policies That Support Them*, SOC. POL'Y REP., Spring 2011, at 1, 8).

165. Godsoe, *supra* note 43, at 1108 n.97.

166. MENDEL, *supra* note 83, at 17.

167. See *id.* at 6 (explaining how widespread physical abuse, excessive use of force, and systematic sexual abuse continue to exist in prisons).

sexually abused have already experienced. A 2010 Bureau of Justice Statistics report found that 12% of youth reported being sexually abused in detention facilities.<sup>168</sup> Other trauma may come in the form of physical abuse by facility staff, uncontrolled youth-on-youth violence, and overreliance on isolation and restraint.<sup>169</sup> Because incarceration is not a vehicle through which needed services are provided, nor does it justly punish girls for actions within their control, the *Roper* trilogy directs the juvenile system to rethink punishment for girls with histories of sexual abuse.

The *Roper* trilogy recognized a number of sentencing reforms as imperatives given the state of current understanding of juveniles' cognitive and socioemotional maturity. Policymakers should similarly grapple with a number of legal reforms in light of research on the sexual-abuse-to-prison pipeline and close the on-ramps into prison for girls who have survived childhood sexual abuse.

### III. Policy Recommendations to Disrupt the Pipeline

The logic from the *Roper* trilogy, combined with the disturbing empirics behind the sexual-abuse-to-prison pipeline, calls for immediate policy changes. For too long, this country has allowed girls who have been sexually abused to become trapped in the juvenile justice system without serving any legitimate penological interest. A range of policy options are discussed below that, taken together, would help disrupt the sexual-abuse-to-prison pipeline.

#### A. Mens Rea Analysis

As Jenny Carroll explains in her article *Brain Science and the Theory of Juvenile Mens Rea*, the *Roper* trilogy necessarily changes mens rea analysis because it directs courts to acknowledge a child's reduced culpability when determining guilt and punishment.<sup>170</sup> Mens rea is an elastic doctrine that by nature includes acknowledgment of the context in which a person committed a crime, so the addition of a child's age to the inquiry comports with common sense.<sup>171</sup> The principle behind reforming mens rea for children generally

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168. ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 228416, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH, 2008-09, at 3 & tbl.1 (2010), <https://perma.cc/L6VF-8K3S>.

169. MENDEL, *supra* note 83, at 6-8; *see also* BECK ET AL., *supra* note 168, at 3.

170. Jenny E. Carroll, *Brain Science and the Theory of Juvenile Mens Rea*, 94 N.C. L. REV. 539, 541-42 (2016).

171. *See id.* at 590; Casey McGowan et al., *Moving Forward from Gault*, CHAMPION, Apr. 2017, at 22, 26.

should similarly apply to reforming mens rea analysis for girls who have been sexually abused.

As Carroll explains, current juvenile court practices unjustly hold children to an adult mens rea standard.<sup>172</sup> While age may be taken into consideration during the sentencing phase, courts do not routinely consider age, immaturity, and past experiences in the mens rea component of presentencing adjudication.<sup>173</sup> So,

while an adolescent offender may not be deemed as culpable as an adult for purposes of punishment, he may nonetheless be judged culpable, or guilty, in the first place based on his ability (or more accurately his inability) to conform to adult expectations and understandings of the social norms that undergird criminal law generally and mens rea particularly.<sup>174</sup>

A child's guilt should therefore not be determined without regard to that child's age, lack of life experience, and socioemotional and cognitive immaturity.<sup>175</sup> If mens rea is meant to "demarcate culpability with precision and consistency," then it must separate adolescent from adult mental capacity.<sup>176</sup> Otherwise, failure to extend the logic of mens rea in juvenile cases "creates a gap between the articulated goal of mens rea and the reality of its application to youthful offenders" and undermines our criminal justice system.<sup>177</sup>

Because "intent is the central element in determining whether the youngster's action was even criminal to begin with,"<sup>178</sup> courts must consider a juvenile's "age and age-related characteristics,' such as whether [s]he was exposed to peer pressure, [her] education and social development, whether [s]he suffers an intellectual disability, [her] family history, and any evidence of impulsivity or immaturity."<sup>179</sup> Although some courts have begun to stop using the flawed mens rea approach of judging an adolescent's culpability based on an adult standard,<sup>180</sup> Carroll persuasively argues that the *Roper* trilogy and

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172. See Carroll, *supra* note 170, at 590.

173. See McGowan et al., *supra* note 171, at 26.

174. Carroll, *supra* note 170, at 590.

175. See McGowan et al., *supra* note 171, at 26.

176. Carroll, *supra* note 170, at 590.

177. *Id.* at 590-91.

178. McGowan et al., *supra* note 171, at 26.

179. *Id.* (quoting *Miller v. Alabama*, 567 U.S. 460, 489 (2012)).

180. The Supreme Court of California in *In re Gladys R.* held that children under fourteen must "kn[ow]" their conduct's wrongfulness before they can be committed to state custody. 464 P.2d 127, 132-33 (Cal. 1970) (quoting CAL. PENAL CODE § 26(1)). The court reasoned that to determine whether a child was capable of criminal intent, the juvenile court must undertake a totality-of-the-circumstances analysis, considering "a child's age, experience, and understanding in determining whether he would be capable of

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juvenile brain science call for a nationwide reconsideration of the mens rea standard as it applies to children.<sup>181</sup>

The *Roper* trilogy explicitly and categorically distinguished adult and juvenile culpability for the purposes of capital punishment and life without parole.<sup>182</sup> And as the *Roper* trilogy discusses,<sup>183</sup> brain science also suggests that “adolescents as a class operate under a comparatively reduced capacity when it comes to higher executive function, including autonomous choice, risk perception, self-management, and calculation and comprehension of future consequences” and, as a result, are less criminally culpable than adults.<sup>184</sup>

Carroll cites a jury instruction proposal by the Youth Advocacy Division of the Committee for Public Counsel Services in Massachusetts for a reformed juvenile mens rea analysis.<sup>185</sup> This instruction astutely focuses the factfinder on the many ways a child’s behavior is a product of the child’s environment and often outside of the child’s control. It also acknowledges a factfinder’s presumed experience with children as a baseline to establish trust and reassurance in the factfinder’s intuition that children are, indeed, different from adults. The instructions continue by including reference to cognitive research to back-up commonsense conclusions about adolescents:

When deciding the question of the Juvenile’s intent, one must/may consider what is expected from an adolescent of similar age and development. Special caution must be taken when determining whether a Juvenile acted with the intent required for this offense. Anybody who is familiar with adolescent behavior knows intuitively that adolescents do not necessarily think or behave like adults. These behavioral differences are pervasive and scientifically documented. Their judgments, thought patterns, and emotions are different from adults’. [sic] Moreover, their brains are physiologically underdeveloped in the areas that control impulses, foresee consequences, and temper emotions. They handle

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committing” an act that would subject him to the jurisdiction of the court. *Id.* at 134. Similarly, in *J.R. v. State*, the Court of Appeals of Alaska refused to hold a child to an adult standard in a case involving the standard of care for conversations that resulted in another person committing a crime. 62 P.3d 114, 119 (Alaska Ct. App. 2003).

181. Carroll was the first to make this novel argument. *See* Carroll, *supra* note 170, at 541, 543-44.

182. McGowan et al., *supra* note 171, at 23.

183. *See supra* text accompanying notes 53-54.

184. Carroll, *supra* note 170, at 575. While adolescents do not lack the ability to abstain from criminal behavior, their “reckless behavior and curtailed decision-making processes . . . are the hallmarks of normal development, not a defect, and they distinguish adolescents from adults.” *Id.* at 581. In particular, “the frontal cortex—seat of the powers of executive decision-making, coordination of emotions and cognition, goal driven planning, forethought, and impulse control—is the last to achieve structural maturity.” *Id.* at 585.

185. Emily Cardy et al., Youth Advocacy Div., Comm. for Pub. Counsel Servs., Juvenile Specific Jury Instructions 1, 6 (2014) (footnotes omitted), <https://perma.cc/RJJ2-GTJQ>.

information processing and the management of emotions differently from adults.<sup>186</sup>

In the sexual abuse context, a reformed mens rea analysis could similarly serve as an immediate corrective to courts' failure to acknowledge the link between sexual abuse and seemingly criminal behavior in girls. Applying a tailored analysis that appreciates the behavioral results of childhood sexual abuse could prevent nonculpable girls from entering the juvenile justice system. This reformed mens rea analysis could thus bridge the gap between a girl's behavior, like aggression and hostility, and her childhood sexual abuse.

A tailored mens rea analysis also could correct the fundamental problem with holding sexually abused girls to a general adolescent, or worse, adult mens rea standard. Mens rea assumes the defendant understands social norms, contextualizes her decisions within these norms, and is a "member of social networks that enforce and enhance her understandings of social norms."<sup>187</sup> These assumptions run counter to the fact that detained girls are more likely than boys to come from "highly discordant homes."<sup>188</sup> This home strife can mean that girls' criminal acts are not conscious acts of disobedience with understood criminal results, as mens rea would presuppose.<sup>189</sup> The sexual abuse that many girls in the justice system have endured comes in the context of their closest relationships in the form of betrayal trauma.<sup>190</sup> The connection between this betrayal trauma and a reduced ability to form and maintain healthy relationships casts further doubt that these girls' criminal acts are evidence of malicious intent.

Finally, a reformed mens rea analysis could address one of the thorniest problems with adjudicating criminal cases against girls with histories of sexual abuse: namely, that their actions can run contrary to outdated and stereotypical views of "victim" behavior. As discussed, girls' anger, rebelliousness, or use of offensive language can be misconstrued by school and juvenile authorities as justifying punishment rather than seen as justifying therapeutic and other supportive interventions.<sup>191</sup> As one report explains, "the

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186. *Id.* at 2-3.

187. Carroll, *supra* note 170, at 547-48.

188. KERIG & FORD, *supra* note 32, at 4; *see also* SAAR ET AL., *supra* note 23, at 12 (stating that girls' "problem behavior" often relates to an "abusive and traumatizing home life" (quoting Kerig & Becker, *supra* note 22, at 121)).

189. *See* Carroll, *supra* note 170, at 549.

190. *See* Kerig, *supra* note 22, 792.

191. *See* Schaffner, *supra* note 103, at 11-12, 22 (explaining how adults dismiss anger, offensive language, confrontational behavior, aggression, and "disassociative behaviors" as "teenage angst" rather than results of abuse); *see also* Candice Feiring et al., *Potential Pathways from Stigmatization and Externalizing Behavior to Anger and Dating Aggression in Sexually Abused Youth*, 42 J. CLINICAL & ADOLESCENT PSYCHOL. 309, 310-14 (2013) (explaining that anger can result from childhood sexual abuse for children).

decision to arrest and detain girls in these cases has been shown often to be based in part on the perception of girls' having violated conventional norms and stereotypes of feminine behavior, even when that behavior is caused by trauma."<sup>192</sup>

And so even though behavioral responses to sexual abuse like increased aggression, anger, and other confrontational behaviors can stave off further victimization, they can ironically lead to entanglement with the juvenile justice system.<sup>193</sup> This problem is compounded for girls of color: "[G]irls of color are punished and further victimized for trying to cope with their victimization in ways that have been shaped by their culture; the wider society, gender, and racial stereotypes; and . . . dynamics of the trauma response."<sup>194</sup> So when girls—especially girls of color—act aggressively as a defense mechanism to stave off further victimization, this is seen as “disruptive, noncompliant, or even threatening, and, thus, as warranting harsh and repressive sanctions”<sup>195</sup> rather than as a call to address underlying trauma.

A juvenile mens rea standard that considers a girl's childhood sexual abuse would thus contextualize behaviors that would otherwise bely adult rationality and underscore how sexual abuse can manifest itself into criminal conduct. The novel instruction offered by this Note could build off those offered by the Massachusetts Youth Advocacy Division and apply to the sexual-abuse-to-prison pipeline.

When deciding girls' criminal culpability in a case with documented sexual abuse,<sup>196</sup> one must consider the pernicious effects of sexual abuse. Girls with histories of sexual abuse warrant special consideration and understanding because their actions and behavior may differ from that of their peers. Sexual abuse can cause defiant, aggressive, antisocial, and promiscuous behavior. It also clouds a girl's conception of social norms and behavior. Cognitive and psychological understanding recognize the harmful effects of sexual abuse on socioemotional development, cognitive processing, and the formation of healthy social bonds. When determining the criminal culpability of a young woman, one must therefore be cognizant of these possibilities if she has a history of sexual abuse.

It is a perversion of the criminal justice system for girls with histories of sexual abuse to be held criminally responsible and punished under an erroneous mens rea standard. Because the very concept of mens rea is an elastic

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192. SAAR ET AL., *supra* note 23, at 7 (footnotes omitted).

193. See Kerig, *supra* note 22, at 798-99.

194. *Id.* at 799.

195. *Id.*

196. The means by which courts will determine whether a girl has a history of sexual abuse is fraught and beyond the scope of this Note.

legal doctrine that necessarily includes reference to a unique defendant's thought process and cognitive function, a juvenile mens rea standard that considers a girl's history of sexual abuse is necessary and readily available as a means to dismantle the sexual-abuse-to-prison pipeline.

### B. Expert Qualifications and Jury Instructions

To drive home the nuanced culpability analysis that girls with histories of sexual abuse deserve, courts should adopt expert qualifications and factfinder instructions that further highlight the known effects of sexual abuse in young women. In *Miller*, the Court reasoned that courts would need to have individualized sentencing for juveniles that would take into consideration a number of factors to ensure only the truly incorrigible would be sentenced to JLWOP.<sup>197</sup> This same principle applies to procedural changes in the context of the sexual-abuse-to-prison pipeline in which expert testimony resulting from relaxed expert qualifications and more nuanced jury instructions could ensure factfinders have the best tools for assessing girls' culpability. Just as *J.D.B.* instructs courts to become more attuned to the realities faced by juveniles because of their age,<sup>198</sup> these changes would help courts become more attuned to the realities faced by girls.

As Carroll explains, an adult factfinder's capacity to put herself in the defendant's position so that she may assess culpability is curtailed even in the context of an ordinary adolescent.<sup>199</sup> With girls who have experienced sexual abuse, the problem is compounded because the judges are often white, male adults in contrast to the many young women of color forced through the sexual-abuse-to-prison pipeline.<sup>200</sup> An expert in sexual abuse and adolescent

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197. *Miller v. Alabama*, 567 U.S. 460, 489 (2012). The extent of the individualized nature of these hearings is contested. Most recently, the Supreme Court heard arguments on October 16, 2019 to determine that scope. Transcript of Oral Argument, *Mathena v. Malvo*, No. 18-217, 2020 WL 962431 (U.S. Feb. 26, 2020), 2019 WL 5266912. The parties in *Mathena* agreed to the dismissal of the petition after the State of Virginia enacted legislation under which all juvenile offenders are eligible for parole." *Mathena*, No. 18-217, 2020 WL 962431 (U.S. Feb. 26, 2020) (mem.); Kimberly Strawbridge Robinson, *D.C. Sniper Case to Be Nixed After Virginia Governor Signs Law*, BLOOMBERG LAW (Feb. 24, 2020, 12:16 PM), <https://perma.cc/58R4-77F2>.

198. *J.D.B. v. North Carolina*, 564 U.S. 261, 275-77 (2011).

199. Jenny E. Carroll, *The Problem with Inference and Juvenile Defendants*, 45 FLA. ST. U. L. REV. 1, 50-51 (2017).

200. Compare SAAR ET AL., *supra* note 23, at 33 (stating that girls of color are disproportionately affected by the sexual-abuse-to-prison pipeline), and Taylor-Thompson, *supra* note 24, at 1137-38 (explaining girls of color represent "nearly two-thirds of the female juvenile justice population"), with Tracey E. George & Albert H. Yoon, *Measuring Justice in State Courts: The Demographics of the State Judiciary*, 70 VAND. L. REV. 1887, 1906-07 (2017) (noting that no state had "women on the bench in the numbers commensurate with  
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psychology could explain why girls exhibit criminal behavior, such as truancy or running away from home, that seemingly runs contrary to their self-interest and success within larger society bridging the gap between a naïve factfinder and a young female defendant with a history of sexual abuse. Allowing more experts to testify on this ground through relaxed qualifications could bridge the divide.

But courts should not only make changes to expert qualifications. Locating a neuroscientist or psychologist with specialized understanding of the behavioral implications of childhood sexual abuse is a daunting task.<sup>201</sup> As Carroll points out, many locations will not have access to experts in adolescent psychology or, even if they do, funds will not be available to pay for them.<sup>202</sup> The lack of funding becomes even more acute because many juveniles, especially girls who may have run away from home due to sexual abuse, would not have funds to pay for expert witnesses.<sup>203</sup> A further wrinkle comes from Federal Rule of Evidence 704(b) and state equivalents, which prohibit an expert from testifying whether an accused had the requisite mental state to commit a crime.<sup>204</sup> So while an expert's testimony can explain a female adolescent's reduced culpability, the expert cannot "explain why that matters to the [judge's or] jury's calculation of mens rea in terms of whether or not the evidence presented in fact suggests that the juvenile achieved the requisite mens rea."<sup>205</sup>

As another procedural change to disrupt the sexual-abuse-to-prison pipeline without requiring defendants to pay out of pocket, states should adopt factfinder instructions that contextualize how sexual abuse affects a girl's subsequent behavior. These instructions can orient a factfinder to contextualize evidence presented in determinations of criminal culpability. These instructions could follow from Carroll's proposal, which is generalized for all adolescents:

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their representation in the general population" and describing state courts as "dominate[d]" by white men), *and* Judicial Council of Cal., Demographic Data Provided by Justices and Judges Relative to Gender, Race/Ethnicity, and Gender Identity/Sexual Orientation 1, 3 (2018), <https://perma.cc/WV3L-ASY5..>

201. Carroll, *supra* note 199, at 52.

202. *Id.*

203. *Id.* at 52-53; *see also* Victoria Negron, *Expert Witness Fee Report: Facts, Figures & Trends in 2017*, EXPERT INST. (Mar. 20, 2018), <https://perma.cc/YM43-KAK8> (stating that, on average, expert testimony in court costs nearly \$500 per hour); Dev. Servs. Grp., Inc., *Indigent Defense for Juveniles* 4 (2018), <https://perma.cc/XMN3-MUEV> (explaining that, while it is impossible to know the exact percentage of juvenile defendants who are indigent, California and Pennsylvania both indicate that the majority of juveniles who are prosecuted are appointed a public defender, suggesting such defendants are indigent).

204. Carroll, *supra* note 199, at 53 (citing FED. R. EVID. 704(b)).

205. *Id.*

Anyone who remembers being a teenager, who has been the parent or caretaker of a teenager, or who has observed adolescent behavior, knows intuitively what scientific research shows[:] that adolescents do not think or behave like adults; their brains are not yet fully developed in the areas that control impulses, ability to foresee the consequences of their actions, and to temper their emotions. As a result, an adolescent may overvalue a reward or undervalue a risk in making a decision. What may appear to be a logical consequence of a decision to you, an adult, may elude an adolescent entirely or may only become apparent after the consequences are realized. These differences are “normal” characteristics of adolescence and do not represent a defect or deficiency. As such, you may consider this difference as you listen to the evidence in this case or make findings based on the evidence in this case.<sup>206</sup>

As Carroll’s instructions illustrate, a “juvenile’s deviation from an adult reasonable standard of behavior is not the indicator of a ‘criminal mind’ in the same way that it might be for an adult” because such deviancy is normal for adolescents.<sup>207</sup> Legislators could similarly tailor these instructions to reference how sexual abuse specifically can predispose girls to commit criminal offenses. The following novel instruction offered by this Note could serve as such an example:

*Girls who have experienced sexual abuse differ from ordinary adolescents. What may appear to be aggressive behavior may actually be a girl’s attempts to stave off victimization. Hostility or general callousness may be a direct reaction to the abuse she has undergone. And acts like running away or prostitution may be key to a girl’s survival. These reactions are not acts of defiance of a legal order in the same way they would be for adults or other adolescents who act in these ways. As such, you may consider the effects of sexual abuse when listening to evidence, making findings, and ultimately determining this girl’s culpability.*

The instructions should conclude by tying adolescence and childhood sexual abuse to the alleged crime and its elements. Carroll proposes the following:

A deliberate act is one “characterized by or resulting from careful and thorough consideration[”]or one [“]characterized by awareness of the consequences.” The defendant here is an adolescent, and one of the differences between adults and adolescents is that adolescents’ brains are not fully developed in the areas that control impulses, foresee consequences, and temper emotions. Adolescents are susceptible to acting impetuously with little thought or consideration of consequences, a fact shown by brain development research as well as common

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206. *Id.* at 54-55.

207. Christopher Northrop & Kristina Rothley Rozan, *Kids Will Be Kids: Time for a “Reasonable Child” Standard for the Proof of Objective Mens Rea Elements*, 69 ME. L. REV. 109, 117-18 (2017).

sense. You must/may consider these attributes of adolescence when determining whether the defendant acted intentionally.<sup>208</sup>

In the case of an adolescent girl who has been sexually abused, problem behaviors such as aggression and risky behavior may be interpreted by a judge as callous indifference, augmenting the need for these policy changes. As Carroll notes, “[b]oth the use of expert testimony and the proposed jury instructions regarding adolescent brain development serve to promote the underlying aims of criminal law: to convict and punish based on the defendant’s degree of culpability as determined by [her] state of mind.”<sup>209</sup> Through this two-pronged approach, fewer girls with histories of sexual abuse would enter into the juvenile justice system.

### C. Status Offenses

Mens rea analysis and the accompanying changes to expert qualification and factfinder instructions are an important starting point to achieve the proper culpability analysis under *Roper* trilogy principles. But the very definitions of criminal behavior must fundamentally change to adequately disrupt the sexual-abuse-to-prison pipeline. Just as the *Roper* trilogy is not crime specific, its principles should not be limited to procedural changes in juvenile law. Substantive criminal law changes should be made so that girls are not criminally punished for behaviors that, while socially disapproved, should not constitute criminal action. That is, the juvenile justice system should stop punishing girls for status offenses and end the practice of leveling up minor criminal offense charges so that girls can be criminally sanctioned for otherwise behavioral infractions.

To begin, courts should end the practice of incarcerating young women for status offenses because, as discussed in Part II.B, these offenses function disproportionately as “gateway[s]”<sup>210</sup> into the juvenile justice system for girls with histories of sexual abuse.<sup>211</sup>

In the 1970s, Congress briefly attempted to stop this pattern of disproportionately incarcerating girls for status offenses. Congress required states to end incarceration for these status offenses in order to remain eligible for federal juvenile justice funds in the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDP A).<sup>212</sup> The JJDP A was motivated by fears that

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208. Carroll, *supra* note 199, at 55.

209. *Id.* at 56.

210. Humphrey, *supra* note 127, at 172-73.

211. See SAAR ET AL., *supra* note 23, at 23.

212. Pub. L. No. 93-415, tit. II, § 223(a)(13), 88 Stat. 1109, 1119, 1121 (codified as amended at 34 U.S.C. § 11133(a)(11)(A) (2018)).

delinquent and status offender children were dangerously “mingling” behind bars.<sup>213</sup> But this change was met with substantial backlash from parents, police, and judges who demanded incarceration for status offenses to protect children—particularly girls—from their own “non-criminal bad behavior.”<sup>214</sup> As a result, Congress created the valid court order (VCO) exception as an amendment to the JJDPa in 1980, allowing states to incarcerate juvenile status offenders who violate a court order without risk of losing federal funding.<sup>215</sup> The VCO exception allows children to be incarcerated if they “violate court orders that prohibit them from committing enumerated status offenses.”<sup>216</sup> So, for example, even though children cannot be incarcerated for the underlying offense of missing school, they can be arrested for violating a court order to attend school.

This VCO exception disproportionately impacts girls, who are two times as likely as boys to be detained for status and technical offenses.<sup>217</sup> “[A]lthough adolescent boys commit an equal number of status offenses as girls, girls are 170% more likely to face arrest for these acts.”<sup>218</sup> Relatedly, girls of color are disproportionately justice-involved for status offenses in comparison to white girls.<sup>219</sup> Once arrested, these status offenses act as a “revolving door” into the juvenile justice system because girls are charged for low-level offenses and then subsequently arrested for technical violations even though the girls have not committed subsequent crimes.<sup>220</sup>

The status offender system not only disproportionately affects girls, but also uniquely affects girls with histories of sexual abuse. Many status crimes like running away, substance abuse, and truancy are common behavioral responses to sexual abuse.<sup>221</sup> In fact, experts in childhood sexual assault list these behaviors as “warning signs that an adolescent has been abused and needs therapeutic intervention.”<sup>222</sup> Despite the best intentions of judges, prosecutors,

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213. Godsoe, *supra* note 43, at 1100 & n.52.

214. *Id.* at 1100.

215. Juvenile Justice Act Amendments of 1980, Pub. L. No. 96-509, § 11(a)(13), 94 Stat. 2750, 2757 (codified as amended at 34 U.S.C. § 11133(a)(11)(A)(i)(II)).

216. SAAR ET AL., *supra* note 23, at 23.

217. Godsoe, *supra* note 43, at 1093, 1101, 1103 n.70 (explaining that girls are disproportionately detained for technical violations of court orders); *see also* Kerig & Schindler, *supra* note 23, at 251 (explaining that girls are also disproportionately punished for status offenses in comparison to boys).

218. Taylor-Thompson, *supra* note 24, at 1144 (footnotes omitted).

219. *See* Godsoe, *supra* note 43, at 1106 (explaining that the increased use of the status offender system generally has disproportionately affected girls of color).

220. Kerig & Schindler, *supra* note 23, at 251.

221. SAAR ET AL., *supra* note 23, at 9.

222. *Id.* at 9-12.

and police, court orders set girls up to fail through overly strict and punitive conditions.<sup>223</sup> This effect is especially problematic for girls with histories of sexual abuse because a history of sexual abuse is one of the strongest indicators of recidivism.<sup>224</sup> And unlike boys, girls' recidivism is often a result of engaging in technical offenses rather than the commission of other types of offenses.<sup>225</sup>

Status offenses can both be "survival crimes"<sup>226</sup> and "maladaptive" coping behaviors to deal with sexual abuse.<sup>227</sup> Girls may engage in status offenses as a way to escape abuse and so these behaviors serve as survival mechanisms.<sup>228</sup> Running away, for example, is a common response to sexual abuse for which one may praise adult women but instead punish underage girls.<sup>229</sup> In one instance,

[a] girl, who has consistently run away from home, comes before the court on a petition that alleges that she is a person in need of supervision ("PINS"). The court orders counseling and a temporary placement in a foster care home. The girl, who has a history of intra-family conflict, does not adjust well to her new placement and again resorts to running away. Although she has never committed a crime, the decision to run away—no matter what the motivation—has now exposed her to a contempt citation for violating the court's directive to reside in the foster home. If the judge chooses to hold her in contempt, she can then be reclassified as a delinquent and face secure detention with other children who have been convicted of delinquency offenses.<sup>230</sup>

And committing status offenses like running away, or other crimes such as prostitution or petty theft, can become necessary for homeless girls to support themselves.<sup>231</sup> The gendered component of running away and prostitution is even more clear from the fact that these two crimes are the only ones for which girls have higher arrest rates than boys.<sup>232</sup>

Maladaptive behaviors like substance abuse, underage sex with multiple partners, and gang membership all have direct connections to childhood sexual

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223. See Godsoe, *supra* note 43, at 1101 & n.58.

224. SAAR ET AL., *supra* note 23, at 9 (explaining that sexual abuse has a greater impact than "other risk factors like behavioral problems and prior justice involvement").

225. Kerig, *supra* note 22, at 794-95.

226. KERIG & FORD, *supra* note 32, at 5; see also Kerig & Schindler, *supra* note 23, at 256-57; Kerig, *supra* note 22, at 256-57.

227. Kerig, *supra* note 22, at 792.

228. Godsoe, *supra* note 43, at 1092, 1105 (explaining that girls commit status offenses, like running away, to escape sexual abuse).

229. See generally Humphrey, *supra* note 127 (explaining that running away, and subsequent punishment, commonly follows sexual abuse); Kerig, *supra* note 22 (same).

230. Taylor-Thompson, *supra* note 24, at 1145.

231. Cindy S. Lederman & Eileen Nexer Brown, *Entangled in the Shadows: Girls in the Juvenile Justice System*, 48 BUFF. L. REV. 909, 917 (2000).

232. *Id.* at 917-18.

abuse and can lead to involvement in the juvenile justice system through status offenses.<sup>233</sup> Drug and alcohol use, for example, can be a form of self-medication that subsequently leads to a range of risky, criminal behaviors.<sup>234</sup> Promiscuous sexual behavior can be a natural response to sexual assault because “girls are socialized to respond to sexism and trauma in gendered and sexualized ways.”<sup>235</sup> These so-called “sexual solutions” to trauma, such as risky sexual behavior, are then penalized by a patriarchal justice system.<sup>236</sup> One study found that almost twice the number of cases for sex between adolescents were brought against girls in comparison to boys.<sup>237</sup> Finally, other status crimes, like dropping out of school (and truancy for similar reasons), can function as behavioral responses to sexual abuse that sweep girls into the juvenile justice system.<sup>238</sup>

To put an end to this pattern, Congress should close the VCO loophole, which unnecessarily traps girls in the juvenile justice system, and restore the JJDPJA to its original intention of preventing arrests for status offenses. Even the National Council of Juvenile and Family Court Judges—a group that originally advocated for the VCO exception—is now in favor of phasing it out.<sup>239</sup> And while some states already have ended the VCO exception, most states continue to have this provision.<sup>240</sup>

Although some judges, parents, and other juvenile justice system stakeholders would raise tired concerns that the system needs the VCO exception to save girls from themselves and incapacitate self-destructive behavior, incarceration is not only wrong, it does not serve the interests of the incarcerated girl or society writ large. As discussed, most juveniles do not obtain adequate services while serving sentences.<sup>241</sup> The problematic

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233. See, e.g., Kerig, *supra* note 22, at 792 (contextualizing the status offense of running away as a “maladaptive attempt[] to cope with victimization,” including sexual abuse); see also Kerig & Schindler, *supra* note 23, at 252-53, 260-61 (explaining the connection of maladaptive behaviors to sexual abuse in the context of the juvenile justice system); Taylor-Thompson, *supra* note 24, at 1144-47 (explaining that “[r]esearchers have discovered a strong correlation between victimization and high risk behaviors such as drug use, sex with multiple partners, and gang membership”).

234. See Schaffner, *supra* note 103, at 23; see also Lederman & Brown, *supra* note 231, at 917, 922 (explaining, within the context of the juvenile justice system, that illicit drug and alcohol use can be a form of self-medication, which is criminal for minors).

235. Schaffner, *supra* note 103, at 5. *But see id.* at 24 (noting that further research may be needed to bear this out).

236. *Id.* at 5.

237. Godsoe, *supra* note 43, at 1103.

238. Schaffner, *supra* note 103, at 23.

239. SAAR ET AL., *supra* note 23, at 23.

240. *Id.*

241. See MENDEL, *supra* note 83, at 22, 24-25; *supra* text accompanying notes 162-66.

conditions in juvenile detention facilities, including the abuse of juveniles and inadequate access to therapeutic services, further undermine this rationale that incarceration benefits girls with histories of sexual abuse.<sup>242</sup> With rates of sexual abuse in prisons at about 12%,<sup>243</sup> it is unacceptable for girls with histories of sexual abuse to be placed at further risk through incarceration. Alternatives must be found.

Jurisdictions could follow in the example of Courtney's House in Washington, D.C., with its combination of individualized counseling and therapy as well as survivor support groups.<sup>244</sup> The program itself is based in the community and so provides services for girls both when they are in facilities and when they are home,<sup>245</sup> preventing the disruptive cessation of services once a child leaves a facility. Moreover, the program proactively seeks out children who are at risk of being trafficked, stepping in before children find themselves in the juvenile justice system.<sup>246</sup> These intensive support systems that operate largely outside of a punitive setting could provide an alternative to incarceration.<sup>247</sup>

#### D. Upcriming and Net Widening

Another area of substantive criminal law that should be altered is the practice of arresting and detaining juveniles for low-level offenses—so-called “net widening”<sup>248</sup> or “upcriming.”<sup>249</sup> As one scholar has noted, “[t]he desire to incarcerate runaway and other misbehaving girls has led to the widespread relabeling of girls’ behavior in delinquency terms.”<sup>250</sup> Zero-tolerance policies

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242. MENDEL, *supra* note 83, at 6-8 (stating that youth in facilities are subjected to “[w]idespread physical abuse and excessive use of force by facility staff,” an “epidemic of sexual abuse,” “[r]ampant overreliance on isolation and restraint,” as well as violence committed by other juveniles (emphasis omitted)).

243. BECKET AL., *supra* note 168, at 3.

244. *How We Help*, COURTNEY'S HOUSE, <https://perma.cc/Y84H-J2FP> (archived Jan. 12, 2020).

245. *Id.*

246. *Id.*

247. For an overview of a number of programs, including Multisystemic Therapy and Functional Family Therapy, that can serve as alternatives to incarceration for children, see MENDEL, *supra* note 83, at 16-18.

248. SAAR ET AL., *supra* note 23, at 23; Kerig & Schindler, *supra* note 23, at 250; *see also* Humphrey, *supra* note 127, at 174-75 (explaining that former status crimes have also been relabeled as delinquency offenses).

249. *See* Kerig, *supra* note 22, at 793 (explaining “upcriming” as a response to mandatory arrest policies that compel police officers to arrest girls who purportedly committed domestic violence).

250. Godsoe, *supra* note 43, at 1106 (citing Barry C. Feld, *Violent Girls or Relabeled Status Offenders?: An Alternative Interpretation of the Data*, 55 CRIME & DELINQ. 241, 241 (2009)).

for domestic violence and mandatory arrest policies for substance abuse, for example, disproportionately impact girls.<sup>251</sup> Domestic violence charges for girls are often the result of intrafamilial disputes and “detailed analyses of their actual arrest reports indicate these episodes often involve girls engaging in low-level forms of aggression.”<sup>252</sup> For example, a mother may call the police on a daughter even though both have been physically abusive toward each other. Yet a jurisdiction’s mandatory arrest laws will lead to the arrest and detention of the daughter.<sup>253</sup> Furthermore, increased enforcement, in addition to relabeling, has led girls to increasingly become involved in the juvenile justice system.<sup>254</sup>

As in the case for status offenses, the solution to upcriming is to reduce punitive treatment for girls who exhibit these behaviors when sexual abuse is a factor. Just as in the case of status offenses, these high-needs, low-risk girls should not be placed in punitive, service-deficient institutions.<sup>255</sup> The juvenile justice system is simply not equipped to handle the many girls who come in with “high need[s]” and so its involvement fails to address underlying issues.<sup>256</sup> Incarceration for minor offenses acts as a “one-way ratchet to involvement in the juvenile justice system.”<sup>257</sup> Instead, a variety of individually tailored programs and services must be made available to girls in their chosen home communities. Removing a girl from all the support she knows and expecting her to pull herself out of a pattern of behavior beyond her control cannot be the solution.

In the case of both status offenses and net-widening, some may invoke a “protectionist rationale” that incarceration incapacitates a girl and so prevents her from committing further crimes that put her at risk.<sup>258</sup> But in the vast majority of cases, the fact that most girls do not receive social services means that incarceration is not serving their needs or those of society.<sup>259</sup>

In *Graham*, the Court acknowledged the argument that adolescents may be so “incorrigible” that they are incapable of change and so should be subject to

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251. Kerig & Schindler, *supra* note 23, at 250-51.

252. *Id.*; see also KERIG & FORD, *supra* note 32, at 4; Kerig, *supra* note 22, at 792-93.

253. See Taylor-Thompson, *supra* note 24, at 1146.

254. SAAR ET AL., *supra* note 23, at 7.

255. Godsoe, *supra* note 43, at 1092 & n.5 (explaining that the population of incarcerated girls is often “high needs, low risk” in comparison to boys and noting that while many boys are incarcerated for minor offenses, they “continue to comprise the vast majority of those minors arrested for violent and more serious offenses”); see also Kerig & Schindler, *supra* note 23, at 248-49.

256. Kerig & Schindler, *supra* note 23, at 248-49.

257. See Godsoe, *supra* note 43, at 1108-09.

258. See *id.* at 1107.

259. *Id.* at 1107-09.



JLWOP.<sup>260</sup> Yet the Court still categorically prohibited the practice of execution in all juvenile cases and mandatory JLWOP because of the “unacceptable likelihood that the brutality or cold-blooded nature” of a crime would “overpower mitigating arguments based on youth as a matter of course”<sup>261</sup>—especially given the difficulty of even expert psychologists to determine when a child is “irreparabl[y] corrupt[.]”<sup>262</sup> The Court went on to explain that juveniles may have “special difficulties encountered by counsel in juvenile representation” given juveniles’ “[d]ifficulty in weighing long-term consequences; . . . corresponding impulsiveness; and reluctance to trust defense counsel,” all of which “can lead to poor decisions by one charged with a juvenile offense.”<sup>263</sup>

Similarly, courts should not be left with the impossible task of identifying the highly rare case of a girl for whom incarceration would be preferable to home-based services. For the vast majority of girls, appropriate, community-based rehabilitative services as alternatives to incarceration could help mitigate and manage the effects of sexual abuse.<sup>264</sup> This transience was a fundamental justification in the *Roper* trilogy for prohibiting punishment that ignored the impermanence of adolescents’ ill-advised behavior and readily applies here.<sup>265</sup>

### Conclusion

As we continue into the #MeToo era, attention must begin to shift to some of the most vulnerable people affected by sexual abuse and sexual assault. Girls with histories of sexual abuse are quickly dismissed as incorrigible, aggressive, or creators of their own unfortunate situations by the juvenile and criminal justice systems. These children are not being rightly seen as victims and, more importantly, as survivors of abuse many adults could not fathom. Society’s offer of help cannot be incarceration. The *Roper* trilogy sets the stage for a fundamental shift in policy away from this shortsighted, inhumane practice of incarcerating girls who are survivors of sexual abuse. As *Roper* stated, children are different from adults. And girls who have been sexually abused as children

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260. *Graham v. Florida*, 560 U.S. 48, 77-78 (2010) (explaining that the *Roper* Court rejected the case-by-case approach because courts could not “distinguish the few incorrigible juvenile offenders from the many that have the capacity for change”).

261. *Id.* at 77-78 (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)).

262. *Id.* at 73 (quoting *Roper*, 543 U.S. at 573).

263. *Id.* at 78.

264. See MENDEL, *supra* note 83, at 16-18 (reviewing various programs, like Multisystemic Therapy and Functional Family Therapy, that could be alternatives to incarceration for children).

265. *Miller v. Alabama*, 567 U.S. 460, 471-73 (2012).

are more different still. Reports and research in the past decade underscore just how lasting the effects of this abuse are: inhibited regulation of emotions, problems developing trusting and lasting relationships, increased risk of substance abuse, risky sexual behavior, survival crimes to provide for themselves while on the street, and so on.<sup>266</sup>

With more information and a revised view of history, the present policy mandate to dismantle the sexual-abuse-to-prison pipeline is clear. Beginning with a tailored mens rea analysis, one that considers the well-documented effects of sexual abuse on girls, and changes to expert qualifications and jury instructions, we could significantly reduce the number of sexually abused girls who are cycled through the juvenile and criminal justice systems. We could further dismantle the status offense system by closing the VCO loophole in addition to properly labeling low-level crimes, instead of “upcriming.” Finally, altering the transfer system to prevent girls with histories of sexual abuse from being transferred to the adult justice system presents an opportunity to begin applying the *Roper* trilogy to one of the most vulnerable populations.

But this is only the beginning. Scholars must begin researching the connection between sexual abuse in heterosexual cisgender boys, queer and transgender children, and nonbinary children of all identities. So too must scholars investigate the connection between abuse and neglect of all kinds and a child’s rate of crime commission. Beyond research, diversion programs and community support are crucial if incarceration is no longer to be an option for these girls. Services and support, purportedly offered by juvenile detention facilities, must actually be made available and accessible in a child’s community. As *Miller* rightly pointed out, the *Roper* trilogy’s logic is not crime specific.<sup>267</sup> And neither should it be limited to juvenile sentencing and criminal procedure. Instead, it’s high time to apply the expansive reasoning deployed in the *Roper* trilogy to the oft-neglected sexual-abuse-to-prison pipeline.

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266. See *supra* text accompanying notes 102-04, 112, 115-16.

267. *Miller*, 567 U.S. at 473.