

Juvenile Offenders Are Ineligible for Civil Commitment as Sexual Predators

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Abstract

In the 1990s post-incarceration civil commitment was added to the existing set of legal dispositions, such as sentencing juveniles to the death penalty or to life in prison without parole, which treated juveniles as though they were adults. Exposure to the possibility of sexually violent predator (SVP) civil commitment proceedings represents a dire predicament for “juvenile only sex offenders” (JOSOs). A judicial and scientific consensus has emerged in the last 10 years, however, that juvenile offenders differ from adult offenders in terms of their developmental characteristics and vulnerabilities. A second body of research also indicates that specific differences exist between JOSOs and adult sex offenders (ASOs) with respect to their sexual behaviors and personality functioning. These facts point to the conclusion that JOSOs should be treated differently than ASOs when it comes to the application of SVP laws and that mental health evaluators are unable to accurately distinguish between those JOSOs who suffer from a sexual sickness and those whose sex crimes were simply an expression of delinquent motivation. Our symposium summarizes the psychosocial and neurological immaturities that differentiate JOSOs from ASOs and finds several specific hypotheses about JOSOs based on the SVP theory to be inconsistent with research results on JOSOs. Overall, we conclude that the problem behaviors of JOSOs are confounded with a developmental condition and that this makes JOSOs ineligible for commitment as SVPs. We also believe that all mental health professionals who conduct SVP evaluations must be thoroughly conversant with current research on adolescent development, the very low rate with which juvenile offenders sexually recidivate, and the ineffectual status of risk factors for identifying JOSOs who are likely to recidivate as adults.

The Application of Sexually Violent Predator Laws to Juvenile Sex Offenders

Many different legal interventions have been instituted over the last 30 years to prevent adult sex offenders (ASOs) from committing new sex offenses and to protect the community from sexual reoffending. These interventions include civil commitment under sexually violent predator (SVP) statutes (Letourneau & Miner, 2005).

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Exposure to the possibility of SVP civil commitment proceedings represents a dire predicament for JOSOs.

The Most Severe Criminal Sanctions Are No Longer Imposed on Juveniles in the United States Because They Are Different From Adult Offenders

The foregoing predicament may not be a permanent one because (1) a great deal of research conducted over the last 20 years indicates that adolescents and adolescent offenders are different from adults and (2) this research has had a significant impact on how juveniles are dealt with by the criminal justice system.

One indicator of the foregoing dynamic is that the U.S. Supreme Court, considering research on adolescent development presented in amicus briefs by the American Psychological Association [American Psychological Association (“APA”) & Missouri Psychological Association (“MPA”), July 2004] and the American Medical Association (“AMA”) and others (American Medical Association, American Psychiatric Association, American Society for Adolescent Psychiatry, American Academy of Child & Adolescent Psychiatry, American Academy of Psychiatry and the Law, National Association of Social Workers, Missouri Chapter of the National Association of Social Workers, & National Mental Health Association, July 2004), decided in the 2005 case of *Roper v. Simmons* that it was unconstitutional to assign the death penalty to juveniles under 18. According to the court (p. 21), “three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders ... (their) susceptibility to immature and irresponsible behavior ... their vulnerability and own lack of control over their immediate environment ... (and) the reality that juveniles still struggle to define their identity means that it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of a irretrievably depraved character.”

A second indicator is that the Supreme Court expanded the scope of its *Roper* decision in May of this year by deciding in *Graham v. Florida* that it is unconstitutional to sentence juvenile offenders to life in prison without the possibility of release for the commission of a nonhomicidal offense. Acknowledging the reliability of the scientific evidence cited five years previously, the Court concluded that “no recent data provide reason to

reconsider the Court's observations in *Roper* about the nature of juveniles" (*Graham v. Florida*, 2010, p. 34). In addition, citing to amicus curiae briefs filed by the APA, the American Psychiatric Association, the National Association of Social Workers, and Mental Health America (2010); and the AMA and The American Academy (The Academy) of Child and Adolescent Psychiatry (July, 2009), the Court pointed out that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds ... for example, parts of the brain involved in behavioral control continue to mature through late adolescence ... juveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character'" (*Graham v. Florida*, 2010, p. 35).

A judicial and scientific consensus has therefore emerged that juvenile offenders differ from adult offenders in terms of their developmental characteristics and vulnerabilities and that mental health professionals are unable to make the most important of forensic distinctions among juvenile offenders with adequate reliability. A second body of research also indicates that specific differences exist between JOSOs and ASOs with respect to their sexual behaviors and personality functioning. This, in turn, means that JOSOs should be treated differently than ASOs when it comes to the application of SVP laws.

The knowledge base on which *Roper* and *Graham* rest is extensive, consistent, expanding, and increasingly sophisticated. Drawing on it, a number of psychologists have advanced arguments that JOSOs differ from ASOs and that policies that have extended interventions and procedures designed for ASOs to JOSOs should be discontinued. This includes SVP commitment.

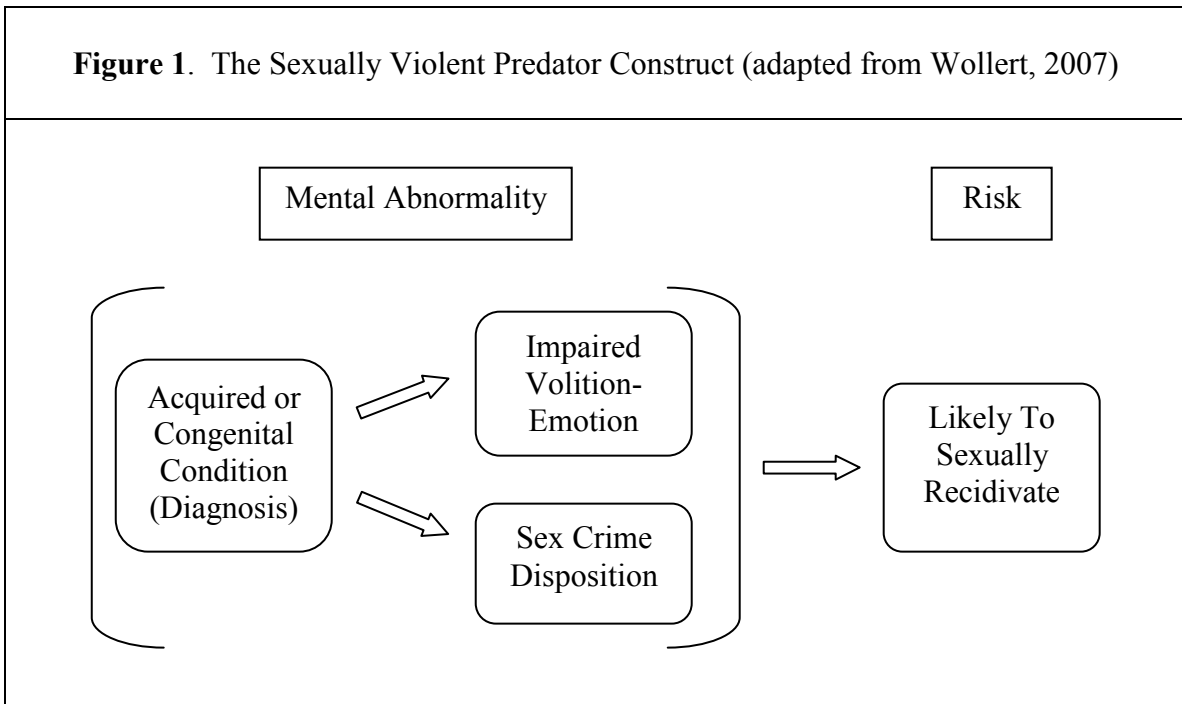
In the first of the remaining sections of this paper the sexually violent predator construct will be described. The second section will argue that JOSOs cannot be found to meet the criteria for being classified as SVPs if their status on the SVP criteria is based to a significant extent on a temporary developmental condition rather than a stable condition and will describe significant developmental differences between juveniles and adults. The reasons that developmental differences make it impossible for forensic examiners to determine the standing of a JOSO on variables that identify sexually violent predators will be discussed in the third section. The fourth section will present and evaluate a number of specific hypotheses about JOSOs derived from the SVP theory. These hypotheses are not only unconfirmed, but are inconsistent with research on JOSOs. The findings and arguments reported in the next three sections will be summarized in the concluding section, and steps that might be taken to prevent the misapplication of SVP proceedings to JOSOs will be considered.

The Sexually Violent Predator Construct

The first sexually violent predator law was passed by the Washington State Legislature and has served as a model for similar legislation in other states (American Psychiatric Association, 1999).

Chapter 71.09 of the Revised Code of Washington sets forth (1) those characteristics that define SVPs; and (2) the standards that must be met to classify a respondent to a civil commitment petition as a SVP. Regarding the first issue, RCW 71.09.020 (16) states that a “ *sexually violent predator means any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence if not confined in a secure setting.*” Elaborating the SVP construct, RCW 71.09.020 (8) states that a “ *‘mental abnormality’ means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others.*” Regarding the second issue, RCW 71.09.020 (3) states that “ *‘likely to engage of acts of predatory sexual violence if not confined in a secure facility’ means that the person more probably than not will engage in such acts if released unconditionally from detention on the sexually violent predator petition.*” The definition of “more likely than not” is often, although not always, assumed to be a probability that exceeds 50% (Mossman, 2008).

Figure 1 illustrates the conjoint elements (represented by boxes) and causal mechanisms (represented by arrows) that form the “SVP Construct” (Wollert, 2007, p. 169).



In *Kansas v. Hendricks* (1997) and in *Kansas v. Crane* (2002) the U.S. Supreme Court has twice upheld the constitutionality of the SVP construct. It has, however, emphasized the critical significance of construing the construct so narrowly that non-SVP sex offenders are not just lumped together with SVPs. In *Kansas v. Crane*, for example, the

Court stated that “*Hendricks* underscored the constitutional importance of distinguishing a dangerous sexual offender subject to civil commitment from ‘other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings.’”

Developmental Differences Between Juvenile Offenders and Adult Offenders

Studies by Arnett (1992), and others indicate that a very large number of juveniles engage in reckless, criminal, and sensation-seeking behaviors. For example, they (1) are more likely to drink and drive than adults; (2) have the highest rate of using every kind of illegal drug; (3) have the highest rates of committing violent and non-violent crimes; and (4) have a high rate of committing sexually violent crimes (Abbey, 2005). These indicia point to the conclusion that juveniles who engage in reckless, dangerous, or delinquent behaviors are following a “normative” (Arnett, 1992, p. 344) path.

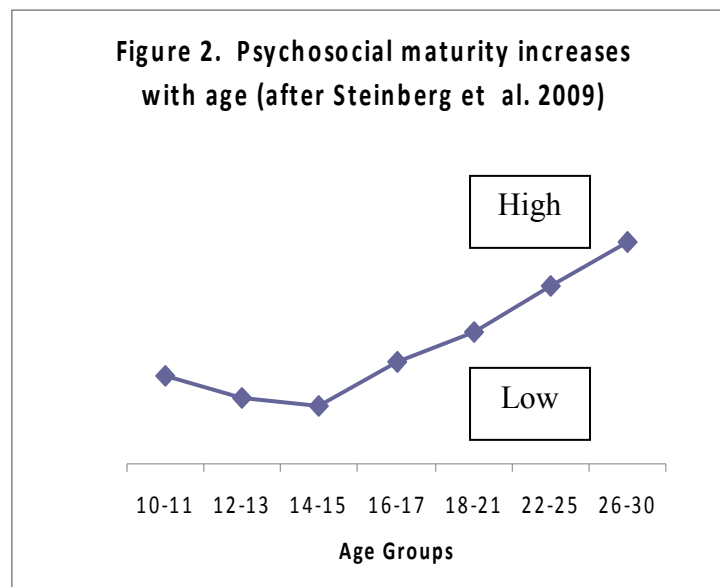
A pattern that is normative for a population is more indicative of a developmental condition than an acquired or congenital condition. A developmental perspective has very serious professional and legal implications because JOSOs cannot be found to meet the criteria for being classified as SVPs if their sexual misconduct is based largely on a temporary developmental condition rather than a highly stable condition. By the same token they cannot meet the SVP criteria if they engage in sexual misconduct before they are developmentally mature, because they have yet to reach a “baseline” capacity which enables the documentation of the impairment to this capacity that SVP laws demand.

Differences in the behaviors of adolescents and adults also point to the conclusion that any allegedly “acquired or congenital condition” that evaluators may assign to adolescents will be confounded with a developmental component. Regarding this proposition, a large body of research that has been compiled over the last 15 years has indicated that the high incidence of problem behaviors by adolescents co-occurs with deficits in their capacity to exercise mature *psychosocial judgment* (APA & MPA, July 2004; APA et al., July 2009; AMA et al., July 2004; AMA & The Academy, July 2009; Casey, Getz, & Galvan, 2007; Steinberg, 2003; Steinberg, 2008; Steinberg, 2009; Steinberg, Cauffman, Woolard, Graham, & Banich, 2009; Steinberg & Scott, 2003).

The following points highlight the major assertions of the psychosocial theory of adolescent immaturity:

- *Limited Sense of Responsibility.* Adolescents have less control of their lives than adults and are less responsible for the events that happen to them (AMA et al., July 2004, p. 7; APA & MPA, July 2004, p. 7; *Roper v. Simmons*, 2005, pp. 21-22). This perception is consistent with the external circumstances facing juveniles, where “they have less control, or less experience with control, over their own environment” (*Roper v. Simmons*, 2005, p. 22; also see APA et al., 2009, p. 16) and “as legal minors they lack the freedom that adults have to extricate themselves from a criminogenic setting” (Steinberg & Scott, 2003, p. 1014).

- *Enhanced Sensitivity to Immediate Rewards.* Adolescents perceive risks in the same light as adults but overvalue the short-term benefits of immediate rewards (AMA et al., July 2004, p. 6; AMA & The Academy, July 2009, pp. 7-8; APA & MPA, July 2004, pp. 6-7; APA et al., July 2009, pp. 10 & 11; Steinberg, 2008, pp. 57 & 58; Steinberg et al., 2009, pp. 589-591). They may therefore place more weight on the rewards of risky or thrill-seeking behavior, “leading to lower risk ratios ... and a higher likelihood of engaging in the ... behavior” (Steinberg, 2008, p. 57).
- *Limited Ability to Control Impulsive Behavior.* Many reviews and empirical studies have concluded that adolescents are more impetuous than adults and less able to suppress thoughts and behaviors that interfere with the achievement of important goals (AMA & The Academy, July 2009, p. 9; AMA et al., July 2004, p. 7; APA & MPA, July 2004, p. 7; APA et al., July 2009, pp. 9-10; *Roper v. Simmons*, 2005, p. 21) These results “are consistent with casual observations of teenagers in the real world, which ... suggest that they are less likely than adults to think ahead before acting” (Steinberg, 2008, p. 58).
- *Susceptibility to the Influence of Peers.* Adolescents are more likely than adults to act in ways that are consistent with the values of their peers (AMA & The Academy, July 2009, pp. 10-11; APA & MPA, July 2004, p. 7; APA et al., July 2009, p. 16; Steinberg et al., 2009, pp. 589-591). Adolescents also “gravitate toward peers who reinforce their own predilections” (AMA et al., July 2004, p. 9; also see Arnett, 1992, pp. 354-355). These factors make “juveniles ... more vulnerable ... to negative influences and outside pressures, including peer pressure” (*Roper v. Simmons*, 2005, p. 22) and “make an already risk-prone or impulsive adolescent even more so” (AMA et al., July 2004, p. 9).



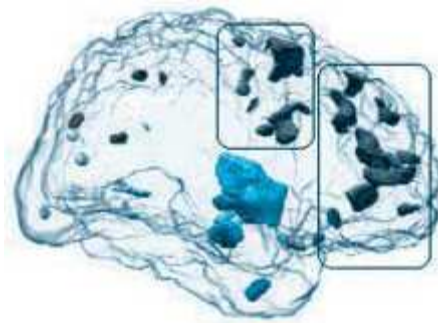
In the MacArthur Juvenile Capacity Study personality tests that measured risk perceptions, sensation seeking, impulsivity, resistance to peer influence, and future orientation were administered to 935 subjects from 10 to 30 years old at five data collection sites across the United States (Steinberg et al., 2009). The results were combined into a single measure of psychosocial immaturity. The investigators found that psychometrically-measured maturity increased with age. Figure 2 presents the pattern of the results they obtained.

Research in the field of developmental neuroscience over the last 15 years has indicated that the psychosocial immaturity of adolescents has a biological component (AMA et al., July 2004; AMA & The Academy, July 2009; Beckman, 2004; Giedd, Blumenthal, Jeffries, Castellanos, Liu, Zijdenbos, Paus, Evans, & Rappoport, 1999; Galvan, Hare, Parra, Penn, Voss, Glover, & Casey, 2006; Gogtay, Giedd, Lusk, Hayashi, Greenstein, Vaituzis, et al., 1994; Gur, January 2005, 2005; Luna, Thulborn, Munoz, Merriam, Garver, Minshaw, et al., 2001; Paus, Zijdenbos, Worsley, Collins, Blumenthal, Giedd, Rapoport, & Evans, 1999; Sowell, Thompson, Holmes, Jernigan, & Toga, 1999; Spink, (January 31, 2002); Steinberg, 2009). Although juveniles appear to be fully mature, “older adolescents do not have adult levels of judgment, impulse control, or ability to assess risks” and “the very regions of their brains involved in governing these behavior-control capacities are anatomically immature” (AMA et al., July 2004, p. 4). The following points highlight these neurological differences, which have been identified through the use of “high-resolution structural and functional magnetic resonance imaging (‘MRI’) and other technologies”¹ (AMA et al., July 2004, p. 10):

Pruning. The outer surfaces of the brain, or *cortices*, consist of neurons and glia known as “gray matter,” because the color of these tissues contrasts markedly with the “white matter” that surrounds neuronal axons. A study by Giedd and his colleagues at the U. S. National Institute of Mental Health (1999, p. 861) found that “gray matter in the frontal lobe increased during preadolescence with a maximum size occurring at 12.1 years for males and 11.0 years for females, followed by a decline during post-adolescence that resulted in a net decrease in volume.” This increase and decrease in gray matter, and thus the neuronal synapses associated with gray matter, is called “pruning” (AMA & The Academy, July 2009, pp. 19-21; Beckman, 2004, p. 596) because “as the pruning of a rose bush strengthens the remaining branches, the pruning of excess neurons and connections which make up the gray matter leads to greater efficiency of neural processing and strengthens the brain’s ability to reason and consistently exercise good judgment” (AMA & The Academy, July 2009, pp. 19-20). Other research has also shown that the “somatosensory and visual cortices” (Gogtay et al., 2004, p. 8174) towards the rear of the brain mature earliest as a result of losing gray matter and that the “higher-order association cortices” of the prefrontal region which integrate the functioning of these other regions continue to mature into young adulthood (Gogtay et al., 2004, Figure 3; also see American Bar Association, January 2004, p. 1). These late maturing regions “govern impulsivity, judgment, planning for the future, and foresight of consequences” (Gur, January 2005, p. 4; also see AMA & The Academy, July 2009, pp.

16-17). Because of this it has been argued that young persons should not be considered to be biologically mature until they are 21 or 22 years old (Beckman, 2004, p. 596). Figure 3 (American Bar Association, January 2004, p. 1) depicts gray matter portions of the brain that are eliminated as a result of pruning between adolescence and adulthood.

Figure 3. A side view of the brain showing gray matter (in the boxes) that is pruned away from the frontal lobe between adolescence to adulthood. The prefrontal lobe, which controls judgment, is enclosed by the larger box. (Adapted from Sowell et al., 1999).



Myelination. The white matter that surrounds the neuronal axons is referred to as myelin, and the process by which this coating is produced is called “myelination.” Data obtained from both MRI and autopsy studies (Gogtay et al., 2004, p. 8177; Paus et al., 1999, p. 1908; Sowell et al., 1999, p. 859) point to the conclusions that “myelination is ongoing well into late adolescence and early adulthood” (Steinberg, 2009, p. 743) and that the prefrontal cortex is among the last regions of the brain to mature in terms of this process (AMA & The Academy, July 2009, p. 21). One important result of myelination is that it enhances the speed and reliability with which the prefrontal cortex can carry out such important executive functions as “response inhibition, planning ahead, weighing risks and rewards, and the simultaneous consideration of multiple sources of information” (Steinberg, 2009, p. 743).

Differential Development of Neurological Networks. The brain consists of different regions that serve different functions. Structures from different regions communicate with one another to form more complex neurological networks (AMA & The Academy, July 2009, p. 25; Steinberg, 2008, p. 54). One important network is the “socioemotional network,” which includes such portions of the limbic and paralimbic regions. Another is the “cognitive control network,” which is localized in the lateral prefrontal cortex, the parietal cortex, and connections from these sites to the anterior cingulate cortex. Improvements occur in executive functioning as adolescence proceeds, because pruning and myelination gradually lead to more effective inter-cortical connections and to more effective cortical-subcortical connections. Improved emotional regulation also results

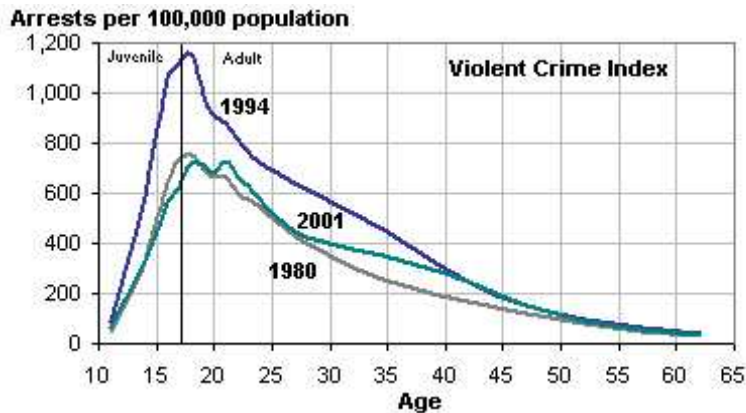
from a gradual increase in the connections between the socioemotional and cognitive control networks. Animal models (Ernst & Spear, 2009, pp. 329-330) strongly suggest that fluctuations in dopaminergic activity leads to an increase in reward-seeking and sensation seeking behavior. Overall, a “heightened vulnerability to risk taking (occurs) during middle adolescence” (Steinberg, 2008, p. 54) because the onset of these changes takes place rapidly while the cognitive control network is still immature and developing at a gradual pace. Adults are not subject to this particular vulnerability because of the maturity of their cognitive control networks.

Differences in Brain Function. The foregoing differences are structural in nature. In light of these differences one would expect to observe differences between adolescents and adults in the patterns of neurological arousal that they show under controlled conditions. A number of such differences have been identified. On tasks that require cognitive control, such as inhibiting a dominant response, adolescents were found to be less successful than adults in activating the regions that serve a control function (Luna et al., 2001, p. 786). On another set of tasks (Galvan et al., 2006, pp. 6689-6690) that compared the reactions of adolescents and adults to large rewards it was found that adolescents showed a stronger response than adults in the nucleus accumbens area, one of the regions in the socioemotional network that processes rewards. On still another set of tasks adolescents were asked to identify the emotions of people in a set of pictures (Spink, January 31, 2002, p. 1). They showed relatively greater arousal than adults in the amygdala, which “is generally associated with processing emotional responses to a perceived danger” (AMA & The Academy, July 2009, p. 28).

A developmental condition is also reflected in trajectories that have a time course that span the developmental period of interest. A number of such trajectories documenting adolescent development have either been described or illustrated. Gogtay and his research team (2004, Figure 3) generated time-lapse maps that depicted how the volume of brain gray matter decreased for subjects who were between 5 and 21 years old (also see Beckman, 2004, p. 597). Barbaree and Blanchard (2008, Figure 6) presented a chart of physiological data in the form of plethysmographic averages indicating that sexual arousal, as Kinsey reported (Kinsey, Pomeroy, & Martin, 1948; Ramsey, 1943), peaks during early adolescence and shows a steep curvilinear decline in the ensuing years. And, per Figure 2, Steinberg and his associates (2009, Figure 1) graphed a plot highlighting the gradual increases in psychosocial maturity that were reported on psychometric instruments by different age groups of adolescents and young adults.

Figure 4, compiled by the U.S. Department of Justice (Office of Juvenile Justice Delinquency Prevention, August 1, 2004), provides a final vivid piece of evidence that supports the theory that problem behaviors on the part of adolescents are confounded with a developmental condition: It shows that the rate of violent crimes increases until it peaks for those who are 17 to 18 years old and then declines very steeply as delinquent adolescents desist from violent behavior during adulthood.

Figure 4. Age-related arrest rates in the United States (U.S. Office of Juvenile Justice Delinquency Prevention, August 2004)



The Developmental Perspective and Probability Theory Suggest that Evaluators Are Unable to Accurately Assess the Status of JOSOs on the SVP Criteria

Overall, the picture that emerges of the typical male adolescent versus the typical adult male is that the adolescent is more likely to seek out situations where hedonistic gratification is attainable and is less likely to exercise mature and reflective judgment when he encounters these types of situations. Furthermore, he is susceptible to such developmental risk factors until his early 20s, when they are moderated by the passage of time, increasing routine, positive social experiences, and neural maturation (Casey et al., 2008; Steinberg, 2003; Steinberg, 2009).

A developmental perspective such as this one holds serious implications for the practice of assessing the status of juveniles on the SVP construct. These implications stem from the fact that, per Bayes's Theorem (Wollert & Waggoner, 2009), the probability of correctly identifying a nondevelopmental condition or predicting a future behavior for a specific evaluatee depends on two factors. One is the prevalence of the variable of interest in the population from which the evaluatee has been drawn. The other is the reliability of the best technique for identifying the variable. The population prevalence of any variable that is confounded with a developmental condition is subject to change, however, as the developmental condition changes. The reliability of any technique that is used to measure the variable will also change over time. These difficulties make it virtually impossible for an evaluator to accurately apprehend a juvenile's standing on the SVP construct by relying primarily on behaviors which are grounded in a developmental condition that is always receding into the past. By the same token it is unreasonable for an evaluator to construe an isolated behavior on the part of an adult as a sign that he will repeat a pattern of offending from his youth, because it is likely that the behavior is better accounted by variables that are more recent. Surely, given the lack of anchor points, this

type of analysis requires a tentative attitude and a thorough inventory of the dimensions along which the evaluatee has changed.

Eminent developmental psychologists have also asserted that “making predictions about the development of relatively more permanent and enduring traits on the basis of patterns of risky behavior observed in adolescence is an uncertain business” (Steinberg & Scott, 2003, p. 1014). The American Psychological Association has consistently agreed with the substance of this position, and the Supreme Court has endorsed it as well. In one instance the APA asserted that “the changes in behavior, attitudes, perspective, risk-taking and personality that are the hallmarks of adolescence preclude reliably predicting a juvenile defendant’s character in adulthood or the likelihood that he or she will continue to be dangerous in adulthood . . . in simpler terms, assessing an adolescent is like attempting to hit a moving target because of the developmental transitions characteristic of adolescence” (APA & MPA, July 2004, p. 16). In another instance the APA pointed out that “juveniles’ unformed selves mean that their future character and conduct cannot be reliably or accurately predicted . . . researchers have consistently concluded that behavior can be identical in adolescents who will continue as criminal offenders through adulthood and those who will not” (APA et al., July 2009, p. 21). Echoing these themes, the Supreme Court stated that “it is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption” (*Roper v. Simmons*, 2005, p. 24; *Graham v. Florida*, 2009, p. 34). It also concluded that the differences between juveniles and adults mean that “juveniles cannot with reliability be classified among the worst offenders” (*Roper v. Simmons*, 2005, p. 21; *Graham v. Florida*, 2009, p. 34) and that “these differences render suspect any conclusion that a juvenile falls among the worst offenders” (*Roper v. Simmons*, 2005, p. 21).

Evaluators Are Also Unable to Assess JOSOs in SVP Cases Because Hypotheses About JOSOs Based on the SVP Theory Have Not Been Confirmed

On the basis of the evidence in the previous sections we believe that the developmental perspective provides a compelling framework for understanding adolescent sexual misconduct by attributing it primarily to delinquent judgment and immaturity rather than the type of sexual sickness proposed by SVP laws. This perspective has not only been consensually validated in *Roper v. Simmons* in 2005 but consensually cross-validated just this year in *Graham v. Florida*. We do not believe there is a rational basis for doing so, but some may still argue that the SVP theory offers an equally plausible framework for conceptualizing the causes of juvenile sex offending. If so, it should be possible to confirm several hypotheses based on the SVP theory. These hypotheses are as follows: (1) the sexual recidivism rate for juvenile sex offenders is relatively high; (2) violence, including sexual violence, does not decrease from adolescence to early adulthood; (3) the sexual recidivism rate for juvenile sex offenders is much greater than the sexual offense rate for juvenile offenders convicted of nonsexual offenses; (4) the sexual recidivism rate for juvenile sex offenders who have committed only sex offenses is greater than the sexual recidivism rate for juvenile sex offenders who have committed sex offenses and

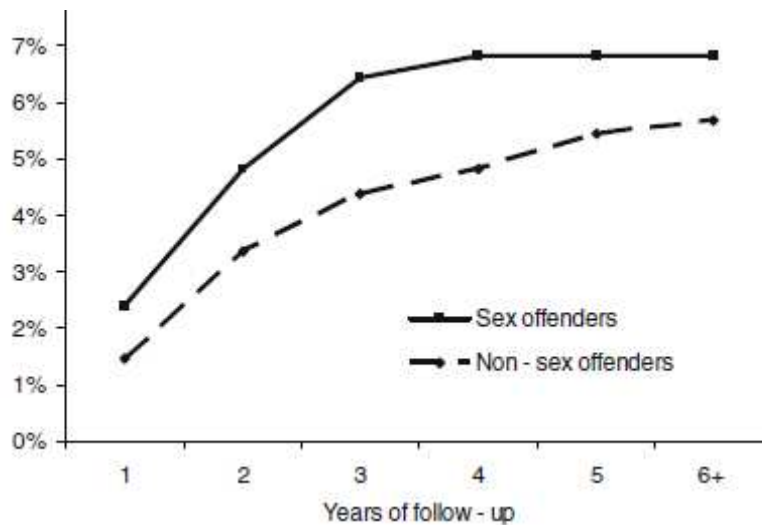
other offenses; (5) risk factors that predict sexual recidivism on the part of adult offenders also predict sexual recidivism on the part of juvenile sex offenders; (6) some type of procedure has been developed which identifies a group of juvenile sex offenders who are likely to recidivate; (7) most of those who were assigned a personality disorder on the basis of observations made when they were juveniles have been assigned the same personality disorder solely on the basis of the signs and symptoms they show as adults; and (8) most of those who were assigned a paraphilic diagnosis on the basis of observations made when they were juveniles have been assigned the same diagnosis solely on the basis of the signs and symptoms they show as adults.

Considering each of the foregoing hypotheses in a question and answer format, the following items point to the conclusion that they are consistently countered by empirical research findings.

1. Is the sexual recidivism rate for juvenile sex offenders relatively high? No.

Caldwell (2009) calculated that the five-year sexual recidivism rate for 11,219 juvenile sex offenders from 63 different data sets was 7%.

Figure 5. Cumulative recidivism rates for 249 juvenile sex offenders versus 1,780 delinquents who did not commit sex offenses. There is no difference between the recidivism rates.



2. Is the sexual recidivism rate for juvenile sex offenders greater than the sexual offense rate for juvenile offenders convicted of nonsexual offenses? No.

Caldwell (2007) compared the recidivism rates of 249 juvenile sex offenders who were released from secured facilities with the rates of 1,780 juveniles released from

secured facilities where they were placed for the commission of nonsexual crimes. Seven percent of the juvenile sex offenders were charged with a new sex offense during a five-year follow-up period while this was the case for 6% of the non-sexual offenders. This difference is neither statistically nor clinically significant. Figure 1 of Caldwell's article, presented above as Figure 5, plots the cumulative recidivism percentages for both groups for each year of the follow-up period.

3. Is the sexual recidivism rate for juvenile sex offenders who have committed only sex offenses greater than the sexual recidivism rate for juvenile sex offenders who have committed sex offenses and other offenses? No.

Doshay (1943) collected data on all 256 male juvenile sex offenders of average intelligence who "appeared in the juvenile court clinics of New York City during a period of six years" (p. 3). He divided this sample into two cohorts in order "to judge the juvenile sex offenses in specific relationship to later life sexual offenses" (p. 3). One "primary group" cohort included boys "having no known involvement in any offensive behavior other than sexual" (p. 3). Another "mixed group" cohort represented "boys of the general-delinquent type" because they were "definitely known to have engaged in a mixed set of offenses" (p. 3). None of the boys in the primary group sexually recidivated during a six-year follow-up period whereas this was the case for about 3% of those in the mixed group. This finding is consistent with the results of Caldwell's (2007) more recent research that was described under item 3.

Zimring and his colleagues (Zimring, Piquero, & Jenkins, 2007, p. 525) analyzed sex offenses in three complete birth cohorts that were followed up on for several years. None of his subjects who were contacted by the police regarding a sex crime as juveniles were contacted only for sex crimes as adults. This result complements Doshay's findings in calling into question the assumption that those who commit sexual offenses as juveniles are "specialists" who have a predisposition to commit sex offenses as adults.

4. Do risk factors that predict sexual recidivism on the part of adult offenders predict sexual recidivism on the part of juvenile sex offenders? No.

A great many researchers have studied the strength with which various factors are associated with subsequent sexual recidivism among juvenile offenders (Caldwell, Ziemke, & Vitacco, 2008; Gretton, McBride, Hare, O'Shaughnessy, & Kumka, 2001; Kahn & Chambers, 1991; Martinez, Flores, & Rosenfeld, 2007; Smith & Monastersky, 1986; Viljoen, Scalora, Cuadra, Bader, Chavez, Ullman, & Lawrence, 2008; Viljoen, Elkovitch, Scalora, & Ullman, 2009; Zimring, 2007). Hanson (Hanson & Bussiere, 1998; Hanson & Morton-Bourgon, 2005; Hanson & Morton-Bourgon, 2004), compiling very large data sets, has published two articles summarizing data on this issue for adult sex offenders. Figure 6 summarizes research on factors that are significantly related to sexual recidivism in adult cohorts and that have also been

studied in juvenile cohorts. Only one of the factors in the chart, known as “psychopathy” (Gretton et al., 2001), might be associated with adult sex offending by juvenile sex offenders. The relationship is very weak, however, in that the likelihood ratio for predicting sexual recidivism for juveniles with very high psychopathy scores was only 2.18 in Gretton’s research, while the correlation between psychopathy and adult recidivism was nonsignificant in both Gretton’s research and in a 2009 study by Viljoen and her colleagues.

Figure 6. Factors that account for a portion of the variance in sexual recidivism among adults are uncorrelated with sexual recidivism among juveniles (“%” stands for the percent of variation in recidivism rates that is accounted for by the risk factor in the left most column).

Risk Factor	Source of Adult Data	Source of Juvenile Data	Adult %	Juvenile %
Stable factors (e.g., actuarials)	Hanson, 04	Caldwell, 08 Martinez, 07 Viljoen, 09	.09	ns
Impulsive-reckless	Hanson, 04	Caldwell, 08 Viljoen, 08	.05	ns
Antisocial Personality	Hanson, 97	Caldwell, 08 Viljoen, 08	.02	ns
Plethysmograph	Hanson, 04	Gretton, 01	.02 - .10	ns
Prior sex crimes	Hanson, 97	Caldwell, 08 Kahn/Chambers, 91 Zimring, 07	.04	ns
Stranger victim	Hanson, 97	Caldwell, 08	.02	ns
Male victim	Hanson, 97	Caldwell, 08 Smith/Monastersky, 86	.01	ns
PCL-R	Hanson, 04	Gretton, 01 Viljoen, 09	.02	?

Zimring’s (2007) research also bears on this question. He conducted a logistic regression analysis of the data for his birth cohorts to evaluate various factors that might predict adult sex offending. He concluded that “juvenile sex offending does nothing to predict ... adult sex offending, above and beyond the frequency of offending” (pp. 526-527). This finding provides further support for the position, articulated earlier, that evaluators are unable to make the distinction the Supreme Court requires, - that is, to accurately separate those JOSOs who suffer from a sexual sickness from those whose sex crimes were simply an expression of delinquent motivation (see the last paragraph of the “SVP Construct”).

5. Has any procedure or test been developed that identifies a group of juvenile sex offenders who are likely to recidivate? No.

There are two approaches to recidivism estimation. One is called clinical judgment and the other is called actuarial prediction. Regarding clinical judgment, data from one published study (Smith & Monastersky, 1986, p. 58) indicated that Washington experts who used clinical judgment based on evaluation interviews to predict sexual recidivism among juvenile sex offenders were wrong 72% of the time (as cited in Wollert, 2006, p. 58). Data from another published study (Kahn & Chambers, 1991, p. 343) indicated that Washington experts who used clinical judgment based on treatment experience to predict sexual recidivism among juvenile offenders were wrong 86% of the time (also cited in Wollert, 2006).

Zimring's (2007) analysis provides a reasonable explanation as to why the error rate for clinical judgment is very high. He found that juveniles who were officially contacted concerning a sex offense accounted for only about 4% of the contacts made by police concerning adult sex offenses. Regarding the size of the error rate that would be expected if one assumed that a predisposition to sex offending was established prior to the age of 18, he stated that "investigating an adult sex offense committed by a male in the Racine data by interviewing the juvenile sex offenders would be wrong 96% of the time" (p. 527).

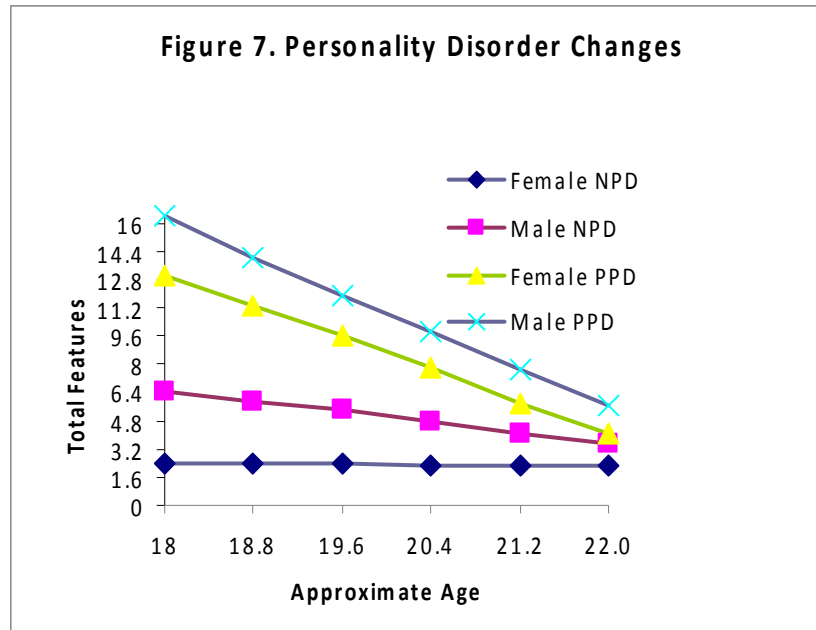
Regarding actuarial prediction, a National Task Force on Juvenile Sex Offending concluded in 1993 that "there are no scientifically validated instruments or criteria to assess risk of re-offense" among juvenile sex offenders (National Adolescent Perpetrator Network, 1993). Since that time many instruments (referred to by such terms as "the JSOAP," "the Eraser," "the JSORRAT-II (C)," "the PCL:YV," "the New Jersey Registrant Risk Assessment Scale and Juvenile Risk Assessment Scale," "the Youth Level of Services/Case Management Inventory (V)," "the Static-99," "the Texas JSO Risk Assessment Instrument," and the "Wisconsin DOC Guidelines for Youthful Sex Offenders") have been recommended for accomplishing this objective. The predictive accuracy of these instruments has been examined by Caldwell and his colleagues (Caldwell et al., 2008) and Viljoen and her colleagues (Viljoen et al., 2008; Viljoen et al., 2009). According to Caldwell, who mounted a 6-year follow-up study that concluded after most of the juveniles on whom he collected data were adults, none of the instruments he studied "except for the PCL:YV, significantly predicted new ... sexual offense charges (p. 89). Viljoen (2008), who monitored adolescents for a 7-year period as they became adults, found in both of her studies that "none of the tools we examined were able to significantly predict which youth sexually reoffended following their discharge" (p. 19).

6. Are most juveniles who are assigned a personality disorder on the basis of observations made when they were juveniles assigned the same personality disorder solely on the basis of the signs and symptoms they show as adults? No.

Although personality disorders are assumed to be stable over time for adults, this has not been assumed to be the case for juveniles. The U.S. Supreme Court, for example, considered this factor in rendering its decision in *Roper v. Simmons* (2005, p. 16), pointing out that “the character of a juvenile is not as well formed as that of an adult” and that “the personality traits of juveniles are more transitory” and “less fixed.” The position of the DSM-IV-TR developers regarding sex offenders is consistent with the more general position of the Supreme Court in that the DSM criteria prohibit the assignment of an Antisocial Personality Disorder diagnosis to individuals who are less than 18 years old.

The assumption that personality disorders cannot be assigned to young persons with an adequate degree of reliability has been confirmed by data that were collected as part of the Longitudinal Study of Personality Disorders (LSPD) project, a prospective analysis of pathological and nonpathological personality development funded by the U.S. National Institute of Mental Health. In one study that was published by the project investigators (Lenzenweger, Johnson, & Willett, 2004), “258 subjects in the LSPD were drawn from a population consisting of 2,000 first-year undergraduate students ... subjects were assigned to a Possible Personality Disorder (PPD) group or a No Personality Disorder (NPD) group according to the International Personality Disorder Examination DSM-III-R Screen (IPDE-S) ... the PPD subjects met the diagnostic threshold for at least 1 specific DSM-III-R PD, whereas NPD subjects (1) did not meet the DSM-III-R defined threshold for diagnosis and (2) had fewer than 10 PD features across all disorders” (p. 1016). About half of the students were assigned to the PPD group and all students were interviewed when they were freshman, sophomores, and seniors. Regarding the scientific controls these interviews incorporate, the investigators reported that “interview assessments were conducted by experienced Ph.D. or advanced MSW clinicians ... the interrater reliability for IPDE assessments was excellent at all three waves, ranging from .84 to .92 for all PD dimensions ... the interviewers were blind to ... all ... LSPD assessment data, and subjects never underwent assessment by the same interviewer more than once” (p. 1017).

In the most general summary of their data analysis, Lenzenweger and his colleagues concluded that “clear evidence of statistically significant individual change was observed for nearly all PD dimensions studied, and this change was typically and uniformly in the direction of decreasing features over time” (2004, p. 1021). They also included a figure in their report, adapted below as Figure 7, which depicted the average decrease in PPD features that occurred over their four-year study period (p. 1024). This chart shows that Personality Disorder Features are so unstable among those who are transitioning into early adulthood that they abate within a few years of their identification. If this level of instability characterizes Personality Disorder Features for those who are 18 to 22 year-olds, their level of instability must be even greater for the longer period that connects young adolescence to early adulthood.



Note. The foregoing chart has been adapted from Lenzenweger et al. (2004). The students who served as subjects were interviewed as freshman, sophomores, and seniors.

7. Are most juvenile offenders who are assigned a paraphilic diagnosis on the basis of observations made when they were juveniles assigned the same diagnosis solely on the basis of the signs and symptoms they show as adults? No.

The members of our research team have not been able to locate any studies that address this question although we have made concerted effort to do so. On the basis of our efforts we do not believe that a test-retest study has ever been conducted of the reliability into adulthood of paraphilic diagnoses assigned in adolescence.

Three streams of research, however, address this question indirectly. One includes those studies that have investigated the extent to which sex offending “carries over” into adulthood from adolescence (Caldwell, 2009; Zimring et al., 2007; Doshay, 1943). This stream of research shows any carry over is minimal.

Another stream of research includes reports of changes in sexual behavior that have been observed to occur over time in normative and sex offending populations. If sexual preferences were firmly established in childhood and adolescence, their stability should be documented in such records.

Regarding normative variations in sexual behavior during childhood, Friedrich and his colleagues (Friedrich, Fisher, Broughton, Houston, & Shafran, 1998) found that children displayed fewer problem sexual behaviors as they aged. Gagnon and

Simon (1971, p. 17) cited data indicating that 30% of the college-bound males interviewed by Kinsey and his colleagues (Kinsey, Pomeroy, & Martin, 1948) had sexual contact to ejaculation with another male when they were adolescents but that only 5% of this group pursued homophilic contacts as adults. Kinsey (Kinsey et al., 1948) also reported that “about 6 percent of the total male population is involved in animal contacts during early adolescence (Table 59) ...this is the highest incidence at any age ... the figure drops to one percent in the single population over 20 years of age” (p. 262).

Considering sexual variations among juvenile sex offenders, which is studied even less extensively than sexual variations in normative groups, Doshay (1943) reported that 7 of the boys he studied engaged in sadistic behaviors, 25 exposed themselves, and 9 were involved in “peeping.” Follow-up indicated that one of his patients recidivated by exposing himself and another recidivated by peeping. No recurrences of sadistic behaviors were recorded, leading Doshay to conclude that “sadism in a boy does not connote severity nor regularity of practice as when the term is applied to an adult” (p. 78). Behaviors referenced under the specific paraphilias included in the DSM are therefore unlikely to recur in JOSOs as they mature.

Taken together, the studies that describe the changes in sexual behavior that occur in normative and juvenile sex offender groups suggest that children and adolescents are generally willing and able to accommodate their sexual behavior to societal expectations when these expectations are reasonable. They do not suggest that the variations in sexual behaviors that are observed during a person’s childhood or adolescence indicate that he will meet the diagnostic criteria for a paraphilia when he becomes an adult.

The last stream of research that bears on this question includes studies that have investigated whether it is possible to enhance the power of a measure of criminality to predict sexual recidivism through the addition of some type of measure of sexual deviance. Zimring and his colleagues (2007) adopted this approach by conducting a logistic regression analysis which showed that a behavioral index that was thought to measure sexual deviance (i.e., number of police contacts for sex offences) did “nothing to predict ... adult sex offending ... beyond the frequency of offending” (p. 526).

Gretton and her colleagues (2001) also reported an investigation based on this approach that used a different set of measures. They administered a measure of criminality known as the PCL:YV to 220 juvenile offenders and calculated indicia of “deviant sexual arousal” from penile plethysmographic (PPG) testing that was administered to members of this group. Following up on their sample for 55 months after treatment, they found that the PCL:YV was weakly related to sexual recidivism. They also found, however, that “PCL:YV scores were not significantly correlated with PPG evidence of deviant sexual arousal ($r = .09$), nor was the latter significantly associated with any outcome measure” (p. 440). The criminality

predictor therefore measured a different construct than the deviance predictor, but the deviance predictor did not enhance the power of the criminality predictor for identifying sexual recidivists.

Conclusions and Recommendations

The foregoing review points to three major conclusions. One is that a large body of research indicates that JOSOs are less mature than ASOs. This fact has been consensually acknowledged as applying to serious offenders, including sex offenders, by researchers, the nationally-organized associations that represent the interests of the major mental health professions in the United States, and the U.S. Supreme Court. The evidence also shows that personality characteristics and sexual behaviors are likely to change in a prosocial direction among JOSOs and that neither personality nor paraphilic disorders can be assigned to JOSOs with any reasonable degree of reliability. Finally, the data indicate that juvenile sex offending does not predispose a youth to adult sex offending and that it is beyond the reach of science to identify which JOSOs are likely to sexually recidivate as adults.

Overall, these findings indicate that the SVP construct and SVP statutes are inapplicable to late adolescent and juvenile only sex offenders. So, in the same way that juveniles are ineligible for the death penalty because their characters are not as “bad” as adults in this category, they are ineligible for SVP commitment because they do not suffer from the “sexual sicknesses” that afflict true SVPs or possess the other elements of the SVP construct.

Our results also raise at least two responsibilities that we as psychologists should shoulder in the future. Individually, practitioners who evaluate juvenile sex offenders and who conduct SVP evaluations in JOSO cases must be thoroughly conversant with current research on adolescent development, the very low rate with which juvenile offenders sexually recidivate, and the ineffectual status of risk factors for identifying JOSOs who are likely to sexually recidivate as adults. Collectively, when the judiciary eventually considers the applicability of SVP statutes to JOSOs, we as psychologists need to encourage the American Psychological Association to take a stand, such as the one it took in *Roper v. Simmons* and *Graham v. Florida*, that is clear, principled, and objective.

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