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The Miller Trilogy and the Persistence of Extreme Juvenile Sentences

Cara H. Drinan

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INTRODUCTION

In a series of Eighth Amendment cases referred to as the *Miller* trilogy,[1] the Supreme Court significantly limited the extent to which minors may be exposed to extreme sentences.[2] Specifically, in this line of cases the Court abolished capital punishment for minors and narrowed the instances when minors may be sentenced to life without parole. Only minors convicted of homicide who are found to be "incorrigible" may now be subject to a death-in-custody sentence. In limiting extreme sentences for youth in these ways, the Supreme Court relied upon the social and medical science that demonstrates youth are simultaneously less culpable for their acts and more amenable to rehabilitation than adults.

While the *Miller* trilogy has set in motion many significant juvenile justice reforms, youth in America are still exposed to extreme sentences—sentences that are disproportionate given the nature of the juvenile brain.[3] Two mechanisms

* Professor of Law, The Catholic University of America.

1. This term refers to *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), and *Miller v. Alabama*, 567 U.S. 460 (2012).

2. *See infra* Part I.

3. In the wake of the *Miller* trilogy, it is also true that far too many minors continue to be exposed to life or virtual life sentences. *See generally* Cara H. Drinan, *The Future of Juvenile Life-Without-Parole Sentences*, *in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT (Meghan J. Ryan & William W.

operate to maintain this status quo.[4] First, automatic transfer provisions allow children to be charged, tried, and convicted in criminal court as if they were adults. This legal fiction flies in the face of the science on which the *Miller* trilogy was predicated. Second, once in adult court, youth are subject to mandatory sentencing schemes that were drafted with adults in mind. Again, this automatic sentencing without regard for the mitigating qualities of youth ignores the logic of the *Miller* trilogy. Indeed, some courts have recognized the disconnect between the Supreme Court's declaration that "kids are different"[5] for sentencing purposes and the ongoing use of automatic transfer provisions and mandatory sentencing schemes for youth.[6] For the most part, though, courts view correction of these laws as purely a legislative prerogative. In this Article, I argue that, in fact, there is a clear path for courts to find both automatic transfer laws and mandatory minimums as applied to youth unlawful after *Miller*.

This Article proceeds in three parts. Part I provides a brief overview of the *Miller* trilogy and the reforms that this line of cases has set in motion over the last ten years. Part II then discusses how the combination of automatic transfer provisions and mandatory sentencing schemes operates to expose youth to extreme sentences notwithstanding the Court's recent case law holding that children are not "miniature adults."[7] In Part III, I make the case that each of these mechanisms—transfer laws and mandatory minimums as applied to youth—are unconstitutional after *Miller*. Finally, by way of conclusion, I address two recurring criticisms of this thesis.

I. THE *MILLER* TRILOGY AND ENSUING REFORMS

In the past, I have written extensively about the *Miller* trilogy cases, their methodology, and their import.[8] Here, I address them briefly only for purposes of context. In 2005, the Supreme Court began to limit the states' ability to impose on

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Berry III eds., 2020) (exploring how the *Miller* trilogy has impacted juvenile life without parole sentencing but not completely eliminated life and virtual life sentences for juveniles). In this Article, I am not focused on juvenile life without parole ("JLWOP") or its equivalent, but rather the more routine—but no less devastating—instances when youth are subject to decade(s)-long sentences on a mandatory basis.

4. *See infra* Part II.

5. *See* Perry L. Moriearty, Miller v. Alabama *and the Retroactivity of Proportionality Rules*, 17 U. PA. J. CONST. L. 929, 949 (2015) (stating that, with the *Roper* decision, "[t]he Court's modern 'kids are different' jurisprudence was born").

6. *See infra* Part III.

7. J.D.B. v. North Carolina, 564 U.S. 261, 274 (2011) (holding that a child's age is relevant to whether the child was "in custody" and therefore entitled to *Miranda* protections).

8. *See generally* CARA H. DRINAN, THE WAR ON KIDS: HOW AMERICAN JUVENILE JUSTICE LOST ITS WAY 84–96 (2017) (discussing *Miller* trilogy and subsequent promising legislative and judicial developments); Cara H. Drinan, *The* Miller *Revolution*, 101 IOWA L. REV. 1787 (2016) [hereinafter Drinan, *The* Miller *Revolution*] (discussing revolutionary changes to juvenile justice policy that are possible post-*Miller*); Cara H. Drinan, *Misconstruing* Graham *&* Miller, 91 WASH. U. L. REV. 785 (2014) (discussing how state actors have failed to comply with sentencing requirements imposed by the *Graham* and *Miller* rulings); Cara H. Drinan, Graham *on the Ground*, 87 WASH. L. REV. 51 (2012) (discussing implications of *Graham* for inmates as well as criminal justice reform more broadly).

children the harshest of criminal sentences. The Supreme Court held in *Roper v. Simmons* that the Constitution bars the execution of juveniles.[9] The *Roper* Court examined youth as a group and analyzed whether execution of minors was proportionate given their diminished culpability and greater capacity for rehabilitation.[10] At the same time, the Court looked at legislative trends regarding juvenile execution and exercised its own judgment to rule that the practice violated evolving standards of decency.[11] Of particular import to the *Roper* Court was science that established children were categorically different from adults.[12] This science proved that juveniles are lacking in maturity and impulse control; that they are more susceptible to negative peer influences than adults; and that their moral character is still fluid.[13] And because of these developmental differences, the Court held that juveniles are less culpable than adults and that the goals of retribution and deterrence cannot justify the death penalty for minors.[14]

Five years later, in *Graham v. Florida*, the Court embraced the same underlying science when examining the question of whether life without parole is a permissible sentence for a juvenile who commits a non-homicide crime.[15] As the Court explained, the Eighth Amendment bars both "barbaric" punishments and punishments that are disproportionate to the crime committed.[16] Further, within the latter category of proportionality cases, the Court traditionally examined term-of-year sentences on a case-by-case basis, while in the death penalty context, it considered categorical restrictions.[17] In a significant methodological departure,[18] the Court held that, because Graham's case challenged "a particular type of sentence" as applied "to an entire class of offenders who have committed a range of crimes," the Court should rely upon its (previously capital) categorical approach.[19] Using this approach, and again relying upon the scientific differences between adolescents and adults,[20] the *Graham* Court held that the Constitution precludes a juvenile life-without-parole ("JLWOP") sentence for a non-homicide crime.[21]

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9. Roper v. Simmons, 543 U.S. 551, 575 (2005).
10. *Id.* at 569–74.
11. *Id.* at 574–75.
12. *See id.* at 569–70.
13. *Id.*
14. *Id.* at 571–72, 575.
15. 560 U.S. 48, 52–53 (2010).
16. *Id.* at 59.
17. *Id.* at 59–61.
18. *See, e.g.*, Alison Siegler & Barry Sullivan, *"'Death is Different' No Longer":* Graham v. Florida *and the Future of Eighth Amendment Challenges to Noncapital Sentences*, 2010 SUP. CT. REV. 327, 328 (noting that, previously, the Court had only considered categorical exclusions for death penalty cases).
19. *Graham*, 560 U.S. at 61–62.
20. *Id.* at 68 ("[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.").
21. *Id.* at 74.

In 2012, in *Miller v. Alabama*, the Supreme Court held that the Eighth Amendment bars JLWOP sentences even in most *homicide* cases.[22] Specifically, JLWOP is not permissible unless the sentencing body takes into account "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[23] Sentencing bodies must analyze the minor's developmental environment,[24] and only if it is determined that the minor is "the rare juvenile offender whose crime reflects irreparable corruption,"[25] is JLWOP constitutional.[26]

Before addressing the work that remains to be done in terms of implementing the *Miller* trilogy, it is important to acknowledge the wave of reforms that this line of cases has set in motion over the last fifteen years. Based on the narrowest reading of these cases, the Court outlawed juvenile execution, banned JLWOP in non-homicide cases, and significantly limited the instances in which states can impose JLWOP in homicide cases. In 2011, the year before *Miller*, only five states banned JLWOP,[27] whereas today twenty-four states and the District of Columbia ban the sentence.[28] Another six states have no one serving a JLWOP sentence.[29] At the end of 2018, almost 400 individuals once sentenced to die in prison as children had returned to their homes and communities.[30] In addition to these successful implementation efforts, the logic and science of the *Miller* trilogy have generated a host of arguments regarding enhanced procedural safeguards for youth facing extreme sentences.[31] Finally, there is growing consensus among the electorate in favor of rehabilitation for justice-involved youth, hopefully foreclosing the misguided

22. 567 U.S. 460, 479 (2012).

23. *Id.* at 480; *see also id.* at 471–72 (reviewing the *Roper* and *Graham* discussions of why children are scientifically and constitutionally different).

24. *See id.* at 477–80 (considering the circumstances in Miller's case, including abuse and neglect).

25. *Id.* at 479–80 (citation omitted).

26. While not technically part of the *Miller* trilogy, it is important to note that in *Montgomery v. Louisiana*, the Court held that its *Miller* decision was retroactively applicable. 136 S. Ct. 718, 736 (2016).

27. CAMPAIGN FOR FAIR SENT'G OF YOUTH, RIGHTING WRONGS: THE FIVE-YEAR GROUNDSWELL OF STATE BANS ON LIFE WITHOUT PAROLE FOR CHILDREN 4 (2016), https://cfsy.org/wp-content/uploads/Righting-Wrongs-.pdf.

28. *States that Ban Life Without Parole*, CAMPAIGN FOR FAIR SENT'G OF YOUTH (Jan. 19, 2021), https://www.fairsentencingofyouth.org/media-resources/states-that-ban-life/.

29. *Id.*

30. CAMPAIGN FOR FAIR SENT'G OF YOUTH, TIPPING POINT: A MAJORITY OF STATES ABANDON LIFE-WITHOUT-PAROLE SENTENCES FOR CHILDREN 6 (2018), https://www.fairsentencingofyouth.org/wp-content/uploads/Tipping-Point.pdf. *But see* Eli Hager, *"Juvenile Lifers" Were Meant to Get a Second Chance. COVID-19 Could Get Them First.*, MARSHALL PROJECT (June 3, 2020, 6:00 AM), https://www.themarshallproject.org/2020/06/03/sentenced-to-life-as-teens-they-fear-getting-coronavirus-before-getting-a-second-chance (discussing the fact that nearly 1,000 "juvenile lifers" are still awaiting relief to which they are entitled per *Miller*).

31. *See, e.g.*, David Siegel, *What Hath* Miller *Wrought: Effective Representation of Juveniles in Capital-Equivalent Proceedings*, 39 CRIM. & CIV. CONFINEMENT 363, 372 (2013) (arguing for heightened standard of representation for youth facing JLWOP); Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 375–76 (2014) (reviewing state parole protocols and urging youth-specific reforms in light of *Miller*).

attitude of "adult time for adult crime."[32] These are all positive developments that one can trace back to the Supreme Court's moral leadership in the *Miller* trilogy.

However, as I discuss in the next two Parts, justice-involved youth in America are still routinely subject to harsh term-of-year sentences that do not take into account the mitigating aspects of youth, and courts can correct that.

II. TRANSFER LAWS AND MANDATORY SENTENCING AS THE PERFECT STORM FOR KIDS

Despite post-*Miller* reform efforts, youth in America are still subject to excessively harsh criminal sentences. Here, I am focused not on the persistence of JLWOP, but on the more routine applications of adult criminal statutes to minors that result in disproportionate sentences.[33] The Supreme Court has read the Eighth Amendment to bar not just sentences that are cruel because they are "barbaric," but also sentences that are cruel because they are disproportionate.[34] When considering whether a sentence is disproportionate to the crime committed, the Court has indicated a number of objective criteria that are relevant, including the "culpability of the offender."[35] Moreover, after the *Miller* trilogy, the Court has solidified the fact that children are categorically less culpable than adults based on developmental factors alone.[36] Finally, the Court has made clear that its proportionality analysis is not exclusively applicable to a certain kind of sentence, but rather applies to all punishments.[37]

Accordingly, even outside the context of JLWOP, courts should be taking into account the diminished culpability of children. When they fail to do so, courts impose a disproportionate, and thus unconstitutional sentence, on a minor. In this Part, I explain that courts are routinely doing just that—imposing disproportionate sentences on minors—and often are doing so against their own judicial inclinations. This is because courts seem constrained by two related procedural elements that subject children to extreme sentences, each of which I discuss in turn below: transfer laws that place children in adult court and mandatory sentencing schemes that apply once children are in the criminal court's jurisdiction.

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32. *See, e.g.*, PEW CHARITABLE TRS., PUBLIC OPINION ON JUVENILE JUSTICE IN AMERICA (2014), https://www.pewtrusts.org/-/media/assets/2015/08/pspp_juvenile_poll_web.pdf (finding that seventy-five percent of voters agree that treatment, counseling, and supervision are more important for juveniles than time in a corrections facility).

33. *See supra* note 3 and accompanying text.

34. Solem v. Helm, 463 U.S. 277, 284 (1983) ("The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence.").

35. *Id.* at 292.

36. *See supra* Part I.

37. *Solem*, 463 U.S. at 288–89 (noting Eighth Amendment limitations apply to bail, fines, capital sentences, and felony prison sentences); *id.* at 290 ("[A] single day in prison may be unconstitutional in some circumstances.").

A. Transfer Laws

From the end of the nineteenth century, when the United States developed the juvenile court model, to the mid-twentieth century, children accused of a crime were dealt with in juvenile court.[38] Removal from the juvenile court system was rare and difficult. But as the nation embraced tough-on-crime sentiments, state and federal lawmakers introduced "transfer laws," which enabled a child to be removed from a juvenile court's jurisdiction and tried in criminal court as if they were an adult. These transfer laws took on various forms: some defined by statute the charges that automatically triggered criminal court jurisdiction; others required a transfer hearing before a judge; and the most harmful ones granted prosecutors unfettered discretion to charge kids in adult court when they saw fit.[39]

As of 2018, every state had some transfer provision that permitted a child to be tried, convicted, and sentenced in adult criminal court.[40] Most states have several such provisions.[41] For example, in Florida, there are four mechanisms by which a child may be charged in adult criminal court: (1) a statutory provision that excludes certain minors from juvenile court based on age, the nature of the charges, and prior convictions; (2) discretionary transfer that permits the prosecutor to request transfer to adult court for any child age fourteen and older; (3) a provision that allows prosecutors to directly file a minor's case in criminal court if the minor is age fourteen or older and has been charged with statutorily delineated crimes; and (4) a "Once an Adult, Always an Adult" provision that requires minors previously convicted in criminal court to thereafter be dealt with in adult court.[42] In twenty-two states and the District of Columbia, there is at least one transfer provision that sets *no minimum age* requirement for transfer to adult court.[43] These kind of laws are predicated on the legal fiction that, if a child is accused of a certain crime or has reached a certain stage of adolescence, that child is now an adult in the eyes of the law.

Transfers laws inflict serious, lasting damage on justice-involved youth.[44] To begin, juvenile court proceedings at least in theory are driven by pursuit of the child's best interests. A child adjudicated in juvenile court may be offered rehabilitation or treatment, and, even if confined in a detention facility, they will be among

38. *See* DRINAN, *supra* note 8, at 20–22, 52–56 (discussing history, nature, and dangers of juvenile transfer laws); Drinan, *The* Miller *Revolution*, *supra* note 8, at 1791 (same).

39. *See* DRINAN, *supra* note 8, at 21–22.

40. *Id.* at 21; *see also* OFF. OF JUV. JUST. & DELINQUENCY PREVENTION, U.S. DEP'T OF JUST., PROVISIONS FOR IMPOSING ADULT SANCTIONS ON JUVENILE OFFENDERS (2018), https://www.ojjdp.gov/ojstatbb/structure_process/qa04115.asp?qaDate=2018.

41. OFF. OF JUV. JUST. & DELINQUENCY PREVENTION, *supra* note 40.

42. *Florida State Profile*, NAT'L. JUV. DEF. CTR., https://njdc.info/practice-policy-resources/state-profiles/florida/ (last visited Feb. 25, 2021).

43. OFF. OF JUV. JUST. & DELINQUENCY PREVENTION, U.S. DEP'T OF JUST., MINIMUM TRANSFER AGE SPECIFIED IN STATUTE (2018), https://www.ojjdp.gov/ojstatbb/structure_process/qa04105.asp.

44. *See* DRINAN, *supra* note 8, at 52–56.

other minors and have access to education. The same is not true in criminal court where the generally applicable criminal code applies, and the court is focused on issues of deterrence and retribution.[45] Moreover, youth who are convicted and sentenced in criminal court may end up incarcerated among adults. In 2019, over 4,500 minors—nearly ten percent of all incarcerated youth—were being held in adult jails and prisons.[46] Not only do youth in adult correctional settings miss out on age-appropriate education and vocational opportunities, but they are also at serious risk for physical and sexual assault, as well as suicide.[47] Finally, studies show that transfer to adult criminal court actually *increases* the minor's likelihood of future recidivism, perhaps in part because the adult criminal conviction hampers future life opportunities.[48]

B. Mandatory Minimums

Historically, judges in America have had the discretion to consider all relevant variables in a criminal case before imposing a sentence. However, as part of the war on drugs in the late-twentieth century, Congress and state lawmakers enacted mandatory sentencing statutes.[49] These laws require judges to impose a legislatively pre-determined punishment upon a convicted defendant without regard for the defendant's personal attributes or mitigating circumstances of the crime.

As scholars have documented widely, mandatory minimums are tremendously problematic in general.[50] They have shifted power from judges to prosecutors, enabling charge-bargaining and unfair plea deals.[51] They have contributed to mass incarceration by requiring lengthy prison terms in cases where the defendant is not a threat to public safety.[52] And they are unfair in perverse ways. For example, they simultaneously enable similar treatment of individuals with differing degrees of culpability and excessive punishment of low-level offenders while sparing more

45. *Id.* at 53.

46. Wendy Sawyer, *Youth Confinement: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Dec. 19, 2019), https://www.prisonpolicy.org/reports/youth2019.html.

47. *Id.* ("Adult prisons and jails are unquestionably the worst places for youth.").

48. DRINAN, *supra* note 8, at 54.

49. *See* FAM. AGAINST MANDATORY MINIMUMS ("FAMM"), FAMM PRIMER ON MANDATORY SENTENCES 1–2, https://www.prisonpolicy.org/scans/famm/Primer.pdf (last visited Feb. 25, 2021) (explaining the rise of mandatory minimums for drug crimes).

50. *See generally* Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1 (2010) (arguing for mandatory minimum reform through the observance of political minimalism); John S. Martin Jr., *Why Mandatory Minimums Make No Sense*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 311 (2004) (offering a former U.S. District Court judge's perspective on why mandatory minimum sentences should be abandoned); Mary Price, *Mill(er)ing Mandatory Minimums: What Federal Lawmakers Should Take from* Miller v. Alabama, 78 MO. L. REV. 1147 (2013) (arguing for the reform and replacement of mandatory minimum sentencing with sentencing policies that embrace proportionality).

51. Luna & Cassell, *supra* note 50, at 14–15; *see also* Cynthia Alkon, *Hard Bargaining in Plea Bargaining: When Do Prosecutors Cross the Line?*, 17 NEV. L.J. 401, 407 (2017).

52. *See* Martin, Jr., *supra* note 50, at 314–16 (providing examples where a drug defendant may receive a longer sentence than "a racist who attacks a minority with the intent to kill" or "a terrorist who detonates a bomb in a public place").

serious defendants.[53] There is emerging consensus that any meaningful criminal justice reform in the twenty-first century will have to include repealing mandatory sentencing schemes.

C. The Perfect Storm

The interplay of these two mechanisms—transfer laws and mandatory minimums—is the perfect storm for justice-involved youth. Transfer laws make it relatively easy and common for youth to be charged in adult criminal court. Once in criminal court, kids are subject to mandatory minimums that were drafted with adults in mind and that many now recognize as unfair even as applied to adults. Some courts have recognized the inherent unfairness of this outcome in light of what the Supreme Court has said about juveniles' diminished culpability and increased amenability to rehabilitation. Some courts have even invited legislative action.[54]

And some states' lawmakers have pursued legislative measures to address the science that says kids are different. For example, California lawmakers passed a law in 2018 to prevent the transfer of any child under the age of sixteen to adult criminal court.[55] This was a measure designed to bolster an earlier ballot initiative that returned to judges the discretion as to whether such a transfer should happen at all.[56] Similarly, Washington amended its mandatory sentencing provisions to exempt children tried as adults, noting that the "emerging research on brain development indicates that adolescent brains, and thus adolescent intellectual and emotional capabilities, differ significantly from those of mature adults."[57] In recent years, a number of states have raised the minimum age for transfer to adult court, and a few are attempting to extend juvenile court jurisdiction beyond the age of eighteen.[58]

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53. *See* FAMM, *supra* note 49, at 7–8 (discussing how, in a conspiracy prosecution, one is subject to the same mandatory minimum regardless of the role one played and that mitigation through information sharing is inherently only available to high-level drug traffickers).

54. *See, e.g.*, People v. Patterson, 25 N.E.3d 526, 553 (Ill. 2014) ("[W]e strongly urge the General Assembly to review the automatic transfer provision based on the current scientific and sociological evidence indicating a need for the exercise of judicial discretion in determining the appropriate setting for the proceedings in these juvenile cases.").

55. Maureen Washburn, *California's Latest Adult Transfer Law Models Pathways for Reform for Rest of U.S.*, JUV. JUST. INFO. EXCH. (Oct. 3, 2018), https://jjie.org/2018/10/03/californias-latest-adult-transfer-law-models-pathways-for-reform-for-rest-of-u-s/.

56. *See* M. Randell Scism, *Children Are Different: The Need for Reform of Virginia's Juvenile Transfer Laws*, 22 RICH. PUB. INT. L. REV. 445, 460–61 (2019) (discussing California's Proposition 57, the former ballot initiative).

57. H.B. 11187, § 1, 85th Leg., Reg. Sess. (Wash. 2005) (establishing the purpose for WASH. REV. CODE § 9.94A.540 (2020)).

58. Scism, *supra* note 56, at 462–64.

As I have written elsewhere, state legislative bodies can be a fruitful ground for aggressive juvenile justice reform.[59] That said, they need not be the exclusive forum.

III. THE CASE FOR STRIKING DOWN TRANSFER LAWS AND MANDATORY SENTENCING OF MINORS

In this Part, I make the case that at least some transfer laws and mandatory minimums as applied to youth are unconstitutional in light of the *Miller* trilogy. I address these mechanisms below in the order in which justice-involved youth encounter them.

A. Transfer Laws

Recall that, while every state has juvenile transfer laws, the laws vary in form.[60] For purposes of this Article, I am focused on those forms of transfer that eliminate judicial discretion, specifically statutory exclusion provisions and direct-file laws. As the name suggests, a statutory exclusion provision states that a child of a certain age accused of a certain crime is excluded from juvenile court and shall be within the jurisdiction of the adult court. Direct-file laws permit the prosecutor to charge the juvenile defendant in adult criminal court on a discretionary basis.[61] Such laws should be barred in light of *Miller*.

To begin, it is important to recognize that, historically, courts have been deferential in their review of juvenile transfer laws. In *Kent v. United States*, the U.S. Supreme Court addressed the question of whether the District of Columbia's juvenile transfer provision satisfied the Constitution's requirement of minimal due process.[62] The Court concluded that the relevant statute conferred significant latitude on juvenile court judges, but such "latitude [wa]s not complete."[63] The Court held that, as a matter of due process, juveniles like Kent were entitled to (1) a hearing before the juvenile court waived his case to adult-court jurisdiction, (2) access to the materials relevant to the court's transfer decision, and (3) a written articulation of the reasons for the ultimate transfer decision.[64] The *Kent* decision was friendly to juveniles in that it rejected the concept of absolute, unfettered judicial waiver to adult court, but it did not require very much of juvenile courts beyond the creation of a record. Moreover, the *Kent* decision did not address alternative transfer mechanisms, such as statutory exclusion and direct-file provisions that became common in the late-twentieth century.

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59. *See* Drinan, *supra* note 3, at 264–65.
60. *See supra* notes 40–43 and accompanying text.
61. Drinan, *The* Miller *Revolution*, *supra* note 8, at 1793.
62. 383 U.S. 541, 543 (1966).
63. *Id.* at 552–53.
64. *Id.* at 561–62.

In subsequent years, advocates challenged juvenile transfer laws on various grounds with little success. For example, in *People v. J.S.*, the Illinois Supreme Court considered the constitutionality of a statute that required fifteen- and sixteen-year-old defendants charged with specific offenses to be tried in adult court.[65] The court upheld the statutory exclusion provision, rejecting claims that it violated the Equal Protection and Due Process Clauses. The court noted that classification based on age was not uncommon and was rationally related to the government's legitimate state interest in prosecuting serious crimes.[66] Moreover, the court held that the statute's delineation of certain felonies as the basis for transfer to adult court was not arbitrary and thus did not violate due process. Instead, according to the court, the violent nature of the specified crimes and the frequency of their commission justified their inclusion (and not others) as a basis for transfer.[67]

In the five decades since the *Kent* decision, many courts have come to similar conclusions when confronted with challenges to juvenile transfer provisions.[68] I suggest, however, that in the wake of the *Miller* trilogy, courts should reconsider the constitutional legitimacy of direct-file and statutory-exclusion transfer laws. First, there is precedent for judicial constraint on juvenile transfer laws on which courts can build. Second, cases in which courts rejected constitutional challenges to transfer laws are now anachronistic in light of contemporary juvenile justice principles. They simply cannot coexist with the Supreme Court's recent reliance upon the science of adolescent brain development. And finally, the Eighth Amendment provides courts an opportunity to reconsider the constitutionality of these laws. I develop each of these steps in greater detail below.

1. Some Precedent for Successful Challenges to Juvenile Transfer Laws

As discussed above, in the post-*Kent* years, courts entertained a number of constitutional challenges to juvenile transfer laws, and in most cases, they upheld the laws. Juveniles transferred to adult court mounted challenges of three kinds: due process, equal protection, and separation of powers. Often litigants raised all three

65. 469 N.E.2d 1090, 1092 (Ill. 1984).

66. *Id.* at 1093–94.

67. *Id.* at 1094–95.

68. *See, e.g.*, Manduley v. Superior Ct., 41 P.3d 3, 27 (Cal. 2002) (upholding prosecutorial discretion to file cases of minors in adult court against constitutional objections), *superseded by statute*, Public Safety and Rehabilitation Act of 2016, Prop. 57, § 4.2 (codified as amended at CAL. WELF. & INST. CODE § 707 (2019)); State v. Cain, 381 So. 2d 1361, 1367 (Fla. 1980) (upholding prosecutor's right to direct file juvenile cases in adult court); People v. Thorpe, 641 P.2d 935, 939–40 (Colo. 1982) (upholding direct-file provision against due process and equal protection challenges); State v. Aalim, 83 N.E.3d 883, 887 (Ohio 2017) (upholding statutory-exclusion law against constitutional challenge); State v. Perique, 439 So. 2d 1060, 1064–65 (La. 1983) (upholding statutory-exclusion law against as-applied constitutional challenge); State v. Leach, 425 So. 2d 1232, 1235–37 (La. 1983) (upholding statutory-exclusion law against facial constitutional challenge); Bishop v. State, 462 S. E.2d 716, 718–19 (Ga. 1995) (upholding prosecutorial discretion in juvenile transfer).

objections. They also routinely failed in these claims. For example, in *Bishop v. State*,[69] the state's attorney exercised discretion to keep a fourteen-year-old in Georgia's adult court system. The juvenile defendant argued that the prosecution's power to select the forum for the case was, in fact, a legislative function. The court roundly rejected this, as others have done, explaining that: "This discretionary choice of forums afforded the district attorney is simply a consequence of the exercise by the General Assembly of the power delegated to it by the Constitution."[70] Further, the court swiftly rejected an equal protection challenge to the transfer provision, noting that "treatment as a juvenile is not an inherent right."[71] Thus, the legislature only needed to offer a rational basis for its classification of which juveniles would be charged in adult court, which it had done.[72] In the absence of any evidence of prosecutorial arbitrariness or discrimination, the court upheld the provision.[73] The *Bishop* court is representative of many other courts during the latter half of the twentieth century that afforded great discretion first to the legislature that drafted transfer laws and then to the prosecutors implementing them.[74]

And yet there were exceptions where courts identified constitutional defects in juvenile transfer laws. In 1972, the Tenth Circuit struck down Oklahoma's statutory cutoff for juvenile court on equal protection grounds.[75] The Oklahoma law at issue stated that a "child" eligible for juvenile court was defined as "any male person under the age of sixteen (16) years and any female person under the age of eighteen (18) years."[76] The Oklahoma Supreme Court had upheld the statute, defending the distinction: "'As we view the situation, the statute exemplifies the legislative judgment of the Oklahoma State Legislature, *premised upon the demonstrated facts of life;* and we refuse to interfere with that judgment.'"[77] The Tenth Circuit found this justification insufficient: "'Demonstrated facts of life' could mean many things. The 'demonstrated facts' which the Court relied upon are not spelled out."[78] Without an articulation of those facts, the statute could have been based on entirely arbitrary criteria, and it was thus unconstitutional.

More recently, the Utah Supreme Court struck down the state's direct-file transfer provision on state constitutional grounds.[79] The statute at issue in *State v. Mohi* permitted the prosecutor to directly file the cases of sixteen- and seventeen-year-olds accused of capital or first-degree felonies in adult court based on pure

69. 462 S.E.2d 716.
70. *Id.* at 717.
71. *Id.* at 718.
72. *Id.*
73. *Id.* at 719.
74. *See supra* note 68 and accompanying text.
75. Lamb v. Brown, 456 F.2d 18, 20 (10th Cir. 1972); *see also* Kelley v. Kaiser, 992 F.2d 1509, 1515 (10th Cir. 1993) (finding Oklahoma transfer provisions that distinguished based on gender unconstitutional).
76. *Lamb*, 456 F.2d at 19.
77. *Id.* (quoting Lamb v. State, 475 P.2d 829, 830 (Okla. 1970)).
78. *Id.* at 20.
79. State v. Mohi, 901 P.2d 991, 997 (Utah 1995).

discretion.[80] The state supreme court held that the statute violated the state's Uniform Operation of Laws provision[81]—a provision akin to the Equal Protection Clause—because it enabled prosecutors to treat similarly situated individuals differently without offering any justification for the differential treatment.[82] One sixteen-year-old charged with a first-degree felony may be charged in adult court, while another child of the same age, facing the same charge, would be adjudicated in juvenile court—and the law required no explanation from the state for these wildly different outcomes.

In sum, most courts during the last half-century have upheld state transfer laws in the face of constitutional challenges, giving lawmakers wide latitude, including the flexibility to delegate transfer decisions to prosecutors. But there have been notable exceptions.[83] And therefore courts striking down transfer laws today would not be the first to do so.

2. The Majority Approach Is Outdated

Second, even if one recognizes that the majority of courts have upheld transfer laws in the past, when one reads those opinions today, they appear anachronistic and inappropriate in light of current science regarding adolescence. Recall from Part I, *supra*, that this science has informed the Supreme Court's recent juvenile sentencing decisions, and it identifies key features of adolescence that are of constitutional significance when analyzing punishment. That science tells us that the adolescent brain is still developing into the mid-twenties.[84] It tells us that, because of immature brain development, youth are risk-seeking, subject to peer pressure, less capable of weighing long-term consequences against short-term rewards, and impulsive.[85] And the Supreme Court has relied upon that science to hold that youth are categorically less culpable and more amenable to rehabilitation.[86]

Yet the majority of cases upholding state transfer laws were decided long before that science was established and certainly before the Supreme Court relied upon it. As a result, the language of these earlier cases is dissonant in the wake of *Miller*. For example, in 1977, the Fifth Circuit upheld the constitutionality of Florida's transfer law, a provision which permitted removal from juvenile court upon a grand jury indictment for a crime punishable by life imprisonment or death.[87] The

80. *See id.*

81. *See* UTAH CONST. art. I, § 24 ("All laws of a general nature shall have uniform operation.").

82. *Mohi*, 901 P.2d at 1004.

83. *See, e.g.*, Hughes v. State, 653 A.2d 241, 250 (Del. 1994) (finding statute transferring child who turns eighteen while facing charges to adult court without judicial oversight violative of state and federal constitutions).

84. Barry C. Feld, *Competence and Culpability: Delinquents in Juvenile Courts, Youths in Criminal Courts*, 102 MINN. L. REV. 473, 557 (2017).

85. *See generally id.* at 555–61 (discussing neuroscience, developmental psychology, and their relationship to adolescent culpability).

86. *See supra* Part I.

87. Woodward v. Wainwright, 556 F.2d 781, 787 (5th Cir. 1977).

petitioners challenged this provision in the wake of *Kent v. United States*,[88] arguing that deprivation of juvenile court treatment should have been the subject of a hearing with procedural safeguards. The federal court rejected this claim, in part by distinguishing *Kent* on statutory grounds, but also by noting that "*treatment as a juvenile* is not an inherent right but one granted by the state legislature. . . ."[89] The court further opined:

> Doubtless the Florida legislature considered carefully the rise in the number of crimes committed by juveniles as well as the growing recidivist rate among this group. The legislature was entitled to conclude that the parens patriae function of the juvenile system would not work for certain juveniles, or that society demanded greater protection from these offenders than that provided by that system. We should not second-guess this conclusion.[90]

This language is consistent with the dominant narrative about juvenile crime in the late-twentieth century.[91]

These cases are jarring to read today because they refuse to recognize several juvenile justice principles that are now foundational. Children enjoy many different kinds of rights: Youth have the right to be cared for in basic respects until the age of majority;[92] the rights of speech and expression in school;[93] the right to bodily autonomy;[94] the right to express an opinion regarding custodial arrangements;[95] recognized most recently, the right to be sentenced in an age-appropriate way;[96] and the right to a "meaningful opportunity to obtain release" in the correctional context.[97] Given the robust development of children's rights, it is absurd to assert that, while juveniles have many rights, being treated as a juvenile is not one of those rights. Moreover, the factual predicates for many of the transfer laws that were upheld in the late-twentieth century have been belied or debunked. We know now, for example, that the juvenile super-predator theory was plainly wrong and

88. 383 U.S. 541 (1966) (holding that juvenile was entitled to hearing, among other safeguards, before juvenile court could waive jurisdiction).

89. *Woodward*, 556 F.2d at 785 (emphasis added).

90. *Id.*

91. *See* Feld, *supra* note 84, at 477–79 (outlining the "harsh legacy of the 1980s' and 1990s' get-tough policies" regarding juvenile justice).

92. *See* Steven Mintz, *Placing Children's Rights in Historical Perspective*, 44 CRIM. L. BULL. 313, 313 (2008) (describing "protective" children's rights, which include a "right to a stable home, adequate subsistence, and an education").

93. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (upholding child's right to wear armband in school as right of free expression).

94. *See* Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) (rejecting blanket rule requiring parental consent for abortion because "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority").

95. *See* Sarah J. Baldwin, *Choosing a Home: When Should Children Make Autonomous Choices About Their Home Life?*, 46 SUFFOLK U. L. REV. 503, 514–15 (2013) (surveying how states handle children's input with regard to custody arrangements).

96. *See* Miller v. Alabama, 567 U.S. 460, 480 (2012).

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

that juvenile crime plummeted at the end of the twentieth century.[98] We also know that most youth simply "age out" of crime.[99] To the extent that courts were deferential to legislative judgment of facts on the ground, those facts no longer govern. And finally, science has shown, and courts now accept, that it is impossible to predict at the sentencing (let alone charging) phase whether youthful crime reflects "unfortunate yet transient immaturity" or the rare case of "irreparable corruption."[100] As a result, courts should not casually defer to the legislative judgment that some children, by stage of adolescence or nature of the crime charged, are beyond the rehabilitative capacities of the juvenile system. This conclusion simply cannot be known *a priori*.

In sum, while the majority of courts have upheld juvenile transfer laws in the past, those majority opinions relied upon outdated and now irrelevant notions of adolescents, their development, and their criminal inclinations.

3. New Challenge Rooted in the Eighth Amendment

Even if one accepts those prior cases as settled law, in the wake of *Miller*, there is a new avenue for challenging transfer laws: The Eighth Amendment. The Supreme Court has relied on the Eighth Amendment to adopt categorical bans on sentencing practices based on the mismatch between the culpability of juvenile offenders and the severity of certain penalties. Here, I argue that the Eighth Amendment provides additional protection from mismatched sentences, specifically when a juvenile is exposed to the harms of adult criminal court by legislative fiat.

Before getting to the heart of this argument, there is a preliminary issue that must be addressed. The Eighth Amendment bars "cruel and unusual punishments."[101] Some courts have found transfer laws immune to Eighth Amendment scrutiny because they treat these laws as "procedural" rather than "punitive" in nature.[102] This argument, however, suffers from formalistic and overly simplistic reasoning. While it is true that a transfer law addresses jurisdiction and not an ultimate sentence, it would strain any commonsense use of the term "punishment"

98. *See* Clyde Haberman, *When Youth Violence Spurred 'Superpredator' Fear*, N.Y. TIMES (Apr. 6, 2014), https://www.nytimes.com/2014/04/07/us/politics/killing-on-bus-recalls-superpredator-threat-of-90s.html.

99. *See* Dana Goldstein, *Too Old to Commit Crime*?, MARSHALL PROJECT (Mar. 20, 2015), https://www.themarshallproject.org/2015/03/20/too-old-to-commit-crime (considering neuroscience and statistical studies that support that criminal propensity declines after a certain age).

100. *Miller*, 567 U.S. at 479–80 (citing and discussing *Roper v. Simmons*, 543 U.S. 551, 573 (2005), and *Graham*, 560 U.S. at 68); *see also* Mary Marshall, Miller v. Alabama *and the Problem of Prediction*, 119 COLUM. L. REV. 1633, 1636 (2019) (arguing that prediction is "fundamentally impossible").

101. U.S. CONST. amend. VIII.

102. *See, e.g.*, People v. Patterson, 25 N.E.3d 526, 551 (Ill. 2014) ("[I]n the absence of actual punishment imposed by the transfer statute, defendant's eighth amendment challenge cannot stand."); People v. Harmon, 26 N.E.3d 344, 359 (Ill. App. Ct. 2013) (holding that automatic transfer statute does not impose punishment but only specifies forum for adjudication and thus the Eighth Amendment does not apply).

to frame transfer to adult court as non-punitive.[103] As discussed in Section II.A, *supra*, from the outset, transfer to adult court alters the lens of analysis from rehabilitation to retribution, and it eliminates rehabilitative outcomes only available in juvenile court. Moreover, the social science evidence indicates that minors are not equipped to navigate the adversarial process of criminal court, and they suffer when they attempt to do so.[104] Most significant, juvenile delinquency proceedings are civil in nature, whereas *criminal* court proceedings are just that: criminal in nature. The latter are adversarial and stigmatizing even in the rare case where they do not result in punishment. Transfer laws devoid of judicial oversight are the keys that unlock the door to adult punishment and all of its devastating consequences, including harsh, non-rehabilitative sentences and lifelong collateral consequences.[105] To label such a transfer process "procedural" rather than "punitive" is pure sophistry,[106] and courts should not shy away from reaching an Eighth Amendment challenge to transfer laws on these grounds.

The Eighth Amendment argument against juvenile transfer laws that are devoid of judicial discretion is fairly straightforward.[107] In the *Miller* trilogy, the Court articulated several findings regarding children. First, "children are constitutionally different from adults for sentencing purposes."[108] Second, because of these significant differences, traditional punishment rationales do not have the same moral force as applied to children. Retribution is undermined by the fact that children are inherently less culpable; deterrence is less effective because of children's immaturity; and incapacitation is inappropriate because "incorrigibility is inconsistent with youth."[109] While *Miller* was focused on the specific sentence of JLWOP, the Court

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103. *Cf.* Hughes v. State, 653 A.2d 241, 250 (Del. 1994) (discussing "criminal *prosecution*" in adult court and its "grave attendant consequences" (emphasis added)).

104. *See* Feld, *supra* note 84, at 501–31 (examining issues with the current system of juvenile courts and youths tried in criminal courts, given competency and psychological issues).

105. *See, e.g.*, MARGARET LOVE & DAVID SCHLUSSEL, COLLATERAL CONSEQUENCES RES. CTR., THE MANY ROADS TO REINTEGRATION (Sept. 2020), https://ccresourcecenter.org/wp-content/uploads/2020/09/The-Many-Roads-to-Reintegration.pdf (compiling a fifty-state survey of collateral consequences to arrest and conviction).

106. *See Patterson*, 25 N.E.3d at 557 (Theis, J., dissenting) ("[T]hat approach is overly simplistic, and elevates form over substance. The automatic transfer statute may indeed protect the public, but it does so by mandatorily placing juveniles in criminal court based only on their offenses, and thereby exposing them to vastly higher adult sentences and, in effect, punishing them."); *id.* at 557–60 (reviewing legislative history that indicated the purpose of the transfer law was to *punish* juveniles).

107. A few scholars have explored this issue in prior works. *See, e.g.*, Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99 (2010) (encouraging lawyers to revisit prior challenges to transfer statutes based on *Graham*); Janet C. Hoeffel, *The Jurisprudence of Death And Youth: Now the Twain Should Meet*, 46 TEX. TECH L. REV. 29, 51–55 (2013) (arguing that *Miller* calls into question juvenile transfer laws); Wendy N. Hess, *Kids Can Change: Reforming South Dakota's Juvenile Transfer Law to Rehabilitate Children and Protect Public Safety*, 59 S.D. L. REV. 312 (2014) (arguing for state-specific transfer law reform in wake of Supreme Court's recent juvenile sentencing decisions); Scism, *supra* note 56 (same); Beck Roan, *Ignoring Individualism, How a Disregard for Neuroscience and Supreme Court Precedent Makes for Bad Policy in Idaho's Mandatory Juvenile Transfer Law*, 52 IDAHO L. REV. 719 (2016) (same). I first made this argument in *The* Miller *Revolution*. Drinan, *supra* note 8, at 1825–26.

108. Miller v. Alabama, 567 U.S. 460, 471 (2012).

109. *Id.* at 472–73 (citation omitted).

acknowledged that "none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific."[110] And I would urge here, that none of what the Court has said about children is *punishment*-specific.

Thus, after *Miller*, courts may find juvenile transfer laws that are lacking judicial discretion to be in violation of the Eighth Amendment. To begin, advocates can argue that, just like in *Graham*, "a sentencing practice itself is in question," and thus the Supreme Court's categorical approach from *Graham* is also appropriate.[111] The first step of the categorical approach is to examine "objective indicia of national consensus."[112] While it is true, as discussed in Section II.A, *supra*, that every state has some kind of law that permits children to be tried as adults, there are still outlier transfer practices among the states. These outlier practices—extreme versions of transfer in a minority of states—are ripe for Eighth Amendment scrutiny. For example, among the forty-six states where a juvenile matter begins in juvenile court, there is mandatory waiver to adult court in only twelve states.[113] This means that, in those twelve states, a statute requires the juvenile court judge to waive jurisdiction and transfer the case to adult court once certain criteria are met.[114] Similarly, the prosecutor has the power to bring charges against a minor directly in criminal court in only fourteen states.[115] In sum, even though juvenile transfer laws are ubiquitous in the United States, the objective indicia of community consensus are against those forms of transfer law that deprive the judiciary of any modicum of discretion.

Consistent with the Supreme Court's categorical approach, after considering community consensus, courts examining extreme versions of transfer that strip judges of discretion should also exercise their own judgment about such practices.[116] As the *Graham* Court explained: "The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question . . . [and] whether the challenged sentencing practice serves legitimate penological goals."[117] In doing so, courts should consider not only the documented

110. *Id*. at 473.

111. Graham v. Florida, 560 U.S. 48, 61 (2010) ("This case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes.").

112. *Id*. at 62.

113. OFF. OF JUV. JUST. & DELINQUENCY PREVENTION, U.S. DEP'T OF JUST., JUVENILES TRIED AS ADULTS (2018), https://www.ojjdp.gov/ojstatbb/structure_process/qa04115.asp?qaDate=2018.

114. *Id*. (defining "mandatory waiver" as when "statutes specify when the matter must be transferred . . . after verifying certain conditions are met").

115. *Id*.; *see also* Jennifer S. Breen & John R. Mills, *Mandating Discretion: Juvenile Sentencing Schemes After* Miller v. Alabama, 52 AM. CRIM. L. REV. 293, 311 (2015) (identifying outlier forms of transfer provisions under which "*[t]he crime with which the child is charged* is entirely and exclusively dispositive of how the child will be sentenced and processed in the criminal justice system").

116. *Graham*, 560 U.S. at 67 ("In accordance with the constitutional design, 'the task of interpreting the Eighth Amendment remains our responsibility.'" (quoting Roper v. Simmons, 543 U.S. 551, 575 (2005))).

117. *Id*. (citations omitted).

differences between adults and minors as reflected in the *Miller* trilogy,[118] but also the voluminous evidence regarding the harms of transfer laws. For example, in 2007, the Centers for Disease Control released a report on the effects of juvenile transfer to adult court and documented significant negative outcomes. Finding that youth tried as adults are thirty-four percent more likely to commit crimes than youth kept in the juvenile system, the report concluded that "transferring juveniles to the adult system is counterproductive as a strategy for preventing or reducing violence."[119] In 2012, the Department of Justice similarly released a report detailing the harms associated with transferring children to adult court, noting that such youth receive longer sentences and miss out on crucial adolescent developmental opportunities.[120] Most disturbing, the report discussed the ways in which youth in adult settings are likely to be victims of sexual assault, physical assault, or both. According to one study mentioned in the report, even though youth make up only a small portion of prisoners in adult facilities, "21 percent of all victims of substantiated incidents of inmate-on-inmate sexual violence in jails were juveniles younger than age 18."[121] This is consistent with other findings regarding juvenile vulnerability to physical and sexual assault in adult prisons.[122] The report noted that many researchers in the area have concluded that transfer laws do more social harm than good.[123] In sum, a court exercising its own independent judgment regarding a narrow subset of transfer laws devoid of judicial discretion could readily determine that such laws are fundamentally unfair and irrational—that they do not "serve legitimate penological goals" given their severity and likelihood of inflicting harm.[124]

In recent years, state courts have engaged with renewed challenges to juvenile transfer laws—challenges that leverage the logic of the *Miller* trilogy—and these cases reveal an uncertain area of the law. For example, in 2014, the Illinois Supreme Court considered the constitutionality of the state's automatic transfer law. In *People v. Patterson*, the fifteen-year-old defendant was charged with aggravated sexual assault and automatically transferred to adult court, where he was convicted and sentenced to more than thirty years in prison.[125] On appeal before the state supreme court, the defendant challenged the state's automatic transfer

118. *See supra* Part I.

119. ROBERT HAN ET AL., CTRS. FOR DISEASE CONTROL, EFFECTS ON VIOLENCE OF LAWS AND POLICIES FACILITATING THE TRANSFER OF YOUTH FROM THE JUVENILE TO THE ADULT JUSTICE SYSTEM (Nov. 30, 2007), https://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm.

120. EDWARD P. MULVEY & CAROL A. SCHUBERT, U.S. DEP'T OF JUST., TRANSFER OF JUVENILES TO ADULT COURT: EFFECTS OF A BROAD POLICY IN ONE COURT 3–5 (Dec. 2012), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/232932.pdf.

121. *Id.* at 4.

122. *Id.*

123. *Id.* at 6 ("Studies like these have contributed to the conclusion that juvenile transfer policies uniformly produce negative outcomes.").

124. Graham v. Florida, 560 U.S. 48, 68 (2010).

125. People v. Patterson, 25 N.E.3d 526, 530 (Ill. 2014).

statute in light of the *Miller* trilogy. Based largely on the way in which the defendant framed the arguments,[126] the court rejected his claims and upheld the transfer law. Nonetheless, the court conceded the following:

> We do, however, share the concern expressed in both the Supreme Court's recent case law and the dissent in this case over the absence of any judicial discretion in Illinois's automatic transfer provision. While modern research has recognized the effect that the unique qualities and characteristics of youth may have on juveniles' judgment and actions, the automatic transfer provision does not. Indeed, the mandatory nature of that statute denies this reality.[127]

Similarly, in 2015, the Connecticut Supreme Court considered a defendant's Eighth Amendment challenge to a fifteen-year mandatory sentence imposed by the criminal court for crimes that began when he was fourteen years old.[128] While the majority rejected the defendant's challenge by distinguishing the fifteen-year sentence from the extreme sentences at issue in the *Miller* trilogy,[129] the concurring and dissenting opinions demonstrated sympathy for the defendant's claims. Concurring in the opinion, Justice Palmer wrote extensively on the relevance of the *Miller* trilogy to defendant's case and invited the legislature "to revisit the question of whether such mandatory prison terms are appropriate for juveniles, as a matter of sound public policy, in light of the marked differences between juveniles and adults."[130] Moreover, the dissenting justice not only agreed with the defendant on the merits, but also specifically noted the manner in which the state's automatic transfer statute contributed to his unconstitutional sentence:

> The mandatory transfer statute *automatically* transferring the defendant from juvenile court—where the court had no sentencing floor—to adult court—where a sentencing floor of ten years of incarceration was automatically imposed without regard to the defendant's individual characteristics—raised the floor of the sentencing range and "require[d] the judge to impose a higher punishment than he might wish." This violates the mandates of the United

126. For example, the defendant urged the court to reconsider its due process rulings regarding the juvenile transfer law pursuant to the *Miller* trilogy, and the court refused to do so noting that:

> [D]efendant is attempting to support his due process argument by relying on the Supreme Court's eighth amendment analysis in *Roper, Graham,* and *Miller*. . . . Although both the Supreme Court and defendant have emphasized the distinctive nature of juveniles, the applicable constitutional standards differ considerably between due process and eighth amendment analyses.

Id. at 549.

127. *Id*. at 553 (internal citations omitted). *See also id*. at 556–69 (Theis, J., dissenting) (arguing that the Illinois automatic transfer statute violates the Eighth Amendment per *Miller* and the parallel portion of the state constitution).

128. State v. Taylor G., 110 A.3d 338, 341–42 (Conn. 2015).

129. *Id*. at 344–46.

130. *Id*. at 361 (Palmer, J., concurring).

> States Supreme Court's juvenile sentencing jurisprudence of *Roper*, *Graham*, and *Miller*.[131]

Most recently, litigation before the Ohio Supreme Court centered on the constitutionality of a mandatory transfer law.[132] In 2016, the state supreme court struck down the transfer statute that automatically subjected certain minors to criminal court jurisdiction based on age and the offenses charged. Discussing both the *Miller* trilogy and state constitutional provisions, the court found the transfer law to be in violation of due process as guaranteed by the Ohio state constitution.[133] As the majority explained:

> The mandatory-transfer statutes preclude a juvenile-court judge from taking any individual circumstances into account before automatically sending a child who is 16 or older to adult court. This one-size-fits-all approach runs counter to the aims and goals of the juvenile system, and even those who would be amenable to the juvenile system are sent to adult court. Juvenile-court judges must be allowed the discretion that the General Assembly permits for other children. They should be able to distinguish between those children who should be treated as adults and those who should not.[134]

One year later, on the state's motion for reconsideration, the Ohio Supreme Court vacated its earlier decision and held that the mandatory transfer provision did not, in fact, violate the federal or state constitutions.[135] In a highly fragmented decision, the court revisited the legal questions and held that the history of juvenile law in Ohio could not support a substantive due process, a procedural due process, or an equal protection challenge to the statute in question.[136] In separate dissenting opinions, though, two justices documented their dismay with the court's failure to protect minors from "mandatory transfer" that "implicates the punitive aspect of sentencing and deprives the juvenile of access to the rehabilitative hallmarks of the juvenile-justice system."[137] The chief justice wrote in dissent that, under fundamental fairness and procedural due process analysis, juveniles should be entitled to an amenability hearing before removal from the juvenile court system.[138] Echoing the sentiments of the chief justice, the second dissenting justice wrote even more explicitly that the reconsidered decision was merely a function of politics:

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131. *Id.* at 378 (Eveleigh, J., dissenting) (internal citation omitted).

132. State v. Aalim, 83 N.E.3d 862, 864 (Ohio 2016), *vacated by* State v. Aalim, 83 N.E.3d 883 (Ohio 2017).

133. *Id.* at 868–70.

134. *Id.* at 870.

135. State v. Aalim, 83 N.E.3d 883, 887 (Ohio 2017).

136. *Id.* at 890–96. The court also noted that it had failed in its original review of the case "to consider the General Assembly's exclusive constitutional authority to define the jurisdiction of the courts of common pleas . . . ." *Id.* at 896.

137. *Id.* at 903 (O'Connor, C.J., dissenting).

138. *Id.* at 905–13.

"[T]here is nothing new to reconsider here; the only thing that has changed is the makeup of this court as a result of the 2016 election."[139]

While none of these cases were a clear victory for juvenile justice advocates challenging mandatory transfer laws under *Miller*, they nonetheless provide grounds for optimism. These opinions reveal that this area of the law is anything but settled. Moreover, the discord among judges in these decisions drives home the fact that "[i]n the context of juvenile transfer to adult court, the Supreme Court has remained silent since *Kent*," and in doing so has created "confusion as to what authority state legislatures have to enact mandatory-transfer statutes with limited or no process."[140] Given the body of Eighth Amendment law that the U.S. Supreme Court has developed in the last fifteen years insisting that youth must be considered at sentencing, these recent cases only highlight the fact that juvenile transfer laws are ripe for constitutional challenge today.

B. Mandatory Minimums as Applied to Youth

Juvenile transfer laws and mandatory minimums together create the perfect storm for justice-involved youth. Automatic transfer laws place children in adult court without judicial oversight, and once children are charged in adult court, they are subject to mandatory minimums that were drafted with adults in mind. Just as the *Miller* trilogy renders automatic transfer laws unlawful, so too does it undermine the legitimacy of mandatory minimums as applied to youth. I have made this claim before,[141] and here I will only recap it briefly before discussing recent litigation in this area. Simply put, one cannot square mandatory sentencing of juveniles with either the language or the logic of the *Miller* trilogy. In *Miller*, the Court explained that "[m]andatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences."[142] And while skeptics of my claim note that the Court was specifically addressing JLWOP sentences, in an earlier part of the decision, the *Miller* Court acknowledged that "none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific."[143] And in the same way, none of what the Court has said about children's diminished culpability is *sentence*-specific either. Children are still immature, impetuous, risk-seeking, and subject to peer pressure whether they are facing a death-in-custody sentence or a mandatory sentence of fifteen years. Moreover, the *Miller* Court drew on two strands of precedent to arrive at its decision: its line of cases dealing with categorical bans on certain sentences and its line of cases barring mandatory imposition of

139. *Id.* at 914 (O'Neill, J., dissenting).
140. *Id.*
141. Drinan, *The* Miller *Revolution*, *supra* note 8, at 1819–24.
142. Miller v. Alabama, 567 U.S. 460, 477 (2012).
143. *Id.* at 473.

the death penalty.[144] Together, these two lines of cases led the Court to conclude that children are categorically different from adults for sentencing purposes and that those differences should be examined in an individualized, granular manner. Thus, in the wake of *Miller*, mandatory minimum sentencing schemes—schemes that preclude consideration of youth and its mitigating attributes—cannot apply to minors.

To date, only one state supreme court has taken this position. In *State v. Lyle*, the Iowa Supreme Court declared mandatory minimums as applied to youth unconstitutional under its state constitution.[145] In an expansive opinion, the *Lyle* court canvassed the history of juvenile justice in America, as well as the Supreme Court's recent bans on extreme juvenile sentencing in the *Miller* trilogy.[146] The *Lyle* court concluded:

> *Miller* is properly read to support a new sentencing framework that reconsiders mandatory sentencing for all children. Mandatory minimum sentencing results in cruel and unusual punishment due to the differences between children and adults. This rationale applies to all crimes, and no principled basis exists to cabin the protection only for the most serious crimes.[147]

The *Lyle* court correctly focused on the fact that the lynchpin of the *Miller* trilogy was the defining characteristics of children that render them less culpable. Those defining characteristics do not vary with the charges or the penalty that children face, and to the extent that those characteristics demand individual assessment, that must be true in all sentencing contexts.

Courts that have upheld mandatory minimums in the face of a *Miller*-based challenge have relied on a mistakenly narrow reading of the *Miller* trilogy, finding *Miller* only applicable to JLWOP cases. For example, an Arizona appellate court determined, "*Miller* stated only that 'a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.'"[148] The court elaborated that this defendant "did not receive the harshest penalty. Instead, the trial court imposed a sentence of life without the possibility of release for twenty-five years."[149] That court held that "the requirement for 'individualized sentencing' was based on the [*Miller*] Court's determination that natural-life prison terms for juveniles are analogous to capital punishment for adults,"[150] and thus *Miller* did not preclude other mandatory minimum sentences for minors. While it is true that the *Miller* Court viewed JLWOP as analogous to a

144. *Id.* at 470.

145. State v. Lyle, 854 N.W.2d 378, 380 (Iowa 2014).

146. *Id.* at 390–95.

147. *Id.* at 402.

148. State v. Imel, No. 2 CA-CR 2015-0112, 2015 WL 7373800, at *3 (Ariz. Ct. App. Nov. 20, 2015) (citation omitted).

149. *Id.*

150. *Id.*; *see also* People v. Wilson, 62 N.E.3d 329, 337, 340 (Ill. App. Ct. 2016) (limiting *Miller*'s application to cases of mandatory JLWOP).

death sentence for an adult, the Court's decision relied upon *two* separate lines of precedent, not solely the precedent that bars mandatory imposition of the death penalty. As discussed above, the Court drew first upon its line of cases that have categorically rejected certain kinds of sentences for certain classes of individuals.[151] And in further developing *that* line of cases, the Court cemented its "kids-are-different" jurisprudence and rejected an entire category of sentence for youth based on their diminished culpability and capacity for rehabilitation.[152] Lower courts are not free to ignore that co-equal part of the Court's rationale so as to confine the *Miller* decision to the JLWOP arena.

Other courts that reject *Miller*-based challenges to mandatory minimums fail to recognize the interplay of transfer laws and mandatory minimum laws, as described *supra* in Part II. For example, in *State v. Taylor G.*, the Supreme Court of Connecticut rejected the defendant's challenge to his mandatory minimum sentence of fifteen years for a sexual assault conviction.[153] At sentencing, the trial court itself expressed hesitation about the mandatory minimum sentence given the young age of the defendant and the fact that he had experienced childhood abuse. Further, the trial court noted that lawmakers were not contemplating fourteen-year-old defendants when they enacted the mandatory minimums. Nonetheless, bound by governing law, the trial court gave the defendant what it described as the most "lenient [sentence it] possibly c[ould]."[154]

On appeal, the defendant challenged his mandatory minimum sentence as disproportionate and unlawful post-*Miller*. As most courts do, the high court in Connecticut myopically viewed the *Miller* line of cases as only applicable to the "two most severe punishments courts are able to impose."[155] As discussed above, the *Miller* trilogy was equally focused on severity of sentences *and* the distinguishing and mitigating qualities of youth. More disturbing, though, is the fact that the Connecticut Supreme Court defended the mandatory minimums as applied to a fourteen-year-old based on the rationale that the sentencing court did have *some* discretion: it could have imposed the maximum applicable sentence of fifty-five years, but, instead, it applied the statutory minimum.[156] Further, the court noted, "[a] mandatory minimum sentence is, by definition, the *least* punitive sentence that may be imposed under a sentencing statute."[157] The court concluded that, given the

151. *See* Miller v. Alabama, 567 U.S. 460, 470 (2012).

152. *See id.* (holding mandatory JLWOP unconstitutional); Graham v. Florida, 560 U.S. 48, 82 (2010) (holding JLWOP for non-homicidal offenses unconstitutional).

153. 110 A.3d 338, 341–42 (Conn. 2015). The defendant was convicted of sexually assaulting his cousin beginning when he was fourteen years old and continuing until he was fifteen years old. The conviction carried a mandatory minimum of ten years for the sexual assault conviction and five years for a related risk of injury to a child conviction. *Id.* at 341–42.

154. *Id.* at 343–44.

155. *Id.* at 346.

156. *Id.* at 347.

157. *Id.*

nature of the conviction, the mandatory minimum was not disproportionate for Eighth Amendment purposes.

But the court ignored what the trial court had noted—that the mandatory minimums were not drafted with fourteen-year-olds in mind. And in Taylor G.'s case, the mandatory minimum was only applicable to him because of the state's automatic transfer provision. Under the state's statutory exclusion law, any minor charged with committing a Class A or B felony after the age of fourteen was automatically removed from the juvenile court's jurisdiction to the regular criminal docket.[158] Once in adult court, it is true that the "least punitive sentence" for Taylor G. was fifteen years. However, in juvenile court, Taylor G. would have benefited from the fact that "the dispositional goal of the Juvenile Court is treatment more than punishment";[159] he may have received rehabilitation services; he would have avoided time in an adult correctional facility; and he would have faced a maximum four-year term with a possible extension based on needs.[160] In short, the Connecticut Supreme Court ignored the perfect storm that subjected Taylor G. to a fifteen-year mandatory minimum sentence in adult prison beginning at the age of fourteen.[161] Instead of confronting the combination of mandatory transfer provisions and mandatory minimum sentencing that led to this child's fifteen-year term in an adult facility, the court defended the sentence as being less bad than the worst case scenario of fifty-five years. Courts can and should do better by children.[162]

Finally, too many courts have rejected the idea that mandatory minimums for children are unlawful after *Miller* simply on the grounds that the argument is novel. By the Iowa Supreme Court's own admission: "[N]o other court in the nation has held that its constitution or the Federal Constitution prohibits a statutory schema that prescribes a mandatory minimum sentence for a juvenile offender."[163] And further, the *Lyle* court recognized that "most states permit or require some or all juvenile offenders to be given mandatory minimum sentences."[164] It is true that one state court's decision is not binding on other states, but it is equally true that another state court's decision can be persuasive authority. In light of what we know about children's diminished culpability and capacity for growth, and given the one-two punch of automatic transfer and mandatory sentencing, courts should be more solicitous of defendants' challenges to mandatory minimums after *Miller*. Courts should not put a thumb on the scale of the status quo from the late-twentieth century and blindly adhere to a misguided—albeit majority—approach.[165]

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158. *Id.* at 342 n.5.

159. CONN. GEN. ASSEMBLY, OLR RESEARCH REPORT: JUVENILES & THE COURTS, https://www.cga.ct.gov/PS94/rpt/olr/htm/94-R-1040.htm (last visited Feb. 25, 2021).

160. *Id.*

161. *Id.* (outlining requirements for juveniles tried as adults); *see Taylor G.*, 110 A.3d at 342.

162. *Taylor G.*, 110 A.3d at 362–87 (Eveleigh, J., dissenting).

163. State v. Lyle, 854 N.W.2d 378, 386 (Iowa 2014).

164. *Id.*

165. *See id.* at 387 ("'[C]onsensus is not dispositive.'" (citation omitted)).

CONCLUSION

In this Article, I have argued that there is a clear path for courts to find both automatic transfer laws and mandatory minimums as applied to youth unlawful after *Miller*. These are indeed minority views, and by way of conclusion, I will address two criticisms.

First, as I discussed *supra* in Part III, some judges continue to view the *Miller* trilogy through a narrow lens—they insist that it was a line of cases only about JLWOP, and even then, only JLWOP imposed as a result of one conviction for one crime, and perhaps even then, only in a context devoid of parole or clemency. Two rejoinders are especially relevant here. First, many courts have already expanded the *Miller* rationale to instances where the defendant received a de facto life sentence and to instances where an extreme sentence is the result of aggregated term-of-year sentences.[166] And this is because those courts have accepted the science of adolescent development as embraced by the Supreme Court.[167] History will frown upon those jurists who ignore that science and insist on mechanically applying the narrowest version of the *Miller* rulings.

Second, some criticize the capacious reading of *Miller* that I have articulated herein by making an outlier argument. That is, those who resist the science of adolescent development and the fact of diminished juvenile culpability unfailingly point out that some kids commit very serious crimes. Those critics say, "What about teens who participate in a heinous homicide? How about the so-called D.C. Sniper? Surely those kids deserve the most serious sentences!"[168] Or, "what about the Twitter hacker?" they ask. "He didn't seem very immature."[169] This argument is of no moment. Of course, it is true that some adolescents commit very serious, life-altering crimes and that their victims suffer tremendously. But this reality is also irrelevant because I am not proposing any sentencing schemes that would preclude serious, potentially life-long, punishment for some adolescents. I argue that we should return to a default where juveniles are dealt with in juvenile court, and where only an informed judge can make the grave decision to transfer a child to adult court. Further, I simply argue that, if a judge makes that grave decision to transfer a child to adult court, and, if a child is convicted in adult court, then they should still enjoy the benefits of individualized consideration demanded by the

166. *See* Drinan, *supra* note 3, at 59.

167. *See, e.g.*, State v. Null, 836 N.W.2d 41 (Iowa 2013) (finding that juvenile's 52.5-year minimum prison term for aggregated mandatory minimum sentences triggered protections of *Miller* and collecting cases on the issue).

168. Ariane de Vogue, *Supreme Court Dismisses DC Sniper's Case*, CNN: POL. (Feb. 26, 2020), https://www.cnn.com/2020/02/26/politics/supreme-court-lee-boyd-malvo-case-dc-sniper/index.html (describing case of seventeen-year-old Lee Boyd Malvo, who was originally sentenced to JLWOP).

169. Kate Conger & Nathaniel Popper, *Florida Teenager Is Charged as 'Mastermind' of Twitter Hack*, N.Y. TIMES (July 31, 2020), https://www.nytimes.com/2020/07/31/technology/twitter-hack-arrest.html (describing case of seventeen-year-old Graham Ivan Clark, who hacked famous Twitter accounts and is being charged as an adult).

Miller trilogy. Neither of those proposals precludes an extreme sentence for an outlier case in which a juvenile defendant is convicted in adult court of a most serious crime. It is true that my proposals would require more resources, care, and consideration by judges and prosecutors, but it is not true that my proposals ignore the instances when youth commit serious crime and require proportionally serious sentences.

Despite the moral import and the practical significance of the *Miller* trilogy, youth in America continue to be subject to extreme sentences. This often occurs not because a judge determines that the minor's case exceeds the jurisdiction of the juvenile court or even because an adult criminal court judge determines that the minor deserves a lengthy term-of-year sentence. Rather, extreme youth sentences persist after *Miller* often because of the interplay between unbridled transfer provisions and mandatory sentencing schemes. As I have argued in this Article, today, relying upon the language, science, and logic of the *Miller* trilogy, courts should review challenges to these two procedural elements, and their interplay, with fresh eyes.