In re Jones

Court of Appeals of North Carolina

September 23, 1999, Heard in the Court of Appeals ; November 2, 1999, Filed

NO. COA99-19

Reporter
135 N.C. App. 400 *; 520 S.E.2d 787 **; 1999 N.C. App. LEXIS 1158 ***

IN THE MATTER OF NICHOLAS JONES, A Juvenile

Prior History: [***1] Appeal by respondent juvenile from an order entered 2 June 1998 by Judge Shirley H. Brown in Buncombe County District Court.

Disposition: Reversed.

Counsel: Attorney General Michael F. Easley, by Assistant Attorney General Daniel D. Addison, for the State.

Public Defender J. Robert Hufstader, by Assistant Public Defender Patricia A. Kaufmann, for respondent appellant.

Judges: HORTON, Judge. Judge WYNN concurs. Judge EDMUNDS concurs in result with separate opinion.

Opinion by: HORTON

Opinion

[**787] [*401] HORTON, Judge.

On 14 January 1998, Detective J. D. Owenby, Jr., of the Buncombe County Sheriff's Department, verified five juvenile petitions alleging that the respondent, Nicholas Jones, was a delinquent juvenile by reason of various sexual offenses involving L.G.C., a female juvenile. The petitions were approved for filing by the Juvenile Intake Counselor on 26 January 1998. The first of those petitions alleged, in pertinent part,

> that the juvenile [respondent] is a delinquent juvenile as defined by G.S. 7A-517(12), in that at and in the county [***2] named above [Buncombe], and on or about the 25th day of November, 1997, the juvenile unlawfully, willfully, and feloniously did engage in a sex offense with [L.G.C.].
> The offense charged here is in violation of G.S. 14-27.

[*402] The second and third petitions were identical to the first, except that both alleged the date of the offense to be 27 November 1997. The fourth petition was also identical to the first three petitions, except

that it alleged the date of the offense to be 28 November 1997. We will discuss the fifth petition, which purported to charge the respondent with first-degree rape, below.

We first note that N.C. Gen. Stat. § 14-27 was repealed in 1979. 1979 N.C. Session Laws, ch. 682, § 7, effective 1 January 1980. It appears from the record and the briefs of the parties that the State intended to charge respondent with a violation of N.C. Gen. Stat. § 14-27.4(a)(1) (Cum. Supp. 1998), first-degree sexual offense, which reads as follows:

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is [***3] at [**788] least four years older than the victim[.]

The respondent's trial was conducted on the theory that he was charged with first-degree sexual offense, and the trial court adjudicated respondent to be delinquent "by reason of four counts of 1st degree sex offense in violation of G.S. 14-27." The four petitions described above, however, did not contain any allegation of the age of the victim or the respondent. Respondent argues that they were fatally defective on their faces, and that judgment should be arrested in the four cases. We agree.

N.C. Gen. Stat. § 7A-560 (1995), a part of our juvenile code, provides, in pertinent part:

> . . . In cases of alleged delinquency or undisciplined behavior, the petitions shall be separate.
>
> A petition in which delinquency is alleged shall contain a plain and concise statement, without allegations of an evidentiary nature, asserting facts supporting every element of a criminal offense and the juvenile's commission thereof with sufficient precision clearly to apprise the juvenile of the conduct which is the subject of the accusation.

Respondent was, of course, entitled to adequate notice of the charges against him so that he can defend [***4] himself against the allegations of the petitions.

> [*403] "Notice must be given in juvenile proceedings which would be deemed constitutionally adequate in a civil or criminal proceeding; that is, notice must be given the juvenile and his parents sufficiently in advance of scheduled court proceedings to afford them reasonable opportunity to prepare, and the notice must set forth the alleged misconduct with particularity."

State v. Drummond, 81 N.C. App. 518, 520, 344 S.E.2d 328, 330 (1986) (quoting *In re Burrus*, 275 N.C. 517, 530, 169 S.E.2d 879, 887 (1969)). Here, the four petitions did not state respondent's alleged misconduct with particularity, in that they did not contain the crucial allegations of the ages of the victim and respondent as required for an alleged violation of N.C. Gen. Stat. § 14-27.4(a)(1). Further, it does not appear that the petitions in this case alleged a violation of any other lesser or related sexual offense described in Article 7 (Rape and Kindred Offenses) of Chapter 14 of our General Statutes. The petitions were fatally defective and the judgments based on them must be arrested.

II.

The fifth petition alleges [***5] that respondent

> is a delinquent juvenile as defined by G.S. 7A-517(12), in that at and in the county named above, and on or about the 28th day of November, 1997, the juvenile did unlawfully and willfully and feloniously did ravish and carnally know [L.G.C.], by force and against the person[']s will.

The offense charged here is in violation of

> G.S. 14-27.2.

The petition states a violation of N.C. Gen. Stat. § 14-27.2(a)(2), first-degree rape. Immediately prior to trial, the State moved to amend the fifth petition to allege a violation of N.C. Gen. Stat. § 14-27.2(a)(1) (Cum. Supp. 1998), which statute provides that:

> (a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old or is at least four years older than the victim[.]

Respondent objected to the amendment, and contends the trial court erred in overruling his objection. We need not reach the merits of respondent's argument, however, because the State did not offer any evidence at trial that respondent was at least 12 years old or at [***6] [*404] least four years older than L.G.C. Respondent contends the trial court committed plain error in failing to dismiss the charge of first-degree rape for insufficiency of the evidence. We note that respondent did not move to dismiss the charges against him at trial, however, we have elected, pursuant to our inherent authority and Rule 2 of the Rules of Appellate Procedure, to consider whether there was sufficient evidence of every element of the offense of first-degree rape to submit the charge to the trial court as the trier of fact.

[**789] Under the plain error rule, the error of the trial court

> must have "had a probable impact on the jury's finding of guilt." Defendant, therefore, "must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result."

State v. Allen, 339 N.C. 545, 555, 453 S.E.2d 150, 155-56 (1995) (citations omitted), *abrogated by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177, 118 S. Ct. 248 (1997). On a motion to dismiss,

> the question is whether the evidence is legally sufficient [***7] to support a verdict of guilty on the offense charged, so as to warrant submission of the charge to the jury. We must view the evidence in the light most favorable to the State and afford the State every reasonable inference that may arise from the evidence. There must be substantial evidence to support a finding that an offense has been committed and that the defendant committed it. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

State v. Jackson, 119 N.C. App. 285, 287, 458 S.E.2d 235, 237 (1995) (citations omitted). Respondent contends the State failed to offer evidence of his age at the time of the offense, that his age was an essential element of the offense, and that the charge of first-degree rape should be dismissed. We agree.

Our Supreme Court confronted the issue of a motion to dismiss on a sex offense charge in *State v. Rhodes*, 321 N.C. 102, 361 S.E.2d 578 (1987). In *Rhodes*, the defendant was charged with first-degree rape under N.C. Gen. Stat. § 14-27.2(a)(1). As in the case before us, the ages of the victim and defendant were elements of the offense. [***8] In *Rhodes*, the Supreme Court held that the evidence of the respective ages of the victim and defendant was sufficient to withstand the motion to dismiss:

> [*405] A person may be guilty of first degree rape if (1) he has vaginal intercourse with a child under the age of 13 years, (2) he is at least 12 years old and (3) he is at least four years older than the victim. In this case two witnesses, the ten year old prosecuting witness and her nine year old brother, testified the defendant had intercourse with the ten year old girl. *There was testimony from several witnesses that the prosecuting witness was ten years of age. The defendant testified he was born on 4*

> *February 1956 which would make him 29 years of age on 4 January 1986.* This evidence is sufficient to withstand a motion to dismiss on the charge of first degree rape.

Rhodes, 321 N.C. at 104, 361 S.E.2d at 580 (emphasis added) (citation omitted). In the case before us, the defendant's age is an essential element of the offense of the amended offense of first-degree rape. The State bears the burden of proving each element of a criminal offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 362, 25 L. Ed. 2d 368, 374, 90 S. Ct. 1068 (1970). [***9] The State did not, however, offer any evidence, direct or circumstantial, of respondent's age at the time of the offense in question. In the context of a motion to dismiss, the State must present substantial evidence of each element of the offense charged. *State v. Nobles*, 350 N.C. 483, 504, 515 S.E.2d 885, 898 (1999). The State contends, however, that in North Carolina the jury may determine a criminal defendant's age merely by observing him in the courtroom. In support of that position, the State relies on the cases of *State v. Samuels*, 298 N.C. 783, 787, 260 S.E.2d 427, 430 (1979); *State v. Evans*, 298 N.C. 263, 267, 258 S.E.2d 354, 356 (1979), *overruled on other grounds by State v. Barnes*, 324 N.C. 539, 380 S.E.2d 118 (1989); *State v. Gray*, 292 N.C. 270, 286, 233 S.E.2d 905, 915 (1977); *State v. Overman*, 269 N.C. 453, 470, 153 S.E.2d 44, 58 (1967), *overruled on other grounds by State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986). Careful analysis of the facts of the cases cited by the State, and other relevant North Carolina decisions, convinces us that [***10] our evidentiary rule does not allow a jury to determine the age of a criminal defendant beyond a reasonable doubt merely by observing him in the courtroom without having the benefit of other evidence, whether circumstantial or direct.

[**790] The first North Carolina decisions to deal with proof of the age of a defendant were *State v. Arnold*, 35 N.C. 184 (1851) and *State v. McNair*, 93 N.C. 628 (1885). In each case, the defendant contended he was less than fourteen years of age at the time of the offense in question, and thus presumptively incapable under the common law of [*406] committing a criminal offense. "In cases of rape, the common law presumption of incapacity was conclusive to age fourteen." *State v. Rogers*, 275 N.C. 411, 424, 168 S.E.2d 345, 352 (1969), *cert. denied*, 396 U.S. 1024, 24 L. Ed. 2d 518, 90 S. Ct. 599 (1970). In *Arnold*, a prosecution for murder, the defendant offered no evidence of his age at trial, but insisted on appeal that he appeared to be under fourteen years of age, "and, therefore, that it was incumbent on the State to prove that he was over that age . . . ." *Arnold*, 35 N.C. at 187. [***11] Chief Justice Ruffin opined for the Court that "as the subject of direct proof, the *onus* was certainly on the prisoner, as the reputed age of every one is peculiarly within his own knowledge, and also the persons by whom it can be directly proved." *Arnold*, 35 N.C. at 192. In *McNair*, the defendant also contended in defense of the charge of murder that he was under the age of fourteen years at the time of the alleged offense. There was testimony before the jury on the issue of his age, the "mother of the prisoner rendering it somewhat uncertain whether he was of that age, and a number of witnesses for the State placing it at about seventeen years." *McNair*, 93 N.C. at 630-31. In instructing the jury, the trial court stated: "It is for you to say whether he is under fourteen years of age or not, being, as you see him before you, grown to the stature of manhood." *McNair*, 93 N.C. at 631. The prosecutor suggested to the trial court that the instruction might be construed as expressing an opinion on the defendant's age, and the trial court gave the jury an additional instruction:

> What the court said to them in reference to the size and appearance [***12] of the prisoner was not to be taken by them as indicating the opinion of the court as to the prisoner's age, but that they had a right to consider his size and appearance to aid them in coming to a conclusion as to his age.

McNair, 93 N.C. at 631. In affirming McNair's conviction and death sentence, Chief Justice Smith noted that "it was competent for the jury to look at the prisoner and draw such reasonable inferences as to his youth as his appearance warranted. *Indeed, the burden rested on him to prove his incapacity from nonage to commit the imputed crime.*" *McNair,* 93 N.C. at 632 (emphasis added). Thus, in both *Arnold and McNair,* we note that the burden was on the *defendant* to prove the common law defense of "nonage." In *Arnold,* the defendant offered no direct evidence as to his age, and thus failed to carry his burden even though he was a "small boy," and appeared to be less than fourteen years of age. In *McNair* there was conflicting evidence from the defendant's mother and the State's witnesses, so that it was held proper for the [*407] trial court to allow the jury to observe the defendant himself to "aid" the jury in resolving the conflicting [***13] testimony as to his age. Although neither of these early decisions hold that a jury may determine the age of a criminal defendant based entirely upon in-court observations, without other evidence, these early cases apparently led to the broad statement by Stansbury that the jury "may look upon the prisoner, although he is not in evidence, to estimate his age." Stansbury's, North Carolina Evidence, § 119 (2d ed. 1963).

In *Overman,* 269 N.C. 453, 153 S.E.2d 44, a prosecution for rape, our Supreme Court held that it was not improper for the assistant solicitor to comment in his argument to the jury on the relative *sizes* of the prisoner and the alleged victim. In finding that the argument was neither "offensive nor inflammatory," the Supreme Court cited the above statement from Stansbury relative to a jury "estimating" the age of a defendant. *Id*. at 470, 153 S.E.2d at 58. We note that in *Overman*, the size of the defendant was not an essential element of the offense charged.

A decade later, our Supreme Court decided *Gray,* 292 N.C. 270, 233 S.E.2d 905, in which the defendant was charged with rape, felonious assault, and first-degree [***14] burglary. The State was required to prove, as an essential element of the offense, that the defendant was more than sixteen years of age. The Supreme Court decided, as a matter of first impression, that when age is in issue, the trial court may properly admit into evidence the opinions of lay witnesses regarding a person's age. In *Gray,* numerous lay witnesses [**791] offered their opinions as to the defendant's age, and the defendant himself testified about his Navy duty, his marriage and his two children. "From defendant's own testimony the conclusion that he was more than sixteen years old, although admittedly one for the jury to draw, is simply inescapable." *Id*. at 286, 233 S.E.2d at 915. We note that the record indicates that the defendant Gray was in fact twenty-eight years of age at the time of his trial.

In *Evans,* 298 N.C. 263, 258 S.E.2d 354, the defendant was charged with first-degree burglary, assault on a female with intent to commit rape, and felonious larceny. The jury found the defendant guilty of first-degree burglary, not guilty of felonious larceny, and guilty of misdemeanor assault on a female. The trial court imposed an active sentence [***15] of life imprisonment on the charge of burglary, and imposed a concurrent two-year sentence on the misdemeanor of assault on a female. On appeal, the defendant argued in part that the State failed to offer evidence on an element of misdemeanor assault on a female [*408] because there was no evidence that he was more than 18 years of age. In affirming defendant's conviction, the Supreme Court cited *McNair* and Stansbury for the proposition that "the jury may look upon a person and estimate his age." *Evans,* 298 N.C. at 267, 258 S.E.2d at 356. The Court continued, however, by pointing out that "any error . . . relative to the assault charge was harmless[,]" because the sentences ran concurrently. *Id.* at 267, 258 S.E.2d at 356-57. Later in 1979, the question was again presented to our Supreme Court in *Samuels,* 298 N.C. 783, 260 S.E.2d 427. Defendant Samuels was charged with first-degree rape and with robbery with a dangerous weapon. He was convicted on the rape count, and

sentenced to life imprisonment. On appeal to our Supreme Court, counsel for Samuels stated that he could find no error prejudicial to defendant, and asked that the Supreme [***16] Court review the record for possible prejudicial error. Justice Copeland, writing for the Court, stated that one of the essential elements of first-degree rape was that the defendant be more than sixteen years of age at the time of its commission. *Id*. at 787, 260 S.E.2d 430. "Here, the jury had ample opportunity to view the defendant and estimate his age. *See State v. Evans*, 298 N.C. 263, 258 S.E.2d 354 (1979)." *Id.* Although the brief opinion in *Samuels* gives the impression that there was no other evidence of defendant Samuel's age, requiring the jury to "estimate" his age, one investigating officer testified that the victim described the man who attacked her as "about 25 years of age, about 6 feet one inches tall, 190 lbs., medium complexion, black hair . . . ." Another officer also testified that the victim described her assailant as "about 25 years of age . . . ." The victim identified the defendant Samuels as her assailant. Thus, there was competent lay opinion evidence of Samuels' age upon which the jury could find that he was more than sixteen years of age at the time of the offense charged.

In *Barnes*, 324 N.C. 539, 380 S.E.2d 118, [***17] the defendant was convicted, among other things, for statutory rape. An element of the offense was that the defendant be at least 12 years of age and at least four years older than the victim. On appeal, defendant challenged the constitutionality of the decisions in *Evans, Gray*, and *McNair*, insofar as they allowed the jury to "determine a defendant's age based on their observations of the defendant." *Barnes*, 324 N.C. at 540, 380 S.E.2d at 119. Our Supreme Court did not reach the constitutional question in *Barnes*, however, because "the State [in *Barnes*] presented adequate circumstantial evidence from which the jury could determine defendant's age." *Id*.

[*409] In the case before us, the State offered no evidence, direct or circumstantial, of the respondent's age although the State itself moved to amend the juvenile petition and alleged that the respondent was more than 12 years of age and more than four years older than the alleged victim at the time of the offense. We do not believe that any of the decisions of our Supreme Court allow the trial court to find beyond a reasonable doubt the respondent's age in a juvenile prosecution for first-degree rape, [***18] merely by observing the juvenile in the courtroom, where the State offers no direct or circumstantial evidence of the respondent's age, and where the age of the respondent is an essential element of the crime charged. The difficulty of determining the age of a juvenile by merely observing the juvenile is exacerbated by the [**792] requirement that the age of the juvenile *at the time of the alleged offense* is the crucial determination, not the age of the juvenile at the time of trial. Further, the trial court made no specific finding as to respondent's age at the time of the offenses alleged; the Juvenile Adjudication Order merely states that "after hearing all the evidence in this matter that the juvenile did commit the acts alleged and finds the juvenile to be delinquent." In light of our decision, we need not reach the related constitutional questions which arise if we relieve the State of the burden of proving beyond a reasonable doubt an essential element of a felony charge against a juvenile respondent.

We hold the trial erred in failing to dismiss the four charges of first-degree sexual offense as fatally defective, and in failing to dismiss the charge of first-degree rape at the [***19] close of the evidence, the State having failed to offer any evidence of respondent's age. In light of our decision, we need not consider respondent's contention that the trial court erred in allowing the State to amend over his objection the juvenile petition charging him with first-degree rape.

Reversed.

Judge WYNN concurs.

Judge EDMUNDS concurs in result with separate opinion.

Concur by: EDMUNDS

Concur

EDMUNDS, Judge, concurs in the result with separate opinion.

I concur with the majority holding that the four juvenile petitions that fail to allege the age of either the juvenile or the victim are fatally flawed. As to the fifth petition, I concur in the result, but on different [*410] grounds. I believe the State should not have been allowed to amend the petition on the day of trial.

The petition in question originally charged that "the juvenile did unlawfully and willfully and feloniously [] ravish and carnally know [the victim], by force and against the persons [sic] will. The offense charged here is in violation of G.S. 14-27.2." On the morning of trial, the State moved to amend this charge to "a statutory offense." Over respondent's objection, the motion was allowed.

[***20] Section 7A-627 states:

> The judge may permit a petition to be amended when the amendment does not change the nature of the offense alleged or the conditions upon which the petition is based. If a motion to amend is allowed, the juvenile shall be given a reasonable opportunity to prepare a defense to the amended allegations.

N.C. Gen. Stat. § 7A-627 (1995) (repealed effective 1 July 1999). This statute does not define the critical term "nature of the offense." However, several cases provide guidance. In *State v. Clements*, 51 N.C. App. 113, 275 S.E.2d 222 (1981), a defendant was charged with death by motor vehicle. The State's motion to amend the underlying traffic offense from "following too closely" to "failure to reduce speed to avoid an accident" was allowed. This Court affirmed the conviction, noting that both before and after the amendment defendant was charged with causing a death while violating a statute pertaining to operation of a motor vehicle. The *Clements* Court held that substituting a "substantially similar" motor vehicle violation for the violation originally alleged did not change the nature of the offense of "death by motor vehicle." [***21] *Clements*, 51 N.C. App. at 116-17, 275 S.E.2d at 225. Similarly, in *In re Jones*, 11 N.C. App. 437, 181 S.E.2d 162 (1971), the respondent juvenile was charged with stealing lights from a parked vehicle. This Court held that an amendment that clarified the identity of the victim did not change the nature of the offense charged.

By comparison, in *In re Davis*, 114 N.C. App. 253, 441 S.E.2d 696 (1994), we held that amending a petition to charge the burning of personal property, in place of the original charge of setting fire to a public building, impermissibly changed the offense alleged against the juvenile. Finally, in *State v. Drummond*, 81 N.C. App. 518, 344 S.E.2d 328 (1986), we held that N.C. Gen. Stat. § 14-27.2 (Supp. 1998) encompassed two types of first-degree rape and that a defendant [*411] was entitled to adequate notice of which of the two types the State was pursuing.

Based on the statute and the foregoing cases, I believe that statutory rape is an offense of a different nature from forcible rape. On one hand, these two offenses are [**793] charged in the same statute (unlike the two burning charges in *Davis*) and both have the same [***22] penalty. On the other hand, these offenses

have different elements. Statutory rape is a strict liability offense that focuses on the age of the participants. *See State v. Anthony*, 133 N.C. App. 573, 578, 516 S.E.2d 195, 198 (1999) (citing *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 674, 509 S.E.2d 165, 177 (1998)). The only intent necessary to commit statutory rape is the intent to have sexual intercourse. By contrast, forcible rape, in which the age of the parties is immaterial, requires an intent by the defendant to gratify his passions notwithstanding any resistance on the part of the victim. *See State v. Nicholson*, 99 N.C. App. 143, 392 S.E.2d 748 (1990). Statutory rape does not encompass violence, while forcible rape is a crime of violence as a matter of law. *See State v. Rose*, 335 N.C. 301, 439 S.E.2d 518 (1994). The significant differences between these forms of rape have led us to hold that a defendant was constitutionally entitled to be given notice of which form the State intended to prove at trial. *See Drummond*, 81 N.C. App. 518, 344 S.E.2d 328. I would hold that the [***23] amendment made by the State changed the "nature of the offense" and was therefore impermissible.

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STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
18CR NUMBER

STATE OF NORTH CAROLINA	)	
	)	**MOTION TO DISMISS FOR**
vs.	)	**VIOLATIONS OF PROCEDURAL AND**
	)	**SUBSTANTIVE DUE PROCESS**
LIZZIE MANSFIELD	)	

NOW COMES the Defendant, Lizzie Mansfield, by and through counsel, Assistant Public Defender Nathan Rubenson, and respectfully moves the Court for an order dismissing the charges against her pursuant to the North Carolina General Statutes Section 15A-954(a)(4), the Fifth and Fourteenth Amendments to the United States Constitution, Article I Sections 1, 19, 23 and 27 of the North Carolina Constitution, State v. Thompson, 349 N.C. 483 (1998) and related case law. The Defendant was incarcerated for close to three days in flagrant violation of the United States Constitution, the North Carolina Constitution and the General Statutes without any meaningful opportunity to secure pretrial release.

In support of said Motion, the Defendant respectfully shows unto the Court, upon information and belief:

1. Lizzie Mansfield is charged with four counts of misdemeanor larceny. She has no prior criminal convictions.
2. Lizzie is a United States citizen and an indigent.
3. Lizzie was 16 years of age on the date of the alleged offenses and during all periods of incarceration referenced in this Motion.
4. At all times relevant to this Motion, the Department of Social Services ("DSS") had legal and physical custody of Lizzie. Ellen Reid is a social worker for DSS and in charge of Lizzie.
5. Prior to these alleged offenses, DSS placed Lizzie in the Williams Group Home located at XXXXXXX, North Carolina.
6. David Adams, the alleged victim in these matters, is the owner of New Vision Group Home.
7. On December 1, 2018, at approximately 8:57 PM, Lizzie was arrested in Davidson County on outstanding warrants in the above-entitled actions.
8. Lizzie was subsequently transported to the Davidson County Jail and brought before Magistrate R. Johnson.
9. Magistrate Johnson thereafter conducted an initial appearance at set as conditions of Lizzie's pretrial release that she execute a secured bond in the amount of $500 "OR IN

State v. Gravette

Supreme Court of North Carolina

May 17, 1990, [1] The matter was heard in the Supreme Court and the Court elected to treat the petition as a petition for writ of certiorari and allowed it for the purposes of review.; July 26, 1990, Filed

No. 99PA90 - Orange

Reporter
327 N.C. 114 *; 393 S.E.2d 865 **; 1990 N.C. LEXIS 569 ***

STATE OF NORTH CAROLINA v. ROBERT GRAVETTE

Prior History: [***1] On the State's petition, filed 13 March 1990 by its Division of Adult Probation and Parole (hereinafter "DAPP") for writ of mandamus or, alternatively, for writ of prohibition to vacate or void the modified order of *Herring, J.*, entered 5 March 1990, requiring DAPP, without its consent, to provide certain supervision of defendant. On 5 April 1990, this Court denied a petition by the State on behalf of DAPP for a temporary stay and supersedeas and, in the exercise of its supervisory power over the trial courts, ordered accelerated briefing and oral argument on defendant's petition.

Disposition: Vacated and remanded.

Counsel: *Lacy H. Thornburg, Attorney General, by Jane R. Garvey, Associate Attorney General, and Sylvia Thibaut, Assistant Attorney General, for the State-appellant.*

J. Kirk Osborn for defendant-appellee.

Judges: Meyer, Justice.

Opinion by: MEYER

Opinion

[*115] [**866] Defendant stands charged with two counts of first-degree murder and is currently a pretrial detainee in the Orange County jail in custody of the sheriff of that county. As will later appear in some detail, defendant has several times been evaluated for competency to proceed to trial as well as to determine whether he was mentally ill and whether he was a danger to himself or others. Judge Herring, in the order appealed from, found that defendant was not competent to stand trial and that defendant was not subject to inpatient involuntary commitment. Judge Herring granted defendant's motion for conditional pretrial release. The conditions required that defendant be released to the custody of his

[1] Subsequent to the oral arguments, defendant filed a motion for clarification of the record for the purpose of correcting a misstatement made during the argument. We have noted the correction.

former wife and, citing the inherent power of the court, further required that DAPP supervise defendant's release by making weekly observations of him and his compliance with the conditions [***4] of his probation, reporting any noncompliance and making monthly written reports to the court. The Durham office of DAPP notified the court that it was not able to consent to such supervision, citing lack of statutory authority to supervise pretrial detainees, workload conditions, and [*116] potential liability, and filed the petitions hereinabove referred to. We find no statutory or inherent authority of the court which authorizes a judge of the superior court to order DAPP to supervise the conditional probation of a pretrial detainee, and we therefore vacate Judge Herring's modified order of 5 March 1990.

The pertinent facts upon which our review of Judge Herring's order arose are as follows: On 1 February 1987, defendant was charged with two counts of first-degree murder for killings which occurred on that date. Two days later, on motion of defendant's counsel, defendant was sent to Dorothea Dix Hospital pursuant to N.C.G.S. § 15A-1002 for an evaluation of his competency to stand trial. Later in the same calendar year, on 16 December 1987, defendant was again sent to Dix Hospital for another examination for the same purpose. Subsequently, about three months later, after [***5] hearing testimony and arguments [**867] of counsel, Judge F. Gordon Battle entered an order declaring defendant incompetent to proceed to trial; ordering that involuntary commitment proceedings be commenced in the district court; and providing that if defendant was not committed or was released from a hospital, he was to be returned to the custody of the Sheriff of Orange County.

On 1 June 1987, the Orange County grand jury returned bills of indictment charging defendant with two counts of first-degree murder for the same alleged offenses.

As a result of the involuntary commitment hearing in the district court, defendant was involuntarily committed to John Umstead Hospital on 23 March 1988 and was released from that hospital on 5 July 1988, having been found to be mentally ill but not dangerous to himself or others. Defendant was returned to the custody of the Sheriff of Orange County, and on 7 July 1988, defendant's counsel made a motion and again obtained an order committing defendant to Dix Hospital to determine defendant's capacity to proceed. It was again found that defendant lacked the capacity to proceed to trial, and defendant was again returned to the custody of the Orange County [***6] jail. On 7 December 1988, Judge Robert L. Farmer again ordered defendant returned to Dix Hospital for another evaluation of his capacity to proceed to trial. On 3 January 1989, defendant was again discharged and returned to custody in the Orange County jail with a finding for the third time that defendant lacked the capacity to proceed to trial.

[*117] Within a month of this third finding, defendant was, on 12 January 1989, again committed to Dix Hospital for an evaluation as to whether he was mentally ill and whether he was dangerous to himself or others. On 9 February 1989, defendant was again found not dangerous to himself or others and was returned to the Orange County jail.

On 7 April 1989, Judge B. Craig Ellis entered an order upon defendant's motion for conditional release, placing him in the custody of his former wife and ordering supervision by the Durham County office of DAPP. This order was stayed following notification by defendant's former wife that she could not assume custody of defendant at that time.

On 8 June 1989, defendant again moved for conditional release, which was denied. Defendant appealed from the denial of that order to the Court of Appeals. That [***7] appeal is still pending.

On or about 12 January 1990, Judge Lowry Betts of the Orange County District Court held an involuntary commitment hearing, found that defendant was mentally ill, and committed defendant to outpatient treatment under chapter 122C of the General Statutes.

On 19 January 1990, defendant made another application for conditional release before Judge D.B. Herring. This application was granted, and defendant was again placed in the custody of his former wife. In addition, the Durham office of DAPP was ordered to supervise defendant as a pretrial detainee and to make written reports to the court as to the matters specified therein. The Court of Appeals was notified by defendant of his success in obtaining conditional release approximately one month later. The initial order by Judge Herring was recited as having been taken pursuant to N.C.G.S. § 15A-1004(b), which requires that the person or persons into whose custody defendant is placed under that provision must consent to such placement. Shortly thereafter, the Durham office of DAPP notified the court that it was not able to consent to such supervision, citing lack of statutory authority to supervise pretrial [***8] detainees, regular workload considerations, and potential liability for any such voluntary undertaking. As a result of this notification, on 5 March 1990, Judge Herring modified the original order, deleting the reference to specific statutory authority but continuing the original mandate to the Durham office of DAPP. He cited as authority for this order the inherent power of the court.

[*118] As recited in Judge Herring's order, it is unlikely that defendant will ever become competent to stand trial. The court further [**868] found that the District Attorney of Orange County had expressed no interest in dismissing the case pursuant to N.C.G.S. § 15A-1004. Judge Herring declined to dismiss the case pursuant to N.C.G.S. § 15A-1008(1) upon a finding that outpatient involuntary commitment would not provide the necessary supervision of the defendant due to potential alcohol consumption and failure to take stabilizing medication.

We find it unnecessary to publish here Judge Herring's thorough and lengthy modified order but will quote or characterize those portions of it necessary to our analysis of its contents.

The modified order makes findings that "unless the Court takes some action in [***9] this matter, defendant will remain indefinitely in a crowded Orange County jail," that the defendant's former wife is willing to assume twenty-four-hour supervision of defendant, that defendant has adequate income, and that DAPP "can assist in carrying out the Court's order by assigning a probation/parole officer to inquire, investigate, and observe the defendant's status while he's in the custody of [his former wife] and to file reports with the Court as may be desired."

As a result, the Durham office of DAPP was ordered, *inter alia*:

> a) To make weekly routine observations of the defendant, with or without notice, at the residence of [his former wife] . . ., with reference to the requirements of Paragraphs "First" through "Eighth" [the supervision provided by her; defendant's access to alcohol, firearms, and motor vehicles; his outpatient treatment and the taking of ordered medications; and defendant's whereabouts] as above set out;
>
> b) To report immediately, by the quickest means, to be followed by written report to the Orange County Clerk of any non-compliance with the requirements of Paragraphs "First" through "Eighth", or any other condition that may be a danger to others; [***10]

> c) To make monthly written reports of defendant's status to the Court not later than the 10th day of each consecutive calendar month beginning in April, 1990, to be mailed to the Orange County Clerk of Superior Court[.]

[*119] **[1]** It is with this last quoted portion of the order that DAPP takes issue. Thus, the question presented is whether a judge of the superior court has either statutory or inherent authority to compel DAPP, without its consent, to supervise the conditional release of a pretrial detainee who has not been tried or convicted because of his lack of capacity to proceed to trial. We conclude that he does not.

Judge Herring recites as consideration for the order at issue here "Section 205 of Chapter 15, Articles 23 and 56 of Chapter 15A; and Part 7, Article 5 of Chapter 122C."

N.C.G.S. § 15-205 sets forth the duties and powers of a probation officer in "all cases referred to him for investigation by the judges of the courts or by the Secretary of Correction." N.C.G.S. § 15-205 (1983). While this language might appear to support the order entered, it is clear from the remaining provisions that DAPP is so empowered only in cases in which the defendant has [***11] been or is to be *sentenced* following a judgment of conviction or plea of guilty. Article 20, in which this provision is found, is entitled "Suspension of Sentence and Probation." N.C.G.S. § 15-205 itself continues with repeated references to *probation*, which is a particular circumstance of actual or anticipated sentencing or formal deferred prosecution. Thus, this provision refers only to the power to investigate on behalf of the court the advisability of placing the defendant on probation.

Article 82 of chapter 15A (N.C.G.S. §§ 15A-1341 to -1347 (1988 and Cum. Supp. 1989)), entitled "Probation," makes it manifest that this form of supervision is available only upon conviction of crime. N.C.G.S. § 15A-1341 states in pertinent part:

> *A person who has been convicted* of any non-capital criminal offense not punishable by a minimum term of life imprisonment or a minimum term without benefit of probation may be placed on probation [**869] as provided by this Article. *A person who has been charged with a criminal offense not punishable by a term of imprisonment greater than 10 years* may be placed on probation as provided in this Article on motion of the defendant and the prosecutor [***12] if the court finds each of the following facts:
>
> (1) *Prosecution has been deferred* by the prosecutor pursuant to written agreement with the defendant, with [*120] the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct.
> (2) Each known victim of the crime has been notified of the motion for probation by subpoena or certified mail and has been given an opportunity to be heard.
> (3) The defendant has not been convicted of any felony or of any misdemeanor involving moral turpitude.
> (4) The defendant has not previously been placed on probation and so states under oath.
> (5) The defendant is unlikely to commit another offense punishable by a term of imprisonment greater than 30 days.

N.C.G.S. § 15A-1341(a) (1988) (emphasis added). Clearly, this provision does not apply to the situation *sub judice*, as the defendant has not been convicted of a crime and the offenses with which he is charged do not qualify for deferred prosecution.

Article 23 of chapter 15A was apparently cited to in error, as it is inapposite. It relates entirely to the processing by the police of a defendant following arrest. It is likely that the [***13] trial judge intended to refer to article 26. N.C.G.S. § 15A-534 of article 26 does permit the court to place a pretrial detainee "in the custody of a designated person or organization *agreeing* to supervise him." N.C.G.S. § 15A-534(a)(3) (Cum. Supp. 1989) (emphasis added). The order in question places custody with the former wife, not DAPP, and while defendant's former wife has agreed to supervise defendant, DAPP has not and has specifically declined to do so. Had the Durham DAPP office agreed to this placement, the State readily concedes that the order in question in this case would have been lawful. Pretrial release is entirely a creature of statute; as such, the authorizing statute must be followed.

Article 56 of chapter 15A is entitled "Incapacity to Proceed" and includes N.C.G.S. § 15A-1004, which is the specific provision dealing with defendant's situation, that is, one who is incompetent to stand trial and yet not subject to involuntary commitment. That statute also provides that the defendant may be placed "in the custody of a designated person or organization *agreeing* to supervise him." N.C.G.S. § 15A-1004(b) (1988) (emphasis added). This statute was the articulated [***14] statutory foundation of Judge Herring's [*121] original order. The Durham probation office declined to undertake such supervision. In its brief filed with this Court, the State notes that it was not mere recalcitrance which motivated the Durham probation office to decline this undertaking. The order in question mandates an even higher level of supervision and reporting than is normally undertaken in most probation cases. In addition to that office's concerns with respect to its workload, it was apprehensive as to the potential for civil liability were it to engage in such a voluntary undertaking in the absence of statutory authority and given the background and implicit potential for harm to others in this particular case. After the Durham office of DAPP declined to undertake the duties assigned to it in the order, the order was modified to articulate the "inherent power" of the court.

Finally, part 7, article 5 of chapter 122C (N.C.G.S. §§ 122C-261 to -277 (1989)) deals with involuntary commitment only. The defendant has repeatedly been found not subject to such commitment, therefore those statutes likewise provide no authority for Judge Herring's order. N.C.G.S. § 122C-271 [***15] does make provision for outpatient commitment if it is found

> by clear, cogent, and convincing evidence that the respondent is mentally ill; that he is capable of surviving safely in the community with available supervision [**870] from family, friends, or others; that based on respondent's treatment history, the respondent is in need of treatment in order to prevent further disability or deterioration that would predictably result in dangerousness as defined in G.S. 122C-3(11); and that the respondent's current mental status or the nature of his illness limits or negates his ability to make an informed decision to seek voluntarily or comply with recommended treatment, it may order outpatient commitment for a period not in excess of 90 days.

N.C.G.S. § 122C-271(a)(1) (1989).

While this provision may facially appear applicable to defendant, the only reference to a possible outpatient commitment that is apparent on the documents available to the State at this time is the abortive attempt of District Court Judge Betts to place defendant on that status on 12 January 1990. That order was made subject to Judge Battle's order of 22 March 1988 ordering involuntary commitment proceedings. [***16] It is not clear from the record why defendant did not remain on outpatient commitment.

[*122] It is clear, however, that defendant is not on outpatient commitment at this time. Otherwise, there would have been no need to order the Durham County Mental Health Center to supervise defendant "as if defendant were involuntarily committed for outpatient treatment."

N.C.G.S. § 122C-277(b) is the specific provision setting forth the procedure for dealing with one such as defendant initially committed for violent crime and found incapable of proceeding and not committed as an inpatient. It merely mandates a hearing pursuant to the above provision and contains no authority for the actions taken in this case.

None of the statutes referred to in the order provide any specific authority for the order as entered nor do any of them imply such authority. The only powers implied or reasonably inferred from a statute are those essential to effectuate its terms. As noted by Judge Mallard, quoting Black's Law Dictionary 1334 (rev. 4th ed. 1968):

> "Implied powers are such as are necessary to make available and carry into effect those powers which are expressly granted or conferred, and which [***17] must therefore be presumed to have been within the intention of the constitutional or legislative grant."

Mallard, *Inherent Power of the Courts of North Carolina*, 10 Wake Forest L. Rev. 1, 12 (1974). "[T]he power a court possesses only by virtue of a statutory grant is not an inherent power." 20 Am. Jur. 2d *Courts* § 78 (1965); *see also Beard v. N.C. State Bar*, 320 N.C. 126, 357 S.E.2d 694 (1987). It does not appear that the applicability of chapter 35A of the General Statutes (entitled "Incompetency and Guardianship") to the defendant's situation was ever explored.

[2] We now turn to the question of the inherent authority of a judge of the superior court to enter the order in question. By entering its amended order to rely upon the inherent power of the court, the trial court essentially conceded that the existing statutes did not provide authority for the portion of the order in question.

As an alternative to the statutory grounds discussed above, the court predicated its order on "the exercise of its inherent power." In support of this position, the court recited in its order:

> [*123] And the Court having no [***18] arm or agency of its own to assist in insuring its orders are complied with or to insure public safety in this unusual situation, the Court finds that *in the exercise of its inherent power and authority* in the interest of justice and public safety, it is necessary and reasonable to order a state agency to assist in the carrying out of its order and that the North Carolina Adult Probation and Parole offices are peculiarly equipped and trained to perform their [sic] requirements contemplated by this order . . . .

(Emphasis added.)

Section 1 of article II of the North Carolina Constitution vests the legislative power of the state in the General Assembly. It is the function of that body, exercising the police power of the state, to "legislate for [**871] the protection of the public health, safety, morals and general welfare of the people." *Martin v. Housing Corp.*, 277 N.C. 29, 45, 175 S.E.2d 665, 674 (1970). As discussed above, that body has provided for pretrial assignment of a defendant to DAPP only upon deferred prosecution, N.C.G.S. § 15A-1341 (1988), and upon the *agreement* to assume supervision of the person, N.C.G.S. § 15A-534(a)(3) (1988).

[***19] However inadequate this provision may be to meet the perceived needs of the defendant, for good or ill, it is not the prerogative of the superior court to amend it.

We are advertent to the dilemma in which the trial court found itself. The record before the court indicated that defendant would probably never be competent to stand trial, nor was he subject to inpatient care. Yet, he had been found to be functionally impaired; and, unless supervision, treatment, and medication could be maintained, he was subject to future violence perhaps as serious as the crimes with which he was charged. The trial court no doubt felt that it had no alternative but to fashion an appropriate remedy to do justice to the defendant and to protect the public. In effect, the trial court crafted a new form of pretrial release.

In a number of cases in recent years involving juvenile matters, our trial judges have found themselves in a similar dilemma because of the lack of statutory commitment and treatment alternatives. In those cases, the judges attempted to craft alternatives predicated on either the implied or inherent power of the court. In each such case, the judge was found to have erred.

[*124] [***20] In *In re Swindell*, 326 N.C. 473, 390 S.E.2d 134 (1990), the trial court ordered treatment and rehabilitation for a sexually abusive juvenile delinquent. This Court held that "the courts must make do with what is currently provided by the General Assembly." *Id.* at 475, 390 S.E.2d at 136. In *In re Wharton*, 305 N.C. 565, 290 S.E.2d 688 (1982), the county department of social services was ordered to create a foster home for a juvenile lacking the capacity to stand trial. This Court reversed, holding that "[w]hile matters implied by the language of statutes must be given effect to the same extent as matters specifically expressed, the court may not, under the guise of judicial interpretation, interpolate provisions which are lacking." *Id.* at 574, 290 S.E.2d at 693 (citations omitted). In *In re Brownlee*, 301 N.C. 532, 272 S.E.2d 861 (1981), a juvenile delinquent was ordered to be placed in a Texas treatment program. This Court was "unable to conclude that the General Assembly intended to vest [the trial judge] with the authority [***21] which he sought to exercise in this case." *Id.* at 555, 272 S.E.2d at 875. In *In re Jackson*, 84 N.C. App. 167, 352 S.E.2d 449 (1987), a school board was ordered to present a plan to meet the needs of a juvenile expelled from school. The Court of Appeals conceded that there was an "overwhelming lack of reasonable alternatives for effective placement" but held that "[h]owever regrettable the existence of this void, a court may not overcome it by fiat." *Id.* at 176-77, 352 S.E.2d at 455.

As in the juvenile cases, we find no inherent authority of the superior court to order DAPP to provide services not specified and, at least by implication, intentionally omitted from the grant of authority to DAPP in N.C.G.S. § 15A-534(a)(3). "[T]he inherent powers of a court do not increase its jurisdiction but are limited to such powers as are essential to the existence of the court and necessary to the orderly and efficient exercise of its jurisdiction." *Hopkins v. Barnhardt*, 223 N.C. 617, 619-20, 27 S.E.2d 644, 646 (1943). In order for a court's power to be inherent, "it [***22] must be such as is reasonably necessary for the exercise of its proper function and jurisdiction in the administration of justice and such as is not granted or denied to it by the Constitution or by a constitutionally enacted statute." Mallard, *Inherent Power of the Courts of North Carolina*, 10 Wake Forest L. Rev. 1, 13 (1974).

As laudable as its objective was, the trial court simply lacked the authority to impose the supervisory functions in question upon [**872] DAPP. The order of Herring, J., entered 5 March 1990, requiring [*125] DAPP, without its consent, to provide supervision of defendant while in custody of his former

wife is vacated. The case is remanded to the Superior Court, Orange County, for further proceedings not inconsistent with this opinion.

Vacated and remanded.

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LIEU OF BOND, DEFENDANT MAY BE RELEASED TO CUSTODY OF LEGAL GUARDIAN OR AUTHORIZED PERSON FROM WILLIAMS (GROUP HOME).

10. The following day, December 2, 2018, Lizzie was transferred to the Mecklenburg County Jail. Upon arrival, Magistrate G. Porter conducted another initial appearance, imposed the same conditions of pretrial release, and ordered that Lizzie be produced in courtroom 1150 at 1:00 PM for a first appearance before a District Court Judge.

11. Notwithstanding Magistrate Porter's order to produce Lizzie in court for an initial appearance on December 2, a first appearance in these matters was not held until December 3. On that date, the District Court, the Honorable Judge Jacob Jacobs presiding, changed the conditions of pretrial release in these matters to "CUSTODY RELEASE TO DSS, ELLEN REID." **In effect, the District Court made the custody release the *sole* condition of pretrial release, removing Lizzie's option to post bond to secure her own release. Moreover, it imposed a custody release to DSS—an agency of the State.**

12. Ms. Reid did not appear to assume custody of Lizzie for seven days, until December 9, 2018.

13. Upon release, DSS transferred Lizzie to a lock-down facility, where she remained for the next several months.

14. Lizzie had no ability to secure her own release during the period of her incarceration and was effectively held without conditions of pretrial release.

The Defendant was illegally detained for nearly three days.

A judicial official may "Place the defendant in the custody of a designated person or organization agreeing to supervise him" as a condition of pre-trial release. § 15A-534(a)(3); see also § 15A-533(b) (a judicial official must impose conditions of pre-trial release for a defendant charged with a non-capital offense in accordance with § 15A-534). However, when a custody release is imposed, whether to pretrial services or a designated individual, "the defendant may elect to execute [a secured] appearance bond." § 15A-534(a). The District Court unlawfully failed to set a secured bond to accompany the custody release; in Lizzie's case, this constitutional and statutory violation effectively denied her *any* opportunity to secure pretrial release during a period of approximately days. Neither DSS nor Ms. Reid assumed custody of her, and Lizzie had no alternative means to secure her release.

In effect, then, a custody release requires that the judicial official impose a secured bond in the alternative—and make findings of fact—unless the person or organization is immediately available and willing to assume custody of the defendant. For this reason, subsection (3) is written in the present tense ("to place").[1] Moreover, requiring a secured bond to accompany a

[1] Similarly, there is no authority permitting the Sheriff to delay an arrestee's execution of an unsecured appearance

custody releases makes sense, since the designated person or organization may be unable or unwilling to take custody of a defendant, thereby depriving him of any meaningful opportunity for pretrial release. See State v. Gravette, 327 N.C. 114 (1990) (vacating an order requiring an organization to take custody of a defendant against its expressed wishes). Section 15A-534 affords defendants the right to "execute" a secured bond—meaning that such a bond has already been set—not to elect to have a secured bond set. Nowhere does § 15A-534 distinguish between defendants under 18 years old and those arrestees considered adults for non-criminal purposes.

Dismissal is the only appropriate remedy for this flagrant violation of the Defendant's rights under the Constitution and North Carolina law.

The Court must dismiss a charge when a "defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." § 15A-954(a)(4). In the present case, dismissal is required for violation of both procedural and substantive due process.

1. The violation of the Lizzie's constitutional right to procedural due process caused irreparable prejudice along the lines of State v. Thompson.

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." U.S. v. Salerno, 481 U.S. 739, 755 (1987). While the legislature may authorize "no bail" for certain classes of offenses or defendants—in effect detaining someone for regulatory rather than criminal purposes—it must create "numerous procedural safeguards" and afford the detainee a prompt, adversarial hearing on the matter. Id.. Such a statute, if carefully drafted, protects a defendant's right to liberty by imposing an adjudicative process to guard against arbitrary detentions.[2] Hence, the Due Process Clause demands that incarceration before trial be imposed in strict accordance with the law and for no longer than necessary to accomplish that law's underlying purpose.[3]

In State v. Thompson, the defendant was detained without conditions of pretrial release on a domestic violence hold for approximately 48 hours pursuant to § 15A-534.1. Section 534.1 requires that a judge rather than a magistrate set conditions of pretrial release in certain domestic violence cases. While a domestic violence hold may last up to 48 hours, the defendant in Thompson was not brought before the first available district court judge, and

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bond; indeed, it appears that he must permit its immediate execution. Compare § 15A-534(a)(2) ("*Release* the defendant upon his execution of an unsecured appearance bond") with § 15A-534(a)(4) ("*Require* the execution of an appearance bond in a specified amount secured by a cash deposit...") (emphasis added).

[2] For this reason, the defense does not challenge the validity § 15A-534 itself; rather, it asks the Court to insist that the State follow the law already in place.

[3] Lizzie was also illegally detained under the Law of the Land provision of the North Carolina Constitution. See generally Henry v. Edmiston, 315 N.C. 474, 480 (1986) ("This 'Law of the Land' clause is the "parallel provision in the state constitution to the due process clause of the Fourteenth Amendment of the federal constitution'").

the state offered no acceptable justification for the delay. Balancing the government's interest in waiting the full 48 hours against the defendant's interest in appearing before the first available judge,[4] the North Carolina Supreme Court held that the five (5) extra hours the defendant spent in custody worked irreparable prejudice that merited dismissal. The State demonstrated no compelling interest in furthering the detention beyond the time the first judge was available to set conditions of pretrial release, and the defendant's interest in securing his freedom from detention was substantial.

The Thompson holding reflects a long line of opinions finding that delays in pretrial release can irreparably harm criminal defendants. Pretrial release "permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction." Stack v. Boyle, 342 U.S. 1, 4 (1951). Even a short amount of time in "pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." Id.. Consequently, prolonged detention prior to trial may be "more serious than the interference occasioned by the arrest." Gerstein v. Pugh, 420 U.S. 103, 114 (1975).

In the present case, Lizzie's liberty interest is even stronger, the governmental interest weaker, and the abuse of authority by the magistrate more egregious than in Thompson. Lizzie was unlawfully detained for more almost seven days instead of a few hours beyond the time legally permitted. There is no evidence that the magistrate or any other judicial official inquired of Lizzie—or of DSS itself—whether DSS or Ms. Reid was *able or willing* to assume custody of her. In contrast, setting a secured bond requires nothing more than checking a box on a form at initial appearance and making findings of fact, whereas ensuring compliance with Thompson required courthouses across the state to reorganize calendars and hold hearings over holidays. Finally, unlike in Thompson, the state can put forth no legitimate purpose served by the law under which Lizzie was detained, since no law actually authorized her detention. With no valid governmental interest to counterbalance the nearly seven days spent in jail in violation of the law, the Court must find irreparable prejudice.

Notably, North Carolina appellate courts have repeatedly held that judicial officials may not correct oversights in the General Statutes' pretrial release scheme—no matter how glaring or unfortunate—through the use of "implied" or "inherent" powers. In Gravette, a mentally ill defendant was found incompetent to stand trial but not an imminent danger to himself or others, and thus ineligible for involuntary commitment. The District Attorney declined to dismiss his case. With the defendant unlikely to ever be restored to competency, the pretrial release statute only allowed court the court to release the defendant to his mother or hold him in jail indefinitely. In the view of the trial court, the former option provided insufficient supervision while the latter was fundamentally unjust. Thus, the court relied on

[4] The court used the Supreme Court's balancing test from FDIC v. Mallen, 486 U.S. 230 (1988), a reformulation of the test in Mathews v. Eldridge, 424 U. S. 319 (1976). See Thompson, 349 N.C. at 499.

its "inherent authority" to order the Department of Adult Probation and Parole to supervise the defendant as a condition of pretrial release. "In effect," the Gravette opinion holds, "the trial court crafted a new form of pretrial release." Id. at 123. The state Supreme Court vacated the trial court's order, comparing the issue to a line of delinquency cases in which judges ventured beyond the pre-dispositional options available under the Juvenile Code in an attempt to better supervise children:

> *"In a number of cases in recent years involving juvenile matters, our trial judges have found themselves in a similar dilemma because of the lack of statutory commitment and treatment alternatives. In those cases, the judges attempted to craft alternatives predicated on either the implied or inherent power of the court. In each such case, the judge was found to have erred."*

In the present case, § 15A-534 is clear—there is no room for judicial discretion in its mandate to set a secured bond when imposing a custody release to a person or entity not immediately available or willing to receive the defendant. Cf. State v. Sparks, 297 N.C. 314, 320 (1979) (a judge may decline to impose conditions of pretrial release in a capital case because of an express statutory provision leaving bail in the court's discretion), cited by State v. Hocutt, 177 N.C. App. 341, 349 (2006). Although 16 years of age on the date of the alleged offenses, Lizzie is charged *as an adult in a criminal case,* where the strictures of Due Process are more stringent than in a juvenile proceeding. See generally McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (comparing the procedural requirements of the Due Process Clause in juvenile and criminal settings).[5] If the pre-trial release statute ought to be amended to account for minors charged as adults, it is up to the legislature—and the legislature alone—to do so. Finally, it is worth noting that DSS—and by extension, Ms. Reid through her role as an agent of DSS—is an arm of the State of North Carolina. Conditioning Lizzie's release on the willingness of the State that is prosecuting her to secure her release is akin to denying her any right to be heard on the issue of pretrial release before a neutral judicial official.

Finally, the State may contend that no prejudice resulted from Lizzie's illegal incarceration because jail policy would have prevented her from being released without a person over 18 years of age present. This argument fails for three reasons. First, if such a policy exists, it is clearly illegal. The Sheriff must release an inmate when ordered to do so by the courts.[6] Second, even assuming that Judge Jacobs believed in the validity of a jail

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[5] It is also fundamentally unfair for the court to treat a defendant as an adult for the state to treat the Defendant as an adult for the purpose of sustaining a criminal prosecution against her and a minor for the purpose of detaining her before trial. See N.C. Const. art. I, § 35 ("A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty").

[6] There is no authority in any other source of law that would support the Sheriff's ability to refuse to abide by a court order to release 16 and 17 year old criminal defendants. In fact, G.S. § 15A-537(a) dictates the opposite:

> *Following any authorization of release of any person in accordance with the provisions of this Article, any judicial official must effect the release of that person upon satisfying himself that the conditions of release have been met. (emphasis added)*

policy requiring that Lizzie should only be released to an adult, he could have imposed a custody release to "any person over eighteen" or no custody release at all since, in that case, the jail would not release him unless a person over 18 years of age signed him out. Instead, the District Court imposed a custody release to a single individual and an agency rather than to any person over 18 years of age. Third, this line of argument is akin to holding that if one police officer fails to administer a *Miranda* warning before interrogating a suspect in custody, no prejudice results from admitting a confession into evidence because the next officer would similarly have failed to administer the warning. The District Court's violation of the Constitution is not permissible simply because the Sheriff might have committed a subsequent violation.

2. The violation of the Lizzie's substantive due process rights under the state and federal constitutions caused irreparable prejudice.

The Supreme Court has held that "if the right infringed upon is a 'fundamental' right, then the law will be viewed with strict scrutiny and the party seeking to apply the law must demonstrate a compelling state interest for the law to survive a constitutional attack." Williamson v. Lee Optical, 348 U.S. 483 (1955).[7] Freedom from physical confinement is perhaps the most fundamental of the substantive restrictions imposed on governmental action by the right to "liberty" under the Fourteenth Amendment. In Foucha v. Louisiana, 504 U.S. 71 (1992) the Supreme Court stated:

> *"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. We have always been careful not to minimize the importance and fundamental nature of the individual's right to liberty."*

(citations and quotations omitted); see also Salerno, 481 U.S. at 750. For almost 40 years, the Court has held that this fundamental right to freedom from physical confinement extends to children, as well. Parham v. J. R., 442 U.S. 584 (1979) (analyzing a civil commitment statute, finding that "a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily").

In the context of incarceration, the confinement pretrial fails to satisfy strict scrutiny if it amounts to punishment rather than an appropriate exercise of regulatory control pending final adjudication of guilt. See Bell v. Wolfish 441 U.S. 520, 535 and n. 16 (recognizing the similarity of the test under substantive due process before conviction with the standard for double jeopardy after conviction). Whether a person's confinement in jail is "impermissible

[7] Notably, the Thompson court never addressed the defendant's as-applied substantive due process argument. 349 N.C. at 503 ("…we need not consider defendant's additional arguments that it was unconstitutionally applied to him under principles of substantive due process and double jeopardy as well. We dispose of the case solely upon procedural due process grounds").

punishment" or "permissible regulation" depends on the legislative purpose of the law authorizing the person's confinement, and the relationship between the length of confinement and the law's purpose. Cf. Salerno, 467 U.S. at 746-47 (analyzing the federal Bail Reform Act along these lines).

In Lizzie's case, the court cannot glean legislative intent from the absence of legislation. No law authorized Lizzie's confinement pursuant to a custody release without a secured bond. If anything, the court must assume from lack of a "juvenile hold" or custody release without a secured bond in Article 26 that the legislature chose to treat 16- and 17-year-old defendants the same as all other persons accused of a crime. N.C. Gen. Stat. Chap. 15A Art. 26 (entitled "Bail"). Without an underlying legislative purpose, any detention beyond that required by the pretrial release statutes is disproportionate and constitutes punishment within the meaning of the Due Process Clause. To try, convict and sentence Lizzie at this point for these offenses would amount to a flagrant violation of substantive due process.

WHEREFORE, the Defendant respectfully moves this Court as follows:

1. To conduct a pre-trial evidentiary hearing to ascertain the facts relevant to this Motion.
2. To enter an Order dismissing with prejudice the charges against the Defendant.
3. For such other and further relief that the Court deems just and proper.

Respectfully submitted this the ____ day of _____, 2019.

_____
Nathan Rubenson
Assistant Public Defender
COUNSEL FOR THE DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion on _____, Assistant District Attorney, Twenty-Sixth Judicial District, by hand delivery, this the the ____ day of _____, 2019.

_____
Nathan Rubenson
Assistant Public Defender
720 E. Fourth Street, Suite 300
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(704) 686-0036

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
18CR NUMBER

STATE OF NORTH CAROLINA	)	
	)	**MOTION TO DISMISS FOR**
vs.	)	**VIOLATIONS OF PROCEDURAL AND**
	)	**SUBSTANTIVE DUE PROCESS**
LIZZIE MANSFIELD	)	

NOW COMES the Defendant, Lizzie Mansfield, by and through counsel, Assistant Public Defender Nathan Rubenson, and respectfully moves the Court for an order dismissing the charges against her pursuant to the North Carolina General Statutes Section 15A-954(a)(4), the Fifth and Fourteenth Amendments to the United States Constitution, Article I Sections 1, 19, 23 and 27 of the North Carolina Constitution, State v. Thompson, 349 N.C. 483 (1998) and related case law. The Defendant was incarcerated for close to three days in flagrant violation of the United States Constitution, the North Carolina Constitution and the General Statutes without any meaningful opportunity to secure pretrial release.

In support of said Motion, the Defendant respectfully shows unto the Court, upon information and belief:

1. Lizzie Mansfield is charged with four counts of misdemeanor larceny. She has no prior criminal convictions.
2. Lizzie is a United States citizen and an indigent.
3. Lizzie was 16 years of age on the date of the alleged offenses and during all periods of incarceration referenced in this Motion.
4. At all times relevant to this Motion, the Department of Social Services ("DSS") had legal and physical custody of Lizzie. Ellen Reid is a social worker for DSS and in charge of Lizzie.
5. Prior to these alleged offenses, DSS placed Lizzie in the Williams Group Home located at XXXXXXX, North Carolina.
6. David Adams, the alleged victim in these matters, is the owner of New Vision Group Home.
7. On December 1, 2018, at approximately 8:57 PM, Lizzie was arrested in Davidson County on outstanding warrants in the above-entitled actions.
8. Lizzie was subsequently transported to the Davidson County Jail and brought before Magistrate R. Johnson.
9. Magistrate Johnson thereafter conducted an initial appearance at set as conditions of Lizzie's pretrial release that she execute a secured bond in the amount of $500 "OR IN

LIEU OF BOND, DEFENDANT MAY BE RELEASED TO CUSTODY OF LEGAL GUARDIAN OR AUTHORIZED PERSON FROM WILLIAMS (GROUP HOME).

10. The following day, December 2, 2018, Lizzie was transferred to the Mecklenburg County Jail. Upon arrival, Magistrate G. Porter conducted another initial appearance, imposed the same conditions of pretrial release, and ordered that Lizzie be produced in courtroom 1150 at 1:00 PM for a first appearance before a District Court Judge.

11. Notwithstanding Magistrate Porter's order to produce Lizzie in court for an initial appearance on December 2, a first appearance in these matters was not held until December 3. On that date, the District Court, the Honorable Judge Jacob Jacobs presiding, changed the conditions of pretrial release in these matters to "CUSTODY RELEASE TO DSS, ELLEN REID." **In effect, the District Court made the custody release the *sole* condition of pretrial release, removing Lizzie's option to post bond to secure her own release. Moreover, it imposed a custody release to DSS—an agency of the State.**

12. Ms. Reid did not appear to assume custody of Lizzie for seven days, until December 9, 2018.

13. Upon release, DSS transferred Lizzie to a lock-down facility, where she remained for the next several months.

14. Lizzie had no ability to secure her own release during the period of her incarceration and was effectively held without conditions of pretrial release.

The Defendant was illegally detained for nearly three days.

A judicial official may "Place the defendant in the custody of a designated person or organization agreeing to supervise him" as a condition of pre-trial release. § 15A-534(a)(3); see also § 15A-533(b) (a judicial official must impose conditions of pre-trial release for a defendant charged with a non-capital offense in accordance with § 15A-534). However, when a custody release is imposed, whether to pretrial services or a designated individual, "the defendant may elect to execute [a secured] appearance bond." § 15A-534(a). The District Court unlawfully failed to set a secured bond to accompany the custody release; in Lizzie's case, this constitutional and statutory violation effectively denied her *any* opportunity to secure pretrial release during a period of approximately days. Neither DSS nor Ms. Reid assumed custody of her, and Lizzie had no alternative means to secure her release.

In effect, then, a custody release requires that the judicial official impose a secured bond in the alternative—and make findings of fact—unless the person or organization is immediately available and willing to assume custody of the defendant. For this reason, subsection (3) is written in the present tense ("to place").[1] Moreover, requiring a secured bond to accompany a

[1] Similarly, there is no authority permitting the Sheriff to delay an arrestee's execution of an unsecured appearance

custody releases makes sense, since the designated person or organization may be unable or unwilling to take custody of a defendant, thereby depriving him of any meaningful opportunity for pretrial release. See State v. Gravette, 327 N.C. 114 (1990) (vacating an order requiring an organization to take custody of a defendant against its expressed wishes). Section 15A-534 affords defendants the right to "execute" a secured bond—meaning that such a bond has already been set—not to elect to have a secured bond set. Nowhere does § 15A-534 distinguish between defendants under 18 years old and those arrestees considered adults for non-criminal purposes.

Dismissal is the only appropriate remedy for this flagrant violation of the Defendant's rights under the Constitution and North Carolina law.

The Court must dismiss a charge when a "defendant's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of his case that there is no remedy but to dismiss the prosecution." § 15A-954(a)(4). In the present case, dismissal is required for violation of both procedural and substantive due process.

1. The violation of the Lizzie's constitutional right to procedural due process caused irreparable prejudice along the lines of State v. Thompson.

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." U.S. v. Salerno, 481 U.S. 739, 755 (1987). While the legislature may authorize "no bail" for certain classes of offenses or defendants—in effect detaining someone for regulatory rather than criminal purposes—it must create "numerous procedural safeguards" and afford the detainee a prompt, adversarial hearing on the matter. Id.. Such a statute, if carefully drafted, protects a defendant's right to liberty by imposing an adjudicative process to guard against arbitrary detentions.[2] Hence, the Due Process Clause demands that incarceration before trial be imposed in strict accordance with the law and for no longer than necessary to accomplish that law's underlying purpose.[3]

In State v. Thompson, the defendant was detained without conditions of pretrial release on a domestic violence hold for approximately 48 hours pursuant to § 15A-534.1. Section 534.1 requires that a judge rather than a magistrate set conditions of pretrial release in certain domestic violence cases. While a domestic violence hold may last up to 48 hours, the defendant in Thompson was not brought before the first available district court judge, and

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bond; indeed, it appears that he must permit its immediate execution. Compare § 15A-534(a)(2) ("*Release* the defendant upon his execution of an unsecured appearance bond") with § 15A-534(a)(4) ("*Require* the execution of an appearance bond in a specified amount secured by a cash deposit...") (emphasis added).

[2] For this reason, the defense does not challenge the validity § 15A-534 itself; rather, it asks the Court to insist that the State follow the law already in place.

[3] Lizzie was also illegally detained under the Law of the Land provision of the North Carolina Constitution. See generally Henry v. Edmiston, 315 N.C. 474, 480 (1986) ("This 'Law of the Land' clause is the "parallel provision in the state constitution to the due process clause of the Fourteenth Amendment of the federal constitution'").

the state offered no acceptable justification for the delay. Balancing the government's interest in waiting the full 48 hours against the defendant's interest in appearing before the first available judge,[4] the North Carolina Supreme Court held that the five (5) extra hours the defendant spent in custody worked irreparable prejudice that merited dismissal. The State demonstrated no compelling interest in furthering the detention beyond the time the first judge was available to set conditions of pretrial release, and the defendant's interest in securing his freedom from detention was substantial.

The Thompson holding reflects a long line of opinions finding that delays in pretrial release can irreparably harm criminal defendants. Pretrial release "permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction." Stack v. Boyle, 342 U.S. 1, 4 (1951). Even a short amount of time in "pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." Id.. Consequently, prolonged detention prior to trial may be "more serious than the interference occasioned by the arrest." Gerstein v. Pugh, 420 U.S. 103, 114 (1975).

In the present case, Lizzie's liberty interest is even stronger, the governmental interest weaker, and the abuse of authority by the magistrate more egregious than in Thompson. Lizzie was unlawfully detained for more almost seven days instead of a few hours beyond the time legally permitted. There is no evidence that the magistrate or any other judicial official inquired of Lizzie—or of DSS itself—whether DSS or Ms. Reid was *able or willing* to assume custody of her. In contrast, setting a secured bond requires nothing more than checking a box on a form at initial appearance and making findings of fact, whereas ensuring compliance with Thompson required courthouses across the state to reorganize calendars and hold hearings over holidays. Finally, unlike in Thompson, the state can put forth no legitimate purpose served by the law under which Lizzie was detained, since no law actually authorized her detention. With no valid governmental interest to counterbalance the nearly seven days spent in jail in violation of the law, the Court must find irreparable prejudice.

Notably, North Carolina appellate courts have repeatedly held that judicial officials may not correct oversights in the General Statutes' pretrial release scheme—no matter how glaring or unfortunate—through the use of "implied" or "inherent" powers. In Gravette, a mentally ill defendant was found incompetent to stand trial but not an imminent danger to himself or others, and thus ineligible for involuntary commitment. The District Attorney declined to dismiss his case. With the defendant unlikely to ever be restored to competency, the pretrial release statute only allowed court the court to release the defendant to his mother or hold him in jail indefinitely. In the view of the trial court, the former option provided insufficient supervision while the latter was fundamentally unjust. Thus, the court relied on

[4] The court used the Supreme Court's balancing test from FDIC v. Mallen, 486 U.S. 230 (1988), a reformulation of the test in Mathews v. Eldridge, 424 U. S. 319 (1976). See Thompson, 349 N.C. at 499.

its "inherent authority" to order the Department of Adult Probation and Parole to supervise the defendant as a condition of pretrial release. "In effect," the Gravette opinion holds, "the trial court crafted a new form of pretrial release." Id. at 123. The state Supreme Court vacated the trial court's order, comparing the issue to a line of delinquency cases in which judges ventured beyond the pre-dispositional options available under the Juvenile Code in an attempt to better supervise children:

> *"In a number of cases in recent years involving juvenile matters, our trial judges have found themselves in a similar dilemma because of the lack of statutory commitment and treatment alternatives. In those cases, the judges attempted to craft alternatives predicated on either the implied or inherent power of the court. In each such case, the judge was found to have erred."*

In the present case, § 15A-534 is clear—there is no room for judicial discretion in its mandate to set a secured bond when imposing a custody release to a person or entity not immediately available or willing to receive the defendant. Cf. State v. Sparks, 297 N.C. 314, 320 (1979) (a judge may decline to impose conditions of pretrial release in a capital case because of an express statutory provision leaving bail in the court's discretion), cited by State v. Hocutt, 177 N.C. App. 341, 349 (2006). Although 16 years of age on the date of the alleged offenses, Lizzie is charged *as an adult in a criminal case,* where the strictures of Due Process are more stringent than in a juvenile proceeding. See generally McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (comparing the procedural requirements of the Due Process Clause in juvenile and criminal settings).[5] If the pre-trial release statute ought to be amended to account for minors charged as adults, it is up to the legislature—and the legislature alone—to do so. Finally, it is worth noting that DSS—and by extension, Ms. Reid through her role as an agent of DSS—is an arm of the State of North Carolina. Conditioning Lizzie's release on the willingness of the State that is prosecuting her to secure her release is akin to denying her any right to be heard on the issue of pretrial release before a neutral judicial official.

Finally, the State may contend that no prejudice resulted from Lizzie's illegal incarceration because jail policy would have prevented her from being released without a person over 18 years of age present. This argument fails for three reasons. First, if such a policy exists, it is clearly illegal. The Sheriff must release an inmate when ordered to do so by the courts.[6] Second, even assuming that Judge Jacobs believed in the validity of a jail

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[5] It is also fundamentally unfair for the court to treat a defendant as an adult for the state to treat the Defendant as an adult for the purpose of sustaining a criminal prosecution against her and a minor for the purpose of detaining her before trial. See N.C. Const. art. I, § 35 ("A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty").

[6] There is no authority in any other source of law that would support the Sheriff's ability to refuse to abide by a court order to release 16 and 17 year old criminal defendants. In fact, G.S. § 15A-537(a) dictates the opposite:

> *Following any authorization of release of any person in accordance with the provisions of this Article, any judicial official must effect the release of that person upon satisfying himself that the conditions of release have been met. (emphasis added)*

policy requiring that Lizzie should only be released to an adult, he could have imposed a custody release to "any person over eighteen" or no custody release at all since, in that case, the jail would not release him unless a person over 18 years of age signed him out. Instead, the District Court imposed a custody release to a single individual and an agency rather than to any person over 18 years of age. Third, this line of argument is akin to holding that if one police officer fails to administer a *Miranda* warning before interrogating a suspect in custody, no prejudice results from admitting a confession into evidence because the next officer would similarly have failed to administer the warning. The District Court's violation of the Constitution is not permissible simply because the Sheriff might have committed a subsequent violation.

2. The violation of the Lizzie's substantive due process rights under the state and federal constitutions caused irreparable prejudice.

The Supreme Court has held that "if the right infringed upon is a 'fundamental' right, then the law will be viewed with strict scrutiny and the party seeking to apply the law must demonstrate a compelling state interest for the law to survive a constitutional attack." Williamson v. Lee Optical, 348 U.S. 483 (1955).[7] Freedom from physical confinement is perhaps the most fundamental of the substantive restrictions imposed on governmental action by the right to "liberty" under the Fourteenth Amendment. In Foucha v. Louisiana, 504 U.S. 71 (1992) the Supreme Court stated:

> *"Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. It is clear that commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. We have always been careful not to minimize the importance and fundamental nature of the individual's right to liberty."*

(citations and quotations omitted); see also Salerno, 481 U.S. at 750. For almost 40 years, the Court has held that this fundamental right to freedom from physical confinement extends to children, as well. Parham v. J. R., 442 U.S. 584 (1979) (analyzing a civil commitment statute, finding that "a child, in common with adults, has a substantial liberty interest in not being confined unnecessarily").

In the context of incarceration, the confinement pretrial fails to satisfy strict scrutiny if it amounts to punishment rather than an appropriate exercise of regulatory control pending final adjudication of guilt. See Bell v. Wolfish 441 U.S. 520, 535 and n. 16 (recognizing the similarity of the test under substantive due process before conviction with the standard for double jeopardy after conviction). Whether a person's confinement in jail is "impermissible

[7] Notably, the Thompson court never addressed the defendant's as-applied substantive due process argument. 349 N.C. at 503 ("…we need not consider defendant's additional arguments that it was unconstitutionally applied to him under principles of substantive due process and double jeopardy as well. We dispose of the case solely upon procedural due process grounds").

punishment" or "permissible regulation" depends on the legislative purpose of the law authorizing the person's confinement, and the relationship between the length of confinement and the law's purpose. Cf. Salerno, 467 U.S. at 746-47 (analyzing the federal Bail Reform Act along these lines).

In Lizzie's case, the court cannot glean legislative intent from the absence of legislation. No law authorized Lizzie's confinement pursuant to a custody release without a secured bond. If anything, the court must assume from lack of a "juvenile hold" or custody release without a secured bond in Article 26 that the legislature chose to treat 16- and 17-year-old defendants the same as all other persons accused of a crime. N.C. Gen. Stat. Chap. 15A Art. 26 (entitled "Bail"). Without an underlying legislative purpose, any detention beyond that required by the pretrial release statutes is disproportionate and constitutes punishment within the meaning of the Due Process Clause. To try, convict and sentence Lizzie at this point for these offenses would amount to a flagrant violation of substantive due process.

WHEREFORE, the Defendant respectfully moves this Court as follows:

1. To conduct a pre-trial evidentiary hearing to ascertain the facts relevant to this Motion.
2. To enter an Order dismissing with prejudice the charges against the Defendant.
3. For such other and further relief that the Court deems just and proper.

Respectfully submitted this the ____ day of _____, 2019.

_____
Nathan Rubenson
Assistant Public Defender
COUNSEL FOR THE DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion on _____, Assistant District Attorney, Twenty-Sixth Judicial District, by hand delivery, this the the ____ day of _____, 2019.

_____
Nathan Rubenson
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720 E. Fourth Street, Suite 300
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STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT DIVISION
19CR NUMBER

STATE OF NORTH CAROLINA	)	
	)	**MOTION TO DISMISS**
vs.	)	**PROSECUTION OF A CHILD**
	)	**AS IF SHE WERE AN ADULT**
LIZZIE MANSFIELD	)	

NOW COMES the Defendant, Lizzie Mansfield, by and through counsel, Assistant Public Defender ATTORNEY, and respectfully moves this Court to dismiss the above-captioned action pursuant to N.C.G.S. § 15A-954(a)(1),(4),(8); the United States Constitution, Amendments V, VIII, and XIV; the Constitution of North Carolina, Art. I, Sec. 1, 19, 23, and 27; *Miller v. Alabama*, 567 U.S. 460 (2012); *Graham v. Florida*, 560 U.S. 48 (2010) and *Roper v. Simmons*, 543 U.S. 551 (2005); and related case law.

I. Factual Background[1]

a. The Charge

Lizzie Mansfield, a sixteen-year-old in the 10th grade, allegedly stole a box of candy bars worth $10.24 from a convenience store. The police arrested her, a magistrate committed her to an adult jail, and the State charged her, as an adult, with misdemeanor larceny. Now, the District Attorney seeks to brand her a criminal and sentence her as an adult.

b. The Nature of Youth

Children today exhibit the same "lack of maturity and underdeveloped sense of responsibility" as their peers 30 years ago. Their decisions are just as "impetuous and ill-considered," *Johnson v. Texas*, 509 US 350, 367 (1993), they are still "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," *Roper* at 543 U.S. at 569, and their characters remain "not as well formed" as those of adults, *id.* at 570. But children today—unlike those of their parents' generation—may not be executed for even the most heinous crimes, *id.* at 551, nor subject to mandatory life without parole, *Miller*, 567 U.S. at 471, nor life without parole at all for offenses other than homicide, *Graham*, 560 U.S. at 82.

[1] The following facts are based on Information and Belief upon undersigned counsel's review of the charging documents in the above-entitled action, police reports provided by the District Attorney's Office, interviews, as well as other evidence.

Nothing about these essential qualities of youth will change on December 1, 2019, and nothing about the nature of their crimes makes children who commit minor offenses any more mature than those who commit murder. *See Miller*, 567 U.S. at 465.

As of December 1, 2019, sixteen-year-olds accused of virtually any misdemeanor—including larceny—will be prosecuted as children in juvenile court. But Lizzie belongs to the unfortunate class of children charged before their 18th birthday still subject to mandatory prosecution as an adult, caught between the passage and effective date of North Carolina's Raise the Age legislation. This Motion contends that the State cannot, by legislative fiat, accept that treating children as adults is wrongheaded, amoral, and impractical—yet continue to do so for thousands more children for the next two years.

c. Raise the Age and Juvenile Jurisdiction in North Carolina

Chief Justice Mark Martin convened the North Carolina Commission on the Administration of Law and Justice in September 2015 to make recommendations for improvement to North Carolina's justice system. The Commission, which included a diverse group of stakeholders and which solicited input from criminal justice participants and the general public, produced a report recommending that North Carolina raise the age for adult prosecution to eighteen years old, with transfer provisions for younger offenders. *See* North Carolina Commission on the Administration of Law and Justice, *Criminal Investigation & Adjudication Committee Report, Appendix A: Juvenile Reinvestment* (2017), *available at* https://nccalj.org/wp-content/uploads/2017/pdf/nccalj_criminal_investigation_and_adjudication_committee_report_juvenile_reinvestment.pdf [hereinafter "the Report"]. The Commission concluded as follows:

> [T]hat the vast majority of North Carolina's sixteen- and seventeen-year-olds commit misdemeanors and nonviolent felonies; that raising the age will make North Carolina safer and will yield economic benefit to the state and its citizens; and that raising the age has been successfully implemented in other states, is supported by scientific research, and would remove a competitive disadvantage that North Carolina places on its citizens.

Id. at 44.

At the time of the Report, only North Carolina and New York automatically tried sixteen-year-olds as adults for all offenses; four states set the age at seventeen, and the remainder at eighteen. *Id.* Since then, New York has raised the age of adult criminal responsibility to eighteen. *See* NY CLS Family Ct Act § 301.2 *et seq* [Appendix A to this Motion].[2] North Carolina children are now the last in the nation automatically prosecuted as adults for petty crimes.

In North Carolina, the 2017 Juvenile Justice Reinvestment Act passed as part of the 2017 state budget in June 2017 with bipartisan support. The JJRA adopted the majority of the

[2] Missouri has passed legislation its age of criminal responsibility from 17 to 18, 2018 Mo. SB 793, however it has not yet taken effect.

Commission's recommendations, including Raise the Age: it increased the age of juvenile court jurisdiction to eighteen for all misdemeanors except motor vehicle offenses, emancipated and married juveniles, and juveniles with prior convictions in adult court G.S. § 7B-1501(7) (as amended); G.S. §§ 7B-1601 *et seq* (as amended). For sixteen- and seventeen-year-olds charged with class H and I felonies, the court must affirmatively find after notice and hearing that "the protection of the public and the needs of the juvenile will be served by transfer to superior court;" otherwise, the juvenile court retains exclusive jurisdiction. §§§ 7B-1601; 7B-2200.5; 7B-2203 (all as amended). At a transfer hearing, the court must consider eight factors, and the juvenile has an opportunity to object and be heard. § 7B-2203 (as amended).[3]

By its own terms, the JJRA's expansion of juvenile court jurisdiction applies to "offenses committed on or after" December 1, 2019. 2017 N.C. Sess. Laws 57, §16D.4(tt). A mere nine months from now, children in Lizzie's position—charged with the same misdemeanor—will be prosecuted in juvenile court, and the State will not be able to treat them "as if" they were adults.

II. Legal Grounds

a. Cruel and Unusual Punishment

The Eighth Amendment's prohibition of cruel and unusual punishment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). The "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures" as well as "state practice." *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Penry v. Lynaugh*, 492 U.S. 302 (1989)*; see also Roper v. Simmons*, 543 U.S. 551, 563 (2005) (finding "objective indicia of society's standards" are "expressed in legislative enactments and state practice").

North Carolina's Constitution, Article I, Section 27 may offer *more* protection than its federal counterpart because it prohibits punishments that are "cruel *or* unusual." Although courts have "historically . . . analyzed cruel and/or unusual punishment claims by criminal defendants the same under both the federal and state Constitutions," *State v. Green*, 348 N.C. 588, 603

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[3] N.C.G.S. § 7B-2203(b) states that "the court shall determine whether the protection of the public and the needs of the juvenile will be served by transfer of the case to superior court and shall consider the following factors:

(1) The age of the juvenile;
(2) The maturity of the juvenile;
(3) The intellectual functioning of the juvenile;
(4) The prior record of the juvenile;
(5) Prior attempts to rehabilitate the juvenile;
(6) Facilities or programs available to the court prior to the expiration of the court's jurisdiction under this Subchapter and the likelihood that the juvenile would benefit from treatment or rehabilitative efforts;
(7) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner; and
(8) The seriousness of the offense and whether the protection of the public requires that the juvenile be prosecuted as an adult."

(1998), the Court of Appeals recently suggested that the disjunctive "or" might afford greater relief. *See State v. Jefferson*, 798 S.E.2d 121, 126 n.3 (N.C. Ct. App. 2017) (identifying provisions mandating automatic transfer of certain juveniles to adult court as nationally unique and noting that the defendant had not raised a challenge under the North Carolina Constitution). Several other state courts have noted that their identical "cruel or unusual punishment" provisions bar punishments that the Eighth Amendment does not otherwise forbid. *See People v. Bullock*, 440 Mich. 15, 30—31 (1992) (holding that it is "self-evident" that the "cruel or unusual" clause in the Michigan Constitution encompassed a broader swath of punishments than the Eighth Amendments "cruel and unusual" provision); *Armstrong v. Harris*, 773 So. 2d 7, 17 (2000) ("Use of the word 'or' instead of 'and' in the Clause indicates that the framers intended that both alternatives (i.e., 'cruel' and 'unusual') were to be embraced individually and disjunctively within the Clause's proscription."); *State v. Ali*, 855 N.W.2d 235, 258 (2014) ("In determining whether a particular sentence is cruel or unusual under the Minnesota Constitution, courts should separately examine whether the sentence is cruel and whether it is unusual."); *People v. Haller*, 174 Cal. App. 4th 1080, 1092 (2009) ("Whereas the federal Constitution prohibits cruel 'and' unusual punishment, California affords greater protection to criminal defendants by prohibiting cruel 'or' unusual punishment."); *but see State v. Wilson*, 306 S.C. 498, 512 (1992) (same meaning as federal constitution notwithstanding disjunctive language).

The automatic prosecution and sentencing of a sixteen-year-old as an adult for a misdemeanor is inconsistent with current societal values and evolving standards of decency. Once the JJRA takes effect, *no state will automatically prosecute sixteen-year-old defendants charged with any misdemeanor as adults*. This national consensus concerning the appropriate age for automatic adult prosecution for petty offenses is vastly stronger than when the Supreme Court ruled in *Graham* that life without the possibility of parole for juvenile non-homicide offenders was unconstitutional, 560 U.S. at 62 (39 jurisdictions permitting), or when it ruled in *Miller* that mandatory life without the possibility of parole for juvenile homicide offenders was unconstitutional, 567 U.S. at 482 (29 jurisdictions permitting).

Perhaps most compellingly, all states that have passed recent legislation concerning the age of adult criminal responsibility have raised, not lowered, the minimum age for adult prosecution. In fact, Vermont recently became the first state to raise the age of criminal responsibility for nearly all offenses except serious felonies to age 19. 2017 Bill Text VT S.B. 234. The "consistency in the direction of change" is "powerful evidence" of evolving standards of decency, *Atkins*, 536 U.S. at 315, and unambiguously weighs in Lizzie's favor.

The nationwide trend to raise the age comports with scientific research showing dramatic differences in cognition, susceptibility to peer pressure, and impulsivity between adults and children. *See, e.g.*, *Miller*, 567 U.S. at 471("[C]hildren are constitutionally different from adults for purposes of sentencing."); *J.D.B. v. North Carolina*, 564 U.S. 261, 274 (2011) ("[C]hildren cannot be viewed simply as miniature adults."); *State v. Sterling*, 233 N.C. App. 730, 734 (2014) (noting that age 18 serves as a "bright line" for constitutional challenges to sentencing schemes). Characterizing this research, *Miller* holds that "none of what it said about children—about their

distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific." *Id.* at 412.

Punishing a child as an adult for a misdemeanor entails serious, lifelong consequences *even if the child is ultimately acquitted or the case dismissed*. Criminal prosecution triggers the creation of a public arrest record, confinement in adult jail subject to the adult bail scheme, temporary separation from the child's parents and school, a public record of conviction, sentencing under more punitive adult sentencing rules, service of sentence in the adult probation, and extensive collateral consequences of conviction. *See* the Report, pages 4-6 (comparing adult and juvenile proceedings). The prosecution of a sixteen-year-old who commits a crime before December 2019 "takes on a punitive aspect that cannot be justified by our Constitution." *In re State ex rel. C.K.*, 182 A.3d 917, 935 (N.J. 2018). The adult system, in other words, is far more oriented toward incapacitation, retribution, and branding one a criminal in the eyes of society than juvenile court. *See United States v. Juvenile Male*, 819 F.2d 468, 471 (4th Cir. 1987) ("The significance of the 'transfer' [to adult court] is not that the transferred defendant must appear in a different court, the district court, and defend himself according to the procedural rules of the district court instead of those of a juvenile court. Rather, its significance is that the transferred defendant is suddenly subject to much more severe punishment.").[4]

For these reasons, prosecuting and/or sentencing Lizzie as an adult would violate the prohibition against cruel and unusual punishment.

b. Due Process

The right to due process protects "those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency." *United States v. Lovasco*, 431 U.S. 783, 790 (1977) (quotation marks and citations omitted). The state constitution's Law of the Land Clause "is synonymous with 'due process of law.'" *State v. Balance*, 229 N.C. 764, 769 (1949). However, state courts may interpret it to impose greater limitations on state action than its federal counterpart. *See Lowe v. Tarble*, 313 N.C. 460, 462 (1985) ("we reserve the right to grant relief against unreasonable and arbitrary state statutes…in circumstances under which no relief might be granted by the due process clause of the fourteenth amendment").

Since, in a few months, North Carolina will allow sixteen-year-olds charged with low-level felonies to demonstrate that their cases are more appropriate for juvenile court, Lizzie's automatic prosecution as an adult for a misdemeanor violates the right to due process. In a seminal case concerning procedural due process protections for juveniles subject to transfer to adult court, the Supreme Court held that "there is no place in our system of law for reaching a

[4] In a pre-*Miller* case, the North Carolina Court of Appeals rejected an Eighth Amendment challenge to the mandatory transfer of juveniles aged 13 and up charged with a class A felony. *State v. Stinnett*, 129 N.C. App. 192 (1998). In light of recent U.S. Supreme Court case law, and the fact that the charge against Lizzie is a misdemeanor, *Stinnett* is inapposite.

result of such *tremendous consequences* without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons." *Kent v. United States*, 383 U.S. 541 (1966) (emphasis added). More recently, and by way of example, the Supreme Court of New Jersey analyzed a statute imposing mandatory lifetime sex offender registry for juveniles adjudicated delinquent of certain sex offenses. *In re State ex rel. C.K.*, 182 A.3d 917 (N.J. 2018). That court held that this *automatic* and *irrevocable* punishment as applied to juveniles violated New Jersey's substantive due process clause, as well, because, in light of scientific and legal consensus about the malleability of adolescents, the punishment "no longer bears a rational relationship to a legitimate state purpose and arbitrarily denies those individuals their right to liberty and enjoyment of happiness." *Id.* at 935.

Lizzie has been prosecuted in adult court with no opportunity whatsoever to demonstrate that her case is more appropriate for the juvenile system and, therefore, without the protections afforded her under the state and federal constitutions.

c. Equal Protection

The Equal Protection Clause of the United States Constitution protects against "disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." *Ross v. Moffitt*, 417 U.S. 600, 609 (1974). "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). However, classifications with no rational or legitimate justification will be struck down, *e.g. United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (invalidating a provision of the Food Stamp Act of 1964 because the challenged classification was "wholly without any rational basis"), as will classifications entirely unrelated to their purported goals, *e.g. Cleburne*, 473 U.S. at 435 (employing rational basis review to strike down a zoning ordinance requiring permits for group homes for the mentally disabled but not others).

In interpreting the parallel clause of the state constitution's Equal Protection Clause, "the meaning given by the Supreme Court of the United States to even an identical term in the Constitution of the United States is, though highly persuasive, not binding upon this Court." *Watch Co. v. Brand Distributors*, 285 N.C. 467, 474 (1974). A criminal statute violates the Equal Protection Clause of the North Carolina Constitution if it "prescribes different punishment for the same acts committed under the same circumstances by persons in like situation." *State v. Benton*, 276 N.C. 641, 660 (1970) (quotations omitted).

There is no legitimate, rational basis for distinguishing between Lizzie's automatic prosecution and punishment in adult court now from the prosecution and punishment of a sixteen-year-old alleged to have committed the same offense after December 1, 2019. Critically, once the court finds an equal protection violation, the burden to demonstrate an inability to remedy the violation in a timely fashion rests with the State. *Cf. Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955) ("The burden rests upon the [school systems] to establish that such time is

necessary" to comply with the Court's desegregation rulings); *Green v. County School Board*, 391 U.S. 430, 439 (1968) ("The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*."); United States v. Virginia, 518 U.S. 515, 547 (1996) ("Having violated the Constitution's equal protection requirement, Virginia was obliged to show that its remedial proposal 'directly addressed and related to' the violation."). Thus, Lizzie's prosecution as an adult violates the state and federal constitutions' guarantees of equal protection of the laws.

III. Conclusion

For the foregoing reasons, the statutory provisions purporting to confer jurisdiction to prosecute Lizzie in adult court are unconstitutional, so the Court must dismiss this action. G.S. § 15A-954(a)(1),(8). Additionally, Lizzie's constitutional rights have been flagrantly violated and there is such irreparable prejudice to the defendant's preparation of her case that there is no remedy but to dismiss the prosecution." G.S. § 15A-954(a)(4).

Accordingly, through counsel, Lizzie moves for a hearing on the matter, for dismissal with prejudice, that in the alternative the Court calendar and hold a transfer proceeding in this matter to determine if Lizzie's prosecution is more appropriate for juvenile court, and for such other relief as is just and proper.

Respectfully submitted, this the ___ day of _____, _____.

_____
ATTORNEY
Assistant Public Defender

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion on _____, Assistant District Attorney, Twenty-Sixth Judicial District, by hand delivery, this the___ day of _____, _____.

_____
ATTORNEY
Assistant Public Defender
720 East Fourth St., Suite 300
Charlotte, North Carolina 28202
(704) 686-0036

Kent v. United States

Supreme Court of the United States

January 19, 1966, Argued ; March 21, 1966, Decided

No. 104

Reporter
383 U.S. 541 *; 86 S. Ct. 1045 **; 16 L. Ed. 2d 84 ***; 1966 U.S. LEXIS 2015 ****; 11 Ohio Misc. 53; 40 Ohio Op. 2d 270

KENT v. UNITED STATES

Prior History: [****1] CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Disposition: 119 U. S. App. D. C. 378, 343 F.2d 247, reversed and remanded.

Syllabus

Petitioner was arrested at the age of 16 in connection with charges of housebreaking, robbery and rape. As a juvenile, he was subject to the exclusive jurisdiction of the District of Columbia Juvenile Court unless that court, after "full investigation," should waive jurisdiction over him and remit him for trial to the United States District Court for the District of Columbia. Petitioner's counsel filed a motion in the Juvenile Court for a hearing on the question of waiver, and for access to the Juvenile Court's Social Service file which had been accumulated on petitioner during his probation for a prior offense. The Juvenile Court did not rule on these motions. It entered an order waiving jurisdiction, with the recitation that this was done after the required "full investigation." Petitioner was indicted in the District Court. He moved to dismiss the indictment on the ground that the Juvenile Court's waiver was invalid. The District Court overruled the motion, and petitioner was tried. He was convicted [****2] on six counts of housebreaking and robbery, but acquitted on two rape counts by reason of insanity. On appeal petitioner raised among other things the validity of the Juvenile Court's waiver of jurisdiction; the United States Court of Appeals for the District of Columbia Circuit affirmed, finding the procedure leading to waiver and the waiver order itself valid. *Held*: The Juvenile Court order waiving jurisdiction and remitting petitioner for trial in the District Court was invalid. Pp. 552-564.

(a) The Juvenile Court's latitude in determining whether to waive jurisdiction is not complete. It "assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a 'full investigation.'" Pp. 552-554.

(b) The *parens patriae* philosophy of the Juvenile Court "is not an invitation to procedural arbitrariness." Pp. 554-556.

(c) As the Court of Appeals for the District of Columbia Circuit has held, "the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile." Pp. 556-557.

(d) The Juvenile Court [****3] Act requires "full investigation" and makes the Juvenile Court records available to persons having a "legitimate interest in the protection . . . of the child . . . ." These provisions, "read in the context of constitutional principles relating to due process and the assistance of counsel," entitle a juvenile to a hearing, to access by his counsel to social records and probation or similar reports which presumably

are considered by the Juvenile Court, and to a statement of the reasons for the Juvenile Court's decision sufficient to enable meaningful appellate review thereof. Pp. 557-563.

(e) Since petitioner is now 21 and beyond the jurisdiction of the Juvenile Court, the order of the Court of Appeals and the judgment of the District Court are vacated and the case is remanded to the District Court for a hearing *de novo*, consistent with this opinion, on whether waiver was appropriate when ordered by the Juvenile Court. "If that court finds that waiver was inappropriate, petitioner's conviction must be vacated. If, however, it finds that the waiver order was proper when originally made, the District Court may proceed, after consideration of such motions as counsel may make [****4] and such further proceedings, if any, as may be warranted, to enter an appropriate judgment." Pp. 564-565.

Counsel: Myron G. Ehrlich and Richard Arens argued the cause for petitioner. With them on the briefs were Monroe H. Freedman and David Carliner.

Theodore George Gilinsky argued the cause for the United States. With him on the brief were Solicitor General Marshall, Assistant Attorney General Vinson, Nathan Lewin and Beatrice Rosenberg.

Nicholas N. Kittrie filed a brief for Thurman Arnold et al., as amici curiae.

Judges: Warren, Fortas, Harlan, Brennan, Black, Stewart, Clark, White, Douglas

Opinion by: FORTAS

Opinion

[*542] [***87] [**1048] MR. JUSTICE FORTAS delivered the opinion of the Court.

[1A]

This case is here on certiorari to the United States Court of Appeals for the District of Columbia Circuit. The facts and the contentions of counsel raise a number [*543] of disturbing questions concerning the administration by the police and the Juvenile Court authorities of the District of Columbia laws relating to juveniles. Apart from raising questions as to the adequacy of custodial and treatment facilities and policies, some of which are not within judicial competence, the case presents important challenges [****5] to the procedure of the police and Juvenile Court officials upon apprehension of a juvenile suspected of serious offenses. Because we conclude that the Juvenile Court's order waiving jurisdiction of petitioner was entered without compliance with required procedures, we remand the case to the trial court.

Morris A. Kent, Jr., first came under the authority of the Juvenile Court of the District of Columbia in 1959. He was then aged 14. He was apprehended as a result of several housebreakings and an attempted purse snatching. He was placed on probation, in the custody of his mother who had been separated from her husband since Kent was two years old. Juvenile Court officials interviewed Kent from time to time during the probation period and accumulated a "Social Service" file.

On September 2, 1961, an intruder entered the apartment of a woman in the District of Columbia. He took her wallet. He raped her. The police found in the apartment latent fingerprints. They were developed and processed. They matched the fingerprints of Morris Kent, taken when he was 14 years old and under the jurisdiction of the Juvenile Court. At about 3 p.m. on September 5, 1961, Kent was taken into [****6] custody by the police. Kent was then 16 and therefore subject to the "exclusive jurisdiction" of the Juvenile Court. D. C. Code § 11-907 (1961), now § 11-1551 (Supp. IV, 1965). He was still on probation to that court as a result of the 1959 proceedings.

Upon being apprehended, Kent [***88] was taken to police headquarters where he was interrogated

by police officers. [*544] It appears that he admitted his involvement in the offense which led to his apprehension and volunteered information as to similar offenses involving housebreaking, robbery, and rape. His interrogation proceeded from about 3 p.m. to 10 p.m. the same evening. [1]

[****7] [2A]

Some time after 10 p.m. petitioner was taken to the Receiving Home for Children. The next morning he was released to the police for further interrogation at police headquarters, which lasted until 5 p.m. [2]

[2B]

The record does not show when his mother became aware that the boy was in custody, but shortly after 2 p. m. on September 6, 1961, the day following [**1049] petitioner's apprehension, she retained counsel.

Counsel, together with petitioner's mother, promptly conferred with the Social Service Director of the Juvenile Court. In a brief interview, they discussed the possibility that the Juvenile Court might waive jurisdiction [****8] under D. C. Code § 11-914 (1961), now § 11-1553 (Supp. IV, 1965) and remit Kent to trial by the District Court. Counsel made known his intention to oppose waiver.

[3A]

Petitioner was detained at the Receiving Home for almost a week. There was no arraignment during this [*545] time, no determination by a judicial officer of probable cause for petitioner's apprehension. [3]

[3B]

[****9] During this period of detention and interrogation, petitioner's counsel arranged for examination of petitioner by two psychiatrists and a psychologist. He thereafter filed with the Juvenile Court a motion for a hearing on the question of waiver of Juvenile Court jurisdiction, together with an affidavit of a psychiatrist certifying that petitioner [***89] "is a victim of severe psychopathology" and recommending hospitalization for psychiatric observation. Petitioner's counsel, in support of his motion to the effect that the Juvenile Court should retain jurisdiction of petitioner, offered to prove that if petitioner were given adequate treatment in a hospital under the aegis of the Juvenile Court, he

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[1] There is no indication in the file that the police complied with the requirement of the District Code that a child taken into custody, unless released to his parent, guardian or custodian, "shall be placed in the custody of a probation officer or other person designated by the court, or taken immediately to the court or to a place of detention provided by the Board of Public Welfare, and the officer taking him shall immediately notify the court and shall file a petition when directed to do so by the court." D. C. Code § 11-912 (1961), now § 16-2306 (Supp. IV, 1965).

[2] The elicited statements were not used in the subsequent trial before the United States District Court. Since the statements were made while petitioner was subject to the jurisdiction of the Juvenile Court, they were inadmissible in a subsequent criminal prosecution under the rule of *Harling* v. *United States*, 111 U. S. App. D. C. 174, 295 F.2d 161 (1961).

[3] In the case of adults, arraignment before a magistrate for determination of probable cause and advice to the arrested person as to his rights, etc., are provided by law and are regarded as fundamental. Cf. Fed. Rules Crim. Proc. 5 (a), (b); *Mallory* v. *United States*, 354 U.S. 449. In *Harling* v. *United States, supra*, the Court of Appeals for the District of Columbia has stated the basis for this distinction between juveniles and adults as follows:

"It is, of course, because children are, generally speaking, exempt from criminal penalties that safeguards of the criminal law, such as Rule 5 and the exclusionary Mallory rule, have no general application in juvenile proceedings." 111 U. S. App. D. C., at 176, 295 F.2d, at 163.

In *Edwards* v. *United States*, 117 U. S. App. D. C. 383, 384, 330 F.2d 849, 850 (1964), it was said that: ". . . special practices . . . follow the apprehension of a juvenile. He may be held in custody by the juvenile authorities -- and is available to investigating officers -- for five days before any formal action need be taken. There is no duty to take him before a magistrate, and no responsibility to inform him of his rights. He is not booked. The statutory intent is to establish a non-punitive, non-criminal atmosphere."

We indicate no view as to the legality of these practices. Cf. *Harling* v. *United States, supra*, 111 U. S. App. D. C., at 176, 295 F.2d, at 163, n. 12.

would be a suitable subject for rehabilitation.

[*546] At the same time, petitioner's counsel moved that the Juvenile Court should give him access to the Social Service file relating to petitioner which had been accumulated by the staff of the Juvenile Court during petitioner's probation period, and which would be available to the Juvenile Court judge in considering the question whether it should retain or waive jurisdiction. Petitioner's counsel represented that access to this [****10] file was essential to his providing petitioner with effective assistance of counsel.

The Juvenile Court judge did not rule on these motions. He held no hearing. He did not confer with petitioner or petitioner's parents or petitioner's counsel. He entered an order reciting that after "full investigation, I do hereby waive" jurisdiction of petitioner and directing that he be "held for trial for [the alleged] offenses under the regular procedure of the U.S. District Court for the District of Columbia." He made no findings. He did not recite any reason for the waiver. [4] [****11] He made no reference [**1050] to the motions filed by petitioner's counsel. We must assume that he denied, *sub silentio*, the motions for a hearing, the recommendation for hospitalization for psychiatric observation, the request for access to the Social Service file, and the offer to prove that petitioner was a fit subject for rehabilitation under the Juvenile Court's jurisdiction. [5]

[*547] Presumably, prior to entry of his order, the Juvenile Court judge received and considered recommendations of the Juvenile Court staff, the Social [****12] Service file relating to petitioner, and a report dated September 8, 1961 (three days following petitioner's apprehension), submitted to him by the Juvenile Probation Section. The Social Service file and the September 8 report were later sent to the District Court and it appears that both of them referred to petitioner's mental condition. The September 8 report spoke of "a rapid deterioration of [petitioner's] personality structure and the possibility of mental illness." As stated, neither this report nor [***90] the Social Service file was made available to petitioner's counsel.

The provision of the Juvenile Court Act governing waiver expressly provides only for "full investigation." It states the circumstances in which jurisdiction may be waived and the child held for trial under adult procedures, but it does not state standards to govern the Juvenile Court's decision as to waiver. The provision reads as follows:

"If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full [****13] investigation, waive jurisdiction and order [*548] such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; or such other court may exercise the powers conferred upon the juvenile court in this subchapter in conducting and disposing of such cases." [6]

Petitioner appealed from the Juvenile Court's

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[4] At the time of these events, there was in effect Policy Memorandum No. 7 of November 30, 1959, promulgated by the judge of the Juvenile Court to set forth the criteria to govern disposition of waiver requests. It is set forth in the Appendix. This Memorandum has since been rescinded. See *United States* v. *Caviness*, 239 F.Supp. 545, 550 (D. C. D. C. 1965).

[5] It should be noted that at this time the statute provided for only one Juvenile Court judge. Congressional hearings and reports attest the impossibility of the burden which he was supposed to carry. See Amending the Juvenile Court Act of the District of Columbia, Hearings before Subcommittee No. 3 of the House Committee on the District of Columbia, 87th Cong., 1st Sess. (1961); Juvenile Delinquency, Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 86th Cong., 1st Sess. (1959-1960); Additional Judges for Juvenile Court, Hearing before the House Committee on the District of Columbia, 86th Cong., 1st Sess. (1959); H. R. Rep. No. 1041, 87th Cong., 1st Sess. (1961); S. Rep. No. 841, 87th Cong., 1st Sess. (1961); S. Rep. No. 116, 86th Cong., 1st Sess. (1959). The statute was amended in 1962 to provide for three judges for the court. 76 Stat. 21; D. C. Code § 11-1502 (Supp. IV, 1965).

[6] D. C. Code § 11-914 (1961), now § 11-1553 (Supp. IV, 1965).

waiver order to the Municipal Court of Appeals, which affirmed, and also applied to the United States District Court for a writ of habeas corpus, which was denied. On appeal from these judgments, the United States Court of Appeals held on January 22, 1963, that neither appeal to the Municipal Court of Appeals nor habeas corpus was available. In the Court of Appeals' view, the exclusive method of reviewing the Juvenile Court's waiver order was a motion to dismiss the indictment in the District Court. *Kent* v. *Reid*, 114 U. S. App. D. C. 330, 316 F.2d 331 (1963).

[****14] Meanwhile, on September 25, 1961, shortly after the Juvenile Court order [**1051] waiving its jurisdiction, petitioner was indicted by a grand jury of the United States District Court for the District of Columbia. The indictment contained eight counts alleging two instances of housebreaking, robbery, and rape, and one of housebreaking and robbery. On November 16, 1961, petitioner moved the District Court to dismiss the indictment on the grounds that the waiver was invalid. He also moved the District Court to constitute itself a Juvenile Court as authorized by D. C. Code § 11-914 (1961), now § 11-1553 (Supp. IV, 1965). After substantial delay occasioned by petitioner's appeal and habeas corpus proceedings, the District Court addressed itself to the motion to dismiss on February 8, 1963. [7]

[****15] [*549] The District Court denied the motion to dismiss the indictment. The District Court ruled that it would not "go behind" the Juvenile Court judge's recital that his order was entered "after full investigation." It held that "The only matter before me is as to whether or not the statutory provisions were complied with and the Courts have held . . . with reference to full investigation, that that does not mean a quasi judicial or judicial hearing. No hearing is required."

On March 7, 1963, the District Court held a hearing on petitioner's motion to determine his competency to stand trial. The court determined [***91] that petitioner was competent. [8]

[****16] [*550] At trial, petitioner's defense was wholly directed toward proving that he was not criminally responsible because "his unlawful act was the product of mental disease or mental defect." *Durham* v. *United States*, 94 U. S. App. D. C. 228, 241, 214 F.2d 862, 875 (1954). Extensive evidence, including expert testimony, was presented to support this defense. The jury found as to the counts alleging rape that petitioner was "not guilty by reason of insanity." Under District of Columbia law, this made it mandatory that petitioner be transferred to St. Elizabeths Hospital, a mental institution, until his sanity is restored. [9] On the six counts of housebreaking and robbery, the jury found that petitioner was guilty. [10]

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[7] On February 5, 1963, the motion to the District Court to constitute itself a Juvenile Court was denied. The motion was renewed orally and denied on February 8, 1963, after the District Court's decision that the indictment should not be dismissed.

[8] The District Court had before it extensive information as to petitioner's mental condition, bearing upon both competence to stand trial and the defense of insanity. The court had obtained the "Social Service" file from the Juvenile Court and had made it available to petitioner's counsel. On October 13, 1961, the District Court had granted petitioner's motion of October 6 for commitment to the Psychiatric Division of the General Hospital for 60 days. On December 20, 1961, the hospital reported that "It is the concensus [*sic*] of the staff that Morris is emotionally ill and severely so . . . we feel that he is incompetent to stand trial and to participate in a mature way in his own defense. His illness has interfered with his judgment and reasoning ability . . . ." The prosecutor opposed a finding of incompetence to stand trial, and at the prosecutor's request, the District Court referred petitioner to St. Elizabeths Hospital for psychiatric observation. According to a letter from the Superintendent of St. Elizabeths of April 5, 1962, the hospital's staff found that petitioner was "suffering from mental disease at the present time, Schizophrenic Reaction, Chronic Undifferentiated Type," that he had been suffering from this disease at the time of the charged offenses, and that "if committed by him [those criminal acts] were the product of this disease." They stated, however, that petitioner was "mentally competent to understand the nature of the proceedings against him and to consult properly with counsel in his own defense."

[9] D. C. Code § 24-301 (1961).

[10] The basis for this distinction -- that petitioner was "sane" for purposes of the housebreaking and robbery but "insane" for the

[****17] Kent [**1052] was sentenced to serve five to 15 years on each count as to which he was found guilty, or a total of 30 to 90 years in prison. The District Court ordered that the time to be spent at St. Elizabeths on the mandatory commitment after the insanity acquittal be counted as part of the 30- to 90-year sentence. Petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. That court affirmed. 119 U. S. App. D. C. 378, 343 F.2d 247 (1964). [11]

[*551] Before the Court of Appeals and in this Court, petitioner's counsel has urged a number of grounds for reversal. [****18] He argues that petitioner's detention and interrogation, described above, were unlawful. He contends that the police failed to follow the procedure prescribed by the Juvenile Court Act in that they failed to notify the parents of the child and the Juvenile Court itself, note 1, *supra*; that petitioner was [***92] deprived of his liberty for about a week without a determination of probable cause which would have been required in the case of an adult, see note 3, *supra*; that he was interrogated by the police in the absence of counsel or a parent, cf. *Harling* v. *United States*, 111 U. S. App. D. C. 174, 176, 295 F.2d 161, 163, n. 12 (1961), without warning of his right to remain silent or advice as to his right to counsel, in asserted violation of the Juvenile Court Act and in violation of rights that he would have if he were an adult; and that petitioner was fingerprinted in violation of the asserted intent of the Juvenile Court Act and while unlawfully detained and that the fingerprints were unlawfully used in the District Court proceeding. [12]

[****19] These contentions raise problems of substantial concern as to the construction of and compliance with the Juvenile Court Act. They also suggest basic issues as to the justifiability of affording a juvenile less protection than is accorded to adults suspected of criminal offenses, particularly where, as here, there is an absence of any indication that the denial of rights available to adults was offset, mitigated or explained by action of the Government, as *parens patriae*, evidencing the special [*552] solicitude for juveniles commanded by the Juvenile Court Act. However, because we remand the case on account of the procedural error with respect to waiver of jurisdiction, we do not pass upon these questions. [13]

[****20] It is to petitioner's arguments as to the infirmity of the proceedings by which the Juvenile Court waived its otherwise exclusive jurisdiction that we address our [**1053] attention. Petitioner attacks the waiver of jurisdiction on a number of statutory and constitutional grounds. He contends that the waiver is defective because no hearing was held; because no findings were made by the Juvenile Court; because the Juvenile Court stated no reasons for waiver; and because counsel was denied access to the Social Service file which

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purposes of the rape -- apparently was the hypothesis, for which there is some support in the record, that the jury might find that the robberies had anteceded the rapes, and in that event, it might conclude that the housebreakings and robberies were not the products of his mental disease or defect, while the rapes were produced thereby.

[11] Petitioner filed a petition for rehearing *en banc*, but subsequently moved to withdraw the petition in order to prosecute his petition for certiorari to this Court. The Court of Appeals permitted withdrawal. Chief Judge Bazelon filed a dissenting opinion in which Circuit Judge Wright joined. 119 U. S. App. D. C., at 395, 343 F.2d, at 264 (1964).

[12] Cf. *Harling* v. *United States*, 111 U. S. App. D. C. 174, 295 F.2d 161 (1961); *Bynum* v. *United States*, 104 U. S. App. D. C. 368, 262 F.2d 465 (1958). It is not clear from the record whether the fingerprints used were taken during the detention period or were those taken while petitioner was in custody in 1959, nor is it clear that petitioner's counsel objected to the use of the fingerprints.

[13] Petitioner also urges that the District Court erred in the following respects:

(1) It gave the jury a version of the "Allen" charge. See *Allen* v. *United States*, 164 U.S. 492.

(2) It failed to give an adequate and fair competency hearing.

(3) It denied the motion to constitute itself a juvenile court pursuant to D. C. Code § 11-914 (1961), now § 11-1553. (Supp. IV, 1965.)

(4) It should have granted petitioner's motion for acquittal on all counts, *n. o. v.*, on the grounds of insanity.

We decide none of these claims.

presumably was considered by the Juvenile Court in determining to waive jurisdiction.

[1B] [4]We agree that the order of the Juvenile Court waiving its jurisdiction and transferring petitioner for trial in the United States District Court for the District of Columbia was invalid. There is no question that the order is reviewable on motion to dismiss the indictment in the District Court, as specified by the Court of Appeals in this case. *Kent* v. *Reid, supra*. The issue is the standards to be applied upon such review.

[5]We agree with the Court of Appeals that the statute contemplates that the Juvenile Court should have considerable [****21] [*553] latitude [***93] within which to determine whether it should retain jurisdiction over a child or -- subject to the statutory delimitation [14] -- should waive jurisdiction. But this latitude is not complete. At the outset, it assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a "full investigation." *Green* v. *United States*, 113 U. S. App. D. C. 348, 308 F.2d 303 (1962). [15] [****23] The statute gives the Juvenile Court a substantial degree of discretion as to the factual considerations to be evaluated, the weight to be given them and the conclusion to be reached. It does not confer upon the Juvenile Court a license for arbitrary procedure. The statute does not permit the Juvenile Court to determine in isolation and without the participation or any representation of the child the "critically important" question whether a child will be deprived of the special protections and provisions of the Juvenile Court Act. [16] It does not authorize the Juvenile Court, in total disregard of a motion for hearing filed [****22] by counsel, and without any hearing or statement or reasons, to decide -- as in this case -- that the child will be taken from the Receiving Home for Children [*554] and transferred to jail along with adults, and that he will be exposed to the possibility of a death sentence [17] instead of treatment for a maximum, in Kent's case, of five years, until he is 21. [18]

[1C]

We do not consider whether, on the merits, Kent should have been transferred; but there is no place in our system of law for reaching a result of such tremendous consequences without ceremony -- without hearing, without effective assistance of counsel, without a [**1054] statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if [****24] society's special concern for children, as reflected in the District of Columbia's Juvenile Court Act, permitted this procedure. We hold that it does not.

[6]1. The theory of the District's Juvenile Court Act, like that of other jurisdictions, [19] [****25] is rooted in social welfare philosophy rather than in the *corpus juris*. Its proceedings are designated as

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[14] The statute is set out at pp. 547-548, *supra*.

[15] "What is required before a waiver is, as we have said, 'full investigation.' . . . It prevents the waiver of jurisdiction as a matter of routine for the purpose of easing the docket. It prevents routine waiver in certain classes of alleged crimes. It requires a judgment in each case based on 'an inquiry not only into the facts of the alleged offense but also into the question whether the *parens patriae* plan of procedure is desirable and proper in the particular case.' *Pee* v. *United States*, 107 U. S. App. D. C. 47, 50; 274 F.2d 556, 559 (1959)." *Green* v. *United States*, *supra*, at 350, 308 F.2d, at 305.

[16] See *Watkins* v. *United States*, 119 U. S. App. D. C. 409, 413, 343 F.2d 278, 282 (1964); *Black* v. *United States*, 122 U. S. App. D. C. 393, 355 F.2d 104 (1965).

[17] D. C. Code § 22-2801 (1961) fixes the punishment for rape at 30 years, or death if the jury so provides in its verdict. The maximum punishment for housebreaking is 15 years, D. C. Code § 22-1801 (1961); for robbery it is also 15 years, D. C. Code § 22-2901 (1961).

[18] The jurisdiction of the Juvenile Court over a child ceases when he becomes 21. D. C. Code § 11-907 (1961), now § 11-1551 (Supp. IV, 1965).

[19] All States have juvenile court systems. A study of the actual operation of these systems is contained in Note, Juvenile Delinquents: The Police, State Courts, and Individualized Justice, 79 Harv. L. Rev. 775 (1966).

civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and of [***94] society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is *parens [*555] patriae* rather than prosecuting attorney and judge. [20] But the admonition to function in a "parental" relationship is not an invitation to procedural arbitrariness.

2. Because the State is supposed to proceed in respect of the child as *parens patriae* and not as adversary, courts have relied on the premise that the proceedings are "civil" in nature and not criminal, and have asserted that the child cannot complain of the deprivation of important rights available in criminal cases. It has been asserted that he can claim only the fundamental due process right to fair treatment. [21] [****26] For example, it has been held that he is not entitled to bail; to indictment by grand jury; to a speedy and public trial; to trial by jury; to immunity against self-incrimination; to confrontation of his accusers; and in some jurisdictions (but not in the District of Columbia, see *Shioutakon* v. *District of Columbia*, 98 U. S. App. D. C. 371, 236 F.2d 666 (1956), and *Black* v. *United States, supra*) that he is not entitled to counsel. [22]

While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. [23] [****27] There is much evidence that some juvenile courts, including that of the District of Columbia, lack [*556] the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children. [24]

This concern, however, does not induce us in this case to accept the invitation [25] to rule that constitutional guaranties which would be applicable to adults charged with the serious offenses for [**1055] which Kent was tried must be applied in juvenile court proceedings concerned with allegations of law violation. The Juvenile Court Act and the decisions of the United States Court of Appeals for the District of Columbia Circuit provide an adequate basis for decision of this case, and we go no further.

[7A]

3. It is clear beyond dispute that the waiver of jurisdiction is a "critically important" action determining vitally important statutory rights of the juvenile. The Court of Appeals for the District of Columbia Circuit has so held. See *Black* v. *United States, supra;* [****28] *Watkins* [***95] v. *United States*, 119 U. S. App. D. C. 409, 343 F.2d 278 (1964). The statutory scheme makes this plain. The Juvenile Court is vested with "original and exclusive jurisdiction" of the child. This jurisdiction confers special rights and immunities. He is, as specified by the statute, shielded from publicity. He may be confined, but with rare

[20] See Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, 1965 Wis. L. Rev. 7.

[21] *Pee* v. *United States*, 107 U. S. App. D. C. 47, 274 F.2d 556 (1959).

[22] See *Pee* v. *United States, supra,* at 54, 274 F.2d, at 563; Paulsen, Fairness to the Juvenile Offender, 41 Minn. L. Rev. 547 (1957).

[23] Cf. *Harling* v. *United States*, 111 U. S. App. D. C. 174, 177, 295 F.2d 161, 164 (1961).

[24] See Handler, *op. cit, supra*, note 20; Note, *supra,* note 19; materials cited in note 5, *supra*.

[25] See brief of *amicus curiae*.

exceptions he may not be jailed along with adults. He may be detained, but only until he is 21 years of age. The court is admonished by the statute to give preference to retaining the child in the custody of his parents "unless his welfare and the safety and protection [*557] of the public can not be adequately safeguarded without . . . removal." The child is protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and disqualification for public employment. D. C. Code §§ 11-907, 11-915, 11-927, 11-929 (1961). [26]

[****29] [1D] [8A]The net, therefore, is that petitioner -- then a boy of 16 -- was by statute entitled to certain procedures and benefits as a consequence of his statutory right to the "exclusive" jurisdiction of the Juvenile Court. In these circumstances, considering particularly that decision as to waiver of jurisdiction and transfer of the matter to the District Court was potentially as important to petitioner as the difference between five years' confinement and a death sentence, we conclude that, as a condition to a valid waiver order, petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision. We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel. [27]

[8B]

[****30] The Court of Appeals in this case relied upon *Wilhite* v. *United States*, 108 U. S. App. D. C. 279, 281 F.2d 642 (1960). In that case, the Court of Appeals held, for purposes of a determination as to waiver of jurisdiction, [*558] that no formal hearing is required and that the "full investigation" required of the Juvenile Court need only be such "as is needed to satisfy *that* court . . . on the question of waiver." [28] (Emphasis supplied.) The authority of *Wilhite*, however, is substantially undermined by other, more recent, decisions of the Court of Appeals.

In [**1056] *Black* v. *United States*, decided by the Court of Appeals on December 8, 1965, the court [29] held that assistance [****31] of counsel in the "critically important" determination of waiver is essential to the proper administration of juvenile proceedings. [***96] Because the juvenile was not advised of his right to retained or appointed counsel, the judgment of the District Court, following waiver of jurisdiction by the Juvenile Court, was reversed. The court relied upon its decision in *Shioutakon* v. *District of Columbia*, 98 U. S. App. D. C. 371, 236 F.2d 666 (1956), in which it had held that effective assistance of counsel in juvenile court proceedings is essential. See also *McDaniel* v. *Shea*, 108 U. S. App. D. C. 15, 278 F.2d 460 (1960). In *Black*, the court referred to the Criminal Justice Act, enacted four years after *Shioutakon*, in which Congress provided for the assistance of counsel "in proceedings before the juvenile court of the District of Columbia." D. C. Code § 2-2202 (1961). The court held that "The need is even greater in the adjudication of waiver [than in a case like *Shioutakon*] since it contemplates the imposition of criminal sanctions." 122 U. S. App. D. C., at 395, 355 F.2d, at 106. [****32]

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[26] These are now, without substantial changes, §§ 11-1551, 16-2307, 16-2308, 16-2313, 11-1586 (Supp. IV, 1965).

[27] While we "will not ordinarily review decisions of the United States Court of Appeals [for the District of Columbia Circuit] which are based upon statutes . . . limited [to the District] . . . ," *Del Vecchio* v. *Bowers*, 296 U.S. 280, 285, the position of that court, as we discuss *infra*, is self-contradictory. Nor have we deferred to decisions on local law where to do so would require adjudication of difficult constitutional questions. See *District of Columbia* v. *Little*, 339 U.S. 1.

[28] The panel was composed of Circuit Judges Miller, Fahy and Burger. Judge Fahy concurred in the result. It appears that the attack on the regularity of the waiver of jurisdiction was made 17 years after the event, and that no objection to waiver had been made in the District Court.

[29] Bazelon, C. J., and Fahy and Leventhal, JJ.

In *Watkins* v. *United States*, 119 U. S. App. D. C. 409, 343 F.2d 278 (1964), decided in November 1964, the [*559] Juvenile Court had waived jurisdiction of appellant who was charged with housebreaking and larceny. In the District Court, appellant sought disclosure of the social record in order to attack the validity of the waiver. The Court of Appeals held that in a waiver proceeding a juvenile's attorney is entitled to access to such records. The court observed that

"All of the social records concerning the child are usually relevant to waiver since the Juvenile Court must be deemed to consider the entire history of the child in determining waiver. The relevance of particular items must be construed generously. Since an attorney has no certain knowledge of what the social records contain, he cannot be expected to demonstrate the relevance of particular items in his request.

"The child's attorney must be advised of the information [****33] upon which the Juvenile Court relied in order to assist effectively in the determination of the waiver question, by insisting upon the statutory command that waiver can be ordered only after 'full investigation,' and by guarding against action of the Juvenile Court beyond its discretionary authority." 119 U. S. App. D. C., at 413, 343 F.2d, at 282.

The court remanded the record to the District Court for a determination of the extent to which the records should be disclosed.

The Court of Appeals' decision in the present case was handed down on October 26, 1964, prior to its decisions in *Black* and *Watkins*. The Court of Appeals assumed that since petitioner had been a probationer of the Juvenile Court for two years, that court had before it sufficient evidence to make an informed judgment. It therefore concluded that the statutory requirement of a "full investigation" had been met. It noted the absence of [*560] "a specification by the Juvenile Court Judge of precisely why he concluded to waive jurisdiction." 119 U. S. App. D. C., at 384, 343 F.2d, at 253. While it indicated that "in some cases at least" a useful [****34] purpose might be served "by a discussion of the reasons motivating the determination," *id.*, at 384, 343 F.2d, at 253, n. 6, it did not conclude that the absence thereof invalidated the waiver.

As to the denial of access to the social records, the Court of Appeals stated that "the statute is ambiguous." It said that petitioner's claim, in essence, is "that counsel should have the opportunity to challenge them, presumably in a manner akin to cross-examination." *Id.*, at [***97] 389, 343 F.2d, at 258. It held, however, that this is "the kind of adversarial tactics which the system is designed to avoid. [**1057] " It characterized counsel's proper function as being merely that of bringing forward affirmative information which might help the court. His function, the Court of Appeals said, "is not to denigrate the staff's submissions and recommendations." *Ibid.* Accordingly, it held that the Juvenile Court had not abused its discretion in denying access to the social records.

[7B]

We are of the opinion that the Court of Appeals misconceived the basic issue and the underlying values in this case. It did note, as another [****35] panel of the same court did a few months later in *Black* and *Watkins*, that the determination of whether to transfer a child from the statutory structure of the Juvenile Court to the criminal processes of the District Court is "critically important." We hold that it is, indeed, a "critically important" proceeding. The Juvenile Court Act confers upon the child a right to avail himself of that court's "exclusive" jurisdiction. As the Court of Appeals has said, "It is implicit in [the Juvenile Court] scheme that non-criminal treatment is to be the rule -- and the adult criminal treatment, the exception which must be governed [*561] by the particular factors of individual cases." *Harling* v. *United States*, 111 U. S. App. D. C. 174, 177-178, 295 F.2d 161, 164-165 (1961).

[1E] [9]Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts. It may not "assume" that there are adequate reasons, nor may it merely assume that "full investigation" has been made. Accordingly, [****36] we hold that it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor. We do not read the statute as requiring that this statement must be formal or that it should necessarily include conventional findings of fact. But the statement should be sufficient to demonstrate that the statutory requirement of "full investigation" has been met; and that the question has received the careful consideration of the Juvenile Court; and it must set forth the basis for the order with sufficient specificity to permit meaningful review.

[1F] [10]Correspondingly, we conclude that an opportunity for a hearing which may be informal, must be given the child prior to entry of a waiver order. Under *Black*, the child is entitled to counsel in connection with a waiver proceeding, and under *Watkins*, counsel is entitled to see the child's social records. These rights are meaningless -- an illusion, a mockery -- unless counsel is given an opportunity to function.

The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice. Appointment of counsel [****37] without affording an opportunity for hearing on a "critically important" decision is tantamount to denial of counsel. There is no justification [*562] for the failure of the Juvenile Court to rule on the motion for hearing filed by petitioner's counsel, and it was error to fail to grant a hearing.

We do not mean by this to indicate that the hearing to be held [***98] must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment. *Pee* v. *United States*, 107 U. S. App. D. C. 47, 50, 274 F.2d 556, 559 (1959).

[1G] [11] [12]With respect to access by the child's counsel to the social records of the child, we deem it obvious that since these are to be considered by the Juvenile Court in making its decision to waive, they must be made available to the child's counsel. This is what the Court of Appeals itself held in *Watkins*. There is no doubt as to the statutory basis for this conclusion, as the Court of Appeals pointed out in *Watkins*. We cannot agree with the Court of Appeals in the present case that the statute [****38] is "ambiguous." The statute [**1058] expressly provides that the record shall be withheld from "indiscriminate" public inspection, "except that such records or parts thereof *shall* be made available by rule of court or special order of court to such persons . . . as have a *legitimate interest* in the protection . . . of the child . . . ." D. C. Code § 11-929 (b) (1961), now § 11-1586 (b) (Supp. IV, 1965). (Emphasis supplied.) [30] [****39] The Court of Appeals has held in *Black*, and we agree, that counsel must be afforded to the child in waiver proceedings. Counsel, therefore, [*563] have a "legitimate interest" in the protection of the child, and must be afforded access to these records. [31]

We do not agree with the Court of Appeals' statement, attempting to justify denial of access to these records, that counsel's role is limited to

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[30] Under the statute, the Juvenile Court has power by rule or order, to subject the examination of the social records to conditions which will prevent misuse of the information. Violation of any such rule or order, or disclosure of the information "except for purposes for which . . . released," is a misdemeanor. D. C. Code § 11-929 (1961), now, without substantial change, § 11-1586 (Supp. IV, 1965).

[31] In *Watkins*, the Court of Appeals seems to have permitted withholding of some portions of the social record from examination by petitioner's counsel. To the extent that *Watkins* is inconsistent with the standard which we state, it cannot be considered as controlling.

presenting "to the court anything on behalf of the child which might help the court in arriving at a decision; it is not to denigrate the staff's submissions and recommendations." On the contrary, if the staff's submissions include materials which are susceptible to challenge or impeachment, it is precisely the role of counsel to "denigrate" such matter. There is no irrebuttable presumption of accuracy attached to staff reports. If a decision on waiver is "critically important" it is equally of "critical importance" that the material submitted to the judge -- which is protected by the statute only against "indiscriminate" inspection -- be subjected, within reasonable limits having [****40] regard to the theory of the Juvenile Court Act, to examination, criticism and refutation. While the Juvenile Court judge may, of course, receive *ex parte* analyses and recommendations from his staff, he may not, for purposes of a decision on waiver, receive and rely upon secret information, whether emanating from his staff or otherwise. The Juvenile Court is governed in this respect by the established principles which control courts and quasi-judicial agencies of the Government.

For the reasons stated, we conclude that the Court of Appeals and the District Court erred in sustaining the validity of the waiver by [***99] the Juvenile Court. The Government urges that any error committed by the Juvenile [*564] Court was cured by the proceedings before the District Court. It is true that the District Court considered and denied a motion to dismiss on the grounds of the invalidity of the waiver order of the Juvenile Court, and that it considered and denied a motion that it should itself, as authorized by statute, proceed in this case to "exercise the powers conferred upon the juvenile court." D. C. Code § 11-914 (1961), now § 11-1553 (Supp. IV, 1965). But we agree with the [****41] Court of Appeals in *Black*, that "the waiver question was primarily and initially one for the Juvenile Court to decide and its failure to do so in a valid manner cannot be said to be harmless error. It is the Juvenile Court, not the District Court, which has the facilities, personnel and expertise for a proper determination of the waiver issue." 122 U. S. App. D. C., at 396, 355 F.2d, at 107. [32]

[13A] [14]Ordinarily [**1059] we would reverse the Court of Appeals and direct the District Court to remand the case to the Juvenile Court for a new determination of waiver. [****42] If on remand the decision were against waiver, the indictment in the District Court would be dismissed. See *Black* v. *United States, supra*. However, petitioner has now passed the age of 21 and the Juvenile Court can no longer exercise jurisdiction over him. In view of the unavailability of a redetermination of the waiver question by the Juvenile Court, it is urged by petitioner that the conviction should be vacated and the indictment dismissed. In the circumstances of this case, and in light of the remedy which the Court of Appeals fashioned in [*565] *Black, supra*, we do not consider it appropriate to grant this drastic relief. [33] Accordingly, we vacate the order of the Court of Appeals and the judgment of the District Court and remand the case to the District Court for a hearing *de novo* on waiver, consistent with this opinion. [34] If that court finds that waiver was inappropriate, petitioner's conviction must be vacated. If, however, it finds that the waiver order was proper when originally made, the District Court may proceed, after consideration of such motions as counsel may make and such further [****43]

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[32] It also appears that the District Court requested and obtained the Social Service file and the probation staff's report of September 8, 1961, and that these were made available to petitioner's counsel. This did not cure the error of the Juvenile Court. Perhaps the point of it is that it again illustrates the maxim that while nondisclosure may contribute to the comfort of the staff, disclosure does not cause heaven to fall.

[33] Petitioner is in St. Elizabeths Hospital for psychiatric treatment as a result of the jury verdict on the rape charges.

[34] We do not deem it appropriate merely to vacate the judgment and remand to the Court of Appeals for reconsideration of its present decision in light of its subsequent decisions in *Watkins* and *Black, supra*. Those cases were decided by different panels of the Court of Appeals from that which decided the present case, and in view of our grant of certiorari and of the importance of the issue, we consider it necessary to resolve the question presented instead of leaving it open for further consideration by the Court of Appeals.

proceedings, if any, as may be warranted, to enter an appropriate judgment. Cf. *Black* v. *United States, supra*.

[13B]

Reversed and remanded.

APPENDIX TO OPINION OF THE COURT.

Policy Memorandum No. 7, November 30, 1959.

The authority of the Judge of the [***100] Juvenile Court of the District [****44] of Columbia to waive or transfer jurisdiction to the U.S. District Court for the District of Columbia is contained in the Juvenile Court Act (§ 11-914 D. C. Code, 1951 Ed.). This section permits the Judge to waive jurisdiction "after full investigation" in the case of any child "sixteen years of age or older [who is] charged with an offense which would amount to a felony in the case of an adult, or any child charged with an [*566] offense which if committed by an adult is punishable by death or life imprisonment."

The statute sets forth no specific standards for the exercise of this important discretionary act, but leaves the formulation of such criteria to the Judge. A knowledge of the Judge's criteria is important to the child, his parents, his attorney, to the judges of the U.S. District Court for the District of Columbia, to the United States Attorney and his assistants, and to the Metropolitan Police Department, as well as to the staff of this court, especially the Juvenile Intake Section.

Therefore, the Judge has consulted with the Chief Judge and other judges of the U.S. District Court for the District of Columbia, with the United States Attorney, with representatives [****45] of the Bar, and with other groups concerned and has formulated the following criteria and principles concerning waiver of jurisdiction which are consistent with the basic aims and purpose of the Juvenile Court Act.

An offense falling within the statutory limitations (set forth above) will be waived if it has prosecutive merit and if it is heinous or of an aggravated character, or -- even though less serious -- if it represents [**1060] a pattern of repeated offenses which indicate that the juvenile may be beyond rehabilitation under Juvenile Court procedures, or if the public needs the protection afforded by such action.

The determinative factors which will be considered by the Judge in deciding whether the Juvenile Court's jurisdiction over such offenses will be waived are the following:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.

[*567] 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.

3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.

[****46] 4. The prosecutive merit of the complaint, i. e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).

5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.

6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of

probation [***101] to this Court, or prior commitments to juvenile institutions.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

It will be the responsibility of any officer [****47] of the Court's staff assigned to make the investigation of any complaint in which waiver of jurisdiction is being considered to develop fully all available information which may bear upon the criteria and factors set forth above. Although not all such factors will be involved in an individual case, the Judge will consider the relevant factors in a [*568] specific case before reaching a conclusion to waive juvenile jurisdiction and transfer the case to the U.S. District Court for the District of Columbia for trial under the adult procedures of that Court.

Dissent by: STEWART

Dissent

MR. JUSTICE STEWART, with whom MR. JUSTICE BLACK, MR. JUSTICE HARLAN and MR. JUSTICE WHITE join, dissenting.

This case involves the construction of a statute applicable only to the District of Columbia. Our general practice is to leave undisturbed decisions of the Court of Appeals for the District of Columbia Circuit concerning the import of legislation governing the affairs of the District. *General Motors Corp.* v. *District of Columbia*, 380 U.S. 553, 556. It appears, however, that two cases decided by the Court of Appeals subsequent to its decision in the present case may have considerably [****48] modified the court's construction of the statute. Therefore, I would vacate this judgment and remand the case to the Court of Appeals for reconsideration in the light of its subsequent decisions, *Watkins* v. *United States*, 119 U. S. App. D. C. 409, 343 F.2d 278, and *Black* v. *United States*, 122 U. S. App. D. C. 393, 355 F.2d 104.

References

Annotation References:

Age of child at time of alleged offense or delinquency, or at time of legal proceedings, as criterion of jurisdiction of juvenile court. 89 ALR2d 506.

Voluntariness and admissibility of minor's confession. 87 ALR2D 624.

Right to and appointment of counsel in juvenile court proceedings. 60 ALR2d 691.

Applicability of rules of evidence in juvenile delinquency proceedings. 43 ALR 2d 1128.

Constitutionality, construction, and application of statutory provision against use in evidence in any other case of records or evidence in juvenile court proceedings. 147 ALR 443.

Right of access to judicial records. 60 L ed 369.

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State v. Lyle

Supreme Court of Iowa

July 18, 2014, Filed

No. 11-1339

Reporter
854 N.W.2d 378 *; 2014 Iowa Sup. LEXIS 84 **; 2014 WL 3537026

STATE OF IOWA, Appellee, vs. ANDRE JEROME LYLE JR., Appellant.

Subsequent History: [1]** Amended September 30, 2014.

Prior History: On review from the Iowa Court of Appeals. Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge. A juvenile challenges his sentence as cruel and unusual under the State and Federal Constitutions.

State v. Lyle, 821 N.W.2d 777, 2012 Iowa App. LEXIS 617 (Iowa Ct. App., 2012)

Disposition: DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT SENTENCE VACATED; CASE REMANDED.

Core Terms

sentence, juveniles, adults, mandatory minimum sentence, offender, parole, categorical, youth, juvenile offender, district court, culpability, cases, cruel and unusual punishment, mandatory, rehabilitation, mandatory minimum, imprisonment, circumstances, prison, life-without-parole, courts, death penalty, life sentence, diminished, eighth amendment, factors, best interests of the child, commission of a crime, youth offender, disproportionate

Case Summary

Overview
HOLDINGS: [1]-It was necessary to vacate the juvenile's sentence for robbery in the second degree, which resulted from the juvenile taking a small plastic bag containing marijuana from another student, and remand the case for resentencing because a mandatory minimum sentencing schema, like the one contained in Iowa Code § 902.12, violated Iowa Const. art. I, § 17 when applied in cases involving conduct committed by youthful offenders; juvenile offenders could not be mandatorily sentenced under a mandatory minimum sentencing scheme.

Outcome
Vacated and remanded.

LexisNexis® Headnotes

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

***HN1*[] Fundamental Rights, Cruel & Unusual Punishment**

A statute mandating a sentence of incarceration in a prison for juvenile offenders with no opportunity for parole until a minimum period of time has been served is unconstitutional under Iowa Const. art. I, § 17.

Criminal Law & Procedure > Criminal Offenses > Classification of Offenses > Felonies

Criminal Law & Procedure > ... > Robbery > Unarmed Robbery > Penalties

***HN2*[] Classification of Offenses, Felonies**

Iowa Code § 711.3 (2011) provides that robbery in the

second degree is a Class C felony. Iowa Code § 902.9(4) provides that a Class C felon, not a habitual offender, shall be confined no more than 10 years. Iowa Code § 902.12(5) provides that a person serving a sentence for conviction for robbery in the second degree in violation of § 711.3 shall be denied parole or work release unless the person has served at least seven-tenths of the maximum term of the person's sentence.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > ... > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Illegal Sentences

Criminal Law & Procedure > Sentencing > Appeals > Legality Review

HN3 **Fundamental Rights, Cruel & Unusual Punishment**

An unconstitutional sentence is an illegal sentence. Consequently, an unconstitutional sentence may be corrected at any time. Iowa R. Crim. P. 2.24(5)(a). Although challenges to illegal sentences are ordinarily reviewed for correction of legal errors, an appellate court reviews an allegedly unconstitutional sentence de novo.

Criminal Law & Procedure > Appeals > Procedural Matters > Briefs

HN4 **Procedural Matters, Briefs**

An issue "may be deemed" waived if a litigant fails to identify the issue, assign error, and make an argument supported by citation to authority in their initial brief. This rule, however, like most other rules, is not without exceptions.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Appeals > Appealability

Criminal Law & Procedure > ... > Reviewability > Preservation for Review > Requirements

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment

HN5 **Fundamental Rights, Cruel & Unusual Punishment**

A categorical challenge to the constitutionality of a sentence under the Eighth Amendment to the United States Constitution, U.S. Const. amend. VIII, or Iowa Const. art. I, § 17 targets the inherent power of a court to impose a particular sentence. As such, the ordinary rules of issue preservation do not apply.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN6 **Fundamental Rights, Cruel & Unusual Punishment**

The Iowa Constitution provides that excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted. Iowa Const. art. I, § 17. The Eighth Amendment to the United States Constitution, U.S. Const. amend. VIII, similarly prohibits excessive punishments. It provides that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN7 **Fundamental Rights, Cruel & Unusual Punishment**

Iowa Const. art. I, § 17 embraces a bedrock rule of law that punishment should fit the crime. While "strict proportionality" is neither required nor possible,

Bruegger reveals that the scrutiny of the proportionality between a crime and a sentence is not "toothless."

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN8[] **Fundamental Rights, Cruel & Unusual Punishment**

The concept of cruel and unusual punishment is not static. Instead, courts consider constitutional challenges under the currently prevailing standards of whether a punishment is excessive or cruel and unusual. This approach is followed because the basic concept underlying the prohibition against cruel and unusual punishment is nothing less than the dignity of humankind. This prohibition must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. This is because the standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change. In other words, punishments once thought just and constitutional may later come to be seen as fundamentally repugnant to the core values contained in the state and federal constitutions as people grow in their understanding over time. As with other rights enumerated under the constitution, courts interpret them in light their understanding of today, not by their past understanding.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Factors

HN9[] **Fundamental Rights, Cruel & Unusual Punishment**

The analysis of a categorical challenge to a sentence normally entails a two-step inquiry. First, a court considers objective indicia of society's standards, as expressed in legislative enactments and state practice to determine whether there is a national consensus against the sentencing practice at issue. Second, the court exercises its own independent judgment guided by the standards elaborated by controlling precedents and by its own understanding and interpretation of the Iowa Constitution's text, history, meaning, and purpose. In exercising independent judgment, the court considers the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. The court also considers if the sentencing practice being challenged serves the legitimate goals of punishment.

Constitutional Law > Bill of Rights > Fundamental Rights > General Overview

HN10[] **Bill of Rights, Fundamental Rights**

Three reasons justify the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

HN11[] **Fundamental Rights, Cruel & Unusual Punishment**

The sentencing of juveniles according to statutorily required mandatory minimums does not adequately serve the legitimate penological objectives in light of the child's categorically diminished culpability. Of course, while youth is a mitigating factor in sentencing, it is not an excuse. The constitutional analysis is not about excusing juvenile behavior, but imposing punishment in a way that is consistent with an understanding of humanity today. While harm to a victim is not diluted by the age of the offender, justice requires a court to consider the culpability of the offender in addition to the harm the offender caused. After all, it is generally agreed that punishment should be directly related to the personal culpability of the criminal defendant.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

HN12[] **Fundamental Rights, Cruel & Unusual Punishment**

All mandatory minimum sentences of imprisonment for youthful offenders are unconstitutional under the cruel and unusual punishment clause in Iowa Const. art. I, § 17.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN13[] **Fundamental Rights, Cruel & Unusual Punishment**

Iowa Const. art. I, § 17 requires the punishment for all crimes be graduated and proportioned to the offense. In other words, the protection of art. I, § 17 applies across the board to all crimes. Thus, if mandatory sentencing for the most serious crimes that impose the most serious punishment of life in prison without parole violates art. I, § 17, so would mandatory sentences for less serious crimes imposing the less serious punishment of a minimum period of time in prison without parole.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

HN14[] **Fundamental Rights, Cruel & Unusual Punishment**

All children are protected by the Iowa Constitution. The constitutional prohibition against cruel and unusual punishment does not protect all children if the constitutional infirmity identified in mandatory imprisonment for those juveniles who commit the most serious crimes is overlooked in mandatory imprisonment for those juveniles who commit less serious crimes. 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.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

HN15[] **Fundamental Rights, Cruel & Unusual Punishment**

A mandatory minimum sentencing schema, like the one contained in Iowa Code § 902.12, violates Iowa Const. art. I, § 17 when applied in cases involving conduct committed by youthful offenders. Article I, § 17 only prohibits the one-size-fits-all mandatory sentencing for juveniles. A statute that sends all juvenile offenders to prison for a minimum period of time under all circumstances simply cannot satisfy the standards of decency and fairness embedded in art. I, § 17 of the Iowa Constitution.

Constitutional Law > Bill of Rights > Fundamental Rights > Cruel & Unusual Punishment

Criminal Law & Procedure > Juvenile Offenders > Sentencing > Age & Term Limits

HN16[] **Fundamental Rights, Cruel & Unusual Punishment**

Iowa Const. art. I, § 17 forbids a sentencing schema for juvenile offenders that deprives a district court the discretion to consider youth and its attendant circumstances as a mitigating factor and to impose a lighter punishment, including one that suspends all or part of the sentence, including any mandatory minimum.

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Judges: CADY, Chief Justice. WATERMAN, Justice (dissenting). Mansfield, J., joins this dissent. ZAGER, Justice (dissenting).

Opinion by: CADY

Opinion

[*380] CADY, Chief Justice.

In this appeal, a prison inmate who committed the crime of robbery in the second degree as a juvenile and was prosecuted as an adult challenges the constitutionality of a sentencing statute that required the imposition of a mandatory seven-year minimum **[**2]** sentence of imprisonment. The inmate was in high school at the time of the crime, which involved a brief altercation outside the high school with another student that ended when the inmate took a small plastic bag containing marijuana from the student. He claims the sentencing statute constitutes cruel and unusual punishment in violation of the State and Federal Constitutions when applied to all juveniles prosecuted as adults because the mandatory sentence failed to permit the court to consider any circumstances based on his attributes of youth or the circumstances of his conduct in mitigation of punishment. For the reasons expressed below, we hold ***HN1***[] a statute mandating a sentence of incarceration in a prison for juvenile offenders with no opportunity for parole until a minimum period of time has been served is unconstitutional under article I, section 17 of the Iowa Constitution.[1] Accordingly, we vacate the sentence and remand the case to the district court for resentencing. Importantly, we do not hold that juvenile offenders cannot be sentenced to imprisonment for their criminal acts. We do not hold juvenile offenders cannot be **[*381]** sentenced to a minimum term of imprisonment. We only hold juvenile offenders cannot be mandatorily sentenced **[**3]** under a mandatory minimum sentencing scheme.

I. Background Facts and Prior Proceedings.

Andre Lyle Jr. was convicted following a jury trial of the crime of robbery in the second degree on June 29, 2011. *See* Iowa Code §§ 711.1-.3 (2011). He was a seventeen-year-old high school student when he committed the crime. The conviction resulted from an incident in October 2010 when Lyle and a companion punched another young man and took a small bag of marijuana from him. The altercation between the boys occurred outside the high school **[**4]** they attended after the victim failed to deliver marijuana to Lyle and his companion in exchange for $5 they had given the victim the previous day. Lyle videoed the confrontation on his cell phone. Prior to trial, Lyle unsuccessfully sought to transfer jurisdiction of the matter to the juvenile court.

Lyle grew up in Des Moines with little family support and few advantages. His father was in prison, and he was raised by his grandmother after his mother threatened him with a knife. His grandmother permitted him to smoke marijuana, and he was frequently tardy or absent from school. Lyle had frequent contact with law enforcement and first entered the juvenile justice system at twelve years of age. He was involved in many criminal acts as a teenager, including assaults and robberies. Lyle was known to record his criminal behavior with his cell phone and post videos on the Internet.

Lyle appeared before the district court for sentencing on his eighteenth birthday. The district court sentenced him to a term of incarceration in the state corrections system not to exceed ten years. *See id****HN2***[] . § 711.3 ("Robbery in the second degree is a class 'C' felony."); *id*. § 902.9(4) ("A class 'C' felon, not a habitual offender, **[**5]** shall be confined no more than ten years . . . ."). Pursuant to Iowa statute, the sentence was mandatory, and he was required to serve seventy percent of the prison term before he could be eligible for parole. *See id*. § 902.12(5) ("A person serving a sentence for conviction of [robbery in the second degree in violation of section 711.3] shall be denied parole or work release unless the person has served at least seven-tenths of the maximum term of the person's

[1] Throughout our opinion today, we use both "juvenile" and "child" to describe youthful offenders. We recognize a statute of the Iowa Code defines "child" as "any person under the age of fourteen years." Iowa Code § 702.5 (2011). Nonetheless, we believe our use of the term "child" today is appropriate. In a different section, the Code defines "child" as "a person under eighteen years of age." *See id*. § 232.2(5). Moreover, we are hardly the first court to equate juveniles and children for the purposes of constitutional protection. *See Miller v. Alabama*, 567 U.S. __, 132 S. Ct. 2455, 2468, 183 L. Ed. 2d 407, 422-23 (2012) ("So *Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult.").

sentence . . . .").

Lyle objected to the seventy percent mandatory minimum sentence. He claimed it was unconstitutional as applied to juvenile offenders. The district court overruled Lyle's objection.

Lyle appealed. In his initial appellate brief, Lyle disclaimed a categorical challenge to mandatory minimums and instead argued the mandatory minimum was unconstitutional as applied to him. We transferred the case to the court of appeals.

During the pendency of the appeal, the United States decided *Miller v. Alabama*, 567 U.S. __, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). In *Miller*, the Court held a statutory schema that mandates life imprisonment without the possibility of parole cannot constitutionally be applied to a juvenile. 567 U.S. at __, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424. Subsequently, we held the rule contemplated by *Miller* was retroactive. *State v. Ragland*, 836 N.W.2d 107, 117 (Iowa 2013). We then applied the reasoning **[**6]** in *Miller* to sentences that effectively deprived a juvenile offender of a meaningful opportunity for early release on parole during the offender's lifetime based on demonstrated maturity and rehabilitation. *State v. Null*, 836 N.W.2d 41, 72 (2013). In a trilogy of **[*382]** cases, our reasoning applied not just to a de facto life sentence or one "that is the practical equivalent of a life sentence without parole," *see Ragland*, 836 N.W.2d at 121, but also to a "lengthy term-of-years sentence," *Null*, 836 N.W.2d at 72; *see also State v. Pearson*, 836 N.W.2d 88, 96-97 (Iowa 2013).

The court of appeals affirmed the sentence. Lyle sought further review and asserted the decision of the court of appeals was contrary to *Miller*. We granted his application for further review and ordered Lyle and the State to submit additional briefing regarding whether the seventy percent mandatory minimum of his ten-year sentence for second-degree robbery was constitutional in light of our recent trilogy of cases. *See generally Ragland*, 836 N.W.2d 107, *Pearson*, 836 N.W.2d 88, *Null*, 836 N.W.2d 41.

II. Scope and Standard of Review.

HN3[] An unconstitutional sentence is an illegal sentence. *See State v. Bruegger*, 773 N.W.2d 862, 872 (Iowa 2009). Consequently, an unconstitutional sentence may be corrected at any time. *Id.; see also* Iowa R. Crim. P. 2.24(5)(*a*). Although challenges to illegal sentences are ordinarily reviewed for correction of legal errors, we review an allegedly unconstitutional sentence **[**7]** de novo. *Ragland*, 836 N.W.2d at 113.

III. Issue Before the Court.

As a threshold matter, the State argues Lyle waived a categorical challenge by failing to raise it in his initial brief. We have consistently held ***HN4***[] an issue "may be deemed" waived if a litigant fails to identify the issue, assign error, and make an argument supported by citation to authority in their initial brief. *See Bennett v. MC No. 619, Inc.*, 586 N.W.2d 512, 521 (Iowa 1998); *Mueller v. St. Ansgar State Bank,* 465 N.W.2d 659, 659 (Iowa 1991); *McCleeary v. Wirtz*, 222 N.W.2d 409, 415 (Iowa 1974). This rule, however, like most other rules, is not without exceptions. *See, e.g., State v. Carroll*, 767 N.W.2d 638, 644-45 (Iowa 2009) (addressing an issue raised for the first time in the State's appellee brief, which the defendant would have been unlikely to be able to address). *But see Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 642 (Iowa 1996) (holding a civil litigant may not raise an issue for the first time in its reply brief).

Our decision in *Bruegger*—a case in which the defendant challenged his sentence as unconstitutional for the first time on appeal—reveals one exception. 773 N.W.2d at 872 ("[A] claim [that the sentence itself is inherently illegal] may be brought at any time."); *see also* Iowa R. Crim. P. 2.24(5)(*a*) ("The court may correct an illegal sentence at any time."). *Bruegger* recognized that ***HN5***[] a categorical challenge to the constitutionality of a sentence under the Eighth Amendment or article I, section 17 targets "the inherent power of the court to impose a particular sentence." *Bruegger*, 773 N.W.2d at 871. As such, "the ordinary **[**8]** rules of issue preservation do not apply." *Veal v. State*, 779 N.W.2d 63, 65 (Iowa 2010). Accordingly, a constitutional challenge to an illegal sentence, even one brought *after* the initial brief has been filed, could fit within our holding in *Bruegger. See* 773 N.W.2d at 871-72.

On the other hand, we recently recognized the value of a '"procedurally conservative approach"' to error preservation involving novel issues raised for the first time on appeal for which there is an inadequate factual record. *See State v. Hoeck*, 843 N.W.2d 67, 71 (Iowa 2014) (quoting Barry A. Miller, *Sua Sponte Appellate Rulings: When Courts Deprive Litigants **[*383]** of an Opportunity to Be Heard*, 39 San Diego L. Rev. 1253, 1300 (2002)). We expressed skepticism about deciding the issue under those circumstances: "[W]e are not

convinced the claims are fully briefed or the factual issues necessary to decide the Iowa constitutional claims are developed." *Id*. Accordingly, we remanded the case to the district court to allow the parties to fully develop and argue the claims. *Id.* at 72.

Yet, as in *Bruegger* and *Veal*, our decision in *Hoeck* acknowledges that the failure to raise an issue in the initial appellate brief does not waive the issue. We preserved the issue in *Hoeck* pending briefing of legal issues and development of the factual record by the parties and consideration by the **[**9]** district court. *See id*. Instead, *Hoeck* recognized a commonsense prudential notion that remand is a more practicable decision than evaluation of an entirely novel constitutional issue upon an undeveloped record. *See id*.

The concerns we identified in *Hoeck* are not present in this case. The issue presented by Lyle in this case on further review (and more thoroughly in response to our order for supplemental briefing) is fundamentally similar to the one he initially raised on appeal. *See Feld v. Borkowski*, 790 N.W.2d 72, 84-85 (Iowa 2010) (Appel, J., concurring in part and dissenting in part). While disclaiming a categorical challenge, Lyle's initial brief suggests mandatory minimums are grossly disproportionate for most or all juveniles. This argument is fundamentally similar to the argument he expanded upon in his application for further review (after the Supreme Court's decision in *Miller*) and that he ultimately articulated in his supplemental brief. The supplemental briefing we ordered, combined with the categorical nature of the relief Lyle seeks also obviates in this narrow circumstance the need for more thorough briefing in the district court. Accordingly, we proceed to consider Lyle's categorical challenge based on *Miller* and our trilogy **[**10]** of cases.

IV. Merits.

Lyle contends the prohibition against cruel and unusual punishment in the Iowa Constitution does not permit a statutory scheme that mandates a person sentenced for a crime committed as a juvenile to serve a minimum period of time prior to becoming eligible for parole or work release. The State argues a mandatory minimum sentence of the term of years for the crime committed in this case is not cruel and unusual.

HN6[] The Iowa Constitution provides, "Excessive bail shall not be required; excessive fines shall not be imposed, and cruel and unusual punishment shall not be inflicted." Iowa Const. art. I, § 17. The Eighth Amendment similarly prohibits excessive punishments. *See* U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").[2] Lyle does not offer a substantive **[*384]** standard for cruel and unusual punishment that differs from the one employed by the United States Supreme Court. Instead, he asks us to apply the federal framework in a more stringent fashion. *See Null*, 836 N.W.2d at 70 (applying the principles espoused in *Miller* in a more stringent fashion under the Iowa Constitution than had been explicitly adopted by the United States Supreme Court under the United States Constitution); **[**11]** *Bruegger*, 773 N.W.2d at 883. Thus, we follow the federal analytical framework in deciding this case, but ultimately use our judgment in giving meaning to our prohibition against cruel and unusual punishment in reaching our conclusion. *See State v. Kern*, 831 N.W.2d 149, 174 (Iowa 2013).

HN7[] Article I, section 17 of the Iowa Constitution "embraces a bedrock rule of law that punishment should fit the crime." *Bruegger*, 773 N.W.2d at 872; *see also Roper v. Simmons*, 543 U.S. 551, 560, 125 S. Ct. 1183, 1190, 161 L. Ed. 2d 1, 16 (2005) ("[T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions."); *Atkins v. Virginia*,

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[2] Similarity between federal and state constitutional provisions does not require us to follow federal precedent interpreting the Federal Constitution. Instead, "[a] decision of this court to depart from federal precedent arises from our independent and unfettered authority to interpret the Iowa Constitution." *Null*, 836 N.W.2d at 70 n.7; *see also State v. Baldon*, 829 N.W.2d 785, 790 (Iowa 2013) ("[O]ur right under principles of federalism to stand as the final word on the Iowa Constitution is settled, long-standing, and good law."). Indeed, we have not hesitated to do so when, after applying the now-familiar *Tonn-Ochoa* analysis, we have determined the liberty and equality of Iowans is better served by departing from the federal rule. *See, e.g., Null*, 836 N.W.2d at 70-74 & n.7 (extending, under article I, section 17, the rationale of *Miller* to sentences that are equivalent to life without parole); *State v. Kern*, 831 N.W.2d 149, 170-72 (Iowa 2013) (declining to adopt a special-needs exception for searches of the homes of parolees under article I, section 8); *Baldon*, 829 N.W.2d at 802-03 (holding a parole agreement does not establish consent to a warrantless, suspicionless search under article I, section 8); *State v. Ochoa*, 792 N.W.2d 260, 291 (Iowa 2010) (holding parole **[**12]** status does not alone permit a warrantless, suspicionless search under article I, section 8); *State v. Cline*, 617 N.W.2d 277, 293 (Iowa 2000) (holding article I, section 8 does not contain a good-faith exception to the exclusionary rule), *abrogated on other grounds by State v. Turner*, 630 N.W.2d 601, 606 n.2 (Iowa 2001).

536 U.S. 304, 311, 122 S. Ct. 2242, 2246, 153 L. Ed. 2d 335, 344 (2002) ("'[I]t is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense.'" (quoting *Weems v. United States*, 217 U.S. 349, 367, 30 S. Ct. 544, 549, 54 L. Ed. 793, 798 (1910)). While "strict proportionality" is neither required nor, frankly, possible, *Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S. Ct. 2680, 2705, 115 L. Ed. 2d 836, 869 (1991), *Bruegger* reveals our scrutiny of the proportionality between the crime and the sentence is not "'toothless,'" 773 N.W.2d at 883 (quoting *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 9 (Iowa 2004)).

Time and experience have taught us much about the efficacy and justice of certain punishments. As a consequence, we understand ***HN8***[⬆] our concept of cruel and unusual punishment is "not static." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 598, 2 L. Ed. 2d 630, 642 (1958). Instead, we consider constitutional challenges under the "currently prevail[ing]" standards of whether a punishment is "excessive" or "cruel and unusual." *Atkins*, 536 U.S. at 311, 122 S. Ct. at 2247, 153 L. Ed. 2d at 344. This approach is followed because the basic concept underlying the prohibition against cruel and unusual punishment "is nothing less than the dignity" of humankind. *Trop*, 356 U.S. at 100, 78 S. Ct. at 597, 2 L. Ed. 2d at 642. This prohibition "must draw **[**13]** its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101, 78 S. Ct. at 598, 2 L. Ed. 2d at 642. "This is because '[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419, 128 S. Ct. 2641, 2649, 171 L. Ed. 2d 525, 538 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382, 92 S. Ct. 2726, 2800, 33 L. Ed. 2d 346, 432 (1972) (Burger, C.J., dissenting)). In other words, **[*385]** punishments once thought just and constitutional may later come to be seen as fundamentally repugnant to the core values contained in our State and Federal Constitutions as we grow in our understanding over time. *See Roper*, 543 U.S. at 574-75, 125 S. Ct. at 1198, 161 L. Ed. at 25 (abrogating *Stanford v. Kentucky*, 492 U.S. 361, 380, 109 S. Ct. 2969, 2980, 106 L. Ed. 2d 306, 325 (1989), which held a sixteen-year-old offender could be sentenced to be executed). As with other rights enumerated under our constitution, we interpret them in light of our understanding of today, not by our past understanding.

Until recently, there were two general classifications of cruel and unusual sentences. *See Graham v. Florida*, 560 U.S. 48, 59, 130 S. Ct. 2011, 2021, 176 L. Ed. 2d 825, 836 (2010). "In the first classification the Court consider[ed] all of the circumstances of the case to determine whether [a term-of-years] sentence is unconstitutionally excessive." *Id*. We recognize this classification under the Iowa Constitution, but refer to these sentences as "grossly disproportionate." **[**14]** *Bruegger*, 773 N.W.2d at 873. The second classification contemplated categorical bars to imposition of the death penalty irrespective of idiosyncratic facts. *Graham*, 560 U.S. at 60, 130 S. Ct. at 2022, 176 L. Ed. 2d at 836. This classification of cases has traditionally "consist[ed] of two subsets, one considering the nature of the offense, the other considering the characteristics of the offender." *Id*. In short, the death penalty simply cannot be imposed on certain offenders or for certain crimes. For instance, no offender can be sentenced to death—regardless of their personal characteristics—if only convicted of a nonhomicide offense and they did not intend to cause the death of another. *Kennedy*, 554 U.S. at 438, 128 S. Ct. at 2660, 171 L. Ed. 2d at 550. Additionally, a death penalty cannot be imposed, irrespective of the crime, on an intellectually disabled criminal offender, *Atkins*, 536 U.S. at 321, 122 S. Ct. at 2252, 153 L. Ed. 2d at 350, or a juvenile offender, *Roper*, 543 U.S. at 578, 125 S. Ct. at 1200, 161 L. Ed. 2d at 28.

Graham introduced a third subset of categorical challenges. *See* 560 U.S. at 70-74, 130 S. Ct. at 2028-30, 176 L. Ed. 2d at 843-45. This subset involved a categorical challenge to a term-of-years sentence based on the underlying sentencing practice. *See id.* at 61-62, 130 S. Ct. at 2022-23, 176 L. Ed. 2d at 837. While the juvenile status of the offender provided the pivotal point for the reasoning in *Graham*, the Court also recognized the offender was being sentenced to life without parole for a nonhomicide crime, a fact that itself entails categorically lesser culpability **[**15]** than a homicide crime. *See id.* at 71, 130 S. Ct. at 2028, 176 L. Ed. 2d at 842; *see also Kennedy*, 554 U.S. at 438, 128 S. Ct. at 2660, 171 L. Ed. 2d at 550 ("[Nonhomicide offenses] may be devastating in their harm . . . but 'in terms of moral depravity and of the injury to the person and to the public,' they cannot be compared to murder in their 'severity and irrevocability.'" (quoting *Coker v. Georgia*, 433 U.S. 584, 598, 97 S. Ct. 2861, 2869, 53 L. Ed. 2d 982, 993 (1977)). The Court thus blended its two prior subsets of categorical challenges—consideration of the nature of the crime and consideration of the culpability of the offender—to generate a new subset.

Importantly, *Miller* added to this jurisprudence by conjoining two sets of caselaw: outright categorical prohibitions on certain punishments for certain crimes or against certain offenders, *e.g., Graham*, 520 U.S. at 75, 130 S. Ct. at 2030, 176 L. Ed. 2d at 845-46; *Roper*, 543 U.S. at 578, 125 S. Ct. at 1200, 161 L. Ed. 2d at 28, with another line of cases requiring a sentencer have the ability to consider certain characteristics **[*386]** about the offender as mitigating circumstances in favor of not sentencing the offender to death, *e.g., Lockett v. Ohio,* 438 U.S. 586, 604, 98 S. Ct. 2954, 2964-65, 57 L. Ed. 2d 973, 990 (1978). *See Miller*, 567 U.S. at __, 132 S. Ct. at 2463-64, 183 L. Ed. 2d at 418. Although *Miller* did not identify its holding as a categorical rule, it essentially articulated a categorical prohibition on a particular sentencing practice. *See id.* at __, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424 ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."). Yet, *Miller* implemented **[**16]** a categorical prohibition by requiring the sentencing court to consider the offender's youth along with a variety of other individual facts about the offender and the crime to determine whether the sentence is appropriate. *See id.* at __, 132 S. Ct. at 2468, 183 L. Ed. 2d at 423; *see also Ragland*, 836 N.W.2d at 115 & n.6.

By importing the line of cases represented by *Lockett, Miller* effectively crafted a new subset of categorically unconstitutional sentences: sentences in which the legislature has forbidden the sentencing court from considering important mitigating characteristics of an offender whose culpability is necessarily and categorically reduced as a matter of law, making the ultimate sentence categorically inappropriate. This new subset carries with it the advantage of simultaneously being more flexible and responsive to the demands of justice than outright prohibition of a particular penalty while also providing real and substantial protection for the offender's right to be sentenced accurately according to their culpability and prospects for rehabilitation. We turn now to consider the merits of Lyle's challenge that mandatory minimums cannot be constitutionally applied to juveniles.

HN9[] The analysis of a categorical challenge to a sentence normally entails a **[**17]** two-step inquiry. First, we consider "'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue." *Graham*, 560 U.S. at 61, 130 S. Ct. at 2022, 176 L. Ed. 2d at 837 (quoting *Roper*, 543 U.S. at 563, 125 S. Ct. at 1191, 161 L. Ed. 2d at 17). Second, we exercise our own "independent judgment" "guided by 'the standards elaborated by controlling precedents and by [our] own understanding and interpretation of the [Iowa Constitution's] text, history, meaning, and purpose.'" *See id*. (quoting *Kennedy*, 554 U.S. at 421, 128 S. Ct. at 2650, 171 L. Ed. 2d at 540). In exercising independent judgment, we consider "the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." *Id.* at 67, 130 S. Ct. at 2026, 176 L. Ed. 2d at 841. We also consider if the sentencing practice being challenged serves the legitimate goals of punishment. *Id*.

Beginning with the first prong of the analysis, we recognize no 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. Further, most states permit or require some or all juvenile offenders to be given mandatory minimum sentences.[3] *See* **[*387]** Martin Guggenheim, Graham v. Florida **[**18]** *and a Juvenile's Right to Age-Appropriate Sentencing*, 47 Harv. C.R.-C.L. L. Rev. 457, 494 & n.267 (2012) [hereinafter Guggenheim] (collecting state statutes permitting or requiring a mandatory minimum sentences to be imposed on a juvenile offender tried as an adult). This state of the law arguably projects a consensus in society in favor of permitting juveniles to be given mandatory minimum statutory sentences. *See* Alex Dutton, Comment, *The Next Frontier of Juvenile Sentencing Reform: Enforcing Miller's Individualized Sentencing Requirement Beyond the JLWOP Context*, 23 Temp. Pol. & Civ. Rts. L. Rev. 173, 195 (2013) [hereinafter Dutton] ("At this moment, no such national consensus exists against the imposition of mandatory sentences on juvenile offenders; the practice is common

[3] Some states have limited or abolished mandatory minimums for juveniles. *See, e.g.*, Colo. Rev. Stat. § 19-2-908 (2013) (limiting the availability of mandatory minimum sentences for juveniles); Del. Code Ann. tit. 11, § 630A(c) (2007) (providing the mandatory minimum for vehicular homicide shall not apply to a juvenile offender); N.M. Stat. Ann. § 31-18-13(B) (West, Westlaw current through May 21, 2014) (providing that juvenile offenders may be sentenced to less than the mandatory minimum); Or. Rev. Stat. § 161.620 (2003) (providing a juvenile tried as an adult shall not receive a mandatory minimum **[**19]** sentence except for aggravated murder or felonies committed with a firearm); Wash. Rev. Code Ann. § 9.94A.540(3)(a) (West 2010) (prohibiting mandatory minimum sentences for juvenile offenders except for aggravated first-degree murder).

across jurisdictions.").

Yet, "[c]onsensus is not dispositive." *Kennedy*, 554 U.S. at 421, 128 S. Ct. at 2650, 171 L. Ed. 2d at 539. Moreover, as *Miller* demonstrates, constitutional protection for the rights of juveniles in sentencing for the most serious crimes is rapidly evolving in the face of widespread sentencing statutes and practices to the contrary. *See* 567 U.S. at __, 132 S. Ct. at 2470-73, 183 L. Ed. 2d at 424-29 (rejecting an argument by Alabama and Arkansas that widespread use of mandatory-life-without-parole sentences for juvenile homicide offenders precluded holding the practice to be unconstitutional). Additionally, the evolution of society that gives rise to change over time necessarily occurs in the presence of an existing consensus, as history has repeatedly shown. The "tough on crime" movement in politics may have made mandatory minimum sentences for juveniles common in society, *see* Dutton, Temp. Pol. & Civ. Rts. L. Rev. at 175 (identifying "conservative, tough-on-crime political campaigns" as one cause of harsh and longer juvenile sentences); *see also* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 509 (2001) (describing the bipartisan "bidding war" to be toughest on crime), **[**20]** but, the shift has also given rise to the claim that some sentencing laws have gone too far as applied to youthful offenders, *cf*. Guggenheim, 47 Harv. C.R.-C.L. L. Rev. at 495 (arguing the national-consensus analysis is inadequate to protect juvenile rights).

We also recognize that we would abdicate our duty to interpret the Iowa Constitution if we relied exclusively on the presence or absence of a national consensus regarding a certain punishment. Iowans have generally enjoyed a greater degree of liberty and equality because we do not rely on a national consensus regarding fundamental rights without also examining any new understanding.

Nevertheless, the absence of caselaw does not necessarily support the presence of a consensus contrary to the challenge by Lyle in this case. Our legislature has already started to signal its independent concern with mandatory prison sentences for juveniles. In 2013, it expressed this recognition by amending a sentencing statute to remove mandatory sentencing for juveniles in most cases. This statute provides:

> **[*388]** Notwithstanding any provision in section 907.3 or any other provision of law prescribing a mandatory minimum sentence for the offense, if the defendant, other than a child being prosecuted **[**21]** as a youthful offender, is guilty of a public offense other than a class "A" felony, and was under the age of eighteen at the time the offense was committed, the court may suspend the sentence in whole or in part, including any mandatory minimum sentence, or with the consent of the defendant, defer judgment or sentence, and place the defendant on probation upon such conditions as the court may require.

2013 Iowa Acts ch. 42, § 14 (codified at Iowa Code Ann. § 901.5(14) (West, Westlaw current through 2014 Reg. Sess.)).[4] While this statute does not change the minimum-term requirement for juveniles if a prison sentence is imposed by the court, it does abolish mandatory prison sentencing for most crimes committed by juveniles.

Just as we typically "owe substantial deference to the penalties the legislature has established for various crimes," *State v. Oliver*, 812 N.W.2d 636, 650 (2012), we owe equal deference to the legislature when it expands the discretion of the court in juvenile sentencing. Legislative judgments can be "the most reliable objective indicators of community standards for purposes of determining whether a punishment is cruel and unusual." **[**22]** *Bruegger*, 773 N.W.2d at 873. Here, the legislative decision to back away from mandatory sentencing for most crimes committed by juveniles weakens the notion of a consensus in favor of the practice of blindly sentencing juveniles based on the crime committed. In fact, it helps illustrate a building consensus in this state to treat juveniles in our courts differently than adults.

Actually, the statutory recognition of the need for some discretion when sentencing juveniles is consistent with our overall approach in the past in dealing with juveniles. Primarily, the juvenile justice chapter of our Code gives courts considerable discretion to take action in the best interests of the child. *See, e.g*., Iowa Code § 232.10(2)(*a*) (2013) (permitting a transfer of venue for juvenile court proceedings for "the best interests of the child" among other reasons); *id*. § 232.38(2) (permitting the district court to excuse temporarily the presence of the child's parents "when the court deems it in the best interests of the child"); *id*. § 232.43(6) (permitting the district court to refuse to accept a guilty plea by the child if the plea "is not in the child's best interest"); *id*. §

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[4] The State argues, and Lyle does not disagree, that the statute does not apply retroactively. *See* Iowa Code § 4.13(1)(*c*) (2013).

232.45(6)(*c*) (permitting the juvenile court to waive jurisdiction over delinquency proceedings if waiver "would **[**23]** be in the best interests of the child and the community"); *id*. § 232.52(2)(*e*) (permitting the court to transfer guardianship of the child to the department of human services for "the best interest of the child" among other reasons); *id*. § 232.62(2)(*a*) (permitting the district court to transfer venue for CINA proceedings for "the best interests of the child" among other reasons); *id*. § 232.108(3) (permitting a court to deny permission for "frequent visitation" by a sibling if the court determines "it would not be in the child's best interest").

Moreover, the Code in general is replete with provisions vesting considerable discretion in courts to take action for the best interests of the child. *See id*. § 92.13 (permitting the labor commissioner to refuse to grant a work permit to a minor if "the **[*389]** best interests of the minor would be served by such refusal"); *id*. § 232C.3(1) (permitting a court to emancipate a minor if it is in the best interest of the child); *id*. § 282.18(5) (directing a school board "to achieve just and equitable results that are in the best interest of the affected child" when determining whether to permit the child to open enroll). Other statutes prohibit juveniles from engaging in risky behavior because of the reduced capacity for **[**24]** decision-making found in juveniles. *See id*. § 123.47(2) (prohibiting persons under twenty-one from purchasing alcohol); *id*. § 135.37(2) (prohibiting persons under eighteen from obtaining tattoos); *id*. § 321.180B (prohibiting persons under eighteen from obtaining "a license or permit to operate a motor vehicle except under the provisions of this section"); *id*. § 453A.2(2) (prohibiting persons under eighteen from purchasing tobacco products); *see also Null,* 836 N.W.2d at 53 (collecting statutes).

All of these statutes reflect a pair of compelling realities. First, children lack the risk-calculation skills adults are presumed to possess and are inherently sensitive, impressionable, and developmentally malleable. Second, the best interests of the child generally support discretion in dealing with all juveniles. In other words, "the legal disqualifications placed on children as a class . . . exhibit the settled understanding that the differentiating characteristics of youth are universal." *J.D.B. v. North Carolina*, 564 U.S. __, __, 131 S. Ct. 2394, 2403-04, 180 L. Ed. 2d 310, 324 (2011).

Overall, it is becoming clear that society is now beginning to recognize a growing understanding that mandatory sentences of imprisonment for crimes committed by children are undesirable in society. If there is not yet a consensus against mandatory minimum sentencing **[**25]** for juveniles, a consensus is certainly building in Iowa in the direction of eliminating mandatory minimum sentencing.[5]

[*390] We next turn to the second step in the analysis of the Cruel and Unusual Punishment Clause. We must decide if the mandatory minimum sentence for a youthful offender violates the Cruel and Unusual Punishment Clause in light of its text, meaning, purpose, and history.

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[5] We recognize many states are currently wrestling with whether *Miller* applies retroactively on collateral review. *Compare Jones v. State*, 122 So. 3d 698, 702-03 (Miss. 2013) (holding *Miller* applies retroactively), *and State v. Mantich*, 287 Neb. 320, 842 N.W.2d 716, 731 (Neb. 2014) (same), *with State v. Tate*, 130 So. 3d 829, 841 (La. 2013) (holding Miller does not apply retroactively), *Chambers v. State*, 831 N.W.2d 311, 326 (Minn. 2013) (same), *and Commonwealth v. Cunningham*, 81 A.3d 1, 11 (Pa. 2013) (same). Of course, retroactivity aside, states must continue to find ways to implement *Miller*, and a variety of options exist. *See* Lauren Kinell, Note and Comment, *Answering the Unanswered Questions: How States Can Comport with* Miller v. Alabama, 13 Conn. Pub. Int. L.J. 143, 149-58 (2013) (discussing different approaches taken by states after *Miller*); Kelly Scavone, Note, *How Long Is Too Long: Conflicting State Responses to De Facto Life Without Parole Sentences After* Graham v. Florida *and* Miller v. Alabama, 82 Fordham L. Rev. 3439, 3441-42 (2014) (discussing varying state responses to issues left unresolved by *Miller*). Even these early days of rapidly evolving juvenile justice jurisprudence, though, we are hardly alone in our approach. For example, other courts have similarly held a term-of-years sentence can be so lengthy as to be the "functional equivalent" of a life sentence. *See Moore v. Biter*, 725 F.3d 1184, 1194 (9th Cir. 2013) (holding a 254-year sentence **[**26]** for nonhomicide crimes violated *Graham*); *People v. Caballero*, 55 Cal. 4th 262, 145 Cal. Rptr. 3d 286, 282 P.3d 291, 295 (Cal. 2012) (holding a 110-year minimum sentence is the equivalent of life without parole); *see also Commonwealth v. Brown*, 466 Mass. 676, 1 N.E.3d 259, 270 n.11 (Mass. 2013) (leaving the contours of a new sentencing scheme to the "sound discretion" of the legislature but cautioning that any sentencing scheme "must take account of the spirit" of *Brown* "and avoid imposing on juvenile defendants any term so lengthy that it could be seen as the functional equivalent of a sentence of life without parole" and citing *Caballero, Ragland*, and *Null*). Indeed, Massachusetts has even gone a step further than we have had occasion to do, holding all juvenile life without parole for homicide offenders violates the Massachusetts Constitution. *See Diatchenko v. Dist. Att'y*, 466 Mass. 655, 1 N.E.3d 270, 284-85 (Mass. 2013).

In doing so, we cannot ignore that over the last decade, juvenile justice has seen remarkable, perhaps watershed, change. This evolution must be cast in its proper place in the history of juvenile justice. Although we have recently traced the evolution of juvenile justice, *see Null*, 836 N.W.2d at 52, we highlight this history **[**27]** to better understand the challenge made in this case by Lyle. This history is particularly salient given the categorical nature of Lyle's challenge. It reveals children and juveniles have been viewed as constitutionally different from adults in this country for more than a century.

At common law, children under seven lacked criminal capacity, and children between seven and fourteen years of age were presumed to lack criminal capacity, but juveniles over fourteen were presumed to have the capacity to commit criminal acts. *Id.; see also In re Gault*, 387 U.S. 1, 16, 87 S. Ct. 1428, 1438, 18 L. Ed. 2d 527, 540 (1967). "For the first hundred years or so after the founding of the United States, juveniles, if they were tried at all, were tried in adult courts." *Null*, 836 N.W.2d at 52 (citing Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & Fam. Stud. 11, 13-14 (2007) [hereinafter Feld]). While these early courts typically did not have authority to accord the juvenile fewer rights, *In re Gault*, 387 U.S. at 16-17, 87 S. Ct. at 1438, 18 L. Ed. 2d at 540, courts did not afford juveniles any greater substantive protection. "Prior to the creation of juvenile courts, 'adult crime' meant 'adult time,' therefore states tried and sentenced children as adults, and imprisoned and executed them for crimes committed as young as ten, eleven, or twelve years **[**28]** of age." Feld, 10 J.L. & Fam. Stud. at 14.

By the end of the nineteenth century, progressive reformers were "appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals." *In re Gault*, 387 U.S. at 15, 87 S. Ct. at 1437, 18 L. Ed. 2d at 539. To ameliorate the harshness and inequity of trying children in adult courts (resulting in adult punishment), reformers advocated for the establishment of a system less concerned with ascertaining the child's guilt or innocence and more concerned with determining what was in the child's best interests based upon the child's unique circumstances. *Id.* at 15-16, 87 S. Ct. at 1437, 18 L. Ed. 2d at 539. "The idea of crime and punishment was to be abandoned. The child was to be 'treated' and 'rehabilitated' and the procedures, from apprehension through institutionalization, were to be 'clinical' rather than punitive." *Id*. "Accordingly, the highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in any comparable context." *Id.* at 17, 87 S. Ct. at 1438, 18 L. Ed. 2d at 540. Theoretically, youthful offenders would not face any actual prison time as a result of most juvenile court proceedings. *See* Julian W. Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104, 108 (1909) [hereinafter Mack] ("[T]he protection is accomplished by suspending sentence and **[**29]** releasing the child under probation, or, in the case of removal **[*391]** from the home, sending it to a school instead of to a jail or penitentiary.").

Underlying these early juvenile courts was the fundamental conceit that the judicial process was not adversarial when dealing with juvenile offenders. Instead, the state ostensibly acted in *parens patriae* on the child's behalf. *See In re Gault*, at 15-17, 87 S. Ct. at 1437-38, 18 L. Ed. 2d at 539-40. In turn, procedural protections for the benefit of criminal defendants did not apply in juvenile court. *Id.* at 15-16, 87 S. Ct. at 1437, 18 L. Ed. 2d at 539. The old law reasoned the child had no right of liberty with his or her parents, only a right to custody, and thus, in delinquency proceedings, the state did "not deprive the child of any rights, because he ha[d] none. It merely provide[d] the 'custody' to which the child [was] entitled." *Id.* at 17, 87 S. Ct. at 1438, 18 L. Ed. 2d at 540. In other words, the state, by prosecuting the child in juvenile court, was stepping in as the child's caretaker. *See* Mack, 23 Harv. L. Rev. at 120.

Sensing the changing perceptions about liberty and due process in the middle of the twentieth century, the United States Supreme Court recognized the basic prevailing underpinning of juvenile courts was inaccurate and "that the purpose of juvenile court proceedings was no longer primarily to protect the best interest **[**30]** of the child and was instead becoming more punitive in nature." *Null*, 836 N.W.2d at 52; *see In re Gault*, 387 U.S. at 17-19, 87 S. Ct. at 1438-39, 18 L. Ed. 2d at 540-41. Accordingly, the Court began to require many basic protections provided to adult offenders to be offered in juvenile courts, *see In re Gault*, 387 U.S. at 32-58, 87 S. Ct. at 1446-60, 18 L. Ed. 2d at 549-63, and in proceedings in which the juvenile is waived to adult court, *see Kent v. United States*, 383 U.S. 541, 556-57, 86 S. Ct. 1045, 1055, 16 L. Ed. 2d 84, 94-95 (1966).

Following *In re Gault*, however, little additional progress was achieved. *See* Guggenheim, 47 Harv. C.R.-C.L. L. Rev. at 466-74. State legislatures generally responded

to *Kent* and *In re Gault* by amending their laws to prosecute more juveniles as adults in adult court and to give more juveniles adult sentences. *See id.* at 472-74; Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 Crime & Just. 81, 84 (2000). As we have recognized "*Kent* and *In re Gault* may have stimulated a mindset of increased exposure of youth to adult criminal sentences." *Null*, 836 N.W.2d at 52; *see* Feld, 10 J.L. & Fam. Stud. at 31 & n.108 (detailing the alarmist, racially charged rhetoric that fueled ever harsher sentences); *see also* John J. Dilulio Jr., *The Coming of the Super-Predators*, The Weekly Standard, November 27, 1995, at 23) (predicting an onslaught of "tens of thousands of severely morally impoverished juvenile super-predators"). The increase in harsh sentencing statutes has led to longer sentences for juveniles.

Nevertheless, the Court did **[**31]** recognize serious differences in juveniles that supported differential treatment in a few cases. *See Johnson v. Texas*, 509 U.S. 350, 367, 113 S. Ct. 2658, 2668-69, 125 L. Ed. 2d 290, 306 (1993) (holding "sentence in a capital case must be allowed to consider the mitigating qualities of youth"); *Thompson v. Oklahoma*, 487 U.S. 815, 836-38, 108 S. Ct. 2687, 2699-2700, 101 L. Ed. 2d 702, 719-20 (1988) (plurality opinion) (holding death penalty for offenses committed by persons under sixteen years of age an "unconstitutional punishment"); *Schall v. Martin*, 467 U.S. 253, 265-67, 104 S. Ct. 2403, 2410-11, 81 L. Ed. 2d 207, 217-19 (1984) (subordinating, in appropriate circumstances, juvenile's liberty interest to state's *parens patriae* interest); *Eddings v. Oklahoma*, 455 U.S. 104, 115-16, **[*392]** 102 S. Ct. 869, 877, 71 L. Ed. 2d 1, 11-12 (1982) (remanding for state court to consider mitigating circumstances of death penalty case of sixteen-year-old youth). Importantly, the reasoning in *Schall*, which permitted pretrial detention of youthful offenders under circumstances not permissible of adults, was based on the notion that juveniles fail to appreciate the gravity of the situation of prosecution—presumably making them likely to reoffend even before trial. *See* 467 U.S. at 265, 104 S. Ct. at 2410, 81 L. Ed. 2d at 217-18. The Court recognized that "[c]hildren, by definition, are not assumed to have the capacity to take care of themselves." *Id*. It further recognized that "[s]ociety has a legitimate interest in protecting a juvenile from the consequences of his criminal activity [including] . . . the downward spiral of criminal activity in which peer pressure **[**32]** may lead the child." *Id.* at 266, 104 S. Ct. at 2410-11, 81 L. Ed. 2d at 218. *Schall* suggested that juveniles necessitate special treatment because the consequences of criminal conduct impact them differently than adults.

In the context of capital murder, the Court recognized the importance of youth as a mitigating factor. *See Eddings*, 455 U.S. at 115-17, 102 S. Ct. at 877-78, 71 L. Ed. 2d at 11-12. The Court explained:

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults.

Id. at 115-16, 102 S. Ct. at 877, 71 L. Ed. 2d at 11 (footnote omitted). Further, the Court found that the presence of evidence of other types of mitigating factors, such as a "turbulent family history, . . . beatings by a harsh father, and . . . severe emotional disturbance" was relevant when the defendant is a juvenile. *See id.* at 115, 102 S. Ct. at 877, 71 L. Ed. 2d at 11.

Indeed, the Court arrived at a similar conclusion in barring imposition of the death penalty on juvenile offenders who were under the age of sixteen at the time of the offense. *See Thompson*, 487 U.S. at 836-38, 108 S. Ct. at 2699-2700, 101 L. Ed. 2d at 719-20. Justice Stevens, writing for a plurality of the Court, explained two principal social purposes justify imposition of the death penalty: **[**33]** retribution and deterrence. *Id.* at 836, 108 S. Ct. at 2699, 101 L. Ed. 2d at 719. However, neither of these rationales applied to fifteen-year-old offenders. *Id.* at 836-38, 108 S. Ct. at 2699-2700, 101 L. Ed. 2d at 719-20.

The reasoning employed by the plurality was strikingly similar to the reasoning and language used by the later majority in *Roper. Compare id.* at 836-37, 108 S. Ct. at 2699-2700, 101 L. Ed. 2d at 719 ("Given the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children, [the retributive justification for imposing the death penalty] is simply inapplicable to . . . a 15-year-old offender."), *with Roper*, 543 U.S. at 569-71, 125 S. Ct. at 1195, 161 L. Ed. 2d at 21 (recognizing the "diminished culpability of juveniles" and their greater capacity for rehabilitation due to "transient immaturity" made the death penalty categorically inappropriate for juvenile offenders generally). Indeed, the idea that deterrence—a more relevant rationale for punishing lesser crimes—applied to juveniles was rejected nearly out of hand by the plurality: "The likelihood that the

teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." **[*393]** *Thompson*, 487 U.S. at 837, 108 S. Ct. at 2700, 101 L. Ed. 2d at 720.

Eddings and *Thompson* demonstrate that while our emerging knowledge of adolescent neuroscience and the diminished culpability **[**34]** of juveniles is indeed compelling, *see Thompson*, 487 U.S. at 836, 108 S. Ct. at 2699-2700, 101 L. Ed. 2d at 719; *Eddings*, 455 U.S. at 115-16, 102 S. Ct. at 877, 71 L. Ed. 2d at 11-12, our commonsense understanding of youth, *Miller*, 567 U.S. at __, 132 S. Ct. at 2464, 183 L. Ed. 2d at 418, or what "any parent knows," *Roper*, 543 U.S. at 569, 125 S. Ct. at 1195, 161 L. Ed. 2d at 21, has for more than thirty years supported a fundamental and virtually inexorable difference between juveniles and adults for the purposes of punishment. The understanding that it was cruel and unusual punishment to mandate the same sentences for juveniles as adults first emerged for crimes involving death sentences. We simply could no longer see death as an acceptable punishment to impose for a crime committed by a juvenile irrespective of the offender's youth.

Yet, for the bulk of the time after *Eddings* and *Thompson* and before *Roper*, a different categorical rule prevailed: the notion "that the penalty of death is qualitatively different from a sentence of imprisonment, however long." *See Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 2991, 49 L. Ed. 2d 944, 961 (1976) (plurality opinion). The "death is different" rule manifested itself in extreme deference to legislative judgments regarding the appropriate duration of punishments for juveniles for other crimes. So long as the juvenile would not be executed, virtually any sentence or statutory sentencing scheme was acceptable. *See* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional* ***[**35]*** *Sentencing Law and the Case for Uniformity*, 107 Mich. L. Rev. 1145, 1145 (2009) ("The Supreme Court takes two very different approaches to substantive sentencing law. Whereas its review of capital sentences is robust, its oversight of noncapital sentences is virtually nonexistent.").

However, ten years ago a new understanding of cruel and unusual punishment emerged. In *Roper*, the Supreme Court held that a state may not impose the death penalty for a crime committed under the age of eighteen. 543 U.S. at 578, 125 S. Ct. at 1200, 161 L. Ed. 2d at 28. Unquestionably, youth and its attendant characteristics were compelling factors in the Court's analysis. *See id.* at 569-74, 125 S. Ct. at 1195-97, 161 L. Ed. 2d at 21-25. The Court commented on three differences between youth and adults. *Id.* at 569-70, 125 S. Ct. at 1195, 161 L. Ed. 2d at 21-23. As it had before, the Court explained:

> [A]s any parent knows and as the scientific and sociological studies . . . tend to confirm, "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."

Id. at 569, 125 S. Ct. at 1195, 161 L. Ed. 2d at 21 (quoting *Johnson*, 509 U.S. at 367, 113 S. Ct. at 2668-69, 125 L. Ed. 2d at 306). The Court also noted "that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." *Id.* at 569, 125 S. Ct. at 1195, 161 L. Ed. 2d at 22. These two factors generally decrease **[**36]** the culpability of juvenile offenders. *See id*. "Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment." *Id.* at 570, 125 S. Ct. at 1195, 161 **[*394]** L. Ed. 2d at 22. "Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults." *Id.* at 571, 125 S. Ct. at 1196, 161 L. Ed. 2d at 23.

A greater capacity for change and rehabilitation complemented the juvenile's diminished culpability. The Court observed: "[T]he character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." *Id.* at 570, 125 S. Ct. at 1195, 161 L. Ed. 2d at 22. "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for greater possibility exists that a minor's character deficiencies will be reformed." *Id.* at 570, 125 S. Ct. at 1195-96, 161 L. Ed. 2d at 22. "Indeed, '[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.'" *Id.* at 570, 125 S. Ct. at 1196, 161 L. Ed. 2d at 22 (quoting *Johnson*, 509 U.S. at 368, 113 S. Ct. at 2669, 125 L. Ed. 2d at 306). "It is difficult even for expert psychologists **[**37]** to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the

rare juvenile offender whose crime reflects irreparable corruption." *Id.* at 573, 125 S. Ct. at 1197, 161 L. Ed. 2d at 24. Accordingly, the Court held the death penalty could not be imposed for a crime committed under eighteen years of age. *Id.* at 578, 125 S. Ct. at 1200, 161 L. Ed. 2d at 28.

Five years later, the Court made a revolutionary advance for juvenile justice. In *Graham*, a seventeen-year-old probationer was sentenced to life in prison (and had no opportunity for parole because Florida has abolished its parole system, *see* Fla. Stat. § 921.002(1)(*e*) (2003)), for actively participating in a series of armed home invasion robberies. 560 U.S. at 54-55, 57, 130 S. Ct. at 2018-19, 2020, 176 L. Ed. 2d at 832-33, 834-35. The Court again reversed the state court and vacated the sentence. Although there was a national consensus against sentencing juvenile offenders to the death penalty, thirty-seven states and the District of Columbia had statutory schemas permitting a juvenile offender to receive a life-without-parole sentence for a nonhomicide crime. *Id.* at 62, 130 S. Ct. at 2023, 176 L. Ed. 2d at 837. The Court opined, however, that "[a]ctual sentencing practices" revealed it was rare for a juvenile to receive such a sentence. *Id.* at 62, 130 S. Ct. at 2023, 176 L. Ed. 2d at 838. The Court concluded a national consensus had developed against the practice of life-without-parole sentences **[**38]** for juvenile nonhomicide offenders even if a statute remained on the books in a large number of states. *Id.* at 67, 130 S. Ct. at 2026, 176 L. Ed. 2d at 841.

More importantly, despite what appeared to be a national consensus against giving youthful nonhomicide offenders life-without-parole sentences, the Court proceeded to the second prong of analysis in a categorical challenge. *See id.* at 67-75, 130 S. Ct. at 2026-30, 176 L. Ed. 2d at 841-46. It reiterated the lessons of *Roper* that juveniles generally have decreased culpability, but treated those lessons as "established." *Id.* at 68, 130 S. Ct. at 2026, 176 L. Ed. 2d at 841. After rejecting penological justifications for life-without-parole sentences for juvenile nonhomicide offenders, the Court concluded:

> A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.

[*395] *Id.* at 75, 130 S. Ct. at 2030, 176 L. Ed. 2d at 845-46. This conclusion, of course, expresses a growing understanding of the meaning of cruel and unusual punishment. This understanding has continued to reveal the truth that the protections against cruel and unusual punishment need to account for the unique differences between juvenile and adult behaviors.

Two years later, the Court **[**39]** took an additional stride forward by holding in *Miller* that a statutory scheme that mandated a life-without-parole sentence for juvenile homicide offenders with no opportunity to take the offender's youth into account as a mitigating factor violated the Eighth Amendment. *Miller*, 567 U.S. at __, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424. A key component of the Court's reasoning was the recognition that "children are constitutionally different from adults for purposes of sentencing." *Id.* at __, 132 S. Ct. at 2464, 183 L. Ed. 2d at 418. It arrived at its conclusion not merely by relying on Roper and *Graham* but by weaving together "two strands of precedent"—one involving categorical bans on punishment for certain crimes and offenders and the other requiring sentencing authorities consider particular characteristics of the crime and the criminal before imposing a death sentence. *Id.* at __, 132 S. Ct. at 2463, 183 L. Ed. 2d at 417-18. Perhaps more importantly, the Court, recognized that "none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific." *Id.* at __, 132 S. Ct. at 2465, 183 L. Ed. 2d at 420. The Court added, "By making youth (and all that accompanies it) irrelevant to imposition of [a life-without-parole sentence], such a scheme poses too great a risk of disproportionate punishment." *Id.* at __, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424. The Court closed, noting:

> Although we do **[**40]** not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

Id.

Last term, we expanded the reach of the Supreme Court's reasoning in a trilogy of juvenile justice cases decided under the Iowa Constitution. In all three cases, we thoroughly canvassed the Court's precedent and examined the contours of *Roper, Graham*, and *Miller. See Ragland*, 836 N.W.2d at 114-22; *Pearson*, 836 N.W.2d at 95-97; *Null*, 836 N.W.2d at 60-68. We also held "that the unconstitutional imposition of a mandatory life-without-parole sentence is not fixed by substituting it

with a sentence with parole that is the practical equivalent of a life sentence without parole." *Ragland*, 836 N.W.2d at 121. In *Null*, we held that "[t]he prospect of geriatric release, if one is to be afforded the opportunity for release at all, does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society as required by *Graham*." *Null*, 836 N.W.2d at 71 (quoting *Graham*, 560 U.S. at 75, 130 S. Ct. at 2030, 176 L Ed. 2d at 845-46). We recognized there was no meaningful difference between a mandatory life-without-parole sentence—commanding the juvenile to spend the entirety of his life in prison and **[**41]** then die there—and a sentence styled as a mere mandatory term of years that, as a practical matter, would obtain the same result. *See Ragland*, 836 N.W.2d at 121; *Null*, 836 N.W.2d at 71. We reached even further in *Pearson*, however, understanding that two twenty-five year sentences (each subject to a mandatory minimum of seventeen-and-one-half years for a total of thirty-five years) "effectively deprived [the defendant] of any **[*396]** chance of an earlier release and the possibility of leading a more normal adult life." 836 N.W.2d at 96. A concurrence in *Pearson* recognized the case was limited to its bizarre facts and procedural posture, but pointed out that an authentic application of *Miller* and *Null* would correctly apply to all crimes and require a sentencing judge to have the discretion to depart from a mandatory minimum before imposing any minimum sentence. *Id.* at 98-99 (Cady, C.J., concurring specially).

To be sure, death conceivably remained different not only after the Court's opinion in *Roper*, but after the Supreme Court's opinions in *Graham* and *Miller*. After all, *Roper* was a death penalty case and could have been viewed as merely correcting the course after *Stanford. Miller* similarly concerned a statute that required a person be incarcerated for the remainder **[**42]** of their life. *Graham* itself recognized that "life without parole is 'the second most severe penalty permitted by law.'" 560 U.S. at 69, 130 S. Ct. at 2027, 176 L. Ed. 2d at 842 (quoting *Harmelin*, 501 U.S. at 1001, 111 S. Ct. at 2705, 115 L. Ed. 2d at 869 (Kennedy, J., concurring)); *see also* William W. Berry III, *More Different than Life, Less Different than Death*, 71 Ohio St. L.J. 1109, 1123-28 (2010) (arguing *Graham* treats life without parole as another category that, like the death penalty, is irreducibly different than other term-of-years sentences).

Yet, as our recent trilogy of cases illustrate, death has ceased to be different for the purposes of juvenile justice. While *Graham*, like *Roper*, placed a barrier to one punishment for juveniles, we recognized that *Miller* articulated a substantial principle requiring a district court to have discretion to impose a lesser sentence. We realized *Miller* left open a number of possibilities, including whether life without parole could ever be imposed for homicide committed by a juvenile and "to what extent a mandatory minimum sentence for adult crimes can automatically be imposed on a juvenile tried as an adult." *Null*, 836 N.W.2d at 66-67. While emerging neuroscience painted a compelling picture of the juvenile's diminished culpability "in the context of the death penalty and life-without-parole sentences, [we recognized] **[**43]** it also applies, perhaps more so, in the context of lesser penalties as well." *Pearson*, 836 N.W.2d at 98. Our recent procession of cases clearly indicates that death is no longer irreconcilably different under article I, section 17 of the Iowa Constitution, at least for juveniles.

Moreover, death sentences have never truly been the difference maker with respect to treating juveniles as adults. As Professor Guggenheim has pointed out, the Court recognized differences of constitutional magnitude between adults and children in an array of nonpunishment contexts. *See* Guggenheim, 47 Harv. C.R.-C.L. L. Rev. at 474-87. The Court permitted intrusions upon the constitutional rights of youths that would be starkly impermissible as applied to adults. *See, e.g., New Jersey v. T.L.O.*, 469 U.S. 325, 341-42, 105 S. Ct. 733, 742-43, 83 L. Ed. 2d 720, 734-35 (1985) (holding a school official may search a child student without a warrant "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school");[6] *Bellotti v. Baird*, 443 U.S. 622,

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[6] We note that *T.L.O*. is also a "special needs" search case, perhaps more purely than it is a children's rights case. *See* 469 U.S. at 341-43, 105 S. Ct. at 742-43, 83 L. Ed. 2d at 734-36. In this regard, T.L.O. also prizes the interest of school teachers to maintain order in schools. *See id.* at 343, 105 S. Ct. at 743, 83 L. Ed. 2d at 735 ("By focusing on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense."). Balancing the child's privacy interest—which is not a nullity—against the school's interest in maintaining order, the Court concluded a youthful student may be searched without a warrant when a school official has reasonable suspicion of wrongdoing by the student. *See id.* at 342-43, 105 S. Ct. at 742-43, 83 L. Ed. 2d at 735-36. Last term, we were presented with a proffered special need in *Kern*, 831 N.W.2d at 165-72.

643-44, **[*397]** 99 S. Ct. 3035, 3048, 61 L. Ed. 2d 797, 813-14 (1979) (holding a statute requiring judicial supervision of a minor's abortion, which would be unconstitutional as applied to an adult, could be constitutional under some circumstances); *Ginsberg v. New York*, 390 U.S. 629, 641-43, 88 S. Ct. 1274, 1281-82, 20 L. Ed. 2d 195, 204-06 (1968) (holding a state statute prohibiting minors from purchasing pornographic materials was a valid exercise of state **[**44]** power). As the Court explained in *Ginsburg*, "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.'" 390 U.S. at 638, 88 S. Ct. at 1280, 20 L. Ed. 2d at 203 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170, 64 S. Ct. 438, 444, 88 L. Ed. 645, 654 (1944)).

The nub of at least some of these cases is that juveniles are not fully equipped to make "important, affirmative choices with potentially serious consequences." *Baird*, 443 U.S. at 635, 99 S. Ct. at 3044, 61 L. Ed. 2d at 808. "[D]uring the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Id*. The Court also said:

> We have recognized ***HN10***[⬆] three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

Id. at 634, 99 S. Ct. at 3043, 61 L. Ed. 2d at 807. This reasoning is ancient, dating back to Blackstone, *see* 1 W. Blackstone, *Commentaries on the Laws of England* *464-65 (George Sharswood ed. 1870) (identifying common law disabilities of children but arguing "their very disabilities are privileges; in order to secure them from hurting themselves by their own improvident acts"), but continues to be forceful today.

More recently, the United States Supreme Court has recognized a child's age is relevant to **[**46]** the analysis of whether the child is in custody for the purposes of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). *See J.D.B.*, 564 U.S. at __, 131 S. Ct. at 2402-06, 180 L. Ed. 2d at 326-27. The Court there recognized that youth "is a fact that 'generates commonsense conclusions about behavior and perception'" that "apply broadly to children as a class" and are "self-evident to anyone who was a child once." *Id.* at __, 131 S. Ct. at 2403, 180 L. Ed. 2d at 323 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 674, 124 S. Ct. 2140, 2155, 158 L. Ed. 2d 938, 958 (2004) (Breyer, J., dissenting)). Moreover, a child's impressionability continued to be relevant: the Court noted "that events that 'would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.'" *Id*. (quoting *Haley v. Ohio*, 332 U.S. 596, 599, 68 S. Ct. 302, 304, 92 L. Ed. 224, 228 (1948)). In short, because **[*398]** children are categorically different under the law, the child's age is "a reality that courts cannot simply ignore." *Id.* at __, 131 S. Ct. at 2406, 180 L. Ed. 2d at 327.

Upon exercise of our independent judgment, as we are required to do under the constitutional test, we conclude that ***HN11***[⬆] the sentencing of juveniles according to statutorily required mandatory minimums does not adequately serve the legitimate penological objectives in light of the child's categorically diminished culpability. *See Graham*, 560 U.S. at 71-75, 130 S. Ct. at 2028-30, 176 L. Ed. 2d at 842-45. First and foremost, the time when a seventeen-year-old could seriously be considered to have adult-like culpability has passed. *See Null*, 836 N.W.2d at 70; *see also Bruegger*, 773 N.W.2d at 885 (recognizing that youth applies broadly to diminish **[**47]** culpability). Of course, scientific data and the opinions of medical experts provide a compelling and increasingly ineluctable case that from a neurodevelopment standpoint, juvenile culpability does not rise to the adult-like standard the mandatory minimum provision of section 902.12(5) presupposes. Thus, this prevailing medical consensus continues to inform and influence our opinion today under the constitutional analysis we are required to follow. As demonstrated by our prior opinions and the recent opinions of the United States Supreme Court, however, we can speak of youth in the commonsense terms of what any parent knows or what any former child knows, and so, surely, we do not abdicate our constitutional duty to exercise independent judgment when we determine Lyle does not have adult-like culpability. *Cf. Hall v. Florida*, 572 U.S. ___, ___, 134 S. Ct. 1986, 2000, 188 L. Ed. 2d 1007, 1025 (2014) ("It is the Court's duty to interpret the Constitution, but it need not do so in isolation. The legal determination of intellectual disability is distinct from a medical diagnosis, but it is informed by the medical community's diagnostic framework."). Of

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We refused to recognize the special needs doctrine, at least for the time being. *Id.* at 170. Our mention of *T.L.O*. today expresses no opinion regarding **[**45]** the special needs doctrine or the privacy interest of juveniles.

course, as we have said before, we do not forget that "while youth is a mitigating factor in sentencing, it is not an excuse." *Null*, 836 N.W.2d at 75. The constitutional **[**48]** analysis is not about excusing juvenile behavior, but imposing punishment in a way that is consistent with our understanding of humanity today.

We understand and appreciate that harm to a victim is not diluted by the age of the offender. *Schall*, 467 U.S. at 264-65, 104 S. Ct. at 2410, 81 L. Ed. 2d at 217. Yet, justice requires us to consider the culpability of the offender in addition to the harm the offender caused. After all, "[i]t is generally agreed 'that punishment should be directly related to the personal culpability of the criminal defendant.'" *Thompson*, 487 U.S. at 834, 108 S. Ct. at 2698, 101 L. Ed. 2d at 717 (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S. Ct. 837, 841, 93 L. Ed. 2d 934, 942 (1987) (O'Connor, J., concurring)). A constitutional framework that focused only on the harm the defendant caused would never have produced *Roper*, which involved a profoundly heinous crime. *See* 543 U.S. at 556-58, 573-74, 125 S. Ct. at 1187-88, 1197, 161 L. Ed. 2d at 13-14, 24-25.

We recognize the prior cases considering whether certain punishments were cruel and unusual all involved harsh, lengthy sentences, including death sentences. *See Miller*, 567 U.S. at __, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424; *Graham*, 560 U.S. at 75, 130 S. Ct. at 2030, 176 L. Ed. 2d at 845-46; *Roper*, 543 U.S. at 578, 125 S. Ct. at 1200, 161 L. Ed. 2d at 28; *Johnson*, 509 U.S. at 367, 113 S. Ct. at 2668-69, 125 L. Ed. 2d at 305-06; *Thompson*, 487 U.S. at 836-38, 108 S. Ct. at 2699-2700, 101 L. Ed. 2d at 719-20; *Eddings*, 455 U.S. at 115-17, 102 S. Ct. at 877-78, 71 L. Ed. 2d at 11-12; *see also Ragland*, 836 N.W.2d at **[*399]** 121-22; *Pearson*, 836 N.W.2d at 96; *Null*, 836 N.W.2d at 76. Of course, the Supreme Court has recognized that the denial of even the opportunity to apply for parole for a portion or the entirety of the applicable period of incarceration renders the sentence harsher. *See Graham*, 560 U.S. at 70, 130 S. Ct. at 2027, 176 L. Ed. 2d at 842 ("The Court has recognized the severity of sentences that deny convicts the possibility of parole."); *Solem v. Helm*, 463 U.S. 277, 300-01, 103 S. Ct. 3001, 3015, 77 L. Ed. 2d 637, 656 (1983) (distinguishing **[**49]** commutation from parole because, while "[p]arole is a regular part of the rehabilitative process" and a prisoner can normally expect parole "[a]ssuming good behavior," commutation is an "*ad hoc* exercise of executive clemency"); *Rummel v. Estelle*, 445 U.S. 263, 280-81, 100 S. Ct. 1133, 1142-43, 63 L. Ed. 2d 382, 395 (1980) (recognizing the opportunity for parole, "however slim," mollifies the severity of the convict's sentence).

More importantly, the Supreme Court has emphasized that nothing it has said is "crime-specific," suggesting the natural concomitant that what it said is not punishment-specific either. *See Miller*, 567 U.S. at __, 132 S. Ct. at 2465, 183 L. Ed. 2d at 420. We recognized as much last term. *See Null*, 836 N.W.2d at 71 ("[T]he notions in *Roper, Graham*, and *Miller* that 'children are different' and that they are categorically less culpable than adult offenders *apply as fully in this case as in any other*." (Emphasis added.)); *see also Pearson*, 836 N.W.2d at 99 (Cady, C.J., concurring specially) (recognizing the gravity of the offense does not affect the applicability of the juvenile's rights under article I, section 17). Simply put, attempting to mete out a given punishment to a juvenile for retributive purposes irrespective of an individualized analysis of the juvenile's categorically diminished culpability is an irrational exercise. *Pearson*, 836 N.W.2d at 98 ("[L]imiting the teachings and protections of these recent cases to only the harshest penalties **[**50]** known to law is as illogical as it is unjust.").

The United States Supreme Court has opined "the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence." *Roper*, 543 U.S. at 571, 125 S. Ct. at 1196, 161 L. Ed. 2d at 23. Punishment simply plays out differently with juveniles. Even in the context of capital punishment, the Court has sagaciously recognized that "[t]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." *Thompson*, 487 U.S. at 837, 108 S. Ct. at 2700, 101 L. Ed. 2d at 720. We add that a deterrence rationale is actually *even less applicable* when the crime (and concordantly the punishment) is lesser. If a juvenile will not engage in the kind of cost-benefit analysis involving the death penalty that may deter them from committing a crime, there is no reason to believe a comparatively minor sentence of a term of years subject to a mandatory minimum will do so. *See Pearson*, 836 N.W.2d at 98-99. "[A] juvenile's impetuosity can lead them to commit not only serious crimes, but considerably pettier crimes as well." *Id*.

Rehabilitation and incapacitation *can* justify criminally punishing juveniles, but mandatory minimums do not further **[**51]** these objectives in a way that adequately protects the rights of juveniles within the context of the constitutional protection from the imposition of cruel and

unusual punishment for a juvenile. *See Graham*, 560 U.S. at 72, 130 S. Ct. at 2029, 176 L. Ed. 2d at 844 ("Even if the punishment has some connection to a valid penological goal, it must be shown that the punishment **[*400]** is not grossly disproportionate in light of the justification offered."). As much as youthful immaturity has sharpened our understanding to use care in the imposition of punishment of juveniles, it also reveals an equal understanding that reform can come easier for juveniles without the need to impose harsh measures. Sometimes a youthful offender merely needs time to grow. As with the lack of maturity in youth, this too is something most parents know.

The greater likelihood of reform for juveniles also substantially undermines an incapacitation rationale. *See id.* at 72-73, 130 S. Ct. at 2029, 176 L. Ed. 2d at 844-45. The juvenile justice jurisprudence of the United States Supreme Court—like our own—is beginning to regard the incapacitation rationale with a healthy skepticism. *See id.* at 73, 130 S. Ct. at 2029, 176 L. Ed. 2d at 845 ("Incapacitation cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity."). A close reading of *Graham* demonstrates **[**52]** the Supreme Court views the incapacitation rationale even more limitedly: the Court recognized Florida needed to incapacitate the youthful offender to the extent he "posed an immediate risk" of "escalating [his] pattern of criminal conduct." *Graham*, 560 U.S. at 73, 130 S. Ct. at 2029, 176 L. Ed. 2d at 844 (internal quotation marks omitted).

Given the juvenile's greater capacity for growth and reform, it is likely a juvenile can rehabilitate faster if given the appropriate opportunity. "Because 'incorrigibility is inconsistent with youth,' care should be taken to avoid 'an irrevocable judgment about [an offender's] value and place in society.'" *Null*, 836 N.W.2d at 75 (quoting *Miller*, 567 U.S. at __, 132 S. Ct. at 2465, 183 L. Ed. 2d at 419). After the juvenile's transient impetuosity ebbs and the juvenile matures and reforms, the incapacitation objective can no longer seriously be served, and the statutorily mandated delay of parole becomes "nothing more than the purposeless and needless imposition of pain and suffering." *Coker*, 433 U.S. at 592, 97 S. Ct. at 2866, 53 L. Ed. 2d at 989.

If the undeveloped thought processes of juveniles are not properly considered, the rehabilitative objective can be inhibited by mandatory minimum sentences. After all, mandatory minimum sentences foreswear (though admittedly not altogether) the rehabilitative ideal. Juvenile offenders who are placed in prison at **[**53]** a formative time in their growth and formation, *see Null*, 836 N.W.2d at 55, can be exposed to a life that can increase the likelihood of recidivism. *See* Ioana Tchoukleva, Note, *Children Are Different: Bridging the Gap Between Rhetoric and Reality Post* Miller v. Alabama, 4 Cal. L. Rev. Circuit 92, 104 (Aug. 2013).

In the end, we conclude ***HN12***[⬆] all mandatory minimum sentences of imprisonment for youthful offenders are unconstitutional under the cruel and unusual punishment clause in article I, section 17 of our constitution. Mandatory minimum sentences for juveniles are simply too punitive for what we know about juveniles. Furthermore, we do not believe this conclusion is inconsistent with the consensus of Iowans. Although most parents fortunately will never find themselves in a position to be in court to see their teenage child sentenced to a mandatory minimum term of imprisonment for committing a forcible felony, we think most parents would be stunned to learn this state had a sentencing schema for juvenile offenders that required courts to imprison all youthful offenders for conduct that constituted a forcible felony without looking behind the label of the crime into the details of the particular **[*401]** offense and the individual circumstances of the child. Additionally, we think the jolt would be compounded once parents **[**54]** would further discover that their child must serve at least seventy percent of the term of the mandatory sentence before becoming eligible for parole. This shock would only intensify when it is remembered how some serious crimes can at times be committed by conduct that appears less serious when the result of juvenile behavior. This case could be an illustration.

A forcible felony can be the product of inane juvenile schoolyard conduct just as it can be the product of the cold and calculated adult conduct most people typically associate with a forcible felony, such as robbery. Yet, our laws have been shaped over the years to eliminate any distinction. Juveniles over sixteen years of age or older who commit any form of forcible felony are now excluded under our law from the jurisdictional arm of juvenile courts and are prosecuted as adults. Iowa Code § 232.8(1)(*c*). Consequently, the mandatory minimum sentences applicable to adult offenders apply, with no exceptions, to juvenile offenders, including those who engage in inane juvenile schoolyard conduct. At least for those juveniles, our collective sense of humanity preserved in our constitutional prohibition against cruel and unusual punishment and stirred **[**55]** by what we all know about child development demands some

assurance that imprisonment is actually appropriate and necessary. There is no other area of the law in which our laws write off children based only on a category of conduct without considering all background facts and circumstances.

Overall, no other logical result can be reached under article I, section 17, a result that is also embedded within the most recent cases from the United States Supreme Court. The Supreme Court banned mandatory life-without-parole sentences for juveniles in *Miller*, but it did not ban nonmandatory life-without-parole sentences if the sentencing court is given the opportunity to consider the attributes of youth in mitigation of punishment. *See Miller*, 567 U.S. at __, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424; *see also Ragland*, 836 N.W.2d at 121. Thus, juveniles can still be sentenced to long terms of imprisonment, but not mandatorily.[7] Accordingly, the heart of the constitutional infirmity with the punishment imposed in *Miller* was its mandatory imposition, not the length of the sentence. The mandatory nature of the punishment establishes the constitutional violation. Yet, ***HN13***[⬆] article I, section 17 requires the punishment for all crimes "be graduated and proportioned to [the] offense." *Cf. Weems*, 217 U.S. at 367, 30 S. Ct. at 549, 54 L. Ed. at 798. In other words, the protection of article I, section 17 applies across **[**56]** the board to all crimes. Thus, if mandatory sentencing for the most serious crimes that impose the most serious punishment of life in prison without parole violates article I, section 17, so would mandatory sentences for less serious crimes imposing the less serious punishment of a minimum period of time in prison without parole. ***HN14***[⬆] All children are protected by the Iowa Constitution. The constitutional prohibition against cruel and **[*402]** unusual punishment does not protect all children if the constitutional infirmity identified in mandatory imprisonment for those juveniles who commit the most serious crimes is overlooked in mandatory imprisonment for those juveniles who commit less serious crimes. *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.

Additionally, the analysis needed to properly apply article I, section 17 to the absence of a sentencing procedure does not bear on the disparity between the crime and the length of the sentence. *Cf. Graham*, 560 U.S. at 60, 130 S. Ct. at 2022, 176 L. Ed. 2d at 836-37. As a categorical challenge, the length of the sentence relative to the crime does not advance the analysis to reach an answer. *See id.* at 61, 130 S. Ct. at 2022, 176 L. Ed 2d at 836-37. Instead, the analysis turns to the procedure to see if it results in disproportionate punishment for youthful offenders. Mandatory sentencing for adults does not result in cruel and unusual punishment but for children it fails to account for too much of what we know is child behavior.

Ultimately, we hold ***HN15***[⬆] a mandatory minimum sentencing schema, like the one contained in section 902.12, violates article I, section 17 of the Iowa Constitution when applied in cases involving conduct committed by youthful offenders. We agree categorical rules can be imperfect, **[**58]** "but one is necessary here." *Id.* at 75, 130 S. Ct. at 2030, 176 L. Ed. 2d at 846. We must comply with the spirit of *Miller, Null*, and *Pearson*, and to do so requires us to conclude their reasoning applies to even a short sentence that deprives the district court of discretion in crafting a punishment that serves the best interests of the child and of society.[8] The keystone of our reasoning is that

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[7] Because our holding focuses exclusively on a statutory schema that requires a district court to impose a sentence containing a minimum period of time a juvenile **[**57]** must serve before becoming eligible for parole and that denies a district court the discretion to impose a lesser sentence, we do not consider the situation in which a district court imposes a sentence that denies the juvenile the opportunity for parole in the absence of a statute requiring such a result. Accordingly, we do not determine whether such a sentence would be constitutional.

[8] We do not ignore the legislature's passage of a statute vesting considerable discretion in district courts to depart from any part of a sentence, including any mandatory minimum. Iowa Code Ann. § 901.5(14) (West, Westlaw current through 2014 Reg. Sess.). However, the mere theoretical availability of unguided sentencing discretion, no matter how explicitly codified, is not a panacea. As we said in *Null, Miller* requires "more than a generalized notion of taking age into consideration as a factor in sentencing." *Null*, 836 N.W.2d at 74. *Null* provides a district court must expressly recognize certain concepts and "should make findings why the general rule [that children are constitutionally different from adults] does not apply." *Id.* In *Ragland* ***[**59]***, we noted the sentencing court "*must consider*" several factors at the sentencing hearing, including:

> (1) the "chronological age" of the youth and the features of youth, including "immaturity, impetuosity, and failure to

youth and its attendant circumstances and attributes make a broad statutory declaration denying courts this **[*403]** very discretion categorically repugnant to article I, section 17 of our constitution.[9]

It is important to be mindful that the holding in this case does not prohibit judges from sentencing juveniles to prison for the length of time identified by the legislature for the crime committed, nor does it prohibit the legislature from imposing a minimum time that youthful offenders must serve in prison before being eligible for parole. Article I, section 17 only prohibits the one-size-fits-all mandatory sentencing for juveniles. Our constitution demands that we do better for youthful offenders—all youthful offenders, not just those who commit the most serious crimes. Some juveniles will deserve mandatory minimum imprisonment, but others may not. A statute that sends all juvenile offenders to prison for a minimum period of time under all circumstances simply **[**61]** cannot satisfy the standards of decency and fairness embedded in article I, section 17 of the Iowa Constitution.

We also recognize the remedy in this case is to resentence Lyle so a judge can at least consider a sentencing option other than mandatory minimum imprisonment. We also recognize our decision will apply to all juveniles currently serving a mandatory minimum sentence of imprisonment. Thus, this case will require all juvenile offenders who are in prison under a mandatory minimum sentence to be returned to court for resentencing. This process will likely impose administrative and other burdens, but burdens our legal system is required to assume. Individual rights are not just recognized when convenient. Our court history has been one that stands up to preserve and protect individual rights regardless of the consequences. The burden now imposed on our district judges to preserve and protect the prohibition against cruel and unusual punishment is part of the price paid by many judges over the years that, in many ways, has helped write the proud history Iowans enjoy today. Even if the resentencing does not alter the sentence for most juveniles, or any juvenile, the action taken by our district judges in each case will honor **[**62]** the decency and humanity embedded within article I, section 17 of the Iowa Constitution and, in turn, within every Iowan. The youth of this state will be better served when judges have been permitted to carefully consider all of the circumstances of each case to craft an appropriate sentence and give each juvenile the individual sentencing attention they deserve and our constitution demands. The State will be better served as well.

Furthermore, our holding today has no application to sentencing laws affecting adult offenders. Lines are drawn in our law by necessity and are incorporated into the jurisprudence we have developed to usher the Iowa Constitution through time. This case does not move any of the lines that currently exist in the sentencing of adult offenders.

[*404] On remand, judges will do what they have taken an oath to do. They will apply the law fairly and impartially, without fear. They will sentence those juvenile offenders to the maximum sentence if warranted and to a lesser sentence providing for parole if warranted.[10]

> appreciate risks and consequences"; (2) the "family and home environment" that surrounded the youth; (3) "the circumstances of the . . . offense, including the extent of [the youth's] participation in the conduct and the way familial and peer pressures may have affected [the youth]"; (4) the "incompetencies associated with youth—for example, [the youth's] inability to deal with police officers or prosecutors (including on a plea agreement) or [the youth's] incapacity to assist [the youth's] own attorneys"; and (5) "the possibility of rehabilitation."

836 N.W.2d at 115 n.6 (emphasis added) (quoting *Miller*, 567 U.S. at __, 132 S. Ct. at 2468, 183 L. Ed. 2d at 423). Clearly, these are all *mitigating factors*, and they cannot be used to justify a harsher sentence. *See id.* at 115 & n.6; *see also Null*, 836 N.W.2d at 74-75. In *Pearson*, for instance, we found the district court's consideration of youth as an aggravating factor in favor a harsher sentence to be error. 836 N.W.2d at 97.

[9] We recognize we have held a mandatory minimum sentence constitutional. *See State v. Lara*, 580 N.W.2d 783, 785 (Iowa 1998); *State v. Horn*, 282 N.W.2d 717, 732 (Iowa 1979); *State v. Holmes*, 276 N.W.2d 823, 829 (Iowa 1979); *State v. Fitz*, 265 N.W.2d 896, 899 (Iowa 1978); *State v. Hall*, 227 N.W.2d 192, 194-95 (Iowa 1975); *see also State v. Fuhrmann*, 261 N.W.2d 475, 479-80 (Iowa 1978) (holding mandatory life imprisonment **[**60]** for first-degree murder was constitutional). None of these cases involved challenges brought under article I, section 17 of our constitution, nor did any of these cases involve challenges brought by youthful offenders. Furthermore, given that the most recent of these cases is sixteen years old and antedates *Roper* by seven years, we do not find them persuasive on the outcome of our decision. We thus express no opinion regarding the continuing vitality of these cases.

[10] To avoid any uncertainty about the parameters of the resentencing hearing and the role of the district court on resentencing, we reiterate that the specific constitutional challenge raised on appeal and addressed **[**63]** in this

Accordingly, ***HN16***[] article I, section 17 of the Iowa Constitution forbids a mandatory minimum sentencing schema for juvenile offenders that deprives the district court of the discretion to consider youth and its attendant circumstances as a mitigating factor and to impose a lighter punishment by eliminating the minimum period of incarceration without parole.

V. Conclusion.

For the above reasons, we vacate Lyle's sentence and **[**65]** remand the case to the district court for further proceedings.

DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT SENTENCE VACATED; CASE REMANDED.

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opinion concerns the statatory imposition of a minimum period of incarceration without parole equal to seventy percent of the mandatory sentence. The holding in this case does not address the mandatory sentence of incarceration imposed under the statutory sentencing schema or any other issues relating to the sentencing schema. Under article I, section 17 of the Iowa Constitution, the portion of the statutory sentencing schema requiring a juvenile to serve seventy percent of the period of incarceration before parole eligibility may not be imposed without a prior determination by the district court that the minimum period of incarceration without parole is warranted under the factors identified in *Miller* and further explained in *Null*. The factors to be used by the district court to make this determination on resentencing include: (1) the age of the offender and the features of youthful behavior, such as "immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) the particular "family and home environment" that surround the youth; (3) the circumstances of the particular crime and all circumstances relating to youth that may have played a role in the commission of the crime; (4) the challenges for youthful **[**64]** offenders in navigating through the criminal process; and (5) the possibility of rehabilitation and the capacity for change. *See Miller*, 567 U.S. at __, 132 S. Ct. at 2468, 183 L. Ed. 2d at 424; *Null*, 836 N.W.2d at 74-75; *see also Pearson*, 836 N.W.2d at 95-96; *Ragland*, 836 N.W.2d at 115 n.6.

In order to address the issue raised in this appeal, the district court shall conduct a hearing in the presence of the defendant and decide, after considering all the relevant factors and facts of the case, whether or not the seventy percent mandatory minimum period of incarceration without parole is warranted as a term of sentencing in the case. If the mandatory minimum sentence is not warranted, the district court shall resentence the defendant by imposing a condition that the defendant be eligible for parole. If the mandatory minimum period of incarceration is warranted, the district court shall impose the sentence provided for under the statute, as previously imposed.

All justices concur except Waterman, Mansfield, and Zager, JJ. Waterman and Zager, JJ., write separate dissents. Waterman, J., joins Zager, J., and Mansfield, J., joins both Waterman, J., and Zager, J.

Dissent by: WATERMAN; ZAGER

Dissent

WATERMAN, Justice (dissenting).

I respectfully dissent for the reasons set forth in Justice Zager's dissent, which I join. I write separately because I would go further to overrule as plainly erroneous our court's juvenile sentencing decisions in *Pearson* and *Null* for the reasons explained in the dissents in those cases. *See State v. Pearson*, 836 N.W.2d 88, 99-107 (Iowa 2013) (Mansfield, J., dissenting); *State v. Null*, 836 N.W.2d 41, 77-84 (Iowa **[*405]** 2013) (Mansfield, J., concurring in part and dissenting in part). And, I would follow Eighth Amendment decisions of our nation's highest court when applying the cruel-and-unusual-punishment provision of the Iowa Constitution because our state's founders intended those provisions to have the same meaning. *See State v. Bruegger*, 773 N.W.2d 862, 882 (Iowa 2009) ("Article I, section 17 of the Iowa Constitution prohibits cruel and unusual punishment in language materially identical to its federal counterpart. Our past cases have generally assumed that the standards for assessing whether a sentence **[**66]** amounts to cruel and unusual punishment under the Iowa Constitution are identical to the Federal Constitution."); *see also State v. Short*, 851 N.W.2d 474, 507, 2014 Iowa Sup. LEXIS 86 (Iowa 2014) (Waterman, J., dissenting) (advocating for a return to our court's long-standing practice of following federal precedent when construing the same language in the Iowa Constitution).

The trial judge found Lyle, then nearly age eighteen, "poses a serious danger to the community at present." In denying Lyle's motion for transfer to juvenile court, the trial judge noted Lyle's "cell phone contained numerous videos which showed [him] engaging in unprovoked, cowardly and vicious attacks against several different individuals" on or near school property. The trial judge personally observed Lyle's defiant demeanor in open court. I have no reason to disagree with the trial judge's firsthand assessment of Lyle. But, even if we accept Lyle as a merely misguided, immature schoolyard bully, the mandatory sentence he received falls well short of being unconstitutionally cruel and

unusual punishment. More importantly, the majority's sweeping, unprecedented holding today precludes mandatory minimum sentences for *any* violent felon who was under age eighteen at the time of the offense. **[**67]**

By holding Lyle's seven-year mandatory minimum sentence for his violent felony is cruel and unusual punishment and unconstitutional under article I, section 17 of the Iowa Constitution, rather than under the Eighth Amendment, the majority evades review by the United States Supreme Court. As Justice Zager observes, no other appellate court in the country has gone this far. Our court stands alone in taking away the power of our elected legislators to require even a seven-year mandatory sentence for a violent felony committed by a seventeen-year-old.

Will the majority stop here? Under the majority's reasoning, if the teen brain is still evolving, what about nineteen-year olds? If the brain is still maturing into the mid-20s, why not prohibit mandatory minimum sentences for any offender under age 26? As judges, we do not have a monopoly on wisdom. Our legislators raise teenagers too. Courts traditionally give broad deference to legislative sentencing policy judgments. *See State v. Oliver*, 812 N.W.2d 636, 650 (Iowa 2012) ("We give the legislature deference because '[l]egislative judgments are generally regarded as the most reliable objective indicators of community standards for purposes of determining whether a punishment is cruel and unusual.'" (quoting *Bruegger*, 773 N.W.2d at 873)). Why not defer today?

Our trial judges have day-to-day **[**68]** experience adjudicating thousands of juvenile cases. Why not continue to trust the trial judges to make the right individualized judgments in deciding whether a youthful offender should be adjudicated in juvenile court or adult court?[11] Why make today's **[*406]** categorical decision invalidating any mandatory minimum sentence for juveniles when no other appellate court has gone that far? We are not writing on a clean slate. Courts across the country are appropriately concluding that only mandatory life without parole or its de facto equivalent constitute cruel and unusual punishment for juveniles who commit violent felonies. *See People v. Pacheco*, 2013 IL App (4th) 110409, 991 N.E.2d 896, 907, 372 Ill. Dec. 406 (Ill. App. Ct. 2013) (reading state "proportionate penalties clause" as "coextensive with the eighth amendment" and holding automatic transfer to adult court did not violate State or Federal Constitution; upholding twenty-year mandatory minimum sentence); *State v. Vang*, 847 N.W.2d 248, 262-263, 2014 WL 1805320, at *9-10 (Minn. 2014) (holding thirty-year sentence does not violate State or Federal Constitution); *see also State v. Lyle*, __ N.W.2d __, __ (Iowa 2014) (Zager, J., dissenting) (collecting additional cases). None have followed *Null* or *Pearson* to extend constitutional prohibitions to shorter sentences.

This is much more than an interesting intellectual debate over jurisprudential philosophies and the proper role for independent state constitutional adjudication. Today's decision will have dramatic real-world consequences. Justice Zager has identified the burdens imposed on the judicial system by the scores of resentencing hearings and has noted the trauma to victims who must testify and relive what the defendant did to them. These hearings will reopen the wounds of the victims and their families. And, some of the offenders will gain release from prison earlier than under the mandatory minimum sentences. Some of those violent felons will commit new crimes. I would instead trust the legislative judgment of our elected branches that required a seven-year **[**70]** mandatory minimum prison term for second-degree robbery, a class "C" felony.[12] A seventeen-year-old offender would still be

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[11] The trial judge, applying the factors in Iowa Code section 232.45(7) (2011), denied Lyle's motion to transfer jurisdiction to juvenile court. The court reviewed Lyle's criminal history **[**69]** and juvenile court services dating back to age thirteen. The court found

> [Lyle] has obviously not benefited from any of the juvenile court services provided to date. He has chosen to remain involved with drugs and a gang, and has instigated numerous violent attacks on unsuspecting victims. His demeanor during the reverse waiver hearing demonstrated his complete disdain for the court system and his lack of interest in any remedial program.

[12] Two years after Lyle's conviction, the legislature prospectively granted sentencing courts discretion to waive mandatory minimums if the defendant was under age eighteen at the time he committed the crime. *See* 2013 Iowa Acts ch. 42, § 14 (codified at Iowa Code Ann. § 901.5(14) (West, Westlaw current through 2014 Reg. Sess.)). Significantly, however, the legislature chose not to make this amendment retroactive. *See* Iowa Code § 4.5 (2013) ("A statute is presumed to be prospective in its operation unless expressly made retrospective."). The majority notes only two other states that have limited or abolished mandatory minimum sentences for juveniles. That presumably means forty-seven states **[**71]** continue to allow mandatory minimum sentences for juvenile felons. It certainly is a reasonable policy choice for

eligible for release by age twenty-five. But, that offender would be incarcerated during the late teens and early twenties—the ages when violent crimes are most likely to be committed. *See* Jeffery T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship: Social Variation, Social* ***[*407]*** *Explanations, in The Nurture Versus Biosocial Debate in Criminology* 377, 377-78 (Kevin M. Beaver, Brian B. Boutwell & J.C. Barnes eds., 2014).

The majority opines that the resentencing hearings to be required of our district court judges "will honor the decency and humanity embedded within article I, section 17 of the Iowa Constitution and, in turn, within every Iowan." I believe our elected representatives—not the members of this court—are best equipped to decide what values are embedded within every Iowan.

I do not wish to take issue today with the court's earlier decision in *Bruegger*. However, it is worth repeating the dissenter's apt observation **[**72]** from that case:

> While some constitutional principles might be receptive to defendant's plight, the Cruel and Unusual Punishment Clause is not among them. Courts must adhere to the constitutional framework, even when the result is difficult to swallow. Furthermore, we must not forget that we are not the only guardians of justice in our government. For example, prosecutors must use sound judgment in charging and prosecuting defendants who may be swept up by broad legislative policies that were not likely intended to capture them. The governor, too, is empowered to commute a sentence viewed to be unjust. Finally, consistent with the one true strength of our democracy, the legislature can repair mistakes.

Bruegger, 773 N.W.2d at 888 (Cady, J., dissenting). As the *Bruegger* dissent reminds us, we are not the only repositories of fairness. It is certainly possible to "rely upon the other components of government to mete out justice." *Id*.

It is easy in the abstract to say we do not put constitutional rights to a vote. It is the role of the courts to say where constitutional lines are drawn. But, we must remember rights, by definition, are restrictions on governmental power—the government elected by the people. If our court misinterprets a statute, the legislature **[**73]** can amend the statute the next session. But, if we misinterpret our state constitution, the people are stuck with the decision unless the decision is overruled or the constitution is amended. That is why judges must be extraordinarily careful with constitutional interpretation. Adherence to settled Federal Eighth Amendment precedent would avoid today's aberrational judicial decision-making on sentencing policy.[13]

I therefore dissent for the reasons set forth above and in Justice Zager's dissent.

Mansfield, J., joins this dissent.

ZAGER, Justice (dissenting).

I respectfully dissent. I do not believe a seven-year mandatory minimum sentence imposed on an individual who was a juvenile at the time the offense was committed is cruel and unusual punishment under either the Federal or our Iowa Constitution. **[**74]** This mandatory minimum sentence is not grossly disproportional, and there is no recognized categorical challenge for a juvenile's "categorically diminished culpability." There is no authority for holding such. By holding all mandatory minimum sentences imposed on juveniles constitutes **[*408]** cruel and unusual punishment, the majority abandons any semblance of our previous constitutional analysis of cruel and unusual punishment and creates a new category for the sentencing of juveniles to achieve a perceived "best practice" in sentencing. The majority expands article I, section 17 of the Iowa Constitution to a point supported by neither our own caselaw nor by any caselaw of the United States Supreme Court. Neither does such an

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our legislature in 2013 to grant trial courts discretion in place of mandatory minimums sentences for juvenile felons. But, today's decision precludes future legislatures from returning to the former, reasonable policy choice of requiring a minimum prison term for certain violent felonies. What if there is a wave of violent crimes committed by gang members under age eighteen? I would not take the mandatory minimum sentencing option away from the elected branches by holding any mandatory minimum sentence is cruel and unusual punishment under our state constitution. We do not need to go that far and should not do so.

[13] The amendment process is a check on judicial power. Indeed, the people of Florida amended that state's constitution to require conformity with Supreme Court interpretations of the Eighth Amendment. *See* Fla. Const. art. I, § 17 ("The prohibition . . . against cruel and unusual punishment[] shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.").

expansive interpretation find support in the caselaw of any other appellate court in the nation. Contrary to the majority's reasoning, the United States Supreme Court's interpretation of the Federal Constitution does not support this expansive interpretation. I would apply the reasoning of *Miller v. Alabama*, 567 U.S. __, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), *State v. Null*, 836 N.W.2d 41 (Iowa 2013), and *State v. Pearson*, 836 N.W.2d 88 (Iowa 2013), to the facts of this case and hold this mandatory minimum sentence is not cruel or unusual under the Iowa Constitution.

In both *Pearson* and *Null*, we reversed the mandatory minimum sentences imposed on those juvenile offenders **[**75]** based on an application of the "principles in *Miller* as developed by the Supreme Court in its Eighth Amendment jurisprudence." *Pearson*, 836 N.W.2d at 96; *see Null*, 836 N.W.2d at 70 (stating "we are persuaded that *Miller*'s principles are sound and should be applied in this case"). The majority here dramatically departs from the analysis we applied in both those cases. Instead, the majority applies the two-prong test applied by the Supreme Court in *Graham v. Florida* to justify its radical departure from our own precedents. *See* 560 U.S. 48, 61, 130 S. Ct. 2011, 2022, 176 L. Ed. 2d 825, 837 (2010) (explaining the approach applied in "cases adopting categorical rules"). One must ask, if the majority felt that all mandatory minimum sentences for juveniles should be considered under this new categorical analysis, why was it not applied in *Null* and *Pearson*? Likely because it did not fit then, and it does not fit now.

It must first be recognized that Lyle did not urge this approach in his appeal. Indeed, in his supplemental brief he "ask[ed] this court to vacate his sentence and remand to the district court for resentencing with consideration given to his youth, immaturity, and chance for rehabilitation, as discussed in *Miller, Null*, and *Pearson*." As explained more fully below, *Miller, Null*, and *Pearson* rested on **[**76]** a legal concept completely different from *Graham*. The *Graham* Court found the issue to be decided on appeal was whether the Eighth Amendment permitted a juvenile offender to be sentenced to life imprisonment without the possibility for parole for a nonhomicide crime. *See id.* at 52-53, 130 S. Ct. at 2017-18, 176 L. Ed. 2d. at 832. The Court's categorical ban was only on life without the possibility of parole in nonhomicide cases. *See id.* at 82, 130 S. Ct. at 2034, 176 L. Ed. 2d at 850 ("The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."). Interestingly, the Court in *Miller* only began its analysis of *Graham*'s two-prong test after it had already expressly held mandatory life-without-parole sentences for juveniles were unconstitutional. *See Miller*, 567 U.S. at __, 132 S. Ct. at 2470, 183 L. Ed. 2d at 424. While *Null* alludes to the two-prong test in discussing *Graham, see Null*, 836 N.W.2d at 62-63, Pearson did not mention the two-prong test utilized in *Graham* at all. Nevertheless, the majority bypasses our caselaw from less than a year ago, attempts to apply the *Graham* analysis, and strikes down all mandatory minimum sentences for juveniles.

The majority's reason for applying *Graham* is that juveniles are categorically less **[*409]** culpable, and so a categorical analysis and categorical rules are appropriate here. On its own, the **[**77]** majority now creates a new constitutional category under our Iowa Constitution, but we need to be clear that there is no judicial authority for creating this new constitutional category. Up to this point, in most cases, the fact of a juvenile's diminished culpability only required the sentencing court "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *See Miller*, 567 U.S. at __, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424. Were a categorical rule appropriate based solely on a juvenile's diminished culpability, the Supreme Court in *Miller* would have imposed a categorical rule. Instead, it expressly declined to consider the "argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger." *Id.* at __, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424. Nevertheless, the majority in this case deems the juvenile's diminished culpability alone is of sufficient constitutional magnitude to impose a categorical rule against mandatory minimum sentences and holds the sentence cruel and unusual.

Though the majority attempts to justify its divergence in its analysis of cruel and unusual punishment, there is a substantial difference between *Graham*'s categorical approach and **[**78]** the approach applied in *Miller, Null*, and *Pearson*. In fact, the Court in *Miller* labored to make clear its decision did "not categorically bar a penalty for a class of offenders or type of crime—as, for example, [it] did in *Roper* [*v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L. Ed. 2d 1 (2005)], or *Graham." See id.* at __, 132 S. Ct. at 2471, 183 L. Ed. 2d at 426. The decision "mandate[d] only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty." *Id*. The Court further noted its decision retained the distinction between homicide and

nonhomicide offenses: "*Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses." *Id.* at __ n.6, 132 S. Ct. at 2466 n.6, 183 L. Ed. 2d at 420 n.6. In extending *Miller*'s rule to the shorter terms of imprisonment in *Pearson* and *Null*, we heeded the Supreme Court's words, retaining the distinction between *Graham* and *Miller*. Now, the majority does what we did not do in *Pearson* and *Null* and what the Supreme Court did not do in *Miller*. The majority flatly bans a "penalty for a class of offenders." *See id.* at __, 132 S. Ct. at 2471, 183 L. Ed. 2d at 426. So much for the spirit of *Miller, Pearson*, and *Null*.

Without success, the majority starts its analysis by attempting to apply the first prong of the two-prong test in ***[**79]*** *Graham*. In searching for "'objective indicia of society's standards,'" *Graham*, 560 U.S. at 61, 130 S. Ct. at 2022, 176 L. Ed. 2d at 837 (quoting *Roper*, 543 U.S. at 563, 125 S. Ct. at 1191, 161 L. Ed. 2d at 17), the majority first turns to other states' juvenile sentencing jurisprudence. That search for authority striking down all mandatory minimum sentences imposed on juveniles, as the majority acknowledges, turns up no support for invalidating all juvenile mandatory minimum sentences. In fact, no other state court has held its state constitution, nor has any federal court held the Federal Constitution, forbids imposing mandatory minimum sentences on juveniles. In fact all authority, except in the life-without-parole context, is to the contrary. *See, e.g., Hobbs v. Turner*, 2014 Ark. 19, 431 S.W.3d 283, 285, 2014 WL 257378, at *9-11 (Ark. 2014) (upholding a term of imprisonment of fifty-five years for crimes committed at seventeen years of age as not **[*410]** prohibited by the Eighth Amendment or *Miller* and *Graham*); *People v. Perez*, 214 Cal. App. 4th 49, 154 Cal. Rptr. 3d 114, 120-21 (Ct. App. 2013) (concluding that imposing a mandatory sentence on a juvenile that allowed for parole eligibility at age forty-seven was not severe enough to implicate *Miller* or *Graham*); *James v. United States*, 59 A.3d 1233, 1238 (D.C. 2013) (upholding a thirty-year mandatory minimum sentence imposed on a juvenile homicide offender); *People v. Pacheco*, 2013 IL App (4th) 110409, 991 N.E.2d 896, 906-07, 372 Ill. Dec. 406 (Ill. App. Ct. 2013) (upholding under the Federal and Illinois Constitutions, a twenty-year mandatory minimum sentence imposed on a juvenile); *Diatchenko v. Dist. Att'y*, 466 Mass. 655, 1 N.E.3d 270, 285, 286 (Mass. 2013) (striking down life-without-parole **[**80]** sentence imposed on juvenile homicide offender but upholding fifteen-year mandatory minimum); *State v. Vang*, 847 N.W.2d 248, 262-263, 2014 WL 1805320, at *8-9 (Minn. 2014) (holding mandatory life sentence with possibility of parole after thirty years for first-degree felony murder committed when defendant was fourteen years old did not violate either the Eighth Amendment or the Minnesota Constitution's prohibition against cruel and unusual punishment); *People v. Aponte*, 42 Misc. 3d 868, 981 N.Y.S.2d 902, 905-06 (Sup. Ct. 2013) (concluding a life sentence with mandatory minimum of twenty-five years for conviction of second-degree murder committed by a seventeen year old was not cruel and unusual under *Miller* or *Graham*, or under any Eighth Amendment theory); *see also United States v. Reingold*, 731 F.3d 204, 214 (2d Cir. 2013) ("Nothing in *Graham* or *Miller* suggests that a five-year prison term is the sort of inherently harsh sentence that—like the death penalty or its deferred equivalent, life imprisonment without parole—requires categorical rules to ensure constitutional proportionality . . . ."). To be clear, the majority cannot cite to any case of any court that used the *Graham—Miller* line of jurisprudence to strike down as cruel and unusual punishment any sentence imposed on anyone under the age of eighteen when the individual still had a substantial life expectancy left at the time of eligibility for parole. **[**81]**

Finding no support in a national survey on mandatory minimum sentences for juveniles, apart from legislation limiting the use of mandatory sentences to certain circumstances, the majority elects to give little weight to the strong national consensus approving juvenile mandatory minimum sentences. *But see State v. Bousman*, 278 N.W.2d 15, 18 (Iowa 1979) (concluding in a challenge to a sentence's claimed disproportionality that "[d]eference" is "appropriate" to the "collective judgment" of "a substantial number of states" that "have determined that the punishment rendered here is not grossly out of proportion to the severity of the crime"). Instead, the majority turns to this state's body of unrelated statutory law concerning juveniles. The majority notes that the legislature recently passed a statute granting sentencing judges the discretion to impose shorter terms of imprisonment for juveniles. *See* 2013 Iowa Acts ch. 42, § 14 (codified at Iowa Code Ann. § 901.5(14) (West, Westlaw current through 2014 Reg. Sess.)). According to the majority, we owe deference to this legislative judgment because it is a reliable indicator of current community standards. *See State v. Bruegger*, 773 N.W.2d 862, 873 (Iowa 2009) ("Legislative judgments are generally regarded as the most reliable objective indicators of community standards **[**82]** for purposes of determining whether a punishment is cruel and unusual."). But, we should not forget, "a reviewing court is not authorized to generally blue pencil criminal

sentences to advance judicial perceptions of fairness." *Id*.

[*411] It is true we owe deference to the legislature's judgments concerning the sentences imposed for commission of various crimes. *See State v. Oliver*, 812 N.W.2d 636, 650 (Iowa 2012) ("[W]e owe substantial deference to the penalties the legislature has established for various crimes."); *see also Graham*, 560 U.S. at 71, 130 S. Ct. at 2028, 176 L. Ed. 2d at 843 ("Criminal punishment can have different goals, and choosing among them is within a legislature's discretion."); *Solem v. Helm*, 463 U.S. 277, 290, 103 S. Ct. 3001, 3009, 77 L. Ed. 2d 637, 649 (1983) ("Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes . . . ."). But, if this court is to give deference to legislative judgments concerning punishment enacted after an offender is sentenced, then surely this court must also give deference to legislative judgments that were in effect when the offender was sentenced. The statute in effect at that time of sentencing is at least as good an objective indicium of society's standards as a statute enacted two years later.[14]

[14] The majority **[**83]** seems to take the enactment of the new statute as an implicit concession by the legislature that the previous sentencing scheme was unconstitutional. I disagree. In *Bousman*, an offender, Bousman, received a one-year sentence for resisting execution of process. 278 N.W.2d at 15-16. Two days before Bousman's trial began, the new criminal code became effective. *See id.* at 16. The new criminal code provided a maximum punishment of thirty days in jail for the offense of which Bousman was convicted. *See id*. Based on this disparity, Bousman argued the one-year sentence he received was cruel and unusual. *See id.* at 17.

We rejected Bousman's argument, finding that the change in the length of the sentence did not reflect a legislative judgment about the harshness of the previous sentencing scheme. *See id.* at 17-18. Though "the subsequent action of the Iowa Legislature in decreasing the penalty" was "relevant," we found "its weight [was] considerably decreased by the fact that that same legislature provided" district courts the authority "to select the prior, more severe, punishment." *Id.* at 17. Like the Code section at issue in *Bousman*, the newly enacted juvenile sentencing statute does not preclude the sentencing judge from selecting a **[**84]** similarly severe punishment. *See* 2013 Iowa Acts ch. 42, § 14 (providing "the court *may* suspend the sentence, in whole or in part, including any mandatory minimum sentence" (emphasis added)). Thus, as we did in *Bousman*, we can safely conclude here the new sentencing statute "demonstrates that the legislature did not necessarily reject prior penalties as excessively harsh." *Bousman*, 278 N.W.2d at 17.

The statute in effect when Lyle was sentenced mandated he serve seventy percent of his ten-year sentence. *See* Iowa Code § 902.12(5) (2011). Assuming both the new sentencing statute and the older sentencing statute should be considered as indicators of society's standards, they are entitled to equal amounts of deference. Nonetheless, the majority analysis discounts one legislative judgment, because they apparently don't agree with it, by elevating the other with which they do agree. This is not the role of an appellate court.

Having decided substantial deference is owed to a statute not in effect when Lyle was sentenced, the majority identifies other statutes that likewise grant courts discretion when dealing with juveniles. In addition to citing various civil statutes concerning juveniles, the majority cites numerous provisions from the juvenile **[**85]** justice chapter of the Iowa Code that grant courts discretion to consider the best interests of the child when making decisions. *See, e.g.*, Iowa Code § 232.10(2)(*a*) (allowing transfer of delinquency proceedings when transfer would serve, among other interests, "the best interests of the child"); *id*. § 232.62(2)(*a*) (permitting a court to **[*412]** transfer child-in-need-of-assistance proceeding when transfer would serve "the best interests of the child"). According to the majority, these statutes reflect the legislature's recognition that juveniles and adults are different. Giving effect to these differences requires that courts have discretion when dealing with juveniles.

I think the majority makes too much of the legislature's grant of discretion to juvenile courts in these other, noncriminal contexts. The legislature's grant of discretion in *some* contexts may well reflect our society's judgment that juveniles are different for purposes of these contexts. It does not follow, however, that juveniles must be treated differently in *all* contexts. Surely the legislature's discretion to select among different penal sanctions contemplates the authority to narrow or expand judicial discretion across varying juvenile contexts. The prerogative **[**86]** for making such policy decisions typically belongs to "our legislature, as representatives of the people." *See Bruegger*, 773 N.W.2d at 887 (Cady, J., dissenting). The legislature, having made a policy distinction it is entitled to make, limits this court's authority to alter it. "Courts do not intervene to alter [sentencing] policies except when

the resulting legislative scheme runs contrary to constitutional mandates." *Id*. Nothing in the majority's survey of the objective indicia of our society's standards suggests our society believes violent juvenile offenders are constitutionally different for purposes of sentencing, except for life without parole and its functional equivalent. Thus, this court should not interfere with the legislature's selected sentencing scheme.

Of course this newly conferred sentencing discretion for juveniles, as provided for by the new statute, holds the prospect of being illusory. That is, the majority purports to favor a sentencing scheme in which district courts are able to craft appropriate sentences according to the unique circumstances of each juvenile. In reality, the majority's approach bestows upon our appellate courts the freedom to impose their members' judgments about the **[**87]** appropriateness of a sentence. After all, sentences are subject to review for abuse of discretion. *See State v. Loyd*, 530 N.W.2d 708, 711 (Iowa 1995). I have serious concerns that in future juvenile sentencing cases appellate courts are likely to remember "our task on appeal is not to second guess the decision made by the district court, but to determine if it was unreasonable or based on untenable grounds." *See State v. Formaro*, 638 N.W.2d 720, 725 (Iowa 2002) (explaining the role of appellate courts in reviewing a district court's sentencing decision).

But, it is in the application of the second prong of the *Graham* test that the majority most clearly departs from our previous cruel and unusual analysis and our precedent. Though in *Pearson* and *Null* we no doubt had the authority to independently interpret our own constitution, nothing we said in those two cases indicated that independence was the foundation of our analysis. Rather, we relied on and expanded on *Miller*'s principles in invalidating the two juvenile sentences. *See Pearson*, 836 N.W.2d at 96 ("Though *Miller* involved sentences of life without parole for juvenile homicide offenders, its reasoning applies equally to Pearson's sentence of thirty-five years without the possibility of parole for these offenses."); *Null*, 836 N.W.2d at 72 (concluding that "*Miller*'s principles **[**88]** are fully applicable to a lengthy term-of-years sentence"). I believe we should adhere to our precedents developed just one year ago in *Pearson* and *Null*. As will be explained below, if the majority was true to the principles espoused in *Pearson, Null* and *Miller*, it must hold Lyle's sentence does not violate the cruel and unusual punishment clause of the Iowa Constitution.

[*413] In rejecting the mandatory sentences in *Pearson* and *Null*, we applied the principles espoused by the United States Supreme Court in *Miller. Pearson*, 836 N.W.2d at 96 (requiring *Miller*'s individualized hearing); *Null*, 836 N.W.2d at 72 ("We conclude that *Miller*'s principles are fully applicable to a lengthy term-of-years sentence as was imposed in this case . . . ."). The Court's holding in *Miller* depended on a convergence of three factors: the offender's age, the harsh sentence, and the mandatory sentencing scheme. *See Miller*, 567 U.S. at __, 132 S. Ct. at 2460, 183 L. Ed. 2d at 414 (describing the facts of the case). This convergence created the risk of a disproportionate sentence. *See id.* at __, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424 (holding unconstitutional sentencing schemes that impose mandatory life-without-parole sentences on juvenile homicide offenders). To mitigate the risk that disproportionate sentences will be imposed on juveniles convicted of homicide, the Court declared sentencing courts must hold an individualized hearing **[**89]** before imposing a harsh, mandatory life-without-parole sentence on a juvenile, a procedure similar to one that courts must perform before imposing the death penalty. *See id.* at __, 132 S. Ct. at 2468, 183 L. Ed. 2d at 422 (explaining that the death penalty may not be imposed without an individualized hearing and concluding "a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison"). Reaching this outcome, however, required the Court in *Miller* to connect the three converging factors to death-penalty sentencing.

The Court began by explaining the differences between children and adults as established in its precedents. *Id.* at __, 132 S. Ct. at 2464, 183 L. Ed. 2d at 418. First, juveniles are immature and their sense of responsibility is underdeveloped, which leads to "recklessness, impulsivity, and heedless risk-taking." *Id*. Juveniles are also more vulnerable than adults to negative influences and pressures, less able to control their environment, and unable to escape "horrific, crime-producing settings." *Id*. A juvenile's "character is not as well formed," his traits "less fixed," and "his actions less likely be evidence of irretrievabl[e] deprav[ity]." *Id* at __, 132 S. Ct. at 2464, 183 L. Ed. 2d at 418 (internal quotation marks omitted).

Psychological research confirmed differences in the brains of adults and children. *See* ***[**90]*** *id.* at __, 132 S. Ct. at 2464, 183 L. Ed. 2d at 419. Those differences contribute to juveniles' "transient rashness, proclivity for risk, and inability to assess consequences." *See id.* at __, 132 S. Ct. at 2465, 183 L. Ed. 2d at 419. These developmental deficiencies, the Court reasoned,

diminished the juvenile's culpability and "enhanced the prospect that, as the years go by and neurological development occurs, his deficiencies will be reformed." *Id*. (internal quotation marks omitted).

Juveniles' attributes undermine the four "penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." *Id*. First, juveniles are less blameworthy than adults, so the case for retribution is weak. *Id*. Second, deterrence does not justify the harshest sentences; juveniles are immature, reckless, and impetuous, and so "less likely to consider potential punishment." *Id.* at __, 132 S. Ct. at 2465, 183 L. Ed. 2d at 419. Third, to justify incapacitating a juvenile for life, it would need to be found that the juvenile was incorrigible. *Id*. Incorrigibility, however, is not consistent with youth. *Id*. Finally, rehabilitation does not justify a life sentence. *Id*. In fact, such a long sentence "is **[*414]** at odds with a child's capacity for change." *Id.* at __, 132 S. Ct. at 2465, 183 L. Ed. 2d at 420. The Court found imposing a sentence on a juvenile that "alters **[**91]** the remainder of his life" advances none of these penological justifications. *See id.* at __, 132 S. Ct. at 2465, 2466, 183 L. Ed. 2d at 420, 421. No one can reasonably argue that a seven-year mandatory minimum sentence imposed on Lyle will "alter the remainder of his life" or that it serves no penological purpose.

While relying heavily on the other two factors, the Court's holding in *Miller* primarily focused on the mandatory nature of the juvenile's life without parole sentence. Mandatory life without parole sentencing schemes prevent judges and juries from considering the juvenile's diminished culpability, the juvenile's capacity for change, and the justifications for a particular sentence. *See id.* at __, 132 S. Ct. at 2466, 183 L. Ed. 2d at 420 (explaining mandatory life without parole sentencing schemes prevent sentencers "from taking account of these central considerations"). Indeed, by subjecting teens and children to the same sentences as adults, mandatory life without parole sentencing laws "prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender." *Id.* at __, 132 S. Ct. at 2466, 183 L. Ed. 2d at 420-21. Mandatory life without parole sentencing risks disproportionate sentencing. But, again, we are not talking about our law's harshest term of imprisonment, nor **[**92]** does the majority opinion now base its decision on a disproportionality analysis.

Nevertheless, the Eighth Amendment allows seemingly disproportionate mandatory life-without-parole sentences for adults. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 961, 996, 111 S. Ct. 2680, 2683, 2702, 115 L. Ed. 2d 836, 843, 865 (1991) (upholding an adult's sentence of life in prison without parole for possessing more than 650 grams of cocaine). The Court reasoned that for a juvenile, however, a life-without-parole sentence is like a death sentence. *See Miller*, 567 U.S. at __, 132 S. Ct. at 2466, 183 L. Ed. 2d at 421. Like the offender condemned to death, the juvenile imprisoned for life irrevocably forfeits the balance of his life. *See id*. Moreover, the juvenile imprisoned for life is often confined for a larger proportion of his life than his adult counterpart. *Id*. "The penalty when imposed on a teenager, as compared with an older person, is therefore 'the same . . . in name only.'" *Id*. (quoting *Graham*, 560 U.S. at 70, 130 S. Ct. at 2028, 176 L. Ed. 2d at 843). In short, there is a "correspondence" between adult death sentences and juvenile life sentences. *Id.* at __, 132 S. Ct. at 2467, 183 L. Ed. 2d at 421. This is the lesson in *Miller, Null*, and *Pearson*.

Mandatory death sentences for adults are prohibited. *See Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 2991, 49 L. Ed. 2d 944, 961-62 (1976) (concluding "that the death sentences imposed . . . under North Carolina's mandatory death sentence statute violated the Eighth and Fourteenth Amendments"). The risk in mandatory imposition of the death penalty **[**93]** is, of course, that the penalty is disproportionate. *See Miller*, 567 U.S. at __, 132 S. Ct. at 2467, 183 L. Ed. 2d at 421 (explaining that in *Woodson* the Court found the mandatory-death-penalty scheme flawed because it did not permit considering mitigating factors). Thus, in light of *Graham* and the Court's death-penalty jurisprudence, the Court in *Miller* drew another connection between death sentences and juvenile life sentences. *See id.* at __, 132 S. Ct. at 2467, 183 L. Ed. 2d at 422 (explaining the death-penalty cases "show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders"). Mandatorily imposing **[*415]** either sentence poses the same risk: disproportionate sentences.

To mitigate this risk in death-penalty cases, sentencing courts must give the defendant an individualized hearing. *See id.* at __, 132 S. Ct. at 2467, 183 L. Ed. 2d at 421. In *Woodson* and its offspring, the Court underscored the importance of considering individual factors before imposing death. *See id.* at __, 132 S. Ct. at 2467, 183 L. Ed. 2d at 421-22 (explaining the Court's evolving death-penalty jurisprudence). Considering mitigating factors ensures "the death-penalty is reserved

only for the most culpable defendants committing the most serious offenses." *Id.* at __, 132 S. Ct. at 2467, 183 L. Ed. 2d at 421. On the other hand, failing to consider mitigating circumstances, especially the "signature qualities" of youth, risks sentencing to death an **[**94]** offender who is not deserving of this irrevocable penalty. *See id.* at __, 132 S. Ct. at 2467, 183 L. Ed. 2d at 422 (internal quotation marks omitted).

Similarly, the Court found imposing a mandatory sentence of life without parole on a juvenile "misses too much." *Id.* at __, 132 S. Ct. at 2468, 183 L. Ed. 2d at 422. And likewise, to mitigate the risk of disproportionality in these cases, the Court held a sentencer must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *Id.* at __, 132 S. Ct. at 2469, 183 L. Ed. 2d at 424. Stopping short of barring life sentences without parole for all juvenile offenders, the Court nonetheless opined that "appropriate occasions" for imposing the harshest penalties on juveniles after an individualized hearing "will be uncommon." *Id*.

In rejecting the mandatory minimum sentences imposed in *Pearson* and *Null*, this court relied on the convergence of the same three factors and the need to mitigate the risk of disproportionality. *See Pearson*, 836 N.W.2d at 96 (finding *Miller*'s "reasoning applies equally to" a "sentence of thirty-five years without the possibility of parole"); *Null*, 836 N.W.2d at 72 (concluding "*Miller*'s principles are fully applicable to a lengthy term-of-years sentence"). First, as in *Miller, Graham*, and *Roper*, the offenders in *Pearson* and *Null* were **[**95]** juveniles. *See Pearson*, 836 N.W.2d at 94 (noting Pearson was seventeen at the time she committed her crimes); *Null*, 836 N.W.2d at 45 (noting Null was sixteen at the time he committed his crimes). Next, like the juvenile in *Miller*, both juveniles in *Pearson* and *Null* were subject to mandatory minimum sentences. *Pearson*, 836 N.W.2d at 95 (describing Pearson's challenge to the seventy percent mandatory minimum sentence); *Null*, 836 N.W.2d at 45-46 (noting Null's crimes subjected him to seventy percent mandatory minimums). Finally, though neither Pearson nor Null was sentenced to life without parole, we found both sentences "effectively deprived" both teens of "the possibility of leading a more normal adult life." *Pearson*, 836 N.W.2d at 96-97 (invalidating Pearson's minimum sentence of thirty-five years without parole); *Null*, 836 N.W.2d at 71 (concluding Null's 52.5-year minimum sentence triggered an individualized hearing). Approving these harsh, lengthy sentences, we reasoned, would have ignored juveniles' diminished culpability, their potential for rehabilitation, and the difficulty courts have in identifying irredeemable juveniles. *See Pearson*, 836 N.W.2d at 95-96. These are the principles of our proportionality analysis.

This court, like the United States Supreme Court, signaled fear of the disjunction between lengthy sentences for juveniles and penological **[**96]** justifications for imprisonment. *See Null*, 836 N.W.2d at 65 (explaining the Supreme Court's discussion **[*416]** of penological goals of imprisonment); *see also Miller*, 567 U.S. at __, 132 S. Ct. at 2465, 183 L. Ed. 2d at 419-20 (discussing *Roper, Graham*, and the weakness of penological justifications for imposing lengthy sentences on juveniles). The lesser culpability of Pearson sapped the strength of the retribution rationale, and the qualities of youth that diminish teens' culpability also meant the teen was more likely to disregard the consequences of criminal misconduct, as the Court found in *Miller. See Pearson*, 836 N.W.2d at 95-96 (noting juveniles' lesser culpability in relation to adults); *see also Miller*, 567 U.S. at __, 132 S. Ct. at 2465, 183 L. Ed. 2d at 419. Moreover, we held that to lock away Null until old age and Pearson until its cusp, would have required a finding that they were incapable of change, which is not consistent with youth. *See Pearson*, 836 N.W.2d at 96 (noting the inconsistency between incorrigibility and youth); *Null*, 836 N.W.2d at 75, *see also Miller*, 567 U.S. at __, 132 S. Ct. at 2465, 183 L. Ed. 2d at 419.

Finally, even though neither Null nor Pearson was sentenced to life without parole, we held that in neither case did rehabilitation justify the lengthy sentence. In *Null*, we rejected the idea that a "juvenile's potential future release in his or her late sixties after a half century of incarceration" would "provide a 'meaningful opportunity' **[**97]** to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society." 836 N.W.2d at 71 (quoting *Graham*, 560 U.S. at 75, 130 S. Ct. at 2030, 176 L. Ed. 2d at 845-46). Nor could Pearson demonstrate she had been rehabilitated before reentering society in her sixth decade of life having spent almost four decades behind bars. *See Pearson*, 836 N.W.2d at 96 (rejecting Pearson's thirty-five-year minimum sentence and noting juveniles' potential for rehabilitation). We reasoned we could reasonably expect both teens to have been rehabilitated long before they had served their minimum sentences.

Like Null and Pearson, Andre Lyle was a juvenile at the time he committed his crime, but he was subject to the same mandatory minimum sentence as an adult. In this case, however, the sentence is not harsh, it is not cruel,

and it is not unusual. Lyle was sentenced to a maximum prison term of ten years, and he is required to serve seventy percent of that term, or seven years, before being eligible for parole. That minimum is only twenty percent of Pearson's minimum and about thirteen percent of Null's. There is clearly no reasonable correlation between adult death sentences, juvenile life sentences without the possibility of parole, or even the sentences imposed in *Null* and *Pearson* **[**98]** , and this seven-year mandatory minimum sentence. *See Miller*, 567 U.S. at __, 132 S. Ct. at 2467, 183 L. Ed. 2d at 421. As a chronological fact, Lyle's sentence is significantly shorter than all the sentences with which this court or the United States Supreme Court has previously dealt.

Lyle will also reenter society much earlier than either Null or Pearson. Lyle's maximum prison term is far shorter than Pearson's thirty-five-year minimum term. If Lyle served the maximum of ten years, he would be released in his late twenties, about twenty-five years younger than Pearson would have been if she been released when she first became parole eligible. If released when he first becomes parole eligible, Lyle will be in his mid-twenties, which would leave him ample time for hitting major life milestones. Lyle's minimum sentence, unlike the sentences of Null or Pearson, does offer him the chance at "a more normal adult life." *Pearson*, 836 N.W.2d at 96.

[*417] Lyle's sentence, unlike that of Pearson or Null, is also justified under penological theories. As in the case of any juvenile, deterrence and retribution offer little support for Lyle's sentence because of his immaturity and diminished culpability. *See Miller*, 567 U.S. at __, 132 S. Ct. at 2465, 183 L. Ed. 2d at 419. Despite Lyle's youth, however, one cannot dispute that he poses a risk to public **[**99]** safety. Incapacitating him, therefore, protects the public. *See Graham*, 560 U.S. at 72, 130 S. Ct. at 2029, 176 L. Ed. 2d at 844 (explaining incapacitation is an important goal because of the risk recidivism poses to public safety). As with Null or Pearson, Lyle "deserve[s] to be separated from society for some time in order to prevent" him from committing more violent crimes. *Id*. But unlike *Miller*'s life-without-parole sentence, or the lengthy mandatory minimum sentences in *Null* and *Pearson*, mandating Lyle spend seven years in prison does not require the grave judgment "that he would be a risk to society for the rest of his life." *Id*. Incapacitation is thus an appropriate justification for Lyle's sentence.

So too with rehabilitation; it is the "penological goal that forms the basis of parole systems." *Id.* at 73, 130 S. Ct. at 2029, 176 L. Ed. 2d at 845. Lyle's sentence does not deny him the right to reenter society, as was the case in *Graham* and *Miller*, and it does not leave him so few years upon his exit from prison that he cannot demonstrate he has been rehabilitated, as in *Pearson* and *Null*. Imprisoning Lyle until his middle or late twenties does not forswear the "rehabilitative ideal." *Id.* at 74, 130 S. Ct. at 2030, 176 L. Ed. 2d at 845. Lyle's comparatively short sentence does not, unlike the life without parole sentence meted out to the juvenile in **[**100]** *Graham*, deny Lyle "the right to reenter the community." *Id*. And it does not reflect "an irrevocable judgment about [Lyle's] value and place in society." *See id*. Rehabilitation therefore also justifies Lyle's sentence.

Though Lyle was a juvenile when he committed his crime and is mandated to serve seventy percent of his sentence, any similarity between his sentence and the sentences imposed in *Null* or *Pearson* ends there. Here, Lyle does not face the prospect of geriatric release after decades of incarceration. In fact, Lyle faces at most a single decade behind bars. Lyle will be provided a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation" and reenter society as required by *Graham*, 560 U.S. at 75, 130 S. Ct. at 2030, 176 L. Ed. 2d at 845-46, *Pearson*, 836 N.W.2d at 96, and *Null*, 836 N.W.2d at 71. The three factors that converged in *Miller, Null*, and *Pearson* do not converge in this case. Therefore, there is no unacceptable risk of disproportionality. I would apply the rationale of *Miller, Null*, and *Pearson* and hold the sentence imposed on Lyle is not cruel and unusual under our Iowa Constitution, and thus no individualized sentencing hearing is required.

I also strenuously disagree with the majority's conclusion, in the exercise of its independent judgment, **[**101]** that sentencing juveniles according to a statutorily required mandatory minimum, regardless of the length of the sentence, does not adequately serve legitimate penological objectives in light of the child's categorically diminished culpability. As stated previously, a short-term period of incarceration clearly serves penological goals of rehabilitation and incapacitation, both goals considered important in Graham and all of the later cases. *See Miller*, 567 U.S. at __, 132 S. Ct. at 2465, 183 L. Ed. 2d at 419-20 (discussing incapacitation and rehabilitation in relation to juveniles); *Graham*, 560 U.S. at 72-74, 130 S. Ct. 2029-30, 176 L. Ed. 2d at 844-45 (discussing penological goals of incapacitation **[*418]** and rehabilitation); *Pearson*, 836 N.W.2d at 96 (explaining juveniles are less culpable than adults); *Null*, 836

N.W.2d at 63 (reviewing *Graham*'s discussion of penological goals in relation to juveniles). There is simply no authority for this blanket proposition. Equally important is that this conclusion appears to squarely contravene the role of the legislature in devising an appropriate sentencing scheme.

But, perhaps most troubling to me is the majority's recognition that every case so far employing this principle of a child's categorically diminished culpability involved harsh, lengthy sentences—even death. In fact, there is no authority cited by the majority, nor did **[**102]** my research disclose any authority, that would extend the principle employed by the majority to all mandatory minimum sentences for juveniles. Undeterred, the majority then emphasizes that nothing the Supreme Court has said is "crime-specific." The majority then extrapolates from this language, "suggesting the natural concomitant that what is said is not punishment-specific either." The majority then cites to our *Pearson* and *Null* opinions from last term to support this proposition. But, neither of these cases was decided on this categorical basis. The language in *Null* is that juveniles are "categorically less culpable than adult offenders *apply as fully in this case as in any other*." 836 N.W.2d at 71 (emphasis added). This general comment is accurate as to the fifty-two and one-half year mandatory minimum sentence for Null in relation to a life-without-parole sentence utilizing the principles in *Miller. Miller* is the basis on which the case was decided. The same logic applies to the quote from the special concurrence in *Pearson*, which recognized the gravity of the offense does not affect the applicability of the juvenile's rights under article I, section 17 of the Iowa Constitution. *See Pearson*, 836 N.W.2d at 99 (Cady, J., concurring specially) (stating "the juvenile **[**103]** offender's decreased culpability plays a role in the commission of both grievous and petty crimes"). This general statement is also accurate in the context of the case in which the length of the sentence itself is being scrutinized as being cruel and unusual. In *Pearson* and *Null*, it was the length of the mandatory minimum sentences, which we held were the equivalent of life without parole, that failed our constitutional analysis. These general comments, taken out of the context in which the cases were decided, are hardly an endorsement for the proposition that all mandatory juvenile sentences are constitutionally invalid because juveniles are "categorically less culpable." The majority now holds that, in order to meet our constitutional prohibition against cruel and unusual punishment, every juvenile facing a mandatory minimum sentence of any length must have an individualized sentencing hearing utilizing the *Miller* factors. This is wrong and has no constitutional support in federal jurisprudence or our own jurisprudence.

Finally, several observations need to be made in this area of juvenile sentencing. First, no court in the land has followed our opinions in *Pearson* and *Null*, which **[**104]** dramatically extended the circumstances under which a *Miller*-type sentencing hearing was constitutionally required. In my opinion, such an extension was far beyond that contemplated by the United States Supreme Court, and clearly, no other federal court or state supreme court has felt it constitutionally required to extend it either. Second, no federal court, no state supreme court, nor any court for that matter has used a categorical analysis employed by the majority in this case to strike down all mandatory minimum sentences for a juvenile. In reaching this conclusion, the majority contorts our constitutional jurisprudence under the guise of independently analyzing our Iowa Constitution.

[*419] Third, the majority justifies its decision in this case by declaring that its decision is based on its desire to return to the district courts its rightful discretion in sentencing juveniles. What the majority fails to comprehend is that these constitutionally unnecessary resentencings come paired with significant practical difficulties for the district courts. According to statistics obtained from the Iowa Justice Data Warehouse, as of May 31, 2013, I would estimate that more than 100 juveniles were **[**105]** serving mandatory sentences under the previous sentencing scheme. *See* Iowa Dep't of Human Rights, Div. of Criminal & Juvenile Justice Planning, *Current Inmates Under 18 at Time of Offense* (May 31, 2013), available at http://www.humanrights.iowa.gov/cjjp/images/pdf/Prison_Population_Juvenile_05312013.pdf; *see also* Iowa Code § 902.12(1)-(6) (providing mandatory minimum terms of imprisonment for specific enumerated felonies). Under the previous scheme, the legislature, by mandating minimum sentence lengths for certain crimes, had provided for an efficient, constitutional sentencing proceeding. *See* Iowa Code § 902.12. Based on the majority's opinion, all of those juveniles must be resentenced and have an individualized sentencing hearing. It will take hundreds, if not thousands, of hours to perform this task. And, of course, there will be expert witnesses: social workers, psychologists, psychiatrists, substance-abuse counselors, and any number of related social scientists. And, other witnesses: mothers, fathers, sisters, and brothers. Finally, and most importantly, victims will again

have to testify and relive the trauma they experienced at the hands of the juvenile offender. I agree that time and expense should be irrelevant if constitutional rights are affected. However, these should be primary considerations when **[**106]** deciding to impose on the courts and the corrections systems a new sentencing practice that has no basis in this state's constitution. I also question whether the ultimate decisions by our district courts will be qualitatively better given this unnecessary time, money, and effort.

After the parade of witnesses ends, the district court must then produce for each juvenile offender a detailed, reasoned sentencing decision. District courts must consider the "juvenile's lack of maturity, underdeveloped sense of responsibility, vulnerability to peer pressure, and the less fixed nature of the juvenile's character," keeping in mind that these are "mitigating, not aggravating factors" in the decision to impose a sentence. *Null*, 836 N.W.2d at 74-75. It does not end there. District courts must recognize juveniles' capacity for change and "that most juveniles who engage in criminal activity are not destined to become lifelong criminals." *Id.* at 75. If tempted to impose a harsh sentence on even a particularly deserving offender, "the district court should recognize that a lengthy prison sentence . . . is appropriate, if at all, only in rare or uncommon cases." *Id*. To impose that harsh sentence, "the district court should make **[**107]** findings discussing why the" harsh sentence should be imposed. *Id.* at 74. And these are just the factors enumerated by this court in *Null*.

For the district court that is particularly fearful of having a sentencing decision overturned, there are yet more factors that might be considered. *See, e.g., Bear Cloud v. State*, 2013 WY 18, 294 P.3d 36, 47 (Wyo. 2013) (listing factors for sentencing courts to consider, including the juvenile's background and emotional development). For instance, the California Supreme Court has advised that sentencing courts must consider evidence of the juvenile's home environment, evidence of the circumstances of the offense, and evidence of the possibility the prosecutor could have **[*420]** charged the juvenile with some lesser offense. *People v. Gutierrez*, 324 P.3d 245, 269, 58 Cal. 4th 1354, 171 Cal. Rptr. 3d 421 (Cal. 2014). In sum, "the trial court must consider all relevant evidence" of the distinctive youthful attributes of the juvenile offender. *See id*. at 269. The possibilities are nearly endless. But, even if the district court were to consider additional factors, there can be no assurance the district court weighed any particular factor the same way the appellate court would. And, so more time and money will be spent trying to determine the appropriate sentence for a juvenile offender. According to the majority, this **[**108]** is what our constitution requires of any juvenile offender.

I understand that the majority believes that an individualized sentencing hearing is the "best practice" for the sentencing of juveniles: "[A]pplying the teachings of *Miller* irrespective of the crime or sentence is simply the right thing to do, whether or not required by our Constitution." *Pearson*, 836 N.W.2d at 99 (Cady, J., concurring specially). I do not necessarily disagree. But, we are not following the teachings of *Miller, Null*, or *Pearson*; instead, the majority is deciding this case on a categorical basis and elevating this new "category" to a constitutional right without any cogent, legitimate jurisprudence to support it. I would hold that the mandatory minimum sentence imposed under Iowa Code section 902.12(5), under these facts, does not constitute cruel and unusual punishment and accordingly does not violate article I, section 17 of the Iowa Constitution. I would affirm the sentence imposed by the district court.

Waterman and Mansfield, JJ., join this dissent.

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PRACTITIONER: WE "KENT" KEEP TRANSFERRING KIDS WITHOUT A HEARING: USING RECENT SUPREME COURT JURISPRUDENCE TO REVIVE KENT V. UNITED STATES AND END MANDATORY TRANSFER FOR JUVENILES

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Text

[*26] **INTRODUCTION**

When it comes to voting, drinking, marrying, serving on a jury, or even watching movies, society recognizes that kids are different. We restrict their privileges, we withhold certain rights, and we require their parents to consent for certain activities. When kids on the playground bully each other we say it's just "kids being kids," or when an adult is stressed and needs to lighten up, we tell them to "embrace their inner child" to do something crazy or reckless. Despite all these societal differences, however, nearly 200,000 children encounter the adult criminal justice system each year. [1] Somehow, we forget about all of these important distinctions when a child commits a crime--as if they went through every stage of puberty and grew up instantly in the five seconds it takes to snap handcuffs on their wrists.

The Supreme Court, through a series of recent cases, has recognized that children are constitutionally and fundamentally different than adults and therefore are more adept to rehabilitation than adults accused of

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[1] Carmen E. Daugherty, Zero Tolerance: How States Comply with PREA's Youthful Inmate Standard, Campaign for Youth Justice, (Nov. 19, 2015), http://www.campaignforyouthjustice.org/news/blog/item/zero-tolerance-how-states-comply-with-prea-s-youthful-inmate-standard.

the same crimes. Starting in 2005, with *Roper v. Simmons*, [2] the Court ruled that the death penalty for juveniles was unconstitutional. In 2010, *Graham v. Florida* [3] established that a sentence of life without the possibility of parole for juveniles accused of non-homicide crimes was unconstitutional and later expanded its ruling to all crimes including homicide in 2012 with Miller v. Alabama. [4] Despite these landmark rulings, however, children are still treated as adults in the criminal system under transfer statutes that either force their cases to be originally filed in adult criminal court or quickly move them out of the juvenile system, often without a hearing. While they can no longer be sentenced to death or sentenced to life in prison, children transferred to adult court are still exposed to harsh punishments, considered adults for sentencing purposes, and not afforded the individualized considerations laid out by the Supreme Court in its recent cases.

[*27] A transfer statute is a "provision that allows or mandates the trial of a juvenile as an adult in criminal court for a criminal act." [5] All states currently have transfer laws that allow or mandate certain youth to be transferred to adult court, even though their age places them in the category of juvenile jurisdiction. [6] Even worse, many states still have mandatory transfer provisions--a type of automatic transfer requiring juveniles to be tried in adult criminal court for certain offenses. These provisions are codified and require a child of a certain age or who has committed a certain offense to be tried in adult court through either mandatory waiver to adult court or through statutory exclusion. [7] Such transfer laws are largely a result of a myth propagated in the 1990s of the juvenile "super predator," which resulted in the adultification of youth and an increased criminalization of youthful behavior. [8]

The Supreme Court has not ruled on the constitutionality of the transfer of juveniles to adult court since it first did in 1966. In Kent v. United States, [9] a sixteen-year-old was transferred to adult court without a hearing or any indication of the reasons for his transfer. The Supreme Court ruled that the waiver was invalid, that juveniles have a right to a formal hearing that "must measure up to the essentials of due process and fair treatment." [10] Since Kent, legislatures and state courts have continued to transfer children, often without a hearing. [11]

This Comment will highlight the 50th anniversary of the Kent decision and argue that this decision, along with the Court's decision in Roper, Graham, and Miller, illustrate that mandatory transfer mechanisms that do not require a court to hold a hearing prior to transferring youth are in violation of the Eighth

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[2] 543 U.S. 551 (2005).

[3] 560 U.S. 48 (2010).

[4] 567 U.S. 460 (2012).

[5] *Transfer Statute*, Black's Law Dictionary (10th ed. 2004).

[6] *See infra* Appendix A.

[7] There are several different methods of mandatory transfer: mandatory waiver, statutory exclusion, direct file, and once an adult, always an adult provision. For the purpose of this comment, "mandatory transfer" includes all of these methods.

[8] Clyde Haberman, *When Youth Violence Spurred 'Superpredator' Fear*, N.Y. TIMES (Apr. 16, 2015).

[9] 383 U.S. 541 (1966).

[10] Id. at 556.

[11] *See infra* Appendix B.

Amendment to the United States Constitution. [12] The Supreme Court has recognized that children are categorically less culpable than adults for their conduct, and this difference is not based on the crime they are charged with, or the punishment they face. This Comment will also argue that all states should repeal mandatory transfer statutes and, regardless of the crime the youth is accused of, should only be able to transfer youth through judicial waiver after a hearing in which the court considers a standardized set of factors. This Comment will propose the factors that courts should be required to consider, based on the original factors outlined in the Kent decision but revised to reflect recent jurisprudence, legislative trends, and understanding of adolescent development, and biology.

[*28] **I. BACKGROUND**

A. Purpose and Evolution of the Juvenile System

During the nineteenth century, the treatment of juveniles in the United States started to change as social reformers began to create special facilities for "troubled juveniles." [13] The first juvenile court was established in Illinois in 1899, seeking to further create a separate system for juvenile offenders that insulated children from the adult criminal system and focused on age-appropriate treatment. [14] One of the first judges on this court, Judge Julian Mack, believed that "the child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude." [15] This idea of special treatment for children caught on and within twenty-five years most states had their own separate juvenile systems. [16] These early courts were focused on rehabilitation, not punishment, and emphasized informal and nonadversarial approaches to cases which were civil actions, based on the doctrine *parens patriae*, which gave the state the power to serve as the guardian of juveniles. [17] However, during the twentieth century, these proceedings became increasingly punitive as judges steadily began to impose harsher sentences on children. [18]

The Supreme Court, recognizing this shift, began to move juvenile courts toward a more paternalistic structure through a series of cases that gave juveniles many of the procedural safeguards associated with

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[12] U.S. CONST. amend. VIII.

[13] ABA Div. for Pub. Educ., *The History of Juvenile Justice* (2016), http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam. pdf.

[14] *See* Eric K. Klein, Note, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 Am. Crim. L. Rev. 371, 376-77 (1998). For example, to protect children from the stigma of adult prosecutions, juveniles were not charged, instead a petition was filed; juveniles were not called "defendants," instead they were called "respondents;" juveniles were not found guilty, instead they were adjudicated delinquent; and juveniles were not sentenced, instead they were committed. *Id.*

[15] Julian W. Mack, *The Juvenile Court*, 23 Harvard L. Rev. 104 (1909).

[16] *See* The History of Juvenile Justice, supra note 13.

[17] *Id.* During this time period, cases were treated as civil actions and courts could even order juveniles to be removed from their homes in order to learn how to be a responsible, law-abiding young adult.

[18] *See* The History of Juvenile Justice, supra note 16.

the adult criminal justice system. [19] The peak of this "due process era" of juvenile justice was the Supreme Court's decision In re Gault, [20] where it held that juveniles had the right to counsel during delinquency proceedings in order to protect against misuse of judicial authority. [21] The Court expressed concerns that the juvenile courts were not living up to their promise of a focus on treatment and rehabilitation, either because of misplaced judicial discretion or lack of resources. [22] If a juvenile's [*29] loss of liberty during confinement in a juvenile training school would be comparable to the punishment of imprisonment faced by adults, the Court felt that they were entitled to at least some due process protections in juvenile hearings to ensure fairness. [23] While recognizing that the state has a responsibility to help children in jeopardy, the Court noted that "good intentions [of judges] do not themselves obviate the need for criminal due process safeguards in juvenile courts." [24]

The juvenile justice system underwent a rapid shift, however, in the 1990s with the rise of the myth of the juvenile "superpredator." [25] Even though these sensationalized claims of criminologists turned out to be false, [26] politicians seized on this idea and campaigned for harsher treatment of juvenile offenders. [27] As a result of this trend, laws shifted to expose children to even harsher procedures and punishments. [28] By the beginning of the twenty-first century, the United States was an international outlier in its harsh treatment of juvenile defendants--until 2005, the United States was the only developed country that subjected children to the death penalty. [29]

However, even before the rise of the "superpredator" myth, general tough-on-crime approaches had begun to make it easier for children to be removed from the protections of the juvenile system and transferred to adult criminal court. [30] Prior to the 1970s, juvenile [*30] transfer to adult court was not common--it was the exception. However, in the 1970s, even before the "superpredator" phenomenon, states changed their

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[19] Ralph A. Weisheit, *Philosophy and the Demise of Parens Patriae*, 52 FED. PROBATION 56 (1988) ("Paternalism implies no firm commitment to rehabilitation but suggests a general attitude of protectiveness from which either gentle or harsh treatment might be justified.")

[20] 387 U.S. 1 (1967).

[21] Id. at 18 (noting "that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure"). However, some academics have suggested that juvenile defendants have fared worse in the post-Gault era. *See* Franklin E. Zimring & David S. Tanenhaus, *On Strategy and Tactics for Contemporary Reforms, in Choosing the Future for American Juvenile Justice*, at 216, 231-32 (describing the contrast between an early juvenile court where the judge had tremendous power and discretion and the post-Gault expansion of prosecutorial power at the expense of judicial and probation authority).

[22] In re Gault, 387 U.S. at 13 (finding that a judge abused his discretion and had too much unfettered power when he sentenced a fifteen-year-old boy to a reform school until he was twenty-one for a prank phone call); *See also* Kent v. United States, 383 U.S. 541, 556 (1966) (noting that because some courts lack the re-sources to perform in a *parens patriae* capacity and "that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children").

[23] Based on this understanding, the Court also extended several other rights to juveniles under due process. *See* In re Gault, 387 U.S. 1, 18 (1967) (notice of the charges against them, the right against self-incrimination, and the right to confront witnesses); In re Winship, 397 U.S. 358 (1970) (raising the standard of proof from "preponderance of the evidence" to "beyond a reasonable doubt"). *But see* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (declining to extend the due process rights of a trial by jury to juvenile court proceedings).

[24] In re Winship, 397 U.S. at 365.

[25] This term was coined by John Delulio, then a Princeton professor, who wrote that "America is now home to thickening ranks of juvenile 'superpredators' -- radically impulsive, brutally remorseless youngsters, including ever more preteenage boys, who murder, assault, rape, rob,

laws in a number of significant ways that make it easier for children to be tried as adults. [31] These changes ranged from lowering the age at which a judge was authorized to allow a transfer to the imposition of statutory exclusion laws that automatically excluded children from adult court, to laws that gave prosecutors more control over where they decided to initially file the charges. [32] This gettough on crime legislation that continued into the 1990s may have been an attempt "to push the allocation of power in juvenile courts closer to the model of prosecutorial domination that has been characteristic of criminal courts in the United States for a generation." [33]

B. Kent v. United States

While the current state of juvenile transfer laws are slowly and methodically moving away from an approach that over-criminalizes juvenile offenders and towards treating juveniles as children instead of sentencing them as adults, that discussion actually began fifty years ago with a child named Morris A. Kent, Jr. in 1961. [34] This case, *Kent v. United States*, remains the only case that the Supreme Court has heard on the issue of juvenile transfer. [35] The defendant was sixteen years old, already on probation, and was arrested for housebreaking, rape, and robbery. [36] Anticipating that he would be transferred to adult court by the District of Columbia, Kent's attorney filed a motion requesting a hearing on the issue of jurisdiction. [37] He also ordered a psychological evaluation to be conducted, which indicated that Kent suffered from a mental illness. [38] The juvenile judge did not rule on this motion, but instead filed an order waiving jurisdiction after a "full investigation." [39] However, the judge failed to describe the investigation or the grounds for the waiver. [40] Kent's lawyer moved to dismiss the criminal indictment, arguing that the juvenile court's waiver had been invalid. [41] His motion was overruled and Kent was found guilty on six counts of housebreaking and robbery. He was sentenced to thirty to ninety years in

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burglarize, deal deadly drugs, join gun-toting gangs and create serious communal disorders." Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. TIMES (Feb. 9, 2001).

[26] *See* Kevin Drum, *The New York Times Fails to Explain Why "Super Predators" Turned Out to be a Myth*, MOTHER JONES (Apr. 7, 2014), http://www.motherjones.com/kevin-drum/2014/04/new-york-times-fails-explain-why-super-predators-turned-out-be-myth (outlining how juvenile crime and specifically violent crime, actually decreased in the United States following this era).

[27] *See* John Kelly, *Juvenile Transfers to Adult Court: A Lingering Outcome of the Super-Predator Craze*, THE CHRONICLE OF SOCIAL CHANGE (Sept. 28, 2016), https://chronicleofsocialchange.org/juvenile-justice-2/juve-nile-transfers-adult-court-lingering-outcome-super-predator-craze/21635 (highlighting then-First Lady Hillary Clinton's statements about kids called "super-predators, saying that "[these kinds of kids have] no conscience, no empathy, we can talk about why they ended up that way, but first we have to bring them to heel."

[28] As reported in the New York Times, politicians believed that crime would continue to increase and continued to foster an environment that demonized youth. Some experts claimed that we would soon see "radically impulsive, brutally remorseless" kids, many "who pack guns instead of lunches" and "have absolutely no respect for human life." *See* Haberman, *supra* note 8. For more information, *see generally* Franklin E. Zimring, *American Youth Violence: A Cautionary Tale, in* Choosing the Future for American Juvenile Justice (2014).

[29] Roper v. Simmons, 543 U.S. 551, 575 (2005) ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty."). *See also* Brief for the Juvenile Law Center et. al. as Amicus Curiae, Roper v. Simmons, 543 U.S. 551 (2005).

[30] *See* Cara H. Drinan, *The Miller Revolution*, 101 Iowa L. REV. 1787, 1790-95 (2016) (discussing how a parallel trend of transfer statutes and the trend toward determinate sentencing schemes were the "perfect storm" to create extreme and mandatory sentences for youth).

[31] Aaron Kupchik, *Judging Juveniles: Prosecuting Adolescents in Adult and Juvenile Courts*, (2006).

[32] *Id.*

[33] *See* Zimring, *supra* note 27.

prison. [42] His conviction was appealed up to the Supreme Court, which ruled the juvenile waiver of jurisdiction was invalid. [43]

Writing for the majority, Justice Fortas stated that "the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children." [44] Under the statute that granted original jurisdiction to the juvenile court, Kent was entitled to a presumption of treatment as a juvenile. To overcome that, a child is entitled to a hearing, which must "satisfy the basic requirements of due process and fairness." [45] The court listed several specific factors that must be considered to satisfy this requirement. [*31] The determinative factors are the following:

> 1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver;
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> 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
>
> 3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted;
>
> 4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the [prosecuting attorney]);
>
> 5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in [criminal court];
>
> 6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude, and pattern of living;
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> 7. The record and previous history of the juvenile, including previous contacts with [social service agencies], other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to [the court], or prior commitments to juvenile institutions;

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[34] *See* Kent v. United States, 383 U.S. 541 (1966).

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] Laurie Sansbury, *The 50th Anniversary of Kent: The Decision that Sparked the Transformation of Juvenile Defense*, NAT'L ASSOC. FOR PUB. DEF. (March 21, 2016), http://www-old.publicdefenders.us/?q=node/1026.

[39] Kent, 383 U.S. at 541.

[40] *Id.*

[41] *Id.*

[42] Id. at 553.

[43] *Id.*

[44] *Id.*

[45] Kent, 383 U.S. at 553.

> 8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court. [46]

These principles still resonate fifty years later with even greater weight considering psychological developments and subsequent juvenile justice jurisprudence. While Kent did not make any judgments about whether or not waiver is constitutional, the case "forcefully establishes that children facing trial as adults need procedural protections--effective counsel, access to and the ability to challenge court documents, and findings as to why waiver is proper." [47]

In subsequent cases, courts declined to follow Kent by finding that the protections were limited to judicial waiver laws and did not apply to statutory exclusion or direct file statutes. [48] Transfer laws remain largely out of the reach of courts and most courts have been deferential to the decisions of legislatures. [49] Additionally, because the Court in Kent detailed that an offense falling within the statutory limitations will be waived if "it is heinous or of an aggravated character or if it represents a pattern of repeated offenses which indicate that [*32] the juvenile may be beyond rehabilitation," all jurisdictions read this to mean that waiver laws for violent offenses did not have to adhere to the standards in Kent. [50]

C. Supreme Court Juvenile Justice Jurisprudence

Prior to the landmark *Roper v. Simmons* [51] decision in 2005, the Supreme Court had noted the important pertinence of youth in several cases. In *Johnson v. Texas*, [52] the Court insisted that sentences consider the "mitigating qualities of youth." [53] The Court also observed that "youth is more than a chronological fact" [54] and is instead a time of immaturity, irresponsibly, impetuousness, and recklessness. [55] In *Eddings v. Oklahoma*, [56] a sixteen-year-old shot and killed a police officer. [57] The Supreme Court invalidated his death sentence because the judge did not consider evidence of his background of neglect and family

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[46] *Id.*

[47] Laurie Sansbury, *supra* note 38.

[48] *See e.g.* State v. Angel C., 715 A.2d 652, 656 (Conn. 1998) (holding that absence of a pre-waiver hearing did not violate any of the defendants' constitutional rights when defendant was transferred under a statutory exclusion provision). In *Angel C.*, the court further noted that there was no inherent or constitutional right to the special treatment of a juvenile, and that any special treatment afforded juveniles by the legislature could be reasonably withdrawn or limited. Id. at 660.

[49] *See* Jeremy D. Ball et. al., *Predicting Public Opinion About Juvenile Waivers*, 19 CRIMINAL JUSTICE POLICY REVIEW 285 (2008).

[50] Kent, 383 U.S. at 553.

[51] Roper, 543 U.S. at 551.

[52] Johnson v. Texas, 509 U.S. 350 (1994).

[53] *Id.*

[54] Eddings v. Oklahoma, 455 U.S. 104 (1982).

[55] Johnson, 509 U.S. at 350.

[56] Eddings, 455 U.S. at 115.

[57] *Id.*

violence. [58] The Court found that this evidence was "particularly relevant"--more so than it would have been in the case of an adult offender. [59] The Court specifically noted that youth is a moment and "condition of life when a person may be most susceptible to influence and to psychological damage," [60] and "just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered" in assessing his culpability. [61]

These cases, however, did not establish any significant reform, but they did build up to a landmark shift in juvenile justice that occurred with the Supreme Court's decisions in *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*. [62] The Supreme Court, through this series of cases, has recognized that children are constitutionally and fundamentally different than adults and are more capable of change than adults accused of the same crimes.

1. Roper v. Simmons

The Supreme Court's shift in perception of juvenile offenders was most significantly marked by its decision in *Roper v. Simmons*, where it held that sentencing individuals to death for crimes committed before the age of eighteen was unconstitutional. [63] In *Roper*, a seventeen-year-old was convicted of burglary, kidnapping, and first-degree murder while he was still a junior in high school. [64] Based on his age at the time, Simmons was outside of the [*33] juvenile jurisdiction of Missouri and charged initially in adult court. [65] During closing arguments, both the prosecutor and defense counsel addressed Simmons' age -- the defense described it as a mitigating factor, to which the state responded "Age he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary." [66] The defense also put on experts and evidence of Simmons's troubled background, but he was still sentenced to the death penalty by the jury. [67]

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[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] Id. at 116.

[62] This groundbreaking reform also included *J.D.B. v. North Carolina*, which expanded the concept of special protection for kids beyond the Eighth Amendment when the Court held that a juvenile's age is a proper consideration in the *Miranda* custody analysis. 564 U.S. 261 (2011).

For a discussion of whether the Supreme Court can actually generate social change or whether it merely responds to social change that has already occurred, *see generally* Gerald N. Rosenberg, "The Hollow Hope: Can Courts Bring about Social Change?" (2d ed. 2008) (questioning whether the Supreme Court can bring about meaningful social change); Brian K. Landsberg, "Enforcing Desegregation: A Case Study of Federal District Court Power and Social Change in Macon County Alabama", 48 LAW & SOC'Y REV. 867 (2014) (stating that despite judicial constraints, it is possible for courts to generate social reform); Mark Tushnet, "Some Legacies of Brown v. Board of Education", 90 VA. L. REV. 1693 (2004) (suggesting that the Court can articulate powerful principles of social reform despite constraints imposed on the judicial branch).

[63] 543 U.S. 551 (2005).

[64] Id. at 555. In this case Simmons, along with a friend, entered the home of the victim, kidnapped her, and then drowned her in a river.

[65] *See* MO. REV. STAT. §§ 211.021 (2000).

[66] Roper, 543 U.S. at 559.

The Supreme Court reversed and its holding was based on a longstanding question applied to capital crimes: if juveniles are examined as a group, is the use of the death penalty proportionate under Eighth Amendment given their diminished capacity? [68] To answer this question of proportionality, the Court looked at the "objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question" and then exercised its own "independent judgment" as to "whether the death penalty is a disproportionate punishment for juveniles." [69] The Court held that under this criteria, the Eighth Amendment forbade the death penalty for juveniles based on the following findings: (1) evolving standards of decency and moral conceptions of juveniles disallowed for capital punishment in the majority of states; (2) it was rarely executed in states that permitted it; (3) and that national trends were moving away from the use of the practice for juveniles. [70]

The Court did not end its analysis with the Eighth Amendment violation, however, and rendered its own judgement about states executing children. [71] Justice Kennedy, writing for the majority, noted that based on recent social and neuroscience research, there were three general reasons why juveniles were categorically different than adults in terms of capital punishment. [72] These characteristics were: (1) juveniles lack maturity and have an underdeveloped sense of responsibility, resulting in impulsive decision-making; (2) juveniles are more susceptible to negative influences and outside pressures; and (3) a juvenile's character is not as well formed as an adults and therefore juveniles have more of a possibility of rehabilitation. [73]

2. Graham v. Florida

Five years after *Roper*, the Court took up the question of proportionate juvenile punishment again in *Graham v. Florida*. [74] In *Graham*, a sixteen-year-old was arrested for an attempted robbery. [75] Under Florida statute, a prosecutor may elect to charge sixteen-year-olds and seventeen-year-olds as adults for most felony crimes. [76] Graham was charged as an adult and, under a plea deal, sentenced to probation and withheld adjudication of guilt. [77] However, when he subsequently violated the terms of his parole and was accused of another armed robbery, the trial court found him guilty of the [*34] earlier armed

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[67] *Id.* The defense put on evidence that Simmons was "very immature," "very impulsive," and "very susceptible to being manipulated or influenced." Testimony included information about a difficult home environment, dramatic changes in behavior, drug abuse, and poor performance in school.

[68] Id. at 564.

[69] *Id.*

[70] Id. at 567-68.

[71] Id. at 563.

[72] *Id.*

[73] *Id.*

[74] 560 U.S. 48 (2010).

[75] Id. at 53.

[76] *See* FLA. STAT. § 985.557(1)(b).

[77] Graham, 560 U.S. at 48.

burglary and other charges and sentenced him to life without parole. [78] Building on *Roper*, the Court found that Graham's sentence was unconstitutional as it was in violation of the Eighth Amendment and held that a life without parole sentence was constitutional for a juvenile offender accused of a crime other than homicide. [79] Once again, the Court found that categorically this punishment was unconstitutional for juvenile offenders. [80] Like *Roper*, the Court found the punishment here was not proportional to the crime, given a juvenile's diminished moral culpability and greater capacity for reform. [81] Justice Kennedy, for the majority, began his analysis by stating that the Eighth Amendment bars both "barbaric" punishments and punishments that are disproportionate to the crime committed. [82] Within the latter category, the Court explained that its cases fell into one of two classifications: (1) cases challenging the length of term-of-years sentences given all the circumstances in a particular case and (2) cases where the Court has considered categorical restrictions on the death penalty. [83] Because Graham's case challenged "a particular type of sentence" and its application "to an entire class of offenders who have committed a range of crimes," the Court found the categorical approach appropriate and relied upon its recent death penalty case law for guidance. [84]

The Court also focused on the non-homicide aspect of the case, and that historically, homicide is treated significantly different than other crimes, even though the Court would reject this argument in *Miller*. [85] After *Graham*, a child could only receive a sentence of life-without-parole for murder. However, based on mandatory waiver statutes, this sentence could be imposed on a child without weighing his or her maturity, culpability, or potential for rehabilitation. [86]

3. Miller v. Alabama

The Court did not take long to take up the question of homicide offenses--two years later, the Court took up the question in *Miller v. Alabama*. [87] The *Miller* case involved two juveniles who were transferred to adult court through state transfer laws in Arkansas and Alabama. Kuntrell Jackson, then fourteen years old, was charged with capital felony murder and aggravated robbery. [88] As discussed below, Arkansas

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[78] Id. at 57. Because Florida had abolished its parole system, a life sentence meant that Graham and other defendants had no possibility of release unless granted executive clemency. *See* FLA. STAT. § 921.002(1)(e).

[79] Graham, 560 U.S. at 52-53.

[80] Id. at 79.

[81] Id. at 68-69.

[82] Id. at 59.

[83] Id. at 59-61.

[84] Id. at 61-62.

[85] *Id.*

[86] Matt Ford, *A Retroactive Break for Juvenile Offenders*, The Atlantic (Jan. 26, 2016), https://www.theatlantic.com/politics/archive/2016/01/montgomery-alabama-supreme-court/426897/.

[87] 567 U.S. 460 (2012).

[88] *See* Jackson v. State, 194 S.W. 3d 757 (Ark. 2004). The facts of the incident, which occurred on November 18, 1999, are as follows. Kuntrell Jackson, a fourteen-yearold, was with his older friends who decided to rob a video store. Jackson remained outside while his two friends went in. One friend pointed a gun at the clerk and demanded money. Jackson entered the store as the victim threatened to call the police and his friend shot her in the face. All three boys fled the scene and the victim died of her injuries.

law gives prosecutors the discretion to charge fourteen-year-olds as adults through direct file when they are alleged to have committed certain offenses, including capital felony murder. [89] Jackson moved to transfer the case to juvenile court, but the court denied the motion based on the alleged facts of the time, a psychiatrist's examination, and his juvenile arrest history. [90] A [*35] jury convicted Jackson on both counts, and the judge was only able to impose one verdict due to mandatory minimums: life without parole. [91] Similarly, fourteen-year-old Evan Miller was also tried and convicted as an adult for murder in the court of arson -- a crime that, like capital felony murder in Arkansas, carries a mandatory minimum punishment of life without parole. [92] In Miller's case, Alabama law required that he initially be charged as a juvenile, but allowed for transfer through judicial waiver on the motion of the prosecutor. [93] The juvenile court agreed to the transfer after a hearing, citing the nature of the crime, Miller's "mental maturity," and his prior juvenile offenses of truancy and "criminal mischief." [94]

In a 5-4 decision, the Court found sentencing schemes that prescribe mandatory life without parole for juveniles to be unconstitutional, regardless of the crime they are accused of. [95] Citing its decisions in *Roper* and *Graham*, it held that imposing mandatory life-without-parole sentences on children "contravenes *Graham*'s (and also *Roper*'s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children" [96] This decision was based on the Court's belief that children "are constitutionally different from adults for sentencing purposes. Their lack of maturity and underdeveloped sense of responsibility lead to recklessness, impulsivity, and heedless risk-taking," therefore acknowledging that regardless of the crime committed, being a child matters. [97]

The Court specifically noted how both juveniles in the companion cases illustrated the precise problem behind mandatory sentencing schemes. [98] In the first case, Jackson was charged through felony murder after he went along with some of his friends who he knew intended to rob a video store. [99] He did not fire the bullet that killed the victim, nor did the State even argue that he meant to kill her, only that he was an

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[89] *See* ARK. CODE ANN. § 9-27-318(c)(2).

[90] *See* Jackson v. State, 194 S.W. 3d 757 (Ark. 2004); ARK. CODE ANN. §§ 9-27-318(d), (e).

[91] Miller v. Alabama, 564 U.S. 460, 467 (2012).

[92] *See* Miller v. State, 63 So. 3d 676 (Ala. 2010). In Miller's case, then fourteen-year-old Miller and his sixteen-year-old friend robbed and beat a neighbor to death. The victim was an adult and Miller's mother's drug dealer. He brought the boys back to his trailer, where all three drank and did drugs. The boys tried to rob the victim, who then became violent and grabbed Miller by the throat. A physical altercation ensued, and the boys struck the victim with a bat several times. After, the boys set fire to the trailer to cover up the evidence and the victim died of smoke inhalation.

[93] Miller, 564 U.S. at 465 (2012). *See* ALA. CODE §§ 13A-5-40(9), 13A-6-2(c).

[94] E.J.M. v. State, No. CR--03-0915, pp. 5-7 (Aug. 27, 2004) (unpublished memorandum).

[95] Miller, 564 U.S. at 465.

[96] Id. at 466.

[97] *Id.*

[98] Id. at 467.

[99] Jackson v. State, 194 S.W. 3d 757, 760 (Ark. 2004).

accomplice. [100] He was convicted solely because he was aware that his accomplice had a gun and because when he entered the store, he told the victim "[w]e ain't playin'." [101] The Court noted that Jackson's age was important for his culpability for the offense -- including the calculation of the risk imposed by his friend having a gun and his willingness to walk away. [102] Additionally, Jackson's violent family background and history of neglect was also relevant to the sentencing decision, yet his background was not even considered before the lower court sentenced him to a life in prison. [103] In Miller's case, he and a friend killed the adult victim after he had provided them with drugs and alcohol. [104] The Court noted that "if [*36] ever a pathological background might have contributed to a 14--year--old's commission of a crime, it is here," referring to a lifetime of physical abuse and suicidal tendencies. [105] Despite the severe crime with which both juveniles were charged, the Court once again stated that youth mattered at sentencing. [106]

The Supreme Court also noted that transfer statutes like those at issue in Miller were not outliers [107] and that many left no room for judicial discretion: "Of the 29 relevant jurisdictions, about half place at least some juvenile homicide offenders in adult court automatically, with no apparent opportunity to seek transfer to juvenile court." [108]

D. Psychological Frameworks

One of the most significant components of the Court's reasoning in these three cases was its acceptance and recognition of the role of science and adolescent development in sentencing decisions. This is significantly based on the increase of research and findings that allow scientists to understand the human brain better and how it functions. [109] Kent was decided during a time when it was assumed that adolescent development was completed by age eighteen, but emerging research shows that the brain--especially the prefrontal cortex, which controls decision-making, risk management, and impulse control--

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[100] Miller, 564 U.S. at 465.

[101] *Id.*

[102] *Id.; see also* Graham v. United States, 560 U.S. 48, 52 (2010) ("[W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability").

[103] Miller, 564 U.S. 470. Both Jackson's mother and his grandmother had previously shot other individuals.

[104] *Id.*

[105] Miller had been in and out of foster care his entire life because his mother suffered from alcoholism and drug-addiction, his stepfather abused him, and he had tried to kill himself four times -- the first time when he was only six. *See* E.J.M. v. State, 928 So. 2d 1077, 1081 (Ala. Crim. App. 2004) (Cobb, J., concurring in result). The Court also noted that, despite such a difficult background, Miller did not have a significant criminal history; there were only two instances of truancy and one instance of second-degree criminal mischief.

[106] Miller, 564 U.S. at 468.

[107] At the time Miller was decided, twenty-eight states and the Federal Government imposed mandatory life without parole on some juveniles convicted of murder in adult court. *Id.*

[108] *Id.*

[109] For an overview of new technology and discoveries, *see* Elkhonon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* (2001).

does not finish developing until one's mid-twenties. [110] Furthermore, after a certain age, the likelihood of committing another violent offense dramatically lessens. [111]

New discoveries have provided scientific confirmation that adolescent years are a significant time of transition and that adolescents have significant neurological deficiencies that result in stark limitations of judgement. [112] For example, the frontal lobe, which is responsible for impulse control, judgement, and decision making, develops slowly until the early twenties. [113] This makes adolescents especially prone to risk-taking. [114] They are also more susceptible to stress, which further distorts already poor cost-benefit analysis, and trauma often makes youth hypervigilant in response to threats. [115] Normal adolescents cannot be expected to operate with maturity, judgment, risk aversion, or impulse control of an adult -- especially teens who have suffered brain trauma, dysfunctional family, abuse, or violence. [116] Additionally, most adolescent delinquent behavior occurs on a social stage where immediate pressure of peers is the main motivation. [117] When a child is transferred to adult [*37] court, none of these important scientific factors are taken in to consideration, as a child is being evaluated as if they were an adult.

E. Impact and Consequences of Juveniles Tried in Adult Court

There are various detrimental immediate and long term effects on juveniles who are transferred to adult court. Transferred children are exposed to longer and harsher sentences than if they remained in the juvenile system, and these punishments are often mandatory sentences. [118] Most states permit or require that youth charged as adults be placed in adult institutions as they are pending trial. [119] On any given day, nearly 7,500 young people are locked up in adult jails. [120] The number in adult prison is even higher -- on

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[110] Young Adult Development Project, Brain Changes, http://hrweb.mit.edu/worklife/youngadult/brain.html.

[111] Nat'l Institute of Justice, "From Juvenile Delinquency to Young Adult Offending", https://www.nij.gov/topics/crime/Pages/delinquency-to-adult-offending.aspx.

[112] *Id.*

[113] *Id.*

[114] Francine Sherman, *Juvenile Justice: Advancing Research, Policy, and Practice* (2011).

[115] *Id.*

[116] Chris Mallet, *Socio-Historical Analysis of Juvenile Offenders on Death Row*, 3 JUV. CORR. MENTAL HEALTH REPORT 65 (2003).

[117] Marty Beyer, *Recognizing the Child in the Delinquent*, KY. CHILDREN'S RIGHTS J., 1999. Dr. Beyer, a child welfare and juvenile justice consultant, has created a framework for juvenile courts to use when assessing children. She believes that juvenile cases should be seen through three separate frameworks: immaturity, disability, and trauma. *Id.* When looking at the immaturity of juveniles, she notes that juveniles are susceptible to immature thinking, which leads to impulsive crimes such as having a weapon without a plan to use it or talking to police without a lawyer. *Id.* They also have immature identities, which leads them to such things as being susceptible to peer pressure or wrongly trusting police. *Id.* Kids also have immature moral development which can lead to consequences as committing an act because they believed they were righting a wrong, not realizing there would be a victim or refusing to cooperate with police to get a friend in trouble. *Id.* She also notes the prevalence of disabilities among youth, which can lead to problems such as processing issues, difficulties understanding Miranda warnings, or problems communicating. *Id.* Finally, she suggests that youth should be viewed through their trauma, which can cause delayed development, high anxiety, and depression. *Id.* It can also lead youth to numb their feelings with substance abuse. *Id.*

[118] Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, *Trying Juveniles As Adults: An Analysis of State Transfer Laws and Reporting* (2011), https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf.

any given day, approximately 2,700 young people are locked up in adult prisons. [121] There is a higher risk of harm for youth in adult facilities than in juvenile institutions: youth sentenced to adult facilities are thirty-six times more likely to commit suicide. [122] They are also at the highest risk for rape and other forms of sexual abuse. [123] According to a survey by the Department of Justice, "1.8 percent of 16- and 17- year-olds imprisoned with adults report being sexually abused by other inmates," and of these cases, 75 percent of children report being repeatedly victimized by staff. [124] But, because of the imbalance of power of children and the adult staff, most juveniles fail to report their abuse. [125] In addition to the immediate physical and psychological consequences of incarceration in adult facilities, transferred children are also at risk to harmful disruptions to their development. [126]

Transfer also has a long-term effect on youth. When they leave jail or prison, they still carry the stigma of an adult criminal conviction. A felony conviction can make it harder to find a job, find housing, get a college degree, or any other means to turn their lives around. [127] Additionally, transfer policies actually increase the likelihood that the youth will reoffend and youth prosecuted as adults are also have a higher [*38] recidivism rate than youth who remain in juvenile court. [128] A Center for Disease Control and Prevention Task Force report found that transferring youth to the adult criminal system increases violence, causes harm to juveniles, and threatens public safety. [129]

F. Current Methods of Transfer by State

A transfer statute is a "provision that allows or mandates the trial of a juvenile as an adult in criminal court for a criminal act." [130] All states [131] currently still have transfer laws that allow or mandate some youth to be transferred to adult court, even though their age places them in the category of juvenile

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[119] *Id.*

[120] *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America*, Campaign for Youth Justice, (2007), http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf.

[121] Heather C. West, *Prison Inmates at Midyear 2009*, U.S. DEP'T OF JUSTICE (2010), https://www.bjs.gov/content/pub/pdf/pim09st.pdf.

[122] *See* Jailing Juveniles, supra note 120; *See also* Ford, *supra* note 86.

[123] Nat'l Criminal Justice Reference Servs, *Nat'l Prison Rape Elimination Comm'n Report* (2009), https://www.ncjrs.gov/pdffiles1/226680.pdf.

[124] *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12*, U.S. DEP'T OF JUSTICE, https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf.

[125] *See* Ford, *supra* note 86.

[126] *Id.*

[127] *After Prison, Roadblocks to Reentry: A Report on State Legal Barriers Facing People with Criminal Records*, Legal Action Ctr. (2004).

[128] Youth prosecuted as adults are 34% more likely to recidivate with more violent offenses. *See* Jailing Juveniles, supra note 120.

[129] *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, Ctrs. for Disease Control & Prevention (2007), http://www.cdc.gov/mmwr/pdf/rr/rr5609.pdf.

[130] *Transfer Statute*, Black's Law Dictionary (10th ed. 2014).

jurisdiction. [132] Current transfer laws vary considerably in specificity of statutory language, application, as well as flexibility and breadth of coverage, but all states have at least one of the three broad categories of transfer law: judicial waiver, statutory exclusion, and direct file. [133] Many states also have "once an adult, always an adult" provisions, which mean that a child who has been transferred will permanently be charged as an adult for all future offenses. [134]

Thirty-one states specify a minimum age a child must reach before the child can be considered for transfer to adult court by any method of transfer, including judicial waiver, statutory exclusion, and direct file. [135] Twelve states do not set an age limitation for certain enumerated offenses, typically violent felonies. [136] Eight states have no statutory minimum age requirement for a child to be tried in adult [*39] court, meaning that under the state statute a child of any age can be tried in adult court. [137]

1. Judicial waiver

Judicial waiver is the most common transfer mechanism--forty-six states allow some form of judicial waiver. [138] If the youth meets statutory age and offense requirements and the proper motion for transfer is filed, if required, a court will hold a transfer hearing to determine if the child should be transferred to adult court. [139] Prior to the hearing, sixteen states require that the youth be evaluated to make findings on the factors the court must consider as delineated in the statute, if necessary, to be considered on whether or not the court should retain jurisdiction over the youth. [140] This includes evaluations by professionals and by the youth's probation officer, if applicable. These findings range from evaluating whether or not

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[131] For the purposes of this comment, the District of Columbia is counted as a state.

[132] *See infra* Appendix A (summarizing the authors' findings of each state's codified transfer provisions). This data was compiled by the author while working as a law clerk at the National Juvenile Defender Center. Unless otherwise indicated, all information in this section comes from the statutes listed in Appendix A. For the purpose of this Comment, which seeks to give a sense of juvenile transfer nationwide, the information has been placed into generalized categories. Each state has a different system for transfer with state-specific nuances; consult each state's statutes for further information.

[133] *See id.* Several states also have mandatory waiver provisions, which are not discussed in the scope of this comment as its effect is the same as statutory exclusion. It can be distinguished from statutory exclusion, however, as under mandatory waiver, proceedings against a child initiate in juvenile court. However, unlike judicial waiver, the court has no other role than to determine that there is probable cause to believe a juvenile of the requisite age committed an offense falling within the mandatory waiver law. Once the court has done so, the juvenile is automatically transferred to adult court.

For more information, *see Trying Juveniles As Adults: An Analysis of State Transfer Laws and Reporting*, Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice (2011). Several states also have reverse waiver statutes, which are also not discussed in the scope of this comment. Reverse waiver statutes allow a juvenile who is charged as an adult to petition to have the case transferred back to juvenile court. For more information, *see* Jason Zeidenburg, *You're An Adult Now: Youth in Adult Criminal Justice Systems*, U.S. DEP'T OF JUSTICE NAT'L INSTITUTE OF CORRECTIONS (2011), http://cfyj.org/documents/FR_NIC_YAAN_2012.pdf.

[134] *See infra* Appendix A.

[135] The following states have specified minimum age limits: fifteen years old in Connecticut, New Jersey, and New Mexico; fourteen years old in Alabama, Alaska, Arizona, Arkansas, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, North Dakota, Ohio, Texas, and Utah; thirteen years old in Georgia, Illinois, Mississippi, New York, and Wyoming; twelve years old in Colorado, Indiana, Missouri, Montana, and Vermont; eleven years old in New Hampshire; and ten years old in Iowa and Wisconsin.

[136] States that do not set an age limit for certain enumerated offenses: These states are Delaware, the District of Columbia, Florida, Hawaii, Idaho, Maryland, Nevada, Oregon, Pennsylvania, Rhode Island, South Carolina, and Tennessee.

[137] States with no statutory minimum age requirement: Maine, Nebraska, Oklahoma, Rhode Island, South Dakota, Washington, and West Virginia.

the child has developmental or mental disabilities to school records and evaluations of the child's living situation and family support.

i. Transfer hearing

States vary as to the party that can motion for transfer, but the majority of states with judicial waiver, thirty-two states, allow the prosecutor to motion for transfer of a youth. [141] Of these thirty-two states, the prosecutor is the only party who can motion for transfer in twenty-three states, two states allow either the prosecutor or the defense to motion for transfer, four states hold a hearing on either the motion of the court or the prosecutor, and three states hold a hearing on the motion of either party or the court. [142] The other fourteen states with judicial waiver only hold a transfer hearing upon the motion of the court. [143] In nine states, a transfer hearing is automatically required regardless of whether a motion from any party was filed for any minor accused of certain offenses. [144] In five states, a hearing is not required for minors of a certain age accused of certain offenses, and the minor will be automatically transferred to adult court if a motion is filed by the state. [145]

Twenty-five states require a finding that there is probable cause that the child committed the alleged act before the child can be considered for transfer. [146] Typically, the burden of proof that the juvenile is not amenable to treatment and that the protection of the community requires transfer of the juvenile to adult court is on the state. However, fourteen states have presumptive waiver provisions where the burden of proof automatically [*40] shifts from the state to the defendant if the youth is of a certain age, accused of certain offenses, or has a prior record. [147]

ii. Factors considered

Every state besides Indiana, South Carolina, and Washington has enumerated factors that a judge is required to consider at the transfer hearing. [148] These factors are specified in Appendix C but are outlined here. Twenty-one states require judges to consider all of the enumerated factors, twelve states only require the court to consider some of the factors, and ten states allow the court to consider other factors not listed

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[138] *See infra* Appendix A (listing judicial waiver statutes by state).

[139] *See infra* Appendix B (outlining the authors' findings of transfer hearing requirements by state). For the purpose of this Comment, these findings were generalized into categories; for specific requirements by state, consult the state statute.

[140] *See infra* Appendix B.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] The following states have such requirements: Delaware, Connecticut, Mississippi, Ohio, Florida, Georgia, Iowa, Kentucky, Louisiana.

[145] The following states do not require a hearing for transfer if a minor is a certain age and accused of an enumerated offense: Connecticut (15), Delaware (15), Indiana (16), North Dakota (14), and South Carolina (16).

[146] *See infra* Appendix B (listing requirements for judicial waiver hearings by state).

[147] *Id.* For specific offenses and ages that require the burden to shift, consult each state's judicial waiver statute, listed in Appendix A.

[148] *See infra* Appendix C.

in the statute. [149] With the exception of Ohio, state statutes do not give an indication on how these factors should weigh for or against transfer. [150] While seven states only consider the seriousness of the offense and the juvenile's prior record when determining waiver of jurisdiction, the other states require a more individualized assessment of the youth based on the following factors. [151]

Forty-one states consider the offense itself. [152] This factor refers to additional consideration of the offense outside of minimum offense requirements for the child to be eligible for judicial waiver. These considerations are composed of the following: (1) seriousness of the alleged offense; (2) whether the alleged felony offense was committed in an aggressive, violent, premeditated, or willful manner; and (3) whether the offense was against persons or property with greater weight to offenses against persons. Forty states consider the juvenile's prior record; this includes the extent and nature of the child's prior delinquency record and response to any prior treatment. [153] Thirty-five states consider the juvenile's mental condition, which includes the psychological development and emotional state of the minor, including any documented mental illness or developmental issues, and whether or not they receive any special education services. [154] Thirty-four states consider the protection of the community, or whether the protection of the community requires isolation of the minor beyond the capacity of juvenile facilities. [155] Thirty-two states consider whether or not the juvenile can be rehabilitated within the time frame of the juvenile court jurisdiction, utilizing all resources currently available to the jurisdiction. [156] Twenty-three states consider the child's maturity as related to the child's age, outside of statutorily imposed limitations. [157] Eighteen states consider the juvenile's pattern of living or family environment, including the effect that familial, adult, or peer pressure may have had on the child's alleged actions in question. [158] Fourteen states consider the culpability of the juvenile, which includes the level of planning and participation involved and the circumstances in which the offense was allegedly committed. [159] Eleven states consider the impact on the victim, which may include victim testimony at [*41] the hearing. [160] Nine states consider whether or not there are co-defendants charged in adult court, which would make it more

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[149] *Id.*

[150] Ohio lists what factors the court should consider in favor of transfer, such as the victim suffered serious physical harm, connection to gang activity, or the child was awaiting adjudication at the time of the act. The statute separately lists what factors the court should consider against transfer, such as the victim induced the act, the child was provoked, or the child did not have reasonable cause to believe harm would occur.

[151] *See infra* Appendix C.

[152] *Id.*

[153] *Id.*

[154] *See infra* Appendix C.

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *See infra* Appendix C.

[160] *Id.*

convenient for the juvenile's case to also be charged in adult court. [161] Six states consider whether or not the offense was committed in connection with gang activity. [162] Finally, six states consider whether or not the offense specifically involved a weapon. [163]

2. Statutory exclusion

Thirty-six states have statutory exclusion provisions. [164] Almost every state that has statutory exclusion also has judicial waiver, with the exception of Massachusetts, Montana, New Mexico, and New York. Generally, these states simply exclude any minor fitting into the specified age and offense categories as being defined as a "child" for juvenile court jurisdictional purposes. A minor who meets the requirements is proceeded against as an adult from the beginning of the proceedings, and therefore no transfer hearing is held. In the majority of states, statutory exclusion only applies to youth sixteen or older. The youngest age that qualifies for statutory exclusion is thirteen, [165] with the exception of states that do not have a specified youngest age for murder, as outlined above. Murder is the most common offense to qualify for statutory exclusion. Other common offenses include drug trafficking, arson, sexual assault, armed robbery, aggravated assault, use of a fire arm, theft of a motor vehicle, and conviction of prior felonies.

3. Direct file

Eleven states have direct file provisions. [166] Typically, these direct file provisions give both juvenile and criminal courts the jurisdiction to hear cases involving certain offenses or minors falling into certain age categories, and it is left up to the prosecutor to decide where to file the charges. [167] As with other transfer mechanisms, there is a wide variation among states regarding the criteria for direct file. Generally, the minimum level of offense necessary to qualify appears to be lower than statutory exclusion. For example, in Arkansas, a minor can be considered for direct file for a large number of offenses that do not qualify for statutory exclusion, such as soliciting a minor to join a street gang. Or, in Florida, misdemeanors can be filed by the prosecutor in criminal court if the minor involved is at least sixteen and has a sufficiently serious prior record. Nebraska is the only state with direct file as the only method of transferring youth to criminal court and the prosecutor must consider a series of factors similar to those considered in judicial waiver before filing charges against a minor in adult court. [168] However, there is no system of accountability for the prosecutor that [*42] requires them to make a showing that all the factors have

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[161] *Id.*

[162] *See infra* Appendix C.

[163] *Id.*

[164] *See infra* Appendix A (listing statutory exclusion statutes by state).

[165] New York allows youth aged thirteen or older to be transferred through statutory exclusion.

[166] *See infra* Appendix A (listing direct file provisions by state).

[167] For a discussion of the issues with direct file in a state specific context in Colorado, *see* Natasha Gardner, *Direct Fail,* 5280 (Dec. 2011), http://www.5280.com/magazine/2011/12/direct-fail?page=full. The Southern Poverty Law Center has also published a report on the extent of mistreatment that direct file has generated in New Orleans.*See More Harm Than Good: How Children Are Unjustly Tried in New Orleans,* S. POVERTY LAW CTR. (2016), https://www.splcenter.org/20160217/more-harm-good-how-children-are-unjustly-tried-adults-new-orleans.

[168] These factors are the type of treatment the minor would be amenable to, if the offense was violent, motivation for offense, age of juvenile and age of others involved in the offense, best interests of the juvenile, public safety, if the juvenile has the ability to appreciate the nature and seriousness of the offense, if the victim agrees to participate in the proceedings, and if the minor was involved in a gang.

been considered. Of all of the transfer methods, direct file has come under the most scrutiny in recent years. [169]

4. Once an adult, always an adult

Twenty-nine states have "once an adult, always an adult" provisions, which require any minor who has been previously charged as an adult to continue to be charged as an adult for all future offenses, regardless of whether the youth would have been eligible for transfer for the present offense. [170] Most states with this provision simply require criminal prosecution of all subsequent offenses, either by a blanket exclusion or an automatic waiver, without consideration of any mitigating factors pertaining to the child's development. [171] Although support for transfers is largely predicated on sending violent career offenders to adult court, in reality more than half of transfers affect juveniles who have committed nonviolent property, drug, or public order offenses through this mechanism. [172]

G. National Trends Regarding Juvenile Transfer

While every state has a transfer mechanism, there is a significant trend throughout the country towards a preference to keep children in juvenile court. Several states have eliminated mandatory transfer provisions. Missouri recently changed its "once an adult, always an adult" provisions to allow a young person to return to the juvenile system if he or she was found "not guilty" in adult court. [173] Utah has also passed significant reforms, limiting the number of felonies that can be transferred to adult court from sixteen to ten and allowing the judge, not the prosecutor, to exercise judgment on transfer based on the interests of the minor. [174] Texas legislators also recently passed laws that give youth the right to an immediate appeal if they are transferred to adult court. [175] Previously, youth could not appeal their transfer to adult court after they had been convicted or deferred. [176] This new legislation restores the right to an immediate appeal and mandates that the Supreme Court take up standards to accelerate the disposition of these appeals. [177] In 2014, the Iowa Supreme Court struck down mandatory minimum sentences for juveniles as unconstitutional, stating that ""[t]here is no other area of the law in which our

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[169] *See* Jean Trounstine, *Trial by Fire: Prosecutors Sending Juveniles to Adult Courts*, TRUTHOUT (Feb. 29, 2016), http://www.truth-out.org/news/item/35017-trial-by-fire-prosecutors-sending-juveniles-to-adult-courts.

[170] *See infra* Appendix A (listing transfer provisions by state).

[171] *Trying Juveniles As Adults: An Analysis of State Transfer Laws and Reporting*, U.S. Dep't of Justice Office of Juvenile Justice and Delinquency Prevention (2011).

[172] *See generally* G. Larry Mays & Rick Ruddell, *Do the Crime Do the Time: Juvenile Criminals and Adult Justice in the American Court System* (2012).

[173] S. 36, 97th Leg., Reg. Sess. (Mo. 2013).

[174] S. 167, 2015 Reg. Sess. (Utah 2015).

[175] S.B., 2015 Reg. Sess. (Tex. 2015).

[176] *Id.*

[177] *Id.*

laws write off children based only on a category of conduct without considering all background facts and circumstances." [178]

Several states have also enacted laws that increase the minimum age that youth can be transferred. In 2015, Illinois eliminated the automatic transfer of youth under the age of sixteen. [179] In 2015, New Jersey passed legislation that increased the minimum age at which a youth can be tried as an adult from fourteen [*43] to fifteen. [180] It also makes it more difficult to initiate transfer of youth, as prosecutors must submit a written analysis on the reasons for transfer, which is then only granted at the discretion of the judge. [181] Additionally, the New Jersey Supreme Court recently held in *State in the Interest of N.H.*, that youth threatened with adult prosecution have the right to full discovery at the waiver stage of juvenile proceedings, which helps defense counsel make a more complete argument at a transfer hearing. [182] In its decision, the court noted that waiver of a juvenile to adult court is the "single most serious act that the court can perform." [183]

There is also a slow shift nationally towards enacting judicial waiver laws that take into account the arguments made in *Roper, Graham*, and *Miller*. In Texas, the Criminal Court of Appeals ruled that a court must make an individualized assessment of youth before transferring him to adult court, regardless of the offense. [184] In 2014, California and Maryland enacted laws that require juvenile court judges to take into account factors such as age, physical and mental health, and the possibility of rehabilitation, when considering transfer. [185] Additionally, California legislation updated their criteria to consider the factors required by the U.S. Supreme Court in *Miller v. Alabama*. [186] In Illinois, new legislation requires juvenile judges to review transfers to determine the proper court for the child, taking in to account the child's age, background, and individual circumstances. [187]

Oregon is one of the first states to have a decision reflecting the importance of evaluating children for transfer in the context of adolescent development. [188] In Oregon, statutory law gives the juvenile court the discretion to waive jurisdiction and transfer a youth to adult court if it finds the youth to be of "sufficient sophistication and maturity to appreciate the nature and quality of the conduct involved." [189] In the case of *In the Matter of J.C.N.-V*, the Supreme Court of Oregon reversed a decision to transfer a

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[178] State v. Lyle, 854 N.W. 2d 378, 401 (Iowa 2014). The Iowa Supreme Court noted that the for the Supreme Court in *Miller*, the "heart of the constitutional infirmity" was that the punishment was mandatory, not the length of the sentence.

[179] H.B. 3718, 98th Leg., Reg. Sess. (Ill. 2015).

[180] S. 2003, 2014 Reg. Sess. (N.J. 2015);

[181] *Id.*

[182] State in the Interest of N.H., 441 N.J. Super. 347 (2015).

[183] *Id.*

[184] Moon v. State, 451 S.W.3d 28 (Tex. Crim. App. 2014).

[185] S. 382, 2014 Reg. Sess. (Cal. 2014); H.B. 618, 2014 Reg. Sess. (Md. 2014).

[186] S. 382, 2014 Reg. Sess. (Cal. 2014).

[187] H.B. 3718, 98th Leg., Reg. Sess. (Ill. 2015).

[188] In the Matter of J.C.N.-V, 359 Or. 559 (2016).

[189] OR. REV. STAT. §§ 419c.340, 419c.349, 419c.352, 419c.355.

youth under this criteria, holding that the legislature did not intend for a child's "sophistication and maturity" to be evaluated by the same standards as adults. [190] Instead, the court must "take measure of a youth and reach an overall determination as to whether the youth's capacities are, on the whole, sufficiently adult-like to justify a conclusion that the youth was capable of appreciating, on an intellectual and emotional level, the significance and consequences of his conduct." [191]

Finally, and most significantly, the Ohio Supreme Court recently ruled that the mandatory transfer of juveniles violates juveniles' right to due process as guaranteed by the Ohio Constitution. [192] In this case, the prosecutor filed a motion to transfer a sixteen-year-old to be tried as an adult based on Ohio statute. [193] After conducting a hearing, the juvenile court found probable cause and the case was consequently transferred. In ruling that the transfer was unconstitutional, the court stated that that:

[*44] The legislative decision to create a juvenile court system, along with our cases addressing due-process protections for juveniles, have made clear that Ohio juveniles have been given a special status. This special status accords with recent United States Supreme Court decisions indicating that even when they are tried as adults, juveniles receive special consideration. [194]

The court maintained however, that the "discretionary-transfer process satisfies fundamental fairness under the Ohio Constitution." [195]

II. ANALYSIS

A. The Rationale Behind the Roper, Graham, and Miller Decisions, in Combination with the Kent Decision, Should be Applied to Juvenile Transfer

Mandatory transfer statutes do not allow judicial discretion and prohibit individual consideration of the youth or the circumstances surrounding the offense. This mandatory consequence is what was at the core of the Supreme Court's recent decisions, and in light of further recognition about the importance of youth in criminal matters, the *Kent* decision should be revaluated based on the holdings in *Roper, Graham*, and *Miller*. [196] Fifty years ago, the *Kent* Court concluded that a transfer to adult court could be considered invalid because for some kids accused of certain crimes, having a meaningful chance for their youth mattered in the transfer consideration. [197] However, this holding had its limitations--the Court in Kent specifically noted that a juvenile was not entitled to a hearing if accused of committing an offense that

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[190] *In the* Matter of J.C.N.-V, 359 Or. at 559.

[191] *Id.*

[192] Ohio v. Aalim, No. 2015-0677, 2016 WL 7449237, *1 (Ohio, Dec. 22, 2016); *See* Carol Taylor, *Mandatory Transfer of Juveniles to Adult Courts is Unconstitutional*, COURT NEWS OHIO (Dec. 22, 2016), http://www.courtnewsohio.gov/cases/2016/SCO/1222/150677.asp#.WKy36xIrKmk.

[193] *Id.*

[194] Ohio v. Aalim, No. 2015-0677, 2016 WL 7449237, at *5 (Ohio, Dec. 22, 2016).

[195] *Id.*

[196] *See* Laurie Sansbury, *supra* note 38.

[197] Kent v. United States, 383 U.S. 541 (1966).

was of "heinous or aggravated character." [198] Furthermore, most states currently allow juveniles to be transferred for non-violent offenses, often without a hearing. [199] Yet, the recent Supreme Court decisions together represent several important propositions that should be applicable to mandatory transfer laws, if taken in combination with *Kent*: (1) given all that is known in terms of adolescent development, biology, and scientific evidence, children are "categorically less culpable" than adults for their conduct; (2) youth is a relevant feature in procedure and sentencing decisions; (3) mandatory sentences fail to appropriately account for factors such as age, maturity, environment, susceptibility, and rehabilitative potential; (4) life without parole and other extreme sentences function like a death sentence when it comes to their application to children because children cannot view the future in the same way as adults do; and (5) children should be given "meaningful" opportunities to earn their release based on demonstrated maturity and rehabilitation. [200]

The juveniles whose cases were brought before the Supreme Court in *Roper*, *Graham*, and *Miller*, all ended up in adult court through [*45] the transfer system. [201] The various state laws in each case made it easy for a child to be tried in adult court, where the juveniles were then exposed to mandatory minimum sentences of the death penalty and life without parole.

1. Death is not different.

The *Kent* decision indicated that while children have a right to a hearing, the most heinous offenses such as murder excluded children from juvenile jurisdiction. [202] In *Miller*, however, the Supreme Court accepted the idea that, as proven by neuroscience and behavioral research, that "children who commit even heinous crimes are capable of change" and further noted that the Court's previous holding in *Roper* and *Graham* were not crime specific. [203] Additionally, the *Miller* Court looked to the context in which a child is accused of murder, and found that the state must give the juvenile a meaningful opportunity to explain the context around the crime, noting that "just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered' in assessing his culpability." [204] Looking at the context of the crime was a significant shift from the *Kent* Court, which waived a hearing for offenses of "heinous"

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[198] Id. at 556.

[199] For example, of the approximately four thousand youth committed to State adult prisons in 1999, 23% were convicted of property offenses, 9% for drug offenses, and 5% for public order offenses. Snyder, H.N., and Sickmund, *Juvenile Offenders and Victims: 2006 National Report*, U.S. DEP'T OF JUSTICE (2006), https://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf.

[200] Miller, 567 U.S. at 461; Graham v. United States, 560 U.S. 48, 72 (2010) (noting that the same characteristics that render juveniles less culpable than adults--their immaturity, recklessness, and impetuosity--make them less likely to consider potential punishment); Roper, 543 U.S. at 571 ("the case for retribution is not as strong with a minor as with an adult"); Kent, 383 U.S. at 556 (holding that "it is clear beyond dispute that the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile").

[201] *See supra* Part II.a.

[202] Kent, 383 U.S. at 564.

[203] Miller, 567 U.S. at 463 ("none of what [*Graham*] said about children--about their distinctive (and transitory) mental traits and environmental vulnerabilities--is crime-specific"

[204] *Id.* at 2466.

character. [205] Instead, the Court in *Miller* believed that there are still levels of culpability when a child is accused of the gravest offense:

> Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other--the 17--year--old and the 14--year--old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile (including these two 14--year--olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses. [206]

Therefore, under *Miller*, a kid who commits murder is still a kid and even children charged with serious offenses deserve a fair hearing and opportunity to grow as an adult outside of the walls of incarceration. [207] A fair hearing would allow the Court to consider the circumstances of the juvenile, outside of the offense that he or she committed, in terms of his or her immaturity, impetuosity, and inability to appreciate risk based on chronological age. [208] Furthermore, at a hearing, the juvenile's act will be considered in the context of the juvenile's history and family environment. [209] Finally, if a juvenile is convicted of murder but remains in juvenile court, it is still possible that the court could charge and convict him or her of a lesser offense based on the limitations or disabilities associated with youth. [210]

[*46] *2. Transfer to adult court exposes youth to mandatory minimums that do not take into account their chronological age.*

The age of the defendant in all criminal proceedings is relevant because kids are categorically less capable and more susceptible to change based on modern scientific studies. [211] Mandatory transfer mechanisms ultimately place children, if convicted, in the realm of mandatory transfer schemes that prevent judges from taking account of the central considerations of youth. [212] Even though the Supreme Court has ruled that juveniles cannot be sentenced to death or life without parole, there are still a large amount of mandatory sentences that still involve significant amounts of incarceration that children would not be exposed to in juvenile court. [213] Mandatory minimums, by definition, do not allow judges to take individualized factors into account even if they wanted to, and juveniles tried in adult criminal court are

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[205] Kent, 383 U.S. at 564.

[206] *Id.* at 2467-86.

[207] *See* Simon Waxman, *A Child Who Kills is Still a Child* (Jan. 2, 2014), http://www.wbur.org/cognoscenti/2014/01/02/philip-chism-simon-waxman (discussing how statutory exclusion for homicide offenses plays out in Massachusetts).

[208] *See* Miller, 567 U.S. at 471.

[209] *Id.* (mandatory sentencing schemes prevent courts from taking into account "the family and home environment that surrounds him--and from which he cannot usually extricate himself--no matter how brutal or dysfunctional").

[210] *Id.*

[211] *See supra* Part II.

[212] *See* Drinan, *supra* note 30.

[213] *See, e.g.*, Mary Price, *Mill(er)ing Mandatory Minimums: What Federal Lawmakers Should Take from Miller v. Alabama*, 78 MO. L. REV. 1147 (2013) (discussing the link between mandatory minimums and over-incarceration and urging that *Miller*-like emphasis on proportionality can reduce incarceration levels).

subject to the same mandatory minimum sentences as their adult counterparts for nearly all offenses, without consideration of their inherent diminished culpability. [214]

The Court's discussion of the unique attributes of children was anchored in social science work, documenting the inchoate nature of the adolescent brain. [215] Current structures that allow for children to be transferred this way do not take age into consideration, which is therefore in direct opposition to the Court's holding in *Roper, Graham*, and *Miller*. [216] By removing youth from the balance--by subjecting a juvenile to the mandatory minimum sentence applicable to an adult--these laws still prohibit a sentencing authority from assessing whether the law's minimum term of imprisonment proportionately punishes a juvenile offender. [217] Adolescents develop gradually and unevenly, and chronological age and physical maturity are not reliable indicators of development. Although their offenses can be serious, much of the behavior surrounding delinquency is not abnormal during adolescence as under stress, adolescents typically cannot use their most advanced judgment and decision-making skills. A judge's ability to consider these key factors should not be constrained by any mandatorily imposed sentences, no matter how short.

3. The Supreme Court intended Miller *to be read broadly*.

The *Miller* opinion states that a child's developmental environment matters at sentencing and thus, context matters when sentencing juveniles outside of life without parole [*47] to any kind of mandatory minimum sentence. [218] The *Miller* Court even suggested in dicta, that it was concerned with juvenile justice practices on a broader scope than the life sentences that were at issue in the case. [219] The Court spent a significant amount of its opinion responding to the State's assertion that youth was already taken into consideration at the transfer hearing and therefore did not need to be considered at a sentencing hearing. [220] The Court rejected this notion entirely because even though the youth in *Miller* was given a transfer hearing, many states use mandatory transfer systems or direct file statutes, which place any discretion solely in the hands of the prosecutor and do not provide a mechanism for a judicial revaluation. [221] Additionally, the Court criticized judicial waiver statutes as being too general and ambiguous. [222]

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[214] *See, e.g.*, James Orlando, *Automatic Transfer of Juveniles from Juvenile to Criminal Court*, OFFICE OF LEG. RESEARCH (2016), https://www.cga.ct.gov/2016/rpt/pdf/2016-R-0214.pdf (outlining the mandatory minimums juveniles are exposed to under Connecticut's current transfer laws); Rachael Frumin Eisenberg,*As Though They Are Children: Replacing Mandatory Minimums with Individualized Sentencing Determinations for Juveniles in Pennslyvania Criminal Court after Miller v. Alabama*, 86 TEMP. L. REV. 215 (2013) (advocating for individualized sentencing schemes in Pennsylvania based on juveniles continued exposure to mandatory minimums).

[215] Roper v. Simmons, 543 U.S. 551, 569-70 (2005) (discussing the lack of maturity and recklessness, susceptibility to negative outside influences, and transient character of youth, citing the science behind each point).

[216] Miller, 567 U.S. at 465 ("'An offender's age,' we made clear in *Graham*, 'is relevant to the Eighth Amendment,' and so 'criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.'") (quoting Graham v. United States, 560 U.S. 48, 56 (2010).

[217] Miller, 567 U.S. at 467.

[218] *Id.* ("the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations.")

[219] *Id.*

[220] Id. at 468.

[221] *Id.*

Furthermore, the purpose of a transfer hearing is dramatically different than that of a sentencing hearing and judges are faced with an extreme choice: giving a lenient sentence in juvenile court or an extreme one in adult court. [223] Therefore, any statute that does not even give youth a meaningful opportunity to be heard at a transfer hearing does not comply with the standard outlined in *Miller*, and it is possible that even youth transferred through judicial waiver may not have a significant opportunity to be evaluated as a child. By discussing the limitations of this system, the majority indicated that its decision was not limited to this particular sentence, but that it was an indictment of broader juvenile justice practices and criticizing the kind of general hearing provisions outlined in *Kent*. [224]

4. Mandatory Transfer Violates a Juvenile's Eighth Amendment Rights

The sentences in *Roper*, *Graham*, and *Miller* were ultimately deemed to violate the principle of proportionality, and therefore the Eighth Amendment's ban on cruel and unusual punishment. [225] *Miller* and *Graham* represented an enormous break from Eighth Amendment precedent dealing with non-death sentences because children were at issue. [226] The Supreme Court previously set the bar for a challenge to sentencing very high: "Although 'no penalty is per se constitutional,' the relative lack of objective standards concerning terms of imprisonment has meant that '[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences [are] exceedingly rare.'" [227]

Therefore, based on this shift in understanding of an Eighth Amendment violation, mandatory waiver provisions violate the individualized requirements of the Eighth Amendment as they deny juveniles any opportunity to [*48] have their age and diminished capacity considered by any decision-maker at any stage of the proceedings against them.

5. Like the death penalty in Roper and life without parole in Graham and Miller, there is indicia of national consensus moving against transferring juveniles without a hearing.

Finally, when finding mandatory practices to be unconstitutional, the Court in *Roper* and *Graham* looked to the current national consensus on the death penalty and life without parole, respectively. While the Court heavily focused on an analysis of legislative trends moving towards outlawing the death penalty in *Roper*, it also noted that the United States is the only country in the world that gives "official sanction" to the juvenile death penalty. [228] In *Graham*, the Court noted that while thirty-seven states, the District of Columbia, and the federal government permitted life without parole sentences for non-homicide juvenile

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[222] Id. at 469 (noting that such laws are "usually silent regarding standards, protocols, or appropriate considerations for decisionmaking" and when states give power to the judges, it "has limited utility," as judges have limited information and juveniles have limited protections).

[223] *Id.*

[224] Additionally, the four dissenting judges in *Miller* were even concerned that the majority's opinion would be read too broadly. *See* id. 471 (Roberts, C.J., dissenting) ("the principle behind today's decision seems to be only that because juveniles are different from adults, they must be sentenced differently," and that such a principle and the process the majority employed in applying it "has no discernible end point."); *See also* id. at 478 (Thomas, J., dissenting) ("[Miller] lays the groundwork for future incursions on the States' authority to sentence criminals.").

[225] Miller, 567 U.S. at 460.

[226] *Id.*

[227] Solem v. Helm, 463 U.S. 277 (1983) (finding a life without parole sentence unconstitutional under a South Dakota recidivist statute for a defendant who passed a bad check).

[228] Roper, 543 U.S. at 575.

offenders, the actual sentencing practices of those jurisdictions indicated that most states were hesitant to sentence a juvenile to such a sentence. [229] At the time of the decision, there were only 123 non-homicide juvenile offenders serving life without parole sentences throughout the entire country--and seventy-seven of them were in Florida prisons. [230] Given the "exceedingly rare" incidence of the punishment in question, the Court held that there was a national consensus against life without parole sentences for non-homicide juvenile offenders. [231]. [232]

As discussed in Part I, like life without parole, there are similar trends throughout the country that show there is a national consensus that children should not be transferred to adult court without a hearing. [233]

B. All States Should be Required to Make an Individualized Assessment of Each Youth Based on Certain/Specific Factors Before Transferring the Youth

Based on the holdings in *Kent, Roper, Miller*, and *Graham*, this precedent, states should only be allowed to transfer youth following a transfer hearing in which a court individually assesses a juvenile defendant and encompasses the diminished culpability of juveniles and their capacity for change. States, therefore, should only transfer juveniles through the process of judicial waiver as statutory exclusion and direct file are unconstitutional under *Miller*. Only fifteen states now rely solely on traditional hearing-based, judicially controlled forms of transfer as contemplated in *Kent*. [234] In these states, all cases against juvenile-age offenders begin in juvenile court and must be literally transferred, by individual court order, to courts with criminal [*49] jurisdiction, unless the state has a provision keeping children who have already been prosecuted once out of the juvenile jurisdiction permanent. While, based on the purpose of the juvenile justice system, it is preferable for all children to stay in juvenile court, courts at the very least should be required to give children a meaningful hearing where they are considered under factors that are consistent with Supreme Court jurisprudence that recognize their status as a child before exposing them to adult sentencing laws and prisons.

First, cases involving children should originate in juvenile court, regardless of the alleged offense on their prior record. If they are then eligible for hearing based on a state's judicial waiver statutes, only the court should be able to motion for a transfer hearing in order to remove any discretionary power from the prosecutor. The juvenile should be represented by counsel at the waiver hearing, and the juvenile should have at least five days notice in order to provide an adequate representation of the child's emotional,

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[229] Graham, 560 U.S. at 61-63.

[230] Id. at 64.

[231] Id. at 67.

[232] *See* Liz Ryan, *With Juveniles, the World Should Not Follow Our Lead*, THE CHRONICLE OF SOCIAL CHANGE (Dec. 11, 2014), https://chronicleofsocialchange.org/opinion/with-juveniles-the-world-should-not-follow-ourlead/8926.

[233] Juvenile transfer in the United States is also disproportionate to the rest of the world--the American criminal justice system leads the word in incarcerating children and no other county routinely processes youth in adult criminal court compared to an estimated 250,000 in the U.S. annually. *See id.* Furthermore, the United States is violating provisions of international human rights conventions. For example, Article 37 of the United Nations Convention on the Rights of the Child (CRC) states that children who are detained should be separated from adults and that they should not be subject to 'torture' or other inhumane forms of punishment. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. The United States is one of the few countries that has not adopted the CRC. However, laws across the United States allow for children charged as adults to be placed in adult jails without any separation from adults, and less than half of these states provide any measure of safety for children.

[234] Kent, 383 U.S. at 541.

physical, and educational history. [235] Furthermore, the juvenile should have access to an expert if necessary, and should have access to all evidence available to the court to either support or contest the motion. [236] Any evidence presented should be under oath and subject to cross-examination. At the hearing, the prosecuting attorney should always bear the burden of proving that probable cause exists to believe not only that the juvenile has committed the offense, but that the juvenile cannot be rehabilitated within the juvenile court. The juvenile may remain silent at the waiver hearing, and additionally no admission by the juvenile during the waiver hearing should be admissible in subsequent proceedings.

Second, at this hearing, courts must individually assess each juvenile as contemplated in *Kent*, but based on factors that incorporate modern scientific studies of adolescence as well as recent Supreme Court jurisprudence that recognizes that kids are different. Courts should be required to consider all the same specific set of factors, as outlined here, and should be unable to transfer a child unless they have made a finding on the record that the conditions have been met.

Most states already consider the nature of the offense when evaluating a child for transfer. [237] In *Kent*, the Court stated that the following should be considered: "the seriousness of the alleged offense to the community and whether the protection of the community requires waiver," "whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner," and "whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted." [238] Forty-one states currently consider the offense committed in a juvenile waiver hearing. [239] However, the Supreme Court has indicated that the focus should not be on the offense itself, but that children are categorically different. Furthermore, as the juvenile system is supposedly rehabilitative instead of punitive, the offense itself should not carry much weight. The offense itself should not matter in terms of what it looks like on paper, but should only be analyzed in context, not as an isolated act. Courts should not determine "premeditation, willful, or other similar words," but should [*50] analyze the offense with more adolescent appropriate standards in light of what personal facts led up to the commission of the offense. Based on this, courts should also not be able to consider the prior record of the child without context and without also considering why the child was not fully rehabilitated by the system, especially if it was based on a lack of rehabilitative resources or a mental condition that remained untreated since the previous offense was committed.

The *Kent* Court instructed that whether or not the juvenile had associates in adult court should be a consideration in the transfer decision, and nine courts currently consider this factor. [240] However, convenience should not be a consideration in juvenile transfer. Juveniles should not be held to the same level of culpability as their adult co-defendants, as often those co-defendants are the very individuals

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[235] ABA Standards for Juvenile Justice, *Standards Relating to Transfers Between Courts* (1979).

[236] *Id.*

[237] *See infra* Appendix C.

[238] Kent, 383 U.S. at 567.

[239] *See infra* Appendix C.

[240] Kent, 383 U.S. at 567; *see infra* Appendix C.

suscepting the juveniles to the peer pressure that *Roper* indicated contributed to a juvenile's responsibility. [241]

In terms of maturity, both the *Kent* Court and thirty-five states consider the sophistication and maturity of the juvenile. [242] Some states have expanded on this, and consider the psychological development and emotional state of the minor, including any documented mental illness or developmental issues. [243] However, none of these transfer statutes state at what maturity level a child becomes eligible for transfer. A child, therefore, should only be eligible for transfer if they are deemed to have the emotionally maturity and decision-making capability of an adult. Otherwise, their mental status as children should keep them in juvenile court. As far as physical maturity, there should be a minimum age imposed on when a child can be eligible for transfer based for all offenses. A child should then be evaluated to see if they developmentally meet the standards of other youth their age, or if there are any mental disabilities or lingering traumatic experiences that would preclude them for developing at the appropriate rate.

Next, *Kent* instructed courts to consider "[t]he sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude, and pattern of living." [244] Twenty-three states currently consider the juvenile's home or family environment, including the effect that familial, adult, or peer pressure may have had on the child's alleged actions in question. [245] This should be a required factor in all jurisdictions and should be expanded to include new research based on trauma and the susceptibilities of children to peer pressure.

Kent, as well as thirty-four states, considered the prospects for adequate protection of the community. [246] If this factor is even to be considered, there should be set criteria and reasons that would allow a court to find that the community cannot be protected by isolating the minor in a juvenile setting; this should not be an arbitrary statement. However, the decision on whether or not to hold a juvenile should only be considered when evaluating their release pre-trial and should not be a factor in a transfer hearing. Additionally, while *Kent* and thirty-two states consider whether [*51] the juvenile can be rehabilitated within the time frame of juvenile court jurisdiction, and if the juvenile court has facilities available that would address the child's individual needs, [247] the Court should not be able to forego rehabilitation solely based on the likelihood that it is unlikely to occur. There should be a presumptive burden that the child can be rehabilitated, and it should be a large burden on the government to prove otherwise.

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[241] Roper, 543 U.S. at 569 (juveniles "are more vulnerable … to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings.)

[242] Kent, 383 U.S. at 567; *see infra* Appendix C.

[243] *See infra* Appendix C.

[244] Kent, 383 U.S. at 567.

[245] *See infra* Appendix C.

[246] Kent, 383 U.S. at 567; *see infra* Appendix C.

[247] Kent, 383 U.S. at 567; *see infra* Appendix C.

Only fourteen states currently consider the culpability of juvenile when assessing them for transfer, and this factor was not even considered in *Kent*. [248] Given that the lessened culpability of children is at the heart of the *Roper, Graham*, and *Miller* cases, this should be a mandatory consideration when attempting to transfer a child. *Kent* and eleven states consider the impact on the victim when deciding whether to transfer a child. Such a consideration should only be considered at sentencing, as the injury suffered by a person does not have any impact on the finding that an individual committed an offense. As the child has not yet been found guilty of the offense he or she is being transferred for, the victim impact should only be considered at sentencing if the child is eventually adjudicated or found guilty. Finally, six states consider whether the offense was committed as part of gang activity, even though this factor was not originally proposed in *Kent*. [249] Contrary to current statutory requirements, gang involvement should actually make it less likely that the juvenile is transferred, instead of an aggravating factor. In *Miller*, the Court explained that juvenile offenders are less culpable than adults because they are less able to assess risk; they are more susceptible to outside influences; and they do not have a fully developed character. [250] The gang setting magnifies all of these concerns.

CONCLUSION

Based on the Supreme Court's decision in *Kent* as well as its recent jurisprudence, states should repeal all mandatory transfer statutes. Mandatory transfer directly contradicts the Supreme Court's recognition that individualized review of a youth's history, the circumstances of the offense, and a youth's ability to charge are critical to determining a youth's sentence. Mandatory transfer statutes take away a court's ability to make this individualized, appropriate assessment of youth as juvenile courts, not adult courts, were specifically created to address the individualized needs of youth. Finally, mandatory transfer statutes are not necessary to ensure youth who commit serious offense are held accountable -- repealing mandatory transfer does not limit a state's ability to try a youth as an adult, it merely means that the child will first have an appropriate hearing.

[*52] APPENDIX A

Methods of Transfer by State

State	Judicial Waiver	Statutory Exclusion
Alabama	Ala. Code § 12-15-203	Ala. Code § 12-15-204
Alaska	Alaska Stat. § 47.12.100	Alaska Stat. § 47.12.030
Arizona	Ariz. Rev. Stat. Ann. § 8-327	Ariz. Rev. Stat. Ann. § 13-501(a)
Arkansas	Ark. Code Ann. § 9-27-318	
California	Cal. Welf. & Inst. Code	Cal. Welf. & Inst. Code

[248] *See infra* Appendix C.

[249] *Id.*

[250] Miller, 567 U.S. at 465.

State	Judicial Waiver	Statutory Exclusion
	§ 707	§ 602(b)
Colorado	Colo. Rev. Stat. § 19-2-518	
Connecticut	Conn. Gen. Stat. 53a-54d	
Delaware	Del. Code Ann. § 1010	10 Del. Code Ann. § 92
D.C.	D.C. Code § 16-2307	D.C. Code § 16-2301
Florida	Fla. Stat. § 985.556	Fla. Stat. § 985.557
Georgia	Ga. Code § 15-11-562	Ga. Code § 15-11-560
Hawaii	Haw. Rev. Stat. § 571-22	
Idaho	Idaho Code Ann. § 20-508	Idaho Code Ann. § 20-509
Illinois	705 Ill. Comp. Stat. 405/5-805	705 Ill. Comp. Stat. 405/5-130
Indiana	Ind. Code Ann. §§ 31-30-3-2, 3-3, 4-4, 3-5, 3-6	Ind. Code Ann. § 31-30-1-4
Iowa	Iowa Code § 232.45	Iowa Code § 232.8(c)
Kansas	Kan. Stat. Ann. § 38-2347	
Kentucky	Ky. Rev. Stat. §§ 635.10, 635.020	
Louisiana	La. Child Code Ann. art. 857, 859, 862	La. Child Code Ann. art. 305
Maine	Me. Rev. Stat. Ann. § 3101	
Maryland	Md. Code Ann., Cts. & Jud. Proc. § 3-8A-06	Md. Code Ann., Cts. & Jud. Proc. § 3-8A-03(d)

State	Direct File	Once an Adult, Always an Adult
Alabama		Ala. Code § 12-15-203(i)
Alaska		

State	Direct File	Once an Adult, Always an Adult
Arizona	Ariz. Rev. Stat. Ann. § 13-501(b)	Ariz. Rev. Stat. Ann. § 13-501
Arkansas	Ark. Code Ann. § 9-27-318	
California		Cal. Welf. & Inst. Code § 707
Colorado	Colo. Rev. Stat. § 19-2-517	
Connecticut		
Delaware		Del. Code Ann. §§ 1010, 1011
D.C.		D.C. Code § 16-2307(h)
Florida	Fla. Stat. § 985.557(1)	Fla. Stat. § 985.227
Georgia		
Hawaii		
Idaho		Idaho Code Ann. § 20-509
Illinois		
Indiana		Ind. Code Ann. § 31-30-3-6
Iowa		Iowa Code § 232.45(a)
Kansas		
Kentucky		
Louisiana	La. Child Code Ann. art. 305	
Maine		
Maryland		Md. Code Ann., Cts. & Jud. Proc. §

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State	Judicial Waiver	Statutory Exclusion
Massachusetts	Mass. Gen. Laws Ann. ch. 119, § 72B	
Michigan	Mich. Comp. Laws. § 712A.4	
Minnesota	Minn. Stat. Ann. § 260B.125	Minn. Stat. Ann. § 260B/007(6)(b)
Mississippi	Miss. Code Ann. § 43-21-157(1)	Miss. Code Ann. § 43-21-151(1)
Missouri	Mo. Rev. Stat. § 211.071	
Montana		Mont. Code. Ann. § 41-5-206(2)
Nebraska		
Nevada	Nev. Rev. Stat. § 62B.390	Nev. Rev. Stat. § 62B.330(3)
New Hampshire	N.H. Rev. Stat. § 169-B:24	
New Jersey	N.J. Stat. § 2A:4A-26.1	
New Mexico		N.M. Stat. Ann. § 32A-2-3
New York		N.Y. Fam. Ct. Act § 301.2(8)
North Carolina	N.C. Gen. Stat. Ann. § 7B-2203	
North Dakota	N.D. Cent. Code § 27-20-34	
Ohio	Ohio Rev. Code § 2152.12	
Oklahoma	Okla. Stat. Ann. tit. 10A § 2-2-403	Okla. Stat. Ann. tit. 10A § 2-5-101
Oregon	Or. Rev. Stat. §§ 419c.340, 419c.349, 419c.352, 419c.355	Or. Rev. Stat. § 137.707
Pennsylvania	42 Pa. Cons. Stat. Ann. § 6355(a)	42 Pa. Cons. Stat. Ann. § 6355(e)
Rhode Island	R.I. Gen. Laws § 14-1-7(a), (b)	
South Carolina	S.C. Code Ann. § 63-19-1210	S.C. Code Ann. § 63-19-20

State	Judicial Waiver	Statutory Exclusion
South Dakota	S.D. Codified Laws § 26-11-4	S.D. Codified Laws § 26-11-3.1

State	Direct File	Once an Adult, Always an Adult
Massachusetts		
Michigan	Mich. Comp. Laws. § 600.606	Mich. Comp. Laws. § 712A.4(5)
Minnesota		Minn. Stat. Ann. § 260.125
Mississippi		
Missouri		
Montana	Mont. Code. Ann. § 41-5-206(1)	
Nebraska	Neb. Rev. Stat. § 43-276	
Nevada		Nev. Rev. Stat. § 62.040(2)(d)
New Hampshire		N.H. Rev. Stat. § 169-B:27
New Jersey		
New Mexico		
New York		
North Carolina		
North Dakota		N.D. Cent. Code § 27-20-34(4)
Ohio		Ohio Rev. Code § 2151.011(B)(6)
Oklahoma	Okla. Stat. Ann. tit. 10A § 2-5-205	
Oregon		Or. Rev. Stat. §§ 419c.364, 419c.367
Pennsylvania		42 Pa. Cons. Stat. Ann.

State	Direct File	Once an Adult, Always an Adult
Rhode Island		§ 6302 R.I. Gen. Laws § 14-1-7.1
South Carolina		
South Dakota		S.D. Codified Laws § 26-11-4

[*54]

State	Judicial Waiver	Statutory Exclusion
Tennessee	Tenn. Code § 37-1-134	
Texas	Tex. Fam. Code § 54.02	
Utah	Utah Code Ann. § 78A-6-703	Utah Code Ann. § 78A-6-701
Vermont	Vt. Stat. Ann. tit. 33 § 5204	Vt. Stat. Ann. tit. 33 §§ 5201(c), 5103, 5204
Virginia	Va. Code Ann. § 16.1-269.1	
Washington	Wash. Rev. Stat. § 13.40.110	Wash. Rev. Stat. § 13.04.030
West Virginia	Wash. Rev. Stat. § 49-4-710	
Wisconsin	Wis. Stat. § 938.18	Wis. Stat. § 938.183
Wyoming	Wyo. Stat. Ann. § 14-6-237	Wyo. Stat. Ann. § 14-6-203

State	Direct File	Once an Adult, Always an Adult
Tennessee		Tenn. Code § 37-1-134
Texas		Tex. Fam. Code § 54.02(m)(1)
Utah		Utah Code Ann. § 78-3a-603
Vermont		

State	Direct File	Once an Adult, Always an Adult
Virginia		Va. Code Ann. § 16.1-271
Washington		Wash. Rev. Stat. § 13.40.020(15)
West Virginia		
Wisconsin		Wis. Stat. § 938.183
Wyoming		

[*55] **APPENDIX B**

Judicial Waiver -- Statutory Requirements for Hearings [251]

State	Evaluation Required	Probable Cause Required	Party that Can Motion for Transfer	Burden Shift to Defendant
Alabama	Yes	Yes	State	No
Alaska	No	No [252]	Court	Offense
Arizona	If requested	Yes	State	No
Arkansas	Yes	No	Any	No
California	Yes	No	State	Offense
Colorado	If requested	Yes	State	Prior Record
Connecticut	No	Yes	State	No
Delaware	No	No	State or Court	No
D.C.	No	No [253]	State	Offense
Florida	Yes	No [254]	State	No
Georgia	Yes	Yes	State	No
Hawaii	Yes	No	Court	No
Idaho	No	No	Any	No
Illinois	No	Yes	State	Age
Indiana	No	Yes [255]	State	Age & Offense
Iowa	Yes	Yes	Any	No
Kansas	No	No	State	No
Kentucky	No	Yes	State	No
Louisiana	Yes	Yes	State or Court	No
Maine	If requested	Yes	State	Offense

[251] *See supra* Appendix A (listing all judicial waiver statutes by state).

[252] In Alaska, probable cause is a factor to be considered, but is not required before a juvenile is transferred.

[253] In D.C., for the purpose of the transfer hearing it is assumed that the child committed the delinquent act.

[254] In Florida, probable cause is a factor to be considered, but is not required.

[255] In Indiana, probable cause is required unless the minor is accused of a felony and has previously been charged with a felony.

State	Evaluation Required	Probable Cause Required	Party that Can Motion for Transfer	Burden Shift to Defendant
Maryland	No	No [256]	Court	No
Massachusetts				
Michigan	No	Yes	State	No
Minnesota	No	Yes	State	Age & Offense
Mississippi	Unless waived	Yes	Court	No
Missouri	No	No	State or Defense	No
Montana				
Nebraska				

[*56]

State	Evaluation Required	Probable Cause Required	Party that Can Motion for Transfer	Burden Shift to Defendant
Nevada	Yes	No	State	Always
New Hampshire	No	No [257]	Court	Age & Offense
New Jersey	No	No	State	No
New Mexico				
New York				
North Carolina	No	Yes	Court	No
North Dakota	No	Reasonable Grounds	Court	Offense
Ohio	Yes	Yes	Court	No
Oklahoma	Yes	Prospective Merit	State or Court	No
Oregon	No	No [258]	Court	No
Pennsylvania	No	Prima Facie Case	Court	Age & Offense
Rhode Island	No	Yes	State	Prior Record
South Carolina	No	No [259]	State or Court	No
South Dakota	No	No	Court	Age
Tennessee	No	Yes	Court	No
Texas	Yes	Yes	Court	No
Utah	If requested	Yes	State	Offense
Vermont	No	Yes	State	No
Virginia	Yes	Yes	State	Always
Washington	No	No	Any	No
West Virginia	No	No	State	No
Wisconsin	No	No	State or Defense	No
Wyoming	No	No	Any	No

[256] In Maryland, for the purpose of the transfer hearing, it is assumed that the child committed the delinquent act.

[257] In New Hampshire, courts only must consider the prospective merit of the complaint as a factor in the transfer decision.

[258] In Oregon, courts only must consider the prospective merit of the complaint as a factor in the transfer decision.

[259] In South Carolina, a minor can only be transferred after a "full investigation" has been made, but a probable cause requirement is not specified.

[*57] APPENDIX C

Judicial Waiver -- Factors Considered at Transfer Hearing [260]

State	Consideration of Factors	Offense	Prior Record	Mental Condition
Alabama	All	X	X	X
Alaska	Some	X	X	
Arizona	Any	X	X	X
Arkansas	Other	X	X	X [261]
California	Any	X	X	X
Colorado	Any	X	X	X
Connecticut	All	X	X	
Delaware	Any	X	X	X
DC	All	X	X	X
Florida	Any	X	X	X
Georgia	Other	X	X	X
Hawaii	All	X	X	X
Idaho	Some	X		X
Illinois	All	X	X	X
Indiana	Some	X	X	
Iowa	Other	X	X	
Kansas	All	X	X	X
Kentucky	2+	X	X	X
Louisiana	All	X	X	X
Maine	All	X	X	X
Maryland	All	X		X
Massachusetts	N/A			
Michigan	All	X	X	
Minnesota	All	X	X	
Mississippi	All	X [263]	X	X
Missouri [264]	Other	X	X	X

State	Consideration of Factors	Protection of Community	Possibility of Rehabilitation	Age
Alabama	All	X	X	X
Alaska	Some		X	

[260] *See supra* Appendix A (listing all judicial waiver statutes by state).

[261] Arkansas requires courts to specifically consider the juvenile's social and educational history.

[263] Mississippi requires courts to consider if the offense occurred on school property or put any other students in danger.

[264] Missouri requires courts to be mindful of racial disparities in certification of juveniles as adults.

State	Consideration of Factors	Protection of Community	Possibility of Rehabilitation	Age
Arizona	Any		X	
Arkansas	Other	X	X	X
California	Any		X	X
Colorado	Any	X	X	X
Connecticut	All		X	
Delaware	Any	X	X	X
DC	All	X	X [262]	X
Florida	Any	X	X	X
Georgia	Other	X	X	X
Hawaii	All	X	X	
Idaho	Some	X		
Illinois	All	X	X	X
Indiana	Some	X	X	
Iowa	Other	X	X	
Kansas	All	X	X	
Kentucky	2+	X	X	
Louisiana	All	X	X	X
Maine	All	X	X	X
Maryland	All	X	X	X
Massachusetts	N/A			
Michigan	All	X	X	
Minnesota	All	X	X	
Mississippi	All	X	X	X
Missouri [264]	Other	X	X	X

State	Consideration of Factors	Pattern of Living	Culpability	Victim Impact
Alabama	All			
Alaska	Some		X	
Arizona	Any		X	X
Arkansas	Other	X	X	
California	Any	X		
Colorado	Any	X		X
Connecticut	All			
Delaware	Any			X
DC	All			
Florida	Any			
Georgia	Other	X	X	X
Hawaii	All	X		
Idaho	Some	X		

[262] D.C. considers if whether or not family counseling would increase the potential rehabilitation of the juvenile.

State	Consideration of Factors	Pattern of Living	Culpability	Victim Impact
Illinois	All		X	X
Indiana	Some			
Iowa	Other		X	
Kansas	All	X		
Kentucky	2+	X		
Louisiana	All			
Maine	All	X		
Maryland	All		X	X
Massachusetts	N/A			
Michigan	All		X	X
Minnesota	All		X	X
Mississippi	All	X		
Missouri [264]	Other	X		

State	Consideration of Factors	Co-Defendants in Adult Court	Gang Involvement
Alabama	All		
Alaska	Some	X	
Arizona	Any		X
Arkansas	Other		
California	Any		
Colorado	Any		
Connecticut	All		
Delaware	Any	X	
DC	All		
Florida	Any	X	
Georgia	Other		
Hawaii	All	X	
Idaho	Some		
Illinois	All		
Indiana	Some		
Iowa	Other		
Kansas	All		
Kentucky	2+		X
Louisiana	All		
Maine	All		
Maryland	All		
Massachusetts	N/A		
Michigan	All		
Minnesota	All		

State	Consideration of Factors	Co-Defendants in Adult Court	Gang Involvement
Mississippi	All		
Missouri [264]	Other		

State	Consideration of Factors	Use of Weapon
Alabama	All	
Alaska	Some	
Arizona	Any	
Arkansas	Other	
California	Any	
Colorado	Any	X
Connecticut	All	
Delaware	Any	X
DC	All	
Florida	Any	
Georgia	Other	
Hawaii	All	
Idaho	Some	
Illinois	All	X
Indiana	Some	
Iowa	Other	
Kansas	All	
Kentucky	2+	
Louisiana	All	
Maine	All	
Maryland	All	
Massachusetts	N/A	
Michigan	All	
Minnesota	All	X
Mississippi	All	
Missouri [264]	Other	

[*58]

State	Consideration of Factors	Offense	Prior Record	Mental Condition
Montana	N/A			
Nebraska	N/A			
Nevada	All			X
New Hampshire	Other	X	X	X
New Jersey	All	X	X	X

State	Consideration of Factors	Offense	Prior Record	Mental Condition
New Mexico				
New York				
North Carolina	All	X	X	X
North Dakota	Other	X	X	X
Ohio	Other	X	X	X
Oklahoma	All	X [266]	X	X
Oregon	All	X	X	X
Pennsylvania	All	X	X	X
Rhode Island	All	X	X	
South Carolina	NS [267]			
South Dakota	Some	X	X	
Tennessee	Some	X	X	
Texas	Other	X	X	X
Utah	Some	X	X	X
Vermont	Some	X	X	X
Virginia	Other	X [268]	X	X
Washington	NS [269]			
West Virginia	All			X
Wisconsin	All	X*	X	X
Wyoming	All	X	X	X

State	Consideration of Factors	Protection of Community	Possibility of Rehabilitation	Age
Montana	N/A			
Nebraska	N/A			
Nevada	All			X
New Hampshire	Other	X	X	
New Jersey	All			X
New Mexico				
New York				
North Carolina	All	X	X	X
North Dakota	Other	X	X	
Ohio	Other	X	X	X
Oklahoma	All	X	X	
Oregon	All	X	X	

[266] Oklahoma additionally requires courts to consider if the offense was committed while escaping or attempting to escape from an institution for delinquent children.

[267] South Carolina does not specify any specific factors for courts to consider.

[268] Virginia is the only state that allows the judge to consider the potential sentence if the juvenile is convicted as an adult; specifically, if the maximum sentence for the crime if committed by an adult would exceed 20 years.

[269] Washington does not list any specific factors for courts to consider.

State	Consideration of Factors	Protection of Community	Possibility of Rehabilitation	Age
Pennsylvania	All	X	X	X
Rhode Island	All	X		
South Carolina	NS [267]			
South Dakota	Some	X	X	
Tennessee	Some		X	
Texas	Other	X	X	
Utah	Some	X	X	
Vermont	Some	X	X	X
Virginia	Other		X	X
Washington	NS [269]			
West Virginia	All			X
Wisconsin	All		X	X
Wyoming	All	X	X	

State	Consideration of Factors	Pattern of Living	Culpability	Victim Impact
Montana	N/A			
Nebraska	N/A			
Nevada	All	X		
New Hampshire	Other			
New Jersey	All		X	
New Mexico				
New York				
North Carolina	All			
North Dakota	Other	X	X	
Ohio	Other		X [265]	X
Oklahoma	All	X		
Oregon	All			
Pennsylvania	All		X	X
Rhode Island	All			
South Carolina	NS [267]			
South Dakota	Some			
Tennessee	Some			
Texas	Other			
Utah	Some	X		
Vermont	Some	X		X
Virginia	Other		X	

[265] Ohio gives more guidance on what makes a juvenile "culpable," and requires a court to consider if defendant was provoked and if the defendant knew actions would cause the harm that occurred.

State	Consideration of Factors	Pattern of Living	Culpability	Victim Impact
Washington	NS [269]			
West Virginia	All	X		
Wisconsin	All	X		
Wyoming	All	X		

State	Consideration of Factors	Co-Defendants in Adult Court	Gang Involvement
Montana	N/A		
Nebraska	N/A		
Nevada	All		
New Hampshire	Other	X	
New Jersey	All		
New Mexico			
New York			
North Carolina	All		
North Dakota	Other		
Ohio	Other		X
Oklahoma	All		
Oregon	All	X	
Pennsylvania	All		
Rhode Island	All		
South Carolina	NS [267]		
South Dakota	Some	X	
Tennessee	Some		X
Texas	Other		
Utah	Some	X	X
Vermont	Some		
Virginia	Other		
Washington	NS [269]		
West Virginia	All		
Wisconsin	All		X
Wyoming	All	X	

State	Consideration of Factors	Use of Weapon
Montana	N/A	
Nebraska	N/A	
Nevada	All	
New Hampshire	Other	
New Jersey	All	

State	Consideration of Factors	Use of Weapon
New Mexico		
New York		
North Carolina	All	
North Dakota	Other	
Ohio	Other	X
Oklahoma	All	
Oregon	All	
Pennsylvania	All	
Rhode Island	All	
South Carolina	NS [267]	
South Dakota	Some	
Tennessee	Some	
Texas	Other	
Utah	Some	X
Vermont	Some	
Virginia	Other	
Washington	NS [269]	
West Virginia	All	
Wisconsin	All	
Wyoming	All	

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Youthful Offenders and the Eighth Amendment Right to Rehabilitation: Limitations on the Punishment of Juveniles

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YOUTHFUL OFFENDERS AND THE EIGHTH AMENDMENT RIGHT TO REHABILITATION: LIMITATIONS ON THE PUNISHMENT OF JUVENILES

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INTRODUCTION

Professor Herbert Morris has famously argued that criminal offenders possess a moral right to be punished for their offenses.[1] This right is derived from a more fundamental natural right–inalienable and absolute—to be treated as a person.[2] Because persons have a right to have their choices respected, when one responsibly chooses to engage in conduct prohibited by a just system of criminal law,[3] one chooses the consequences of the violation:

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1. Herbert Morris, *Persons and Punishment in* PUNISHMENT (Joel Feinberg & Hyman Gross eds., (1975). For an example of the influence of Morris's work, *see* ANDREW VON HIRSCH, DOING JUSTICE 48-49 (1976). Professor Morris's paper is reprinted in numerous collections of essays on punishment. *See, e.g.*, PHILOSOPHICAL PERSPECTIVES ON PUNISHMENT 116 (Gertrude Ezorsky ed., 1972); SENTENCING 93 (Hyman Gross & Andrew von Hirsch eds., 1981).

2. The right is "inalienable" in the sense that the right cannot be waived or transferred to another, and "absolute" in the sense
that it always exists, even if occasions arise requiring that a person be denied the right. Morris, *supra* note 1, at 84-86.

3. Professor Morris's right to be punished is applicable only within a legal system which conditions punishment on a careful finding that a person is guilty of violating a "primary rule," which is similar to a core rule of our criminal law. To

punishment.[4] Non-punitive responses—most notably compulsory rehabilitative therapy—regard deviant conduct as merely symptomatic of an unhealthy status condition plaguing the offender rather than the product of a responsible moral agent.[5] Paternalistically imposing compulsory rehabilitative regimens on morally accountable offenders[6] disregards the offender's right to be punished.[7]

I have suggested elsewhere that the right to be punished may be constitutionally protected under the Cruel and Unusual Punishments Clause of the Eighth Amendment.[8] I have also explored the extent to which juveniles might enjoy the protections of this right, while Professor Sanford Fox has raised his influential voice in arguing for this right without explicitly grounding it in the Constitution.[9] Thus, rather than experiencing the *parens patriae*

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avoid unjust applications of punishment, accused offenders must be afforded a variety of substantive defenses permitting them to show that their offenses were involuntary or otherwise excusable. Moreover, the system must provide safeguards against double jeopardy and self-incrimination, rights to trial by jury, requirements of proof beyond a reasonable doubt as a prerequisite to conviction, and protections against punishment that is disproportionate to the seriousness of the offense or the culpability of the offender. Morris, *supra* note 1, at 75-78.

4. Professor Morris justifies the institution of punishment both as a necessary means of promoting compliance with the law and as a requirement of justice. *Id.* at 75-80. Justice demands that an offender be punished in order to restore the equilibrium lost through the offender's renunciation of the burdens of law-abiding conduct. Without punishment, the offender would gain an unfair advantage over law-abiding citizens since he would receive the benefits of life within the legal order without assuming the burdens of restraining his conduct in accordance with the rules of the legal system. *Id.*

5. *Id.* at 76-80.

6. *Id.* at 79-80.

7. For a theory similar to Morris's, *see* C.S. Lewis, *Humanitarian Theory of Punishment*, 6 RES. JUD. 224 (1953).

8. Martin R. Gardner, *The Right to be Punished—A Suggested Constitutional Theory*, 33 RUTGERS L. REV. 838 (1981). I argue also that offenders may choose not to assert their right to be punished and choose instead to accept an executive pardon if offered or therapeutic treatment in lieu of punishment should the state offer such a choice. *Id.* at 852-53.

9. Martin R. Gardner, *The Right of Juvenile Offenders to be Punished: Some Implications of Treating Kids as Persons*, 68 NEB. L. REV. 182 (1989). While it may be difficult to imagine how a juvenile would ever see it desirable to assert a right to be punished, one need only consider the facts of the most famous Supreme Court juvenile justice case, *In re Gault*, to see the possible value of the right's constitutional recognition. *In re Gault*, 387 U.S. 1 (1987). In *Gault*, a juvenile court judge committed fifteen-year-old Gerald Gault to the State Industrial School for the remainder of his minority, "that is until [age] 21, unless sooner discharged." *Id.* at 7.

dispensations of traditional juvenile courts,[10] the argument is that to the extent that older juveniles function as adults, they may be entitled to the right to be punished for their offenses rather than being subjected to the sometimes more onerous "rehabilitative" dispositions imposed by juvenile courts.[11]

Although some social science data supports the claim that adolescents are functionally equivalent to adults in terms of cognitive ability[12] and a few Supreme Court cases specifically identify juveniles as "persons"[13] in light of a recent series of cases

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An adult committing the same offense as Gerald—making an obscene phone call—could have been punished by no more than a five to fifty dollar fine or a jail sentence up to two months. *Id.* at 8. Gerald may well have preferred to be punished for a maximum of two months in jail rather than be subjected to up to six years incarceration in a secure state facility.

In addition to substantive issues, recognition of a right to be punished would also afford juveniles procedural advantages not otherwise available within the juvenile justice system. For example, due process procedural protections in "reverse certification" proceedings from criminal court to juvenile court would be required, allowing the juvenile the opportunity to assert his right to be punished in criminal court rather than rehabilitated in the juvenile system. *See* Gardner *supra* note 9, at 212-13. *See infra* notes 278-82 and accompanying text for a discussion of reverse certification. For Fox's argument that "children have a right to be punished for what they have done, not to be treated for what someone else thinks they are," see Sanford J. Fox, *The Reform of Juvenile Justice: The Child's Right to Punishment*, JUV. JUST., Aug. 1974, at 2, 6.

10. *See infra* notes 54-79.

11. *See infra* notes 9, 13 and accompanying text.

12. Empirical studies indicate that nothing distinguishes adolescent decision-making competency from adults. A commentator summarized the existing social science literature as follows: "[The] findings, suggest that adolescents, aged 14 and older, possess the cognitive capability to reason, understand, appreciate, and articulate decisions comparable to young adults. . . . [T]here is a paucity of scientific or social science study that supports the present legal view of adolescent incapacity" suggesting "a promising legacy for the recognition of adolescent autonomous rights." Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 51 HASTINGS L.J. 1265, 1286 (2000).

Such findings lead some to conclude that the law should treat adolescents as autonomous persons: "[A]dolescents' personhood should be recognized by policymakers. Insofar as denial of autonomy has been based on assumptions of incompetence, current psychological research does not support such an age-graded distinction." Gary B. Melton, *Toward "Personhood" for Adolescents: Autonomy and Privacy as Values in Public Policy*, 38 AM. PSYCHOLOGIST 99, 102 (1983).

13. *See, e.g.*, Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 511 (1969) (holding that school students are "persons" under the Constitution and thus enjoy First Amendment rights at school, specifically the right to wear black armbands to protest the Vietnam War); Planned Parenthood v. Danforth, 428 U.S. 52, 72-74 (1976)

disallowing capital punishment and life sentences without parole, (LWOP), as cruel and unusual under the Eighth Amendment[14] when applied to juveniles, the Court has now recognized that rather than enjoying a right to be punished, young people, specifically adolescents, instead uniquely possess the quite different—indeed in many ways antithetical—constitutional "right to a meaningful opportunity to be rehabilitated."[15] This right is based on the Court's

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("[M]inors as well as adults . . . possess constitutional rights" to abort pregnancies and such "rights do not mature and come into being magically only when one attains the state-defined age of majority.").

14. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. *See infra* Part III for discussion of the Court's cases.

15. *See infra* notes 156-60 and accompanying text. A variety of lower courts have previously recognized a statutory right to rehabilitation or "treatment" of juvenile offenders confined in state institutions. *See, e.g.*, State v. S.H., 877 P.2d. 205, 216 (Wash. Ct. App. 1994) (juvenile statute creates a "statutory duty to provide treatment"); J.D.W. v. Harris, 319 S.E.2d 815, 822 n.10 (W. Va. 1984) (providing for a "statutory right to rehabilitation and treatment"); State v. Trent, 289 S.E.2d 166, 175 (W. Va. 1982) (state statutes authorizing institutionalization of juveniles are aimed at rehabilitation, therefore juveniles "must be given treatment").

Moreover, some lower courts have also recognized federal constitutional rights to rehabilitation for confined juvenile offenders. *See, e.g.*, Alexander v. Boyd, 876 F. Supp. 773, 797 n.43 (D.S.C. 1995) (juveniles "are entitled . . . to rehabilitative treatment" under Fourteenth Amendment Due Process); Gary W. v. Louisiana, 437 F. Supp. 1209, 1219 (E.D. La. 1976) ("[t]he constitutional right [of delinquents] to treatment is a right to a program of treatment that affords the individual a reasonable chance to acquire . . . skills" necessary to cope with the demands of life); Nelson v. Heyne, 355 F. Supp. 451, 459 (N.D. Ind. 1972), aff'd 491 F.2d 352 (7th Cir. 1974) ("juvenile offenders are [constitutionally] entitled to rehabilitative efforts"). On the other hand, some courts have held that reasons other than rehabilitation—protection of society and protection of the juvenile from a dangerous or unhealthy environment—suffice to justify institutional confinement. *See, e.g.*, Santana v. Collazo, 714 F.2d 1172, 1176 (1st Cir. 1983). In the eyes of these courts, juveniles do not enjoy a constitutional right to rehabilitation.

Prior to the cases discussed *infra* at Part III, the Supreme Court had not spoken to whether or not offenders enjoy a constitutional right to rehabilitation. A leading commentator summarized the situation as follows: "For the time being, it would be sheer speculation to predict what the Supreme Court's response might be to a right to treatment claim by juveniles." SAMUEL M. DAVIS, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM 526 (2d ed. 2014) [hereinafter RIGHTS OF JUVENILES].

However, the Supreme Court has held that adults possess neither a right to rehabilitation nor parole release. *See* Swarthout v. Cooke, 131 S. Ct. 859, 862 (2011) (per curiam) ("There is no right under the Federal Constitution to be conditionally released before the expiration of a valid sentence, and the States are under no duty to offer parole to their prisoners.") (citation omitted). Thus, determinate sentences

identification of adolescents as, among other things, singularly amenable to rehabilitation, thus designating them a categorically distinct class from adults. Specifically, as I will show, the Court's decisions logically extend beyond LWOP sentences and strongly suggest that it is now unconstitutional to punish adolescent offenders with *any* sentence of imprisonment without providing for their possible rehabilitation.[16]

The implications of this new constitutional right to rehabilitation for adolescents are far reaching, affecting both the juvenile and criminal justice systems. Indeed, one commentator has observed that the Court's Eighth Amendment cases raise "questions about the constitutionality of any sentencing scheme that fails to take account of the . . . differences between children and adults,"[17] especially the unique potential of youthful offenders to reform. This Article explores those questions. I will demonstrate that the emphasis on rehabilitation does not necessarily spell the demise of all punishment of youthful offenders, whether in the criminal or juvenile system. I thus reject the view of some that the Court's recognition of the fundamental differences between adolescents and adults logically leads to the conclusion that juveniles may never be tried in adult criminal court.[18]

To understand the potential scope of the Court's implicit conclusion that the punishment of adolescents is unconstitutional unless a meaningful opportunity for rehabilitation is afforded, it is necessary to carefully distinguish and clarify the distinction between the conflicting concepts of punishment and rehabilitation. I therefore begin Part I by analyzing this distinction. Since the logic of the Court's decisions impacts the punishment of adolescents in both the juvenile and criminal justice contexts, I contrast the two systems in Part II by tracing the development of the juvenile court movement

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with no opportunities for rehabilitation are perfectly legal for adults.

16. *See infra* notes 230-66 and accompanying text.

17. Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescent*, 15 U. PA. J.L. & SOC. CHANGE 283, 321 (2012). In discussing the *Roper* case, an early decision in the line of cases that will be considered later in this article, one commentator presciently observed: "*Roper* may open the door for [various] sentences imposed on juvenile offenders to be deemed unconstitutional. [T]he United States may begin to see a shift in the philosophy and focus of the juvenile justice system back to one of rehabilitation, rather than punishment." Julie Rowe, *Mourning the Untimely Death of the Juvenile Death Penalty: An Examination of Roper v. Simmons and the Future of the Juvenile Justice System*, 42 CAL. W. L. REV. 287, 289 (2006). For discussion of *Roper*, *see infra* notes 127-37 and accompanying text.

18. *See infra* note 226.

from its original rehabilitative origins towards an increasingly punitive model, dispensing dispositions traditionally found only in the criminal system. In Part III, I discuss the Court's Eighth Amendment cases from which the right to an opportunity for rehabilitation emerges, examining in Part IV this right's implications for juveniles within the criminal justice system, showing specifically that juvenile offenders are now entitled to: (1) systematically less punishment than that imposed on adults committing the same offenses; (2) a robust individualized pre-sentencing hearing, taking into account, among other things, the offender's amenability to rehabilitation; (3) a disposition in the juvenile system if, at the pre-sentencing hearing, the offender is deemed to be amenable to rehabilitation and the juvenile system affords the best opportunity for its realization; and (4) a sentence offering a realistic possibility for rehabilitation and parole if the offender is deemed not amenable to rehabilitation at the pre-sentencing hearing.

In Part V, I explore the ramifications of the right to a meaningful opportunity for rehabilitation for the juvenile system, concluding: (1) that rehabilitative juvenile justice systems are now constitutionally mandated; (2) that for all juveniles charged with criminal offenses, jurisdiction must now originate in juvenile court with transfer to criminal court permitted only if a juvenile court judge finds that an accused is not amenable to rehabilitation within the juvenile system; and (3) for punishment within the juvenile system, the same judicial hearing and parole release requirements applicable to criminal court punishment are now equally required. Finally, in Part VI, I show that these manifestations of the right to a meaningful opportunity for rehabilitation are not waiveable by juvenile offenders and that implementation of this right would require considerable reform of current practices in both the criminal and juvenile systems.

I. PUNITIVE VS. REHABILITATIVE DISPOSITIONS: THE CONCEPTUAL DISTINCTION

Before examining the Supreme Court's Eighth Amendment case law concerning adolescent offenders, it is helpful to understand the role played by the rehabilitative ideal in the traditional juvenile court movement. While the effort to rehabilitate through state intervention was the *raison d'etre* for the advent of juvenile courts, adolescent offenders were always subject to possible punishment through waivers of jurisdiction from juvenile to criminal courts.[19]

19. *See infra* notes 68-69 and accompanying text.

Moreover, punishment is now an increasingly common occurrence within the juvenile system itself.[20]

A separate system of juvenile courts originated in large part to provide a "civil" rehabilitative, non-punitive alternative to deal with young people who violate criminal law.[21] The legislative choice of a system that rehabilitates rather than punishes was not simply an important policy decision, but also one of constitutional import. Impositions of "punishment" trigger legal consequences peculiar to that sanction.[22] Of particular importance for purposes of this Article, punitive sanctions alone are candidates for prohibition as cruel and unusual under the Eighth Amendment, while non-punitive dispositions, rehabilitative ones for example, are outside the Amendment's scope.[23] Thus, to understand the respective roles of rehabilitation and punishment within the juvenile justice system, as well as to comprehend the Court's recent recognition of the right to an opportunity for rehabilitation flowing from the Cruel and Unusual Punishments Clause—a right entailing both the concepts of rehabilitation and punishment—it is necessary to be clear about how coercive rehabilitation and punishment differ. As grounded in the Eighth Amendment, the rehabilitation right is triggered only if a punitive disposition is at stake.[24]

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20. *See infra* notes 80-93 and accompanying text; *see generally*, Martin R. Gardner, *Punitive Juvenile Justice and Public Trials by Jury: Sixth Amendment Applications in a Post-*McKeiver *World*, 91 NEB. L. REV. 1 (2012) [hereinafter Gardner, *Punitive Juvenile Justice*].

21. *See infra* notes 54-79 and accompanying text.

22. For a discussion of various constitutional protections applicable only when punishment is employed, Gardner, *Punitive Juvenile Justice, supra* note 20, at 11-12, 21-22 (2012). *See also infra* notes 71-77 and accompanying text. For a discussion of the presence of punishment as a necessity for relief under the Cruel and Unusual Punishments Clause of the Eighth Amendment, *see infra* notes 23, 70-77 and accompanying text.

23. "[A]n imposition must be 'punishment' for the Cruel and Unusual Punishments Clause to apply." Ingraham v. Wright, 430 U.S. 651, 670 n.39 (1977). The Court did allow, however, that "some punishments though, not labeled 'criminal' by the State, may be sufficiently analogous to criminal punishments . . . to justify application of the Eighth Amendment," noting that "[w]e have no occasion in this case, for example, to consider . . . under what circumstances persons involuntarily confined in mental or juvenile institutions can claim the protection of the Eighth Amendment." *Id.* at 669 n.37.

24. *See infra* notes 310-26 and accompanying text for a discussion of the necessity of distinguishing punishment and rehabilitation in understanding the constitutional impact of the rehabilitation right on presentencing practices in juvenile courts. I have elsewhere drawn the conceptual distinction developed in the text immediately *infra*. *See* Gardner, *Punitive Juvenile Justice, supra* note 20, at 13-

A. Punishment

Notwithstanding the unique legal significance of governmental imposition of punishment, the Supreme Court has never provided a precise definition of that sanction.[25] However, from the Court's cases, it is possible to make the following general observations: a sanction is punitive if a legislature so labels it,[26] and the Court will otherwise defer to the legislature if it labels a sanction non-punitive or "civil," unless a party challenging the sanction shows by the "clearest proof" that it is "so punitive either in purpose or effect as to negate [the State's] intention to deem it civil."[27] Moreover, in addressing the question of punitive purpose or effect, the Court routinely alludes to the "useful guideposts"[28] established in *Kennedy v. Mendoza-Martinez*,[29] which outlines "the tests traditionally applied to determine whether [a sanction] is penal . . . in character."[30] These tests include the following:

> [w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be

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22; Martin R. Gardner, *Punishment and Juvenile Justice: A Conceptual Framework for Assessing Constitutional Rights of Youthful Offenders*, 35 VAND. L. REV. 791, 798-800 (1982) [hereinafter Gardner, *Punishment and Juvenile Justice*].

25. The Court first attempted to define punishment in mid-nineteenth century cases arising under the Bill of Attainder and Ex Post Facto Clauses. *See* Cummings v. Missouri, 71 U.S. 277, 286-322 (1866) (finding that a teacher-priest was unconstitutionally punished by imposition of a $500 fine for continuing to teach without taking a required oath of allegiance to the Union under a state constitutional provision enacted after the teacher had begun teaching).

26. Smith v. Doe, 538 U.S. 84, 92 (2003). The Court has characterized the framework described immediately hereafter in the text as the "well established" basis for determining the presence of punishment. For examples of cases following the framework, see Gardner, *Punitive Juvenile Justice*, *supra* note 20, at 13 n.48.

27. *Smith*, 538 U.S. at 92 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)) (internal quotation marks omitted).

28. *Id.* at 97 (quoting Hudson v. United States, 522 U.S. 95, 99 (1997)).

29. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (holding that forfeiture of citizenship rights for fleeing the United States to avoid the draft constituted "punishment," thus triggering the protections of the Fifth, Sixth, and Eighth Amendments).

30. *Mendoza-Martinez*, 372 U.S. at 168.

> connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.[31]

These factors establish that punishment entails intentionally inflicting unpleasantness ("an affirmative disability or restraint") upon one engaging in undesirable "behavior" for purposes of exacting "retribution" and achieving "deterrence." So understood, punishment imposes unpleasantness upon a person as a response to his or her commission of a wrongful act.[32] Furthermore, the Court's attention to "scienter" in *Mendoza-Martinez* suggests that punishment is characteristically imposed on offenders believed blameworthy.[33] Thus, the state punishes when it purposely visits unpleasant consequences upon blameworthy offenders who have violated legal rules.

Although the Court has not emphasized the matter, philosophical literature defining punishment has articulated an additional central conceptual factor. Because punishment is a response to past action, it is "determinate" in the sense that its intensity and duration are set by the seriousness of the action to which it responds.[34] As one commentator notes, "we would be

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31. *Id.* at 168-69. For discussion of the problematic nature of the Court's reference to whether a sanction "appears excessive in relation to the alternative [non-punitive] purpose[s] assigned," see Gardner, *Punitive Juvenile Justice*, *supra* note 20, at 14 n.53.

32. This view of the Court's conception closely tracks H.L.A. Hart's famous characterization of the "standard case" of legal punishment:

> (i) [Punishment] must involve pain or other consequences normally considered unpleasant.
> (ii) It must be for an offence against legal rules.
> (iii) It must be of an actual or supposed offender for his offence.
> (iv) It must be intentionally administered by human beings other than the offender.
> (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.

H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1, 4-5 (1969).

33. Richard Wasserstrom also emphasizes blameworthiness as a fundamental precondition for punishment. Belief that the offender's action was "blameworthy" is a necessary factor in his definition of punishment. Richard Wasserstrom, *Some Problems with Theories of Punishment*, *in* JUSTICE AND PUNISHMENT 173, 179 (J.B. Cederblom & William L. Blizek eds., 1977). *See infra* note 36.

34. Punitive sentences are thus in a sense "fixed" and determined through attempts to proportion punishment to the seriousness of the relevant offense. *See, e.g.*, Anthony A. Cuomo, *Mens Rea and Status Criminality*, 40 S. CALIF. L. REV. 463,

punishing someone" if, in addition to imposing unpleasantness upon an offender by virtue of the fact that he or she culpably acted, "we determined—within at least some limits—at the time of our decision to punish what the nature and magnitude of the [inflicted] unpleasantness would be."[35]

To summarize, the Court's cases and the relevant philosophical literature reveal the following framework for determining whether a given sanction is punitive:

> (1) If the sanction is labeled punitive by the legislature, it is conclusively presumed to be so.
>
> (2) If the legislative label or intent indicates that the sanction is "civil," it will be presumed to be so unless it is shown "by the clearest proof" to be punitive under the following conception of punishment:
>
> (a) The sanction involves an unpleasant restraint purposely imposed by the state;
>
> (b) The sanction is imposed upon a person because of an offense;
>
> (c) The sanction is imposed to achieve the purposes of punishment—retribution and deterrence;
>
> (d) The extent of the unpleasant restraint is known, within possible limits, at the time of its imposition; and
>
> (e) The sanction is generally imposed upon offenders deemed to be blameworthy.[36]

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507 (1967). Justice Scalia has identified judicial imposition of fixed periods of incarceration on uncooperative litigants as the basis for distinguishing "criminal" contempt from "civil" contempt, which is characterized by indeterminate confinement until a litigant complies with a specific order of the court. *See* Int'l Union, United Mine Workers of Am. v. Bagwell, 521 U.S. 821, 840 (1994) (Scalia, J., concurring).

35. Wasserstom, *supra* note 33, at 179; *see also* Morris, *supra* note 1, at 78 (noting that "with punishment there is an attempt at some equivalence between the advantage gained by the wrongdoer—partly based upon the seriousness of the interest invaded, partly on the state of mind with which the wrongful act was performed—and the punishment meted out").

36. Some argue that the power of punishment to express social disapprobation toward morally blameworthy offenders is the central characteristic that distinguishes punishment from non-punitive sanctions. *See, e.g.*, Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (1958) ("What distinguishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition."); *see also* Joel Feinberg, *The Expressive Function of Punishment*, *in* DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 95, 98 (1970) (arguing that judgments of disapproval and reprobation are part of the definition of

As noted above, the distinction between punitive and rehabilitative dispositions[37] is central to understanding the legal consequences of the Supreme Court's constitutional recognition of a rehabilitation right. After clarifying the concept of punishment, attention will be turned to distinguishing it from rehabilitation.

B. Rehabilitation

Because coercive rehabilitation often entails significant deprivations of liberty,[38] it is sometimes mistakenly considered to be punishment.[39] However, therapeutic or rehabilitative dispositions are premised on principles directly opposite those defining punishment. Where punishment entails the purposeful infliction of suffering upon its recipient, rehabilitation involves a beneficent response[40] aimed at overcoming unwelcome aspects of its recipient's life.

Moreover, while punishment is linked to proscribed actions, rehabilitation is directed at alleviating a present unwelcome

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legal punishment). For discussion of the view that punishment does not, by definition, entail blameworthiness, see Martin R. Gardner, *Rethinking* Robinson v. California *in the Wake of* Jones v. Los Angeles: *Avoiding the "Demise of the Criminal Law by Attending to Punishment,"* 98 J. CRIM. L. & CRIMINOLOGY 429, 464-65 (2008) [hereinafter Gardner, *Rethinking*].

37. Theorists have noted the significance—for both philosophical as well as legal purposes—of distinguishing rehabilitation, often characterized as "treatment" or "therapy," from punishment. *See, e.g.*, TED HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 1 (1969); Morris, *supra* note 1; HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 25-28 (1968); Wasserstrom, *supra* note 33, at 179,180.

38. In juvenile justice, custodial confinement in "training schools" or "industrial schools" for purposes of rehabilitation has been a dispositional alternative from the beginning of the juvenile court movement. *See* MARTIN R. GARDNER, UNDERSTANDING JUVENILE LAW 303-04 (4th ed. 2014).

39. Some commentators have defined sanctions as punitive if the sanction is experienced as unpleasant by its recipients. Thus, if the "impact" of a sanction is to visit upon its recipient unpleasant restrictions similar to those experienced by persons who are punished—similar, for example, to deprivations existing in prisons—then the sanction is considered "punishment" regardless of the state's purpose in administering it. For a discussion of the impact theory and its inadequacies as a definition of punishment, see Gardner, *Punitive Juvenile Justice* *supra* note 20, at 17 n.61.

40. *See* PACKER, *supra* note 37, at 25 ("[T]he justification for [rehabilitation] rests on the view that the person subjected to it is or probably will be "better off" as a consequence."); Wasserstrom, *supra* note 33, at 179 ("[W]e would be treating someone if . . . [w]e acted in [a] way . . . [which] would alter [the recipient's] condition in a manner beneficial to him or her.").

status.[41] Wrongful conduct may be symptomatic of such status, but it is not a necessary predicate for rehabilitation.[42] As punishment responds to the commission of offenses, rehabilitation responds to the needs of the person, whether or not he or she has committed offenses. Finally, unlike punitive sentences which are determinate in nature,[43] rehabilitative dispositions are indeterminate upon imposition given the impossibility of knowing the time needed to rehabilitate a given offender.[44]

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41. *See* PACKER, *supra* note 37, at 25-26; Wasserstrom, *supra* note 33, at 179.

42. Offending conduct is the *sine qua non* of punishment but is not necessarily relevant to dispensations of treatment. PACKER, *supra* note 37, at 26. Packer explains:

> [I]n the case of Punishment we are dealing with a person because he has engaged in offending conduct; our concern is either to prevent the recurrence of such conduct, or to inflict what is thought to be deserved pain, or to do both. In the case of Treatment, there is no necessary relation between conduct and Treatment; we deal with the person as we do because we think he will be "better off" as a consequence.

Id.

43. *See supra* notes 34-35.

44. "[T]reatment [for rehabilitation is] always subject to revision upon a showing either: a. That an alternative response would be more beneficial to him or her, or b. That his or her condition has altered so as to no longer require that, or any other, further response." Wasserstrom, *supra* note 33, at 179. "The *idea* of treatment necessarily entails individual differentiation, indeterminacy, a rejection of proportionality, and a disregard of normative valuations of the seriousness of behavior." Barry Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 91 (1997) [hereinafter Feld, *Abolish the Juvenile Court*]. In distinguishing offense-oriented sentences (punitive) and offender-oriented ones (rehabilitative), Professor Feld observes:

> When based on the characteristics of the offense, the sentence usually is determinate and proportional, with a goal of retribution or deterrence. When based on the characteristics of the offender, however, the sentence is typically indeterminate, with a goal of rehabilitation or incapacitation. The theory that correctional administrators will release an offender only when he is determined to be "rehabilitated" underlies indeterminate sentencing. When sentences are individualized, the offense is relevant only for diagnosis. Thus, it is useful to contrast offender-oriented dispositions, which are indeterminate and non-proportional, with offense-based dispositions, which are determinate, proportional, and directly related to the past offense.

C. Punishment v. Rehabilitation: Mutually Exclusive Dispositions?

In light of the above discussion, it is not surprising that many consider punishment and coercive rehabilitation as mutually exclusive sanctions.[45] However, some disagree and consider

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Barry Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment and the Different it Makes*, 68 B.U. L. REV. 821, 847 (emphasis added) (footnotes omitted) [hereinafter Feld, *The Juvenile Court Meets . . . Punishment*].

45. Professor Feld sees an "innate contradiction" in attempting to combine a "penal social control" function with a rehabilitative "social welfare" function. Feld, *Abolish the Juvenile Court*, *supra* note 44, at 93.

> Conceptually, punishment and treatment are mutually exclusive penal goals. Both make markedly different assumptions about the sources of criminal or delinquent behavior. Punishment assumes that responsible, free-will moral actors make blameworthy choices and deserve to suffer the prescribed consequences for their acts. Punishment imposes unpleasant consequences because of an offender's *past offenses*. By contrast, most forms of rehabilitative treatment . . . assume some degree of determinism. . . . [T]reatment assumes that certain antecedent factors cause the individual's undesirable conditions or behavior. Treatment and therapy, therefore, seek to alleviate undesirable conditions in order to improve the offender's *future welfare*.

Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 44, at 833 (footnotes omitted).

Professor Federle observes that "the juvenile court fluctuates between punishment and rehabilitation without attempting to reconcile these opposing justifications" which are "two [irreconcilable] polar impulses." Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23, 38 (1990). H.L.A. Hart observes that "[t]he ideals of Reform . . . (corrective training) . . . plainly run counter to . . . [punitive] principles of Justice or proportion." Hart, *supra* note 32, at 25. Professor Herbert Morris, as noted above, argues for a basic human right to be punished for one's criminal offenses in stark contrast to being subjected to coercive rehabilitation which disrespects human dignity. *See generally* Morris, *supra* note 1. Herbert Packer adds that punishment and rehabilitation are "always distinguish[ed] . . . [by] the nature of the relationship between the offending conduct and what we do to the person who has engaged in it." PACKER, *supra* note 37, at 26. He explains:

> If we send [a troubled youth] to a school pursuant to a judgment that he has engaged in offending conduct, we are subjecting him to Punishment; if we think that he will be better off in jail than on the streets and proceed to lock him up without a determination that he has engaged in offending conduct, we are subjecting him to Treatment.

Id.

punishment and rehabilitation compatible.[46] Both camps are correct, depending on the context in which they make their claims.

Those seeing compatibility correctly point out that punishment sometimes makes its recipient "better off."[47] Adult inmates have long been sent to penal institutions as punishment for committing criminal offenses, but with hopes that they will also be rehabilitated.[48] While in practice these goals may well be fundamentally at odds,[49] there are situations where individuals emerge from prison "rehabilitated," at least in part as a consequence of events or rehabilitation programs occurring within the prison.[50]

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46. *See In re* Buehrer, 236 A.2d 592, 596-97 (N.J. 1967) (viewing probation as both punitive and rehabilitative).

47. *See* PACKER, *supra* note 37, at 26-27; *infra* note 51 and accompanying text.

48. *See infra* notes 78-79 and accompanying text. For example, the punishments defined by the Model Penal Code are administered within a "general framework of a preventative scheme" with "rehabilitation" as a "subsidiary" goal. MODEL PENAL CODE § 1.02 explanatory note (Official Draft 1985).

Some claim that the introduction of the rehabilitative ideal into adult criminal law theory meant that punishment, with its concerns for retribution and deterrence, had been totally abandoned in favor of a systematically rehabilitative and preventative model. *See* Jerome Hall, *Justice in the 20th Century*, 59 CALIF. L. REV. 752, 753 (1971) (describing the widespread disillusionment with punishment in the twentieth century with attendant disparagement of theories of deterrence and retribution and the emergence of rehabilitation as "the single rational goal" of legal policy).

However, the emergence of the rehabilitative ideal never meant the total demise of punishment. Vestiges of retributivism remained in legislation embodying the rehabilitative model. Sentences were based on legislative proscriptions of maximum penalties based on offenses and considerations of relative blameworthiness. *See* AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 38 (1974). The commission of a criminal act as a necessary predicate for a sentence thus belied any systematic rehabilitative model in favor of a "backward-looking," desert-oriented system of justice.

49. In a famous statement expressing skepticism regarding the effectiveness of rehabilitation within penal confinement, Judge Marvin Frankel said "no one should ever be sent to prison *for rehabilitation*." United States v. Bergman, 416 F. Supp. 496, 499 (S.D.N.Y. 1976) (emphasis added). By the 1970s disillusionment with the rehabilitative ideal had become widespread. *See* Martin R. Gardner, *The Renaissance of Retribution: An Examination of Doing Justice*, 1976 WIS. L. REV. 781, 782-83 [hereinafter Gardner, *The Renaissance of Retribution*].

50. *See* Christoper Slobogin, *The Civilization of the Criminal Law*, 58 VAND. L. REV. 121, 132 (2005) (arguing that "properly conducted" programs of "risk management" may effectuate offenders' ability to change their antisocial behavior). *But see* Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, Spring 1974 PUB. INTEREST 22, 25 (arguing only in a "few and isolated" situations do rehabilitative efforts in correctional institutions actually reduce

In the juvenile justice context, one commentator made the following observation: "[P]unishment and rehabilitation are theoretically compatible. In recent years, researchers have begun to suggest that some degree of punishment, especially for serious offenders, is appropriate and compatible with the juvenile system's child-centered philosophy. . . . [s]ome types of 'punishment' can serve to rehabilitate a young offender."[51]

On the other hand, while rehabilitation may occur within a punitive regime,[52] the concepts of punishment and rehabilitation are mutually exclusive for purposes of assessing Eighth Amendment applicability.[53] If a given disposition is solely rehabilitative or otherwise non-punitive, it is not subject to scrutiny under the Cruel and Unusual Punishments Clause of the Eighth Amendment.

Having clarified the respective meanings of punishment and rehabilitation, consideration can now be directed to the role each plays in the context of criminal acts committed by juveniles. As the following discussion illustrates, both rehabilitation and punishment are often aspects of juvenile offender dispositions imposed in either juvenile or criminal courts.

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recidivism).

51. Julianne P. Sheffer, Note, *Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation Within the Juvenile Justice System*, 48 VAND. L. REV. 479, 506-08 (1995) (arguing that scaled-down punishment in the juvenile system followed by intensive follow up and counseling achieves effective rehabilitation).

52. Similarly, punishment may occur within rehabilitative dispositions. *See, e.g.*, Knecht v. Gillman, 488 F.2d 1136, 1139-40 (8th Cir. 1973) (holding that administering to hospitalized mental patient a drug, which induces vomiting as "aversive stimuli," for allegedly violating behavior rule of the institution, constitutes cruel and unusual punishment unless the inmate consents to the use of the drug). However, the Supreme Court has arguably ruled that Eighth Amendment remedies are unavailable to involuntarily committed mental patients even if hospital officials are deliberately indifferent to their medical and psychological needs. *See* Youngberg v. Romeo, 457 U.S. 307, 312, 325 (1982) (holding that the lower court erred in instructing the jury on the Eighth Amendment deliberate indifference standard in the case of a patient's allegations of unsafe conditions in the hospital where he was confined). The Court noted with approval the position of the Third Circuit Court of Appeals that the "Eighth Amendment, prohibiting cruel and unusual punishment of those convicted of crimes, was not an appropriate source for determining the rights of the involuntarily committed." *Id.* at 312.

53. *See supra* notes 22-23 and accompanying text.

II. THE JUVENILE JUSTICE MOVEMENT: FROM REHABILITATIVE TO PUNITIVE DISPOSITIONS

A. The Rehabilitative Ideal and Original Juvenile Justice

The first juvenile court system was implemented in 1899.[54] Prior to that time, young people committing criminal offenses were subjected to the same criminal court system and array of punishments as adult offenders.[55] Even so, children had long been recognized as different from adults, as exemplified by the common law infancy defense reflecting the view that children lack the mature ability to appreciate the wrongfulness of their actions and are thus less culpable and deterrable than their adult counterparts.[56] This defense specified that children under the age of seven conclusively lacked criminal responsibility thus exempting them from criminal court jurisdiction; children between ages seven and fourteen were subject to a rebuttable presumption of non-responsibility;[57] and adolescents, those over the age of fourteen, were treated as adults.[58]

With the arrival of the twentieth century, progressive reformers acted on these perceived differences between young people and adults and established separate court systems for juveniles aimed at rehabilitating those committing criminal offenses while attending to the needs of other troubled youths not charged with violating criminal statutes.[59] After its initial enactment in Illinois,[60] the movement quickly spread nationwide and throughout Europe.[61] Underlying the movement was the belief that because of their developing maturation, young people are by their nature uniquely

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54. SAMUEL M. DAVIS, CHILDREN'S RIGHTS UNDER THE LAW 253-54 (2011) [hereinafter DAVIS, CHILDREN'S RIGHTS].

55. Andrew Walkover, *The Infancy Defense in the New Juvenile Court*, 31 UCLA L. REV. 503, 509 (1984).

56. *Id.* at 509-10.

57. The presumption could be overcome by the prosecutor showing that the young defendant in fact appreciated the wrongfulness of his or her actions. *Id.* at 510-11.

58. *Id.* Adolescence is often defined as the period beginning at age 14 and extending to adulthood. *See, e.g.*, Hartman, *supra* note 12.

59. Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 44, at 824; Elizabeth S. Scott & Thomas Grisso, *The Evolution of Adolescence: A Developmental Perspective on Juvenile Justice Reform*, 88 J. CRIM. L. & CRIMINOLOGY 137, 141 (1997).

60. DAVIS, *supra* note 15, at 1.

61. *See* Charles W. Thomas & Shay Bilchik, *Prosecuting Juveniles in Criminal Courts: A Legal and Empirical Analysis*, 76 J. CRIM. L. & CRIMINOLOGY 439, 451 (1985).

amenable to rehabilitation[62] while also being unfit subjects for punishment because their immaturity renders them neither culpable[63] nor deterrable.[64] As a manifestation of *parens patriae* power,[65] the juvenile court movement constituted an attempt to meet the needs of youthful violators of criminal statutes—generally referred to as "delinquents"—rather than to punish them for their offenses.[66] "Dispositions" were "indeterminate,"[67] possibly extending throughout the period of minority, and were aimed at promoting the

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62. Scott & Grisso, *supra* note 59, at 142. Young people were not the sole subjects of the "rehabilitative ideal." Reformers had come to believe that all criminal conduct was determined by underlying conditions affecting the offenders rather than as the product of their free choices. *Id.* at 141. Thus, treatment, rather than punishment, was the preferred disposition for adult offenders, although perhaps not as successfully employed as in the case of their more malleable juvenile counterparts. *See supra* note 36 and accompanying text.

63. *See* Sanford J. Fox, *Responsibility in the Juvenile Court*, 11 WM. & MARY L. REV. 659, 661-64 (1970).

64. Scott & Grisso, *supra* note 59, at 143. The juvenile court movement thus extended the underlying predicates of the infancy defense not just to children under the age of fourteen, but to all young people under the age of majority.

65. The original English concept of *parens patriae*, applied historically by chancery courts, allowed courts to exercise the Crown's paternal prerogative to declare a child a ward of the Crown when the parents had failed to maintain the child's welfare. *See generally* Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S.C. L. REV. 205 (1971).

66. "Delinquents" are juveniles who commit offenses that would be crimes if committed by an adult. MARTIN R. GARDNER, UNDERSTANDING JUVENILE LAW 175 (4th ed. 2014). The fundamental concern of juvenile courts towards child offenders was with "what is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career." Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119-20 (1909). In adopting reformation as its goal, the juvenile court movement eschewed retributivist notions of guilt and blameworthiness. Francis Barry McCarthy, *The Role of the Concept of Responsibility in Juvenile Delinquency Proceedings*, 10 U. MICH. J.L. REFORM 181, 207 (1977).

67. A "disposition" is a euphemism for a criminal court "sentence." The juvenile court movement adopted a set of euphemisms to replace the stigmatic terminology of criminal law. GARDNER, *supra* note 38, at 167. "Indeterminate" dispositions are those with no set limit, which could continue until adulthood. Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed?* 34 N. KY. L. REV. 189, 196 n.37 (2007) [hereinafter Feld, *A Century of Juvenile Justice*]. The rehabilitative objectives of the juvenile system were characterized by a system of indeterminate sentencing in which the type and duration of sanctions were dictated by the "best interests" of the offender rather than the seriousness of the offences. Stephen Wizner & Mary F. Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?* 52 N.Y.U. L. REV. 1120, 1121 (1977).

best interests of the offender, rather than "determinate" in proportion to the minor's offenses.

While enacted to function as rehabilitative alternatives to the criminal system, juvenile courts from early on provided mechanisms to transfer ("waive") juvenile court jurisdiction to criminal court in certain cases.[68] Once transferred to criminal court, juveniles enjoyed the full array of procedural protections of the criminal process while being subject to all the punishments imposed upon convicted adults.[69]

In opting for a "civil" rehabilitative alternative to the punitive system, reformers moved in a new policy direction[70] with constitutional implications. As mentioned above, impositions of punishment generate constitutional consequences, triggering rights—"some substantive[,][71] others procedural[—]under various Bill of Rights provisions applicable to 'criminal' cases[72] and 'prosecutions.'"[73] Such rights do not necessarily apply to proceedings

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68. "In 1903 . . . the Chicago juvenile court transferred fourteen children to the adult criminal system." Stephen Wizner, *Discretionary Waiver of Juvenile Court Jurisdiction: An Invitation to Procedural Arbitrariness*, 3 CRIM. JUST. ETHICS 41, 42 (1984). Such a trend continued into the 1970s, when every American jurisdiction had laws authorizing or requiring criminal prosecution of certain minors in adult courts. *Id.*; *see also* Barry C. Feld, *Reference of Juvenile Offenders for Adult Prosecution: The Legislative Alternative to Asking Unanswerable Questions*, 62 MINN. L. REV. 515, 516 n.5 (1978) (discussing the varied terminology used to describe the juvenile waiver procedure). Waiver is generally reserved for those youths whose "highly visible, serious, or repetitive criminality raises legitimate concern for public safety or community outrage." Barry C. Feld, *Juvenile Court Legislative Reform and the Serious Young Offender: Dismantling the "Rehabilitative Ideal"*, 65 MINN. L. REV. 167, 171 (1980). However, many youths committing minor offenses are also dealt with in criminal court, perhaps because of the unavailability of fines as a juvenile court sanction. Stephen Wizner, *Discretionary Waiver of Juvenile Court Jurisdiction: An Invitation to Procedural Arbitrariness*, 3 CRIM. JUST. ETHICS 41, 44-45 (1984).

69. DAVIS, RIGHTS OF JUVENILES, *supra* note 15, at 214. As noted above, the Supreme Court has, however, recently found that certain punishments constitute cruel and unusual punishment under the Eighth Amendment when applied to offenders who commit their crimes while under eighteen years of age. *See infra* Part III.

70. At the same time the rehabilitative ideal was being embodied in the new juvenile movement, similar policies were enacted in the criminal law as indeterminate sentencing emerged in the attempt to rehabilitate adult offenders within prisons, if possible, and restrain them therein if deemed dangerous and unrehabilitated. ANDREW VON HIRSCH, *supra* note 1, at 9-10.

71. *See* Gardner, *Punitive Juvenile Justice*, *supra* note 20, at 11 n.37 for a discussion of constitutional rights depending on the presence of punishment.

72. *Id.*

73. *Id.*

dispensing such non-punitive sanctions as coerced rehabilitation.[74] Moreover, distinguishing punishment from rehabilitation is constitutionally necessary in light of the Supreme Court's proclamation in *Robinson v. California*[75] that a person may never be "punished" under the Eighth Amendment for undesirable status conditions, but may be subjected to compulsory rehabilitation or medical "treatment."[76] Thus, if a juvenile justice system were in fact "punitive," even though nominally "rehabilitative," it would become a "criminal" legal system subject to those requirements unique to state impositions of punishment.[77]

At the same time the rehabilitative ideal was finding its place in the juvenile court movement, a similar policy was emerging in the criminal law as indeterminate sentencing and parole release were embraced as aspects of the attempt to rehabilitate adult offenders within prisons, and to restrain therein dangerous, unrehabilitated offenders.[78] Today, many jurisdictions continue indeterminate sentencing with inmates being released from confinement when parole boards find them rehabilitated.[79]

B. The Modern Juvenile Court and the Emergence of the Punitive Sanction

While for most of the twentieth century the rehabilitative ideal influenced criminal law sentencing, in the 1970s various theorists and legislatures de-emphasized rehabilitation as a penal goal and

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74. *See, e.g.*, Addington v. Texas, 441 U.S. 418, 428 (1979) (holding civil commitment proceedings are not "punitive" in purpose, and hence are not "criminal cases" uniquely requiring "proof beyond a reasonable doubt"—proof by "clear and convincing evidence" is sufficient in civil commitment matters). For a comprehensive discussion of the variety of legal consequences of the punitive/nonpunitive distinction, see *generally* J. Morris Clark, *Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis*, 60 MINN. L. REV. 379 (1976).

75. Robinson v. California, 370 U.S. 660, 666-68 (1962).

76. *Id.* (holding that a state may require drug addict to undergo compulsory treatment, but may not punish him for the status of drug addiction). *See In re* De La O, 378 P.2d 793 (Cal. 1963) (holding that a confinement of petitioner for six months to five years for a drug addiction constituted permissible "treatment and rehabilitation" rather than impermissible "punishment" under *Robinson*).

77. "Criminal" law is distinguished from "civil" law by the former's imposition of punishment. Professor George Fletcher explains: "The best candidate for a conceptual proposition about the criminal law is that the infliction of 'punishment' is sufficient to render a legal process criminal in nature." GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 408-09 (1978) (footnotes omitted).

78. *See supra* note 70.

79. *See supra* 48-49 and accompanying text.

embraced retributive theory, supporting punishment as the vehicle to afford offenders their "just deserts" and to deter crime.[80] By the mid-1980s roughly half the states had enacted determinate sentencing laws, with several eliminating parole and some enacting sentencing guidelines setting prison terms.[81]

This new retributive philosophy also infiltrated juvenile justice as policy makers adopted "get tough" penalties on youthful offenders in response to the perception of rapidly increasing juvenile crime.[82] In the mid-1990s, virtually all states enacted measures facilitating the transfer of more and younger youths to criminal court for prosecution.[83] Moreover, the traditional offender-oriented emphasis of juvenile courts began to be joined, if not replaced, by retributive and deterrence considerations reflected in the enactment of statutes embodying determinate and mandatory minimum offense-based sentencing.[84]

Some states, Washington in particular, enacted systems explicitly aimed at providing "punishment commensurate with the age, crime, and criminal history of the juvenile offender"[85] in order

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80. *See generally* Gardner, *The Renaissance of Retribution*, *supra* note 49. Professor Feld notes that in the 1970s determinate sentencing based on present offense and prior record increasingly replaced indeterminate sentencing as "just deserts" and retribution displaced rehabilitation as the underlying rationale for criminal sentencing. Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & FAM. STUD. 11, 26 n.83 (2007) [hereinafter Feld, *Unmitigated Punishment*].

81. Feld, *Unmitigated Punishment*, *supra* note 80, at 26 n.83.

82. *Id.* at 25, 31; Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323, 331 (1991).

83. Feld, *Unmitigated Punishment*, *supra* note 80, at 31, 34, 40. Among the states, the enhanced waiver policy took three forms: liberalizing the power of judges to make waiver decisions; legislative exclusion of certain offenses from juvenile court jurisdiction; and granting prosecutors discretion to "directly-file" certain cases in criminal court. *Id.* at 38-39. *See generally* Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 J. CRIM. L. & CRIMINOLOGY 471 (1987); *see also* Forst & Blomquist, *supra* note 82, at 337-42 (discussing the various waiver procedures used to transfer juveniles into adult criminal court).

84. As of 1988, about one-third of the states had employed offense-based determinate sentencing in one form or another. Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 44, at 851.

85. WASH. REV. CODE ANN. § 13.40.010(2)(d) (West 2013). "In passing the Juvenile Justice Act of 1977, Washington became the first state to enact a [systematic] determinate sentencing statute for juvenile offenders." Forst & Blomquist, *supra* note 82, at 343. *See id.* at 343-45, 346-49 for discussion of California's enactment of a punitive approach. Kansas has adopted a system similar

to, among other things, "[m]ake the juvenile offender accountable for his or her criminal behavior."[86] The Washington juvenile code embodies a presumptive sentencing system in which dispositions are determined by the youth's age, the offense committed, and the history and seriousness of previous offenses.[87] The direct purpose of such provisions is not to promote the rehabilitative needs of the offender, but rather to create an extensive sentencing system aimed at holding juveniles accountable in proportion to their culpability, thus imposing less severe dispositions than adult offenders committing the same offense would receive in criminal court.[88]

The statutes of other states also now include offense-based criteria with substantial sentences imposed on juvenile offenders committing the most serious crimes and proportionally shorter sentences for those committing less serious offenses.[89] Some dictate mandatory minimum terms of confinement based on the seriousness of the offense,[90] while others retain indeterminate sentencing for convicted delinquents generally, but mandate determinate dispositions for repeat offenders or those committing certain serious offenses.[91] These latter jurisdictions thus manifest pockets of punitive juvenile justice within otherwise indeterminate, and arguably rehabilitative, systems. The offense-oriented, determinate sentencing movement constitutes a clear invocation of the punitive sanction,[92] and stands in stark contrast to the offender-oriented, indeterminate dispositional scheme reflected in traditional rehabilitative juvenile justice.[93]

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to Washington's. *See In re* L.M., 186 P.3d 164 (Kan. 2008) for a discussion of the Kansas model.

86. WASH. REV. CODE ANN. § 13.040.010(2)(c) (West 2013).

87. The Washington system is described in detail elsewhere. *See* Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 44, at 843, 852-55; Walkover, *supra* note 55, at 528-31. The ramifications of the right to rehabilitation, discussed *infra* notes156-84 and accompanying text, would impact the Washington system in significant ways. See *infra* notes 307-12 and accompanying text.

88. Walkover, *supra* note 55, at 531.

89. *See, e.g.*, Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 44, at 859-60.

90. *Id.* at 862-63.

91. *Id.* at 863-71. For the impact the new rehabilitation right had on these statutes, *see infra* notes 313-25 and accompanying text.

92. *See supra* notes 26-36 and accompanying text for a definition of "punishment" for constitutional purposes.

93. *See supra* notes 54-77 and accompanying text.

C. Punishment of Juveniles in Criminal Court

1. Judicial Waiver

Today most states continue to vest juvenile courts with exclusive original jurisdiction over young people charged with acts of delinquency.[94] In these states, where waiver of jurisdiction to criminal court is permitted,[95] the juvenile court judge conducts a hearing[96] and—using statutorily defined criteria—decides whether

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94. DAVIS, RIGHTS OF JUVENILES, *supra* note 15, at 53; BARRY C. FELD, JUVENILE JUSTICE ADMINISTRATION 221 (2014).

95. Most states require that the accused juvenile be over a certain age and charged with a particularly serious offense before juvenile court jurisdiction may be waived. DAVIS, RIGHTS OF JUVENILES *supra* note 15, at 224. However, some states place no limitations on waiver, permitting waiver without regard to age or nature of offense. *Id.* at 228.

96. The Supreme Court has required due process protections for juvenile candidates for waiver to criminal court. Kent v. United States, 383 U.S. 541 (1966). Finding the loss of the rehabilitative protections of the juvenile court to be "critically important" to the juvenile, the *Kent* Court required: a judicial hearing; assistance of counsel; access to social investigations; and a record of the findings of the judge thus enabling review by an appellate court. *Id.* at 553-54. The *Kent* Court also offered a list of adequate substantive criteria for courts to employ when making waiver decisions:

> The determinative factors which will be considered by the Judge in deciding whether the Juvenile Court's jurisdiction . . . will be waived are the following:
> 1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver. 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner. 3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted. 4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney). 5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in [adult criminal court]. 6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living. 7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions. 8. The prospects for adequate protection of the public and the likelihood of reasonable

the case should be waived to criminal court.[97] Waiver is generally reserved for cases of serious criminality where repetitive misconduct raises concerns for public safety or where the likelihood of rehabilitation within the juvenile system is deemed unlikely.[98]

Waiver procedures often employ presumptions in favor of waiver for certain designated serious offenses with the burden of proof placed on the juvenile to establish why the juvenile court should retain jurisdiction.[99] Waiver hearings are conducted informally,[100] and allow both the state and the juvenile to present evidence and cross-examine the testimony and submissions of the other side.[101] Proceedings are initiated by the state filing a motion to "waive" jurisdiction and—except in cases involving a presumption in favor of waiving the case to criminal court—the state must carry the burden of proof by either a preponderance of the evidence or clear and convincing evidence, depending on the jurisdiction.[102] Generally, state statutes dictate that the decision to waive is irrevocable.[103]

Because the focus of waiver hearings is at least in part directed to the juvenile's amenability to rehabilitation, expert psychiatric evidence and clinical evaluations are often considered by the court.[104] In making amenability decisions, courts consider the clinical evidence in light of the juvenile's age and the time remaining within juvenile court jurisdiction.[105] Thus older juveniles, particularly those committing serious offenses, are prone to be

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> rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

Id. at 566-67.

97. State statutes often incorporate the *Kent* criteria listed above, *see supra* note 95; FELD, *supra* note 94, at 225.

98. Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 147 (2010). For a list of the waiver statutes from all the states, see Martin Guggenheim, Graham v. Florida *and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 493-94 (2012).

99. FELD, *supra* note 94, at 227.

100. For example, strict evidentiary rules are not followed, with "informal-but-reliable evidence" sometimes sufficing. FELD, *supra* note 94, at 229-31.

101. *Id.* at 229.

102. *Id.* at 229-30.

103. *Id.* at 230. However, some states require a juvenile to be returned to juvenile court for disposition if he or she is convicted in criminal court of a lesser included offense than that originally considered by the juvenile court. DAVIS, RIGHTS OF JUVENILES *supra* note 15, at 240.

104. *Id.* at 232.

105. *Id.* at 234.

transferred to criminal court due to inadequate time for rehabilitation within the juvenile system.[106] Moreover, courts routinely transfer juveniles to criminal court who have been unsuccessful in prior rehabilitation interventions made available by the state.[107]

2. Legislative Exclusion

Statutes in the majority of states grant criminal courts exclusive jurisdiction over youths of a certain age charged with certain offenses—generally serious crimes committed by older juveniles.[108] Apart from considering age, the statutes focus on the crime charged rather than the circumstances of the offender and thus foreclose consideration of the juvenile's amenability to treatment through the juvenile court.[109] Rejecting claims that a right to such treatment exists,[110] courts have historically upheld legislative exclusion statutes against constitutional attack.[111] Underlying such statutes is the belief that youthful offenders committing serious crimes are not amenable to rehabilitation, or even if they were, the costs of their rehabilitation would be too expensive, thus diverting resources from other more amenable juveniles within the juvenile system.[112] Furthermore, the statutes reflect the perception that older juveniles committing serious crimes deserve to be punished for their offenses.[113]

3. Prosecutorial Discretion: Direct File

A dozen or so jurisdictions grant prosecutors the authority to decide whether to bring cases involving youthful offenders in either juvenile or criminal court.[114] In most concurrent jurisdiction states,

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106. *Id.*

107. *Id.*

108. DAVIS, RIGHTS OF JUVENILES, *supra* note 15, at 30; FELD, *supra* note 94, at 239.

109. FELD, *supra* note 94, at 243.

110. *Id.* at 239.

111. *See, e.g.*, United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 909 (1973). *Bland* is considered in detail *infra* notes 269-72, 268 and accompanying text.

112. FELD, *supra* note 94, at 244.

113. *Id.*

114. DAVIS, RIGHTS OF JUVENILES, *supra* note 15, at 38. *See infra* notes 284-85 and accompanying text.

the statutes afford no guidelines, standards, or criteria,[115] but simply allow the prosecutor discretion to choose either juvenile or criminal court. As with legislative exclusion, direct file statutes routinely have been upheld, often with courts explicitly rejecting claims that juveniles have constitutional rights to the rehabilitative auspices of the juvenile court.[116]

III. THE SUPREME COURT'S JUVENILE PUNISHMENT CASES AND THE EIGHTH AMENDMENT RIGHT TO REHABILITATION

As mentioned above, the Supreme Court has sometimes flirted with the idea that young people enjoy the constitutional protections afforded autonomous persons.[117]At the same time, the Court has often recognized that for some legal purposes children, even adolescents, are sufficiently different from adults so as to justify denials of autonomy and personhood rights.[118] Because of a perceived lack of mature competence, the Court has upheld numerous state measures denying juveniles personhood rights in the name of affording them protection, care, discipline, and guidance.[119] At no time, however, has the Court *required* that children be treated differently from adults.[120]

That all changed in the Court's Eighth Amendment cases with the Court's recognition of a categorical distinction between young people and adults entitling juveniles to constitutional rights of protection and care unavailable to adults. These cases—beginning with capital punishment situations and moving to the context of life imprisonment—are certain to impact juvenile law in significant ways.

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115. FELD, *supra* note 94, at 247.

116. *Id.* at 247-48; *see infra* notes 286-92 and accompanying text.

117. *See supra* note 13 and accompanying text.

118. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (parents have the liberty to "direct the upbringing and education of children" and to "direct [their] destiny"); Prince v. Massachusetts, 321 U.S. 159, 169-70 (1944) (children, unlike adults, have no First Amendment right to proselytize on public streets); Parham v. J.R., 442 U.S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments."). *See generally* Bruce C. Hafen, *Children's Liberation and the New Egalitarianism, Some Reservations About Abandoning Youth to Their "Rights."* 1976 B.Y.U. L. REV. 605.

119. *Supra* note 118.

120. Guggenheim, *supra* note 98, at 486.

A. The Death Penalty Cases

In *Thompson v. Oklahoma*,[121] the Supreme Court planted the seeds for its eventual conclusion that minors, specifically adolescents, are a categorically distinct class from adults for purposes of the Cruel and Unusual Punishments Clause of the Eighth Amendment. The *Thompson* Court held that inflicting the death penalty on offenders committing murder when fifteen-years-old or younger constitutes cruel and unusual punishment. In finding that individuals that young are unable to act with sufficient culpability to justify capital punishment, the Court referred to "the experience of mankind" as evidence of the differences between young people and adults, differences which must be recognized in determining the rights and duties of juveniles and adults respectively.[122] The Court noted "broad agreement" that adolescents are "less mature and responsible than adults" while also being "more vulnerable, more impulsive, and less self-disciplined than adults."[123] Thus, juvenile offenders are less culpable than adults committing the same crime. Even though this conclusion was "too obvious to require extended explanation,"[124] the Court nevertheless explained: "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult."[125] Interestingly, the Court footnoted a host of social science data supporting its conclusions about adolescents, but did not directly relate the studies to its analysis.[126]

However, the social science data referenced in *Thompson* burst to the forefront in *Roper v. Simmons*,[127] which held that the Eighth

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121. 487 U.S. 815 (1988). A four Justice plurality issued the opinion of the Court.

122. *Id.* at 824-25. Supporting its conclusion that adolescents are less culpable than adults, the Court appealed to "evolving standards of decency" manifested by the reluctance of state legislatures and juries to impose the death penalty on offenders under age sixteen who committed capital crimes. *Id.* at 821-31.

123. *Id.* at 834 (quoting 1978 Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders as quoted in Eddings v. Oklahoma, 455 U.S. 104, 115 n.11 (1982)).

124. *Id.* at 835.

125. *Id.*

126. "The . . . decision in *Thompson* does not speak explicitly in the language of adolescent development or support its arguments with scientific research on adolescents' capacities." Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1013 (2003).

127. 543 U.S. 551 (2005). "*Roper* was the first time the Supreme Court applied

Amendment prohibits execution of offenders who were under age eighteen at the time they committed capital crimes.[128] The infrequency of state imposition of the death penalty on juveniles,[129] along with empirical evidence suggesting differences between adolescents and adults, convinced the Court that juveniles are "categorically less culpable" than average adult offenders,[130] thus immunizing them from the death penalty.

Appealing directly to empirical studies, the Court identified three general characteristics of adolescents that differentiate them from adults: (1) immaturity and underdeveloped awareness of responsibility, manifesting itself in propensities to engage in reckless behavior and impetuous and ill-considered actions and decisions; (2) a vulnerability and susceptibility to negative influences and outside pressures, including peer pressure; and (3) less character development than adults with more transitory, and fewer fixed, personality traits which enhance a minor's amenability to rehabilitation.[131] Rejecting traditional arguments in favor of case-by-

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psychological studies to the area of juvenile law." Samantha Schad, *Adolescent Decision-Making: Reduced Culpability in the Criminal Justice System and Recognition of Complexity in Other Legal Contexts*, 14 J. HEALTH CARE L. & POL'Y. 375, 388 n.124 (2011).

128. Between *Thompson* and *Roper*, the Court decided Stanford v. Kentucky, 492 U.S. 361 (1989), which upheld imposition of the death penalty for murderers who were sixteen or seventeen-years-old at the time of their crimes. While the Court recognized that juveniles are generally less culpable than adults, it rejected a categorical ban on capital punishment favoring instead a case-by-case jury assessment of whether particular offenders are sufficiently culpable to deserve execution.

129. *Roper*, 543 U.S. at 564-67. In reaching its conclusion, the *Roper* Court applied a two-step test developed in earlier death penalty cases. The first inquiry focuses on whether the punishment at issue is consistent with "evolving standards of decency," indicated by "objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question." *Id.* at 563-64. Applying this standard, the Court concluded that objective indicia of consensus in the case—"the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today society views juveniles," as "categorically less culpable than the average criminal." *Id.* at 567 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

The second inquiry of the two-part test allows the Court to exercise its "own independent judgment." *Id.* at 564. In doing so, the Court appealed the "categorical" differences between juveniles and adults, discussed *infra* notes 130-37 and accompanying text, in concluding that juveniles lack sufficient culpability to merit the death penalty.

130. *Id.* at 567 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

131. *Roper*, 543 U.S. at 569-70.

case assessments in assessing culpability in administering the death penalty,[132] the Court concluded: "The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability."[133] In addition to culpability issues, the Court emphasized that the transitory nature of adolescents' character development rendered them uniquely amenable to rehabilitation. Noting that "it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed[,]"[134] the Court gave voice to the notion that juvenile offenders might be entitled to an opportunity to be rehabilitated.

In fashioning its categorical rule, the Court argued that fixing the line for eligibility for the death penalty at age 18 was not an arbitrary choice,[135] observing that in light of the transitory personality development of adolescents, psychiatrists are forbidden by rule from diagnosing any patient under age eighteen as having a personality disorder.[136] Moreover, the "age of 18 is the point where society draws the line for many purposes between childhood and adulthood."[137]

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132. *Id.* at 572.

133. *Id.* at 572-73.

134. *Id.* at 570.

135. Justice O'Connor argued in her dissent that the relevant differences between "adults" and "juveniles" are matters of degree rather than of kind:

> Chronological age is not an unfailing measure of psychological development, and common experience suggests that many 17-year-olds are more mature than the average young "adult." In short, the class of offenders exempted from capital punishment by today's decision is too broad and too diverse to warrant a categorical prohibition.

Roper, 543 U.S. at 600-02 (O'Connor, J., dissenting).

136. *Id.* at 573.

137. *Id.* at 574. In his dissenting opinion, Justice Scalia questioned the Court's reliance on the social science evidence. In addition to raising questions about possible methodological problems with the studies, Scalia cited the studies described above in this Article, *see supra* note 13—for him contradicting the Court's conclusion that adolescents lack the ability to take moral responsibility for their decisions—showing that "by middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, and reasoning about interpersonal relationships and interpersonal problems." *Id.* at 617-18 (Scalia, J. dissenting) (citing Brief for APA as Amicus Curiae, Hodgson v. Minnesota, 497 U. S. 417 (1990) (No. 88-805) at pp. 19-20) (citations omitted)). Scalia also chided the Court for its categorical rule, claiming that the studies cited by the

B. Mandatory Life Imprisonment Without Parole (LWOP)

1. Graham

Five years after *Roper* acknowledged the categorical distinction between adolescents and adults, the Court reaffirmed that view in *Graham v. Florida*,[138] which invalidated as cruel unusual mandatory LWOP sentences for offenders committing non-homicide crimes[139] when the offender was younger than 18.[140] Citing *Roper*, the *Graham* Court again declared that compared to adults juveniles embody a "lack of maturity and an underdeveloped sense of responsibility; . . . are more . . . susceptible to negative influences and outside pressures, including peer pressure; and their characters are not as well formed."[141] The Court pointed out that these conclusions had become even more firmly established since *Roper*, noting that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."[142] The Court again emphasized that juvenile offenders

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Court offered "scant support" for a categorical prohibition, showing at most that "*on average* . . . persons under 18 are unable to take moral responsibility for their actions," and not that "all individuals under 18 are unable to appreciate the nature of their crimes." *Id.* at 618. Scalia observed that "at least some minors will be mature enough to make difficult decisions that involve moral considerations." *Id.* at 620. For an argument that the social science sources relied on by the *Roper* Court were "too scanty, vague, and dated," see Deborah W. Denno, *The Scientific Shortcomings of* Roper v. Simmons, 3 OHIO ST. J. CRIM. L. 379, 380 (2006).

138. 560 U.S. 48 (2011).

139. Graham, the juvenile involved in the case, was charged with attempted robbery after a prosecutor elected to bring his case in criminal, rather than juvenile, court. *See supra* note 114.

140. Graham v. Florida, 560 U.S. 48, 68, 74 (2011). As with *Roper*'s finding of a national consensus against capital punishment of juvenile offenders, *supra* note 122, the *Graham* Court found a similar consensus against sentencing juveniles to mandatory life sentences. *Graham*, 560 U.S. at 62-67.

141. *Id.* at 68 (quoting *Roper*, internal citations omitted).

142. *Id.* at 68. Leading commentators agree with the soundness of the science supporting the Court's conclusions. *See, e.g.*, Barry C. Feld, *The Youth Discount: Old Enough To Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 108-121 (2013) (extensive review of the social science research) [hereinafter Feld, *Youth Discount*]; Elizabeth S. Scott, *"Children are Different": Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 85-87 (2013) (noting that the differences between juveniles and adults are "verified through a solid and growing body of research"); Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 801 (2003) (noting that the judgment of teens is "immature"); Elizabeth S. Scott et al., *Evaluating Adolescent Decision Making in Legal Contexts*, 19 LAW & HUM. BEHAV. 221, 230 (1995) (noting that adolescents are uniquely susceptible to

manifest a unique "capacity for change" which makes them "most . . . receptive to rehabilitation," an impossibility in the context of life imprisonment without the possibility of parole.[143] This amenability to rehabilitation, and to a lesser extent the limited culpability of juveniles, convinced the Court that LWOP sentences for juveniles committing non-homicide crimes are unconstitutionally severe.[144]

At issue in *Graham* was a challenge to a "particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes."[145] The Court thus saw the need to apply a "categorical approach" previously utilized only in capital punishment cases,[146] and in so doing, rejected the longstanding view that the death penalty is different in kind from other punishment thus necessitating a rigorous Eighth Amendment approach exempting certain categorical classes[147] such as juveniles[148] or the mentally retarded from the death penalty.[149] Prior to *Graham*, the

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peer pressure); Christopher Slobogin et al., *A Prevention Model of Juvenile Justice: The Promise of* Kansas v. Hendricks *for Children*, 1999 WIS. L. REV. 185, 196 (research shows that "the average adolescent . . . differs from the average adult in ways that diminish willingness to pay attention to the criminal law"); Elizabeth Cauffman & Laurence Steinberg, *The Cognitive and Affective Influences on Adolescent Decision-Making*, 68 TEMP. L. REV. 1773, 1773-75 (1995) (documenting propensity of adolescents to be influenced by peer pressure).

143. *Graham*, 560 U.S. at 74.

144. *Id.* "The idea that juveniles are capable of rehabilitation was central to the Court's analysis in Graham." Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 378 (2014).

145. *Graham*, 560 U.S. at 61.

146. *Id.* at 61-62. *See supra* note 129. In a concurring opinion, Chief Justice Roberts agreed with the majority that "*Roper*'s conclusion that juveniles are typically less culpable than adults has pertinence beyond capital cases," but opposed a categorical rule outside the death penalty context. *Id.* at 88-91 (Roberts, C.J. concurring). Treating life sentences as analogous to capital punishment was, for Roberts, "at odds with [the] longstanding view that 'the death penalty is different from other punishments in kind rather than degree.'" *Id.*

147. In cases adopting categorical rules, the Court has taken the two-step approach utilized in *Roper*. *See supra* note 129. The first consideration involves determining whether a national consensus exists against the sentencing practice at issue. *Graham*, 560 U.S. at 61. The second step requires the Court to exercise its own understanding in light of controlling precedent and its interpretation of the Eighth Amendment's text, history, meaning and purpose. *Id.* The judicial exercise of independent judgment also requires assessing the culpability of the offenders at issue in light of their crimes and personal characteristics, along with the severity of the punishment in question. *Id.* at 67.

148. *See supra* notes 127-37 and accompanying text.

149. *See* Atkins v. Virginia, 536 U.S. 304 (2002).

Court had always engaged in a more narrow proportionality analysis in non-capital cases, one heavily differential to legislative prerogative and finding excessive punishment only in "rare cases" of "gross disproportionality" of a sentence for a particular crime, taking into account circumstances of the particular offender.[150]

In finding that mandatory LWOP constituted disproportionately severe punishment for the class of non-homicide crimes involved,[151] the Court directed its focus to the characteristics of juvenile offenders that—in light of traditional justifications for punishment—immunize them from such from sentences. Retributive interests in giving adult offenders their just desserts are less applicable to juveniles, who by definition lack adult culpability.[152] Due to their impetuous nature, juveniles are also less susceptible to deterrence than their adult counterparts.[153] Moreover, confining juveniles for life to incapacitate them from committing further crime is less justifiable than similar dispositions for adults given 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," suggesting to the Court that "incorrigibility is inconsistent with youth."[154] Finally, the Court noted that mandatory life sentences obviously preclude release upon rehabilitation, a particularly cruel plight for juveniles given that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult [in light of the] greater possibility that [the] minor's character deficiencies will be reformed."[155]

The *Graham* Court's repeated references to a juvenile's unique amenability to reform grants constitutional status to an interest in rehabilitation.[156] Recognizing rehabilitation as the basis of parole

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150. *Graham*, 560 U.S. at 59-60, 88.

151. The Court compared the severity of mandatory life sentences to the death penalty, noting that such sentences "alter the offender's life by a forfeiture that is irrevocable," denying them "basic liberties without hope of restoration." *Id.* at 69-70. Life without parole is also especially harsh for juveniles who on average end up serving more years and a greater percentage of their lives in prison than adult offenders. *Id.* at 70.

152. *Id.* at 71.

153. *Id.* at 72.

154. *Id.* at 73 (quoting Roper v. Simmons, 543 U.S. 551, 572 (2005); Workman v. Commonwealth, 429 S.W.2d 374, 378 (Ky. 1968)).

155. *Graham*, 560 U.S. at 68-69.

156. *Id.* at 73. Various commentators have viewed *Graham* as establishing, in some sense, a constitutional "right to rehabilitation." *See e.g.*, Arya, *supra* note 98, at

systems, the Court declared in the language of constitutional requirement: "*What the State must do* . . . is to give [juveniles] some meaningful, ['realistic'] opportunity to obtain release based on demonstrated maturity and rehabilitation."[157] Juvenile offenders thus now have a right to demonstrate "maturity and reform," and "should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and potential" outside prison walls.[158]

Such a conclusion does not mean that juveniles have a right to be rehabilitated in the sense that they may never be confined for life.[159] Rather the view is that—at least in *Graham*'s context of non-homicide crimes—juveniles cannot be confined for life unless they have a "meaningful opportunity" to be rehabilitated, successful occurrence of which mandates parole.[160] Thus, at a minimum,

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102 (*Graham* provides the "fodder" for "firmly establishing a constitutional right to rehabilitation"); Meghan J. Ryan, *Finality and Rehabilitation*, 4 WAKE FOREST J.L. & POL'Y. 121, 143-44 (2014) ("ignoring juveniles' potential for rehabilitation rendered the punishments unconstitutional"). Aaron Sussman, *The Paradox of* Graham v. Florida *and Juvenile Justice System*, 37 VT. L. REV. 381, 389 (2012) (*Graham* establishes "the right to rehabilitative treatment" for juveniles). *But see* Feld, *Youth Discount*, *supra* note 142, at 145 (*Graham* and *Miller* "rest firmly on retributive grounds"); Guggeheim, *supra* note 98, at 490, 491 ("I do not . . . suggest that *Graham* stands for the notion that juveniles have a constitutional right to rehabilitation"—*Graham*'s "preeminent conclusion" is that "juveniles have lessened culpability than most adults") (internal quote omitted). The author gives content to the right to rehabilitation entailed in *Graham*. *See infra* notes 312-14 and accompanying text.

157. *Id.* at 75, 82 (italics added).

158. *Id.* at 79.

159. The Court specified that its holding did not "require the State to release [all offenders during their natural lives] as some juveniles who commit "truly horrifying crimes may turn out to be irredeemable." *Id.* at 75. "The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society." *Id.*

160. The Court noted that the concept of rehabilitation is imprecise, making no attempt to define what legally adequate rehabilitation programs would look like, but instead left it for legislatures to determine appropriate and effective rehabilitative techniques. *Id.* at 73, 74. However, termination of imprisonment must occur upon rehabilitation. *See infra* note 209.

The opportunity for release through parole is the "logical inference" of *Graham*. Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How State Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1, 30 (2011); Michelle Marquis, Graham v. Florida: *A Game-Changing Victory for Both Juveniles and Juvenile-Rights Advocates*, 45 LOY. L.A. L. REV. 255, 284 (2011) (*Graham* requires sentencing statutes to include the possibility of parole for juveniles

juveniles have an Eighth Amendment right to be free from a sentencing scheme that mandates life in prison without possibility of parole.

2. Miller

Shortly after *Graham*, the Court in *Miller* v. *Alabama*[161] again extended Eighth Amendment protection to juveniles by striking down mandatory life sentences without parole imposed upon offenders committing murder when under the age of 18 at the time of their crimes.[162] Reemphasizing the *Roper/Graham* position that "children are constitutionally different from adults for purpose of sentencing,"[163] the Court found that the social science supporting those differences had become "even stronger."[164] The Court observed that the logic of *Graham* was not limited to non-homicide cases, noting that "none of what [*Graham*] said about children—about their distinctive . . . mental traits and environmental vulnerabilities—is crime specific"[165] and concluded that sentencing juveniles to mandatory life without parole impermissibly precludes considerations of the characteristics that make adolescents unique.[166]

In language inviting application to any and all juvenile punishment, the Court quoted *Graham*: "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."[167] Noting that the mandatory penalty schemes at issue in *Miller* prevented the sentencer from considering the offender's age, thus running afoul of the fundamental principle of *Roper/Graham*, the Court observed: "the imposition of a State's most severe

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serving life sentences); Leslie Patrice Wallace, *"And I Don't Know Why It Is that You Threw Your Life Away": Abolishing Life Without Parole, The Supreme Court in* Graham v. Florida *Now Requires States to Give Juveniles Hope for a Second Chance*, 20 B.U. PUB. INT. L.J. 35, 64-76 (2010) (discussing requirement that states have parole boards). Indeed, the Court has recognized that "parole is a regular part of the rehabilitative process." Solem v. Helms, 463 U.S. 277, 300-01 (1991).

161. Miller v. Alabama, 132 S. Ct. 2455 (2012).

162. *Id.* at 2475. Statutes from Alabama and Arkansas were struck down in *Miller*. *Id.*

163. *Id.* at 2464.

164. *Id.* at 2465 n.5. *See infra* note 170 and accompanying text.

165. *Id.* at 2465.

166. *Id.* at 2468.

167. *Id.* at 2466 (quoting Graham v. Florida, 560 U.S. 48, 76 (2010)).

penalties on juvenile offenders cannot proceed as though they were not children."[168]

The *Miller* Court analogized life sentences to capital punishment, imposition of which requires "individualized sentencing" which takes into account mitigating factors, including the offender's age, background, and mental and emotional development.[169] Mandatory life sentences for a juvenile homicide offender thus impermissibly preclude consideration

> of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. . . . [Finally] this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.[170]

Failure to consider such factors before imposing the harshest prison sentence creates "too great a risk of disproportionate punishment."[171] The Court concluded, therefore, that the Eighth Amendment forbids a sentencing scheme that mandates LWOP for juvenile offenders,[172] but declined to explicitly forbid all juvenile LWOP sentences.[173] The Court did predict, however, that "appropriate occasions" for such sentences will be "uncommon" in light of juveniles' diminished culpability and heightened capacity for

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168. *Id.* at 2466. The Court viewed life imprisonment for juveniles as "akin to the death penalty" by altering an offender's life by through a "forfeiture that is irrevocable." *Id.* (citing Solem v. Helm, 463 U.S. 277, 300-01 (1983)).

169. *Id.* at 2467.

170. *Id.* at 2468. The Court rejected the argument that because many states permitted mandatory LWOP sentences for some juveniles convicted of murder, no finding of a national consensus against the practice could be made, suggesting that such permission may instead be the inadvertent product of multiple independent statutory provisions. *Id.* at 2470-72.

171. *Id.* at 2469.

172. *Id.* at 2469, 2471.

173. In dicta, the Court declared that its holding forbidding mandatory LWOP was sufficient to decide *Miller*, therefore "we do not consider . . . the argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles." *Id.* at 2469.

change.[174] It thus appears, for the time being at least, that so long as robust individualized pre-sentencing procedures are followed, LWOP sentences are still allowed.

The *Miller* Court rejected the argument by the involved states that the requirement for an "individualized sentencing" had been satisfied by the juvenile court proceedings that waived the cases to criminal court.[175] Noting that at the early pretrial stage juvenile courts have only partial information about the child and the circumstances of the suspected offense,[176] the Court found the waiver process further deficient because it did not always include expert opinion by mental health professionals on behalf of the juvenile.[177] Perhaps more significantly, the Court focused on the differences between the issues at stake in pretrial waiver hearings and those at post-conviction sentencing in criminal court. Because juvenile courts lose jurisdiction when offenders reach a particular age, waiver decisions often present the choice of a disposition for a brief period of time in the juvenile system or waiver to criminal court where, prior to *Miller*, the juvenile could receive a mandatory sentence of life without parole.[178] The Court easily imagined a juvenile court judge deciding that a minor deserves a much higher sentence than would be available in juvenile court while thinking life-without-parole inappropriate.[179] Therefore, the Court found that judicial waiver hearings in juvenile court are inadequate vehicles to assess relevant sentencing issues.

Adequate considerations are afforded, however, if juveniles receive post-conviction discretionary sentencing in criminal court where a judge or jury could choose, rather than a life-without-parole prison sentence, "a lifetime prison term *with* the possibility of parole or a lengthy term of years."[180] Such a situation honors *Graham*'s requirement of a "meaningful opportunity" for the juvenile to show that he or she has been rehabilitated.[181] "By making youth (and all that accompanies it) irrelevant to imposition of the harshest prison sentence, [mandatory] scheme[s] pose[] too great a risk of disproportionate punishment."[182]

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174. *Id.*

175. *Id.* at 2474; *see supra* notes 95-107 and accompanying text.

176. *Id.* at 2474.

177. *Id. But see supra* notes 104-05 and accompanying text.

178. *Id.* at 2474.

179. *Id.* at 2475.

180. *Id.* at 2474-75.

181. *See* Graham v. Florida, 560 U.S. 48 (2010). The *Miller* Court quoted language from *Graham*. *Miller*, 132 S. Ct. at 2469.

182. *Miller*, 132 S. Ct. at 2469.

Four Justices dissented in *Miller*.[183] Criticizing the majority opinion as implicitly providing "a way station on the path to further judicial displacement of the legislative role in prescribing appropriate punishment for crime," the dissenters saw "no discernable end point" to the implications of *Miller*.[184] Having cast aside the possibility of limiting the Court's recognition of juveniles' right to rehabilitation to the death penalty as in *Roper*, or to non-homicide crimes in *Graham*, the dissent noted that the *Miller* majority made no attempt to restrict the scope of its opinion.[185] Indeed, the dissent noted that with its observation that "none of what [*Graham*] said about children is 'crime specific,'" the majority had extended the juvenile rehabilitation right principle to any and all crimes, whatever their punishment.[186] Viewing the sole principle underlying *Miller* to be "that because juveniles are different from adults they must be sentenced differently," the dissenters declared:

> There is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive. Unless confined, the only stopping point for the Court's analysis would be never permitting juvenile offenders to be tried as adults.[187]

IV. DECIPHERING THE RIGHT TO REHABILITATION IN THE CRIMINAL JUSTICE SYSTEM

A. Reconciling Graham *and* Miller

Tension exists between *Graham* and *Miller*.[188] Unless the cases can be distinguished, *Miller*'s failure to prohibit all juvenile LWOP sentences is at odds with *Graham*'s recognition of a right to parole release upon rehabilitation.[189] A distinction could seemingly rest

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183. Chief Justice Roberts and Justices Scalia, Thomas and Alito dissented. *Id.* at 2477.

184. *Id.* at 2481 (Roberts, C.J., dissenting).

185. *Id.* at 2482.

186. *Id.*

187. *Id.*

188. Beth A. Colgan, *Constitutional Line Drawing at the Intersection of Childhood and Crime*, 9 STAN. J. C.R. & C.L. 79, 94 (2013) (*Graham* and *Miller* provide "vastly different remedies, . . . fully categorical protection against a [LWOP] sentence for non-homicide offenses [in *Graham*] and mere protection against mandatory imposition of such sentences [in *Miller*]").

189. *See Miller*, 132 S. Ct. at 2469. The *Miller* Court, with a "cf." signal, cited *Graham*'s language requiring the State to provide "some meaningful opportunity to

only on the basis of the different underlying offenses in the two cases—non-homicide in *Graham*, homicide in *Miller*. Such a distinction appears insignificant, however, in light of *Miller*'s observation that none of what *Graham* said about the distinct status of juveniles is "crime specific."[190]

Moreover, while *Graham* focused heavily on capability for rehabilitation, *Miller*'s requirement of an individualized pre-sentence hearing emphasized front end culpability issues in setting an appropriate sentence, paying virtually no attention to back end issues requiring parole release should the juvenile's amenability to rehabilitation be realized.[191] These considerations might suggest that juveniles are entitled to either an individualized pre-sentence hearing or an opportunity for eventual parole release, but not to both. As a prelude to examining this question, it should be noted that numerous commentators have concluded that LWOP sentences are now unconstitutional and will eventually be declared so by the Court if they are not repealed by legislative action.[192] Such conclusions obviously imply that denial of the right to a meaningful opportunity for rehabilitation through absence of parole release is unconstitutional, whether or not a robust *Miller* pre-sentence hearing is provided.

1. Parole Release in Lieu of an Individualized Pre-sentence Hearing

Carol and Jordan Steiker, argue that if the individualized hearing required by *Miller* envisions the same "unbridled consideration of mitigating evidence" mandated in capital cases, such hearings will likely seldom occur.[193] Rather than exploring

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obtain [parole] release based on demonstrated maturity and rehabilitation." *Miller*, 132 S. Ct. at 2469.

190. *Id.* at 2465. *Graham*, *supra* note 165 and accompanying text.

191. *Id.*; Scott, *supra* note 142, at 77. *Miller* focused on the reduced culpability of juveniles, with its proportionality analysis supporting "a general mitigation principle." *See also infra* notes 199-202 and accompanying text (Prof. Felds views). On the other hand, *Graham*'s emphasis was on juveniles' unique capacity for rehabilitation. *Supra* note 143 and accompanying text.

192. *See e.g.*, Colgan, *supra* note 188, at 96 (suggesting that the Court's remand of a case imposing a discretionary LWOP indicates that the Court disfavors such sentences); Richard S. Frase, *What's "Different" (Enough) in Eighth Amendment Law?* 11 OHIO ST. J. CRIM. L. 9, 10 (2013) (courts will most likely invalidate *non-mandatory* LWOP sentences imposed on juveniles); Carol S. Steiker & Jordan M. Steiker, Miller v. Alabama: *Is Death (Still) Different?* 11 OHIO ST. J. CRIM. L. 37, 46 (2013) (the requirement of individualized sentences in the juvenile LWOP context will likely end juvenile LWOP).

193. Steiker & Steiker, *supra* note 192, at 42-45. The authors observe that the

"every aspect of a defendant's character and background" through the expertise of mitigation specialists, mental health professionals, and other "pertinent professionals,"[194] the Steikers suggest that to avoid such expense and complexity, "[s]tates will [likely] choose to forego LWOP in the juvenile context and opt out of 'individualized sentencing' by simply tacking on parole eligibility to juvenile life sentences."[195] For the Steikers, simply adding parole eligibility would be a constitutionally permissible "simpler fix . . . rather than attempting to inaugurate a new system of individualized sentencing."[196] Therefore, of the unique attributes of juveniles, amenability to rehabilitation trumps lesser culpability as a matter of constitutional significance.

This is not to minimize the significance of a pre-sentence hearing as a forum affording individual offenders the opportunity to present mitigating factors in their lives, which justify leniency in determining of their sentences.[197] Pre-sentence consideration of such mitigating factors is crucial because once a sentence is imposed, culpability issues are settled and theoretically should not be revisited.[198]

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circumstances the Court deemed relevant in *Miller*'s case included:

> [t]hat he was 'high on drugs' at the time of the offense, that his 'stepfather physically abused him,' that his 'alcoholic and drug-addicted mother neglected him,' that he had been 'in and out of foster care,' and that he had attempted suicide four times, 'the first when he should have been in kindergarten.' [The Court] concludes that the sentence in *Miller*'s case "needed to examine all these circumstances before concluding that life without possibility of parole was the appropriate penalty."

Id. at 44.

194. *Id.* at 43.

195. *Id.* at 45.

196. *Id.* at 48.

197. *Supra* note 191 and accompanying text.

198. "*Miller*'s ban on mandatory LWOP . . . assumes that judges and juries can be trusted to individualize at the time of sentencing and to forecast whether a juvenile killer must remain in prison for life." Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 417 (2013). While culpability issues are theoretically finalized at sentencing, some parole boards do ill-advisedly consider an inmate's culpability in making parole decisions. As Professor Russell states: "The severity of the crime is taken into account in determining the original sentence—including the date for parole eligibility. Under *Graham* and *Miller*, crime severity should not influence an assessment of release suitability." Russell, *supra* note 144, at 413. However, historically parole boards have factored in crime severity, often as a bases for parole denial in cases of violent

2. Individualized Pre-sentence Hearing in Lieu of Parole

Unlike the Steikers, Barry Feld takes the position that the culpability factor predominates, claiming that *Graham/Miller* are satisfied so long as the minimal culpability of juveniles is accommodated. "Rather than require judges to provide some 'meaningful opportunity to obtain release' or to grapple with 'the mitigating qualities of youth,' state legislatures should use age as a proxy for reduced culpability and provide substantial reductions in sentence lengths."[199] Arguing that the "reduced culpability that precludes the death penalty for juvenile offenders is just as diminished for other sentences,"[200] Professor Feld proposes a "youth discount" to apply to any and all punishment imposed on youthful offenders.[201]

Feld pays virtually no attention to the rehabilitative amenability factor articulated in *Roper/Graham/Miller*,[202] and instead sees the cases as "rest[ing] firmly" on retributive—reduced culpability—grounds.[203] For him, the demands of these cases are satisfied so long

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offenses. *Id.* at 397.

199. Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy:* Roper, Graham, Miller/Jackson, *and the Youth Discount*, 31 LAW & INEQ. 263, 264-65 (2013) [hereinafter Feld, *Adolescent Criminal Responsibility*].

200. Feld, *The Youth Discount*, *supra* note 142, at 122.

201. Feld justifies his position by noting that *Miller* provided no practical guidance as to how to incorporate mitigating qualities of youth into sentencing decisions. *Id.* at 136. He observes that states are already "scrambling" to revise sentencing laws to convert mandatory LWOP statutes to life *with* the possibility of parole or to impose minimum terms of years. Seeing such measures as inadequately accounting for the lesser culpability of youth, he argues:

> Rather than try to weigh the role of youthfulness on a discretionary basis, states should formally incorporate an offender's age as a mitigating factor in sentencing statutes. The Court's jurisprudence of youth recognizes that juveniles who produce the same harms as adults are not their moral equals and do not deserve the same consequences for their immature decisions. *Roper*, *Graham*, and *Miller* . . . endorse youthfulness as a mitigating factor that applies to capital and non-capital sentences.

Id. at 137.

202. Without explanation, Feld does say that "states should provide [juveniles] with resources [enabling] them to demonstrate maturity and rehabilitation." Feld, *Adolescent Criminal Responsibility*, *supra* note 199, at 329.

203. Feld, *The Youth Discount*, *supra* note 142, at 145.

as juveniles receive substantially less severe penalties than those imposed on adults committing the same crime.[204]

3. Both Parole Release and an Individualized Pre-Sentence Hearing

Rather than either parole release or individualized presentencing hearings, the best reading of *Roper/Graham/Miller* requires both. If the cases indeed establish a right to an opportunity for rehabilitation, then parole upon rehabilitation is clearly mandatory. Given the Court's acknowledgment of the pre-sentence impossibility of precisely distinguishing those juveniles whose crimes are one-time products[205] of "transient immaturity" and those "rare [offenders] whose crime[s] reflect irreparable corruption,"[206] rehabilitation programs within prison[207] with parole release are necessary to effectuate a youthful offender's right to a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[208] Moreover, because rehabilitation can occur at any time and requires immediate release from prison upon its occurrence,[209] it follows that mandatory minimum sentences can no

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204. Professor Feld's system would give the largest sentence reductions to the youngest, least mature offenders based on a sliding scale of diminished responsibility, with fourteen-year-olds receiving no more than twenty or twenty-five percent the length of an adult sentence. *Id.* at 141. Mid-adolescents could receive no more than half the adult length. *Id.* at 142. Because the length of an LWOP is indeterminate, states should apply a youth discount to a presumptive life sentence length of about forty years. *Id.* at 142 n.163.

205. Some see criminal conduct as a "normal aspect of teen life," especially for males, which is usually not repeated upon reaching adulthood. Scott & Grisso, *supra* note 59, at 154 (quoting Terrie Moffitt, *Adolescent-Limited and Life Course Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 675 (1993)). Professor Scott elaborates:

> [M]any studies find a . . . pattern of adolescent offending, with the aggregate level of criminal involvement beginning at about age thirteen and increasing until age seventeen, followed by a sharp decline. This age-crime trajectory confirms the transitory nature of most adolescent offending and supports the Court's judgment that juveniles are more likely to reform than their adult counterparts.

Scott, *supra* note 142, at 87.

206. *Graham*, *supra* note 154 and accompanying text.

207. For what such programs might look like, see *infra* note 227.

208. *Graham*, *supra* note 157 and accompanying text.

209. *See supra* note 44. In discussing the inconsistency of mandatory minimum sentences within a rehabilitative model, one court noted that if "at any time" during

longer be imposed on juvenile offenders if *Graham* is followed to its logical conclusions.

Supposing scaled-down sentences are legislatively enacted as an accommodation to the diminished culpability of juveniles, *Miller* hearings would still be required even if the juvenile has arrived in criminal court as a consequence of a judicial waiver hearing in juvenile court.[210] The *Miller* Court found that waiver hearings lack the rigor of a thorough and effective individualized inquiry into the culpability and rehabilitative amenability of the juvenile offender.[211] While *Miller*'s main focus was directed to considerations of retributive justice in accommodating the diminished culpability of juveniles, the Court did note that another purpose of such hearings is to address "the possibility of rehabilitation."[212] This suggests—again, in light of the acknowledged difficulty in accurately assessing rehabilitative amenability at the pre-sentencing stage—that no juvenile, not even ones deemed not amenable to rehabilitation, can be given a punitive sentence where no meaningful and realistic prospect of rehabilitation exists. This is true even if a juvenile court judge has also previously found the juvenile not amenable to rehabilitation. Where, however, a prison sentence with a parole release mechanism does present a realistic opportunity for rehabilitation,[213] such sentence could permissibly be imposed.

The situation is arguably different, however, in cases where the criminal court judge concludes in a *Miller* hearing that a juvenile is amenable to rehabilitation. Here, the juvenile may well be a fit candidate for rehabilitation in the juvenile system, even if a juvenile court judge, in transferring the case to criminal court, has previously found the juvenile not amenable to rehabilitation.[214] This is

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a rehabilitative placement, a juvenile offender is "successfully rehabilitated, he [is] entitled to release." *In re* Felder, 402 N.Y.S.2d 528, 533 (N.Y. Fam. Ct. 1978) (finding mandatory dispositions based on crime seriousness to constitute "punishment" for purposes of determining jury trial rights).

210. *See supra* notes 94-98, 104-107 and accompanying text.

211. *See supra* notes 177-181 and accompanying text.

212. *See* note 170 and accompanying text (the discussion of *Miller*).

213. For questions about how likely this opportunity is in present prison settings, see *supra* note 49; *infra* note 243 and accompanying text.

214. There are several reasons why the criminal court in a post-conviction *Miller* hearing might be better able to make an accurate assessment of amenability to rehabilitation than was the juvenile court judge at the pretrial waiver hearing. The judge in a post-conviction *Miller* hearing has access to more information than did the juvenile court judge who acted on "only partial information at [the] early, pretrial stage about either the child or the circumstances of [the suspected] offense." *See supra* note 178 and accompanying text. The trial evidence, while justifying a guilty verdict may also reveal aspects of the offender's circumstances which support a

particularly true in cases of younger offenders who will not soon reach termination age for juvenile court jurisdiction. In such situations, a rehabilitative disposition in juvenile court would be appropriate, and arguably required, and could be effectuated through a "blended sentencing" mechanism which would allow the criminal court judge to impose a juvenile court disposition either in lieu of a criminal sentence, or to stay a criminal sentence pending successful completion of a commitment to the juvenile system.[215] If such disposition presents the best opportunity for rehabilitation, justifying its denial would be difficult in light of the Court's recognition of the rehabilitative amenability of juvenile offenders.

B. The Right to Rehabilitation-Beyond LWOP

Clearly the "Court has broken new ground" in its attempt in *Roper/Graham/Miller* to "decipher [through social science] the young minds of those who disobey the law."[216] As the *Miller* dissenters correctly note, there is no principled reason to limit the Court's conclusions regarding the inherent nature of young people to the context of LWOP sentences.[217] As Professor Feld accurately observes, "the reduced culpability that precludes the death penalty

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conclusion that the offender is amenable to rehabilitation, contrary to the earlier conclusion of the juvenile court judge's juvenile court judge at the waiver proceeding. Moreover, the judge in the *Miller* hearing may have richer access to the expertise of mental health and other professionals than did to the juvenile court, thus enhancing the possibilities of a more informed assessment of the offender's prospects for successful rehabilitation. *Supra* note 179.

Transferring judicially-waived cases back to juvenile court from criminal court would require changes in current law. Presently, transfer from criminal to juvenile court is possible only in cases originating in criminal court in legislative exclusion and direct file situations, and not ones involving judicial waivers. *See* THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 824 (Barry C. Feld & Donna M. Bishop eds.) (2012).

215. For a discussion of blended sentencing, see DAVIS, CHILDREN'S RIGHTS, *supra* note 54, at 391-93. The American Law Institute's revised Model Penal Code (MPC) sentencing provisions require that juvenile offenders' age is to be presumed a mitigating factor and that criminal court judges should have authority to impose any disposition that would have been available had the offender been adjudicated for the same conduct in juvenile court. MODEL PENAL CODE § 6.11A(d). Alternatively, the court may impose a juvenile-court disposition while reserving the possibility of imposing an adult criminal sentence if the offender fails to comply with the conditions of the juvenile-court disposition. *Id.*

216. Denno, *supra* note 137, at 384.

217. *See supra* notes 184-87 and accompanying text.

for juvenile offenders is just as diminished for other sentences"[218] whether they be sentences of life or for any shorter term. Therefore, the *Miller* dissenters again appear correct in concluding that any and all juvenile sentences must now be less severe than those imposed on similarly-situated adults,[219] thus requiring something like Feld's "youth discount." By the same token, if juvenile offenders are indeed uniquely amenable to rehabilitation, they are so regardless of the offense committed or the possible punishment. The Court's cases thus clearly imply that all juvenile offenders have a right to a disposition presenting a realistic, meaningful opportunity for rehabilitation.

While punishment can take many forms—fines and house arrest for example—punishment in the form of incarceration was the subject of the *Graham* and *Miller* Courts. Therefore, the rehabilitation right entailed in those cases may be limited to contexts where imprisonment is the form of punishment at stake. In any event, my discussion of the right throughout the remainder of this Article assumes situations where juveniles face the possibility of punitive imprisonment. As will be demonstrated in Part V, the above description of the rehabilitation right is equally applicable to juvenile, as well as criminal, court dispensations of punishment.

It is, of course, impossible to predict whether the Court will impose the full array of reforms entailed in *Graham/Miller*[220] as spelled out above. Nevertheless, it seems clear that the requirements of an individualized pre-sentence hearing and parole upon successful rehabilitation described in the context of LWOP sentences[221] also

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218. *Supra* note 200 and accompanying text.

219. *See supra* note 187 and accompanying text. While the *Graham* Court implied that juvenile LWOP sentences are unique as the "second most severe penalty," Graham v. Florida, 560 U.S. 48, 72 (2010). Justice Thomas correctly notes that "no reliable limiting principle remains to prevent the Court from immunizing juvenile offenders from the law's third, fourth, fifth or fiftieth most severe penalties as well." *Id.* at 103, (Thomas, J., dissenting). One commentator made the point this way: "The complexities of childhood exist no matter the crime of conviction." Colgan, *supra* note 190, at 95.

220. "The Court has broken new ground and announced a constitutional principle with potentially far reaching implications: 'children are different.' At this point it is not clear whether the Court will apply the principle to further enhance juveniles' special constitutional status." Scott, *supra* note 142, at 105. I have previously argued for extension of the "children are different" concept beyond the context of juvenile punishment. *See* Martin R. Gardner, *The Categorical Distinction Between Adolescents and Adults: The Supreme Court's Juvenile Punishment Case—Constitutional Implications for Regulating Teenage Sexual Activity*, 28 BYU J. PUB. L. 1 (2013).

221. *See supra* notes 204-09 and accompanying text.

logically extend to all juvenile sentencing contexts.[222] Thus, all juveniles now appear entitled to indeterminate sentences as noted by the *Miller* dissenters.[223] However, the dissenters mistakenly

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222. As one commentator put it: "[The *Roper*, *Graham*, and *Miller* cases] carve out a clear message. Young people, even those who have committed serious crimes, are capable of change. This capacity demands individualized consideration at sentencing and throughout the course of incarceration." Laura Cohen, *Freedom's Road: Youth, Parole, and the Promise of* Miller v. Alabama *and* Graham v. Florida, 35 CARDOZO L. REV. 1031, 1055 (2014). For an illustration of how these principles apply to juvenile court sentencing, *see infra* text Part V.

Some courts agree. *See, e.g.*, State v. Null, 836 N.W.2d 41, 74-76 (Iowa 2013) (state constitution requires trial courts to apply the "core teaching" of *Roper*, *Graham* and *Miller* in making sentencing decision for long prison terms—here 52.5 years in prison before parole eligibility—involving juveniles); State v. Pearson, 836 N.W.2d 88 (Iowa 2013) (individualized *Miller* hearing required when juvenile received a 35 year mandatory minimum sentence); State v. Lyle, 854 N.W.2d 378, 402 (Iowa 2014) (reasoning of *Miller* applies even to "short" mandatory sentences—here 7 years—thus requiring sentencing court to "craft[] punishment that serves the best interests of the child and of society").

Other courts have, however, limited *Graham* and *Miller* to situations of mandatory LWOP, *see, e.g.*, Bunch v. Smith, 685 F.3d 546, 550-51 (6th Cir. 2012), *cert.* denied 569 U.S. ___ (2013) (*Graham* limited to LWOP and arguably does not extend to lengthy sentences amounting to the "practical equivalent" of LWOP). Still other courts have extended *Graham* and *Miller* to sentences technically not LWOP but with parole eligibility dates that fall outside the juvenile offender's natural life expectancy. *See, e.g.*, People v. Caballero, 282 P.3d 291, 295 (Cal. 2012) (sentence of 110 years to life constituted cruel and unusual punishment). See also People v. Pacheco, 991 N.E.2d 896, 907 (Ill. App. Ct. 2013) (20-year minimum sentence "does not compare" to LWOP); State v. Vang, 847 N.W.2d 248, 262-65 (Minn. 2014) (life sentence with possibility of release after 30 years is "not tantamount" to LWOP).

223. *See supra* note 189 and accompanying text. By declaring that juveniles can no longer be given "mandatory sentences," I assume the Justices meant that indeterminate sentencing must now be employed. While apparently no court has yet explicitly so held, the Iowa Supreme Court has entertained the possibility. In holding that even "short" mandatory minimum sentences are impermissible under *Miller*, the court observed:

> Because our holding focuses exclusively on a statutory schema that requires a district court to impose a sentence containing a minimum period of time a juvenile must serve before becoming eligible for parole and that denies a district court the discretion to impose a lesser sentence, we do not consider the situation in which a district court imposes a sentence that denies the juvenile the opportunity for parole in the absence of a statute requiring such a result. Accordingly, we do not determine whether such a sentence would be constitutional.

Lyle, 824 N.W.2d at 401 n.7.

conclude that the "only stopping point" for the *Miller* analysis is that juveniles can never be tried as adults, if, by that, they mean that juveniles can never be tried in criminal court.[224] There is nothing in the Court's cases that precludes juveniles being tried in adult criminal court so long as they receive rigorous pre-sentence hearings and indeterminate sentences[225]—less severe than those imposed on adults committing the same crime—with parole upon rehabilitation.[226]

How the mechanics of the hearing procedures and the juvenile parole requirements could be effectuated is a complicated matter[227]

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224. *Id.* This view is embraced by some commentators. *See, e.g., infra* note 226.

225. "Indeterminate sentences" are those with no mandatory minimum prison terms. *See supra* note 209 and accompanying text. I argue in Part V that a judicial waiver hearing in juvenile court is a constitutional precondition to assertion of criminal court jurisdiction over any juvenile accused of committing criminal offenses. *See infra* notes 231-66 and accompanying text.

226. Thus, Neelum Arya erroneously views decisions to transfer juveniles to criminal court as themselves cruel and unusual punishment because of the "lifelong impact of a criminal court conviction" and because "available evidence indicates that [transfer laws] . . . are counterproductive." Arya, *supra* note 98, at 138, 142 (internal quotes omitted). In arguing that transfer decisions are "punishment and not merely . . . jurisdictional [matters]," *Id.* at 138. Arya pays insufficient attention to the concept of punishment, *see supra* notes 35-36 and accompanying text, the presence of which is necessary for Eighth Amendment applicability. *See supra* notes 22-23 and accompanying text. Transfer decisions serve the non-punitive, administrative purpose of making a criminal trial possible with punishment a possible future consequence. These decisions thus function the same way as such things as police arrests, pretrial detention, and preliminary hearings function within the criminal justice system. While such restraints on liberty may be unpleasant to their recipients, they constitute non-punitive precursors to possible future punishment. For an analysis demonstrating the non-punitive nature of police arrests and pretrial detention, see Gardner, *Rethinking*, *supra* note 36, at 452-58 (2008).

227. Professor Feld notes some of the complexities:

> *Graham* . . . required states to provide them with "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." but did not define states' responsibility to provide youths with resources with which to change or identify when they would become eligible for parole. Does a "meaningful opportunity" to change require states to provide rehabilitative programs? Would a first parole release hearing in forty years provide "some meaningful opportunity to obtain release"?

Feld, *Youth Discount supra* note 142 at 135 (footnotes omitted).

For some of the problems involved in implementing the hearing requirement, see Steiker & Steiker, *supra* note 192, at 42-47. As possible ways to usefully implement the hearing and parole release requirements, consider the

following recommendations:

A. Sentencing and Institutional Reform
- Eliminate all true and de facto juvenile LWOP sentences.
- Amend sentencing statutes to create differential sentencing schemes for youth tried in the adult system, including shorter . . . terms than those faced by adults, and compel courts to consider and weigh defendants' ages and developmental status both at the time they committed their offenses and at sentencing.
- For youth serving indeterminate sentences, create presumptions in favor of release upon completion of minimum terms, if current dangerousness is not established.
- Increase available prison programming—including mental health, substance abuse, educational, vocational, release-preparation, and re-entry programs—for adolescent and young adult inmates.
- Create post-conviction victim-offender mediation or education programs for inmates sentenced as adolescents.

B. Parole Process
- Require parole board members who hear cases involving inmates convicted as minors to have expertise in adolescent development and the nexus between developmental science and juvenile offending.
- Require parole board members to receive training in the causes and frequency of juvenile wrongful convictions, and to take these considerations into account, when appropriate, in evaluating inmates who were convicted as adolescents for parole.
- Require annual parole reviews once youth have served . . . [defined] terms of incarceration.
- Require parole boards to consider and afford weight to prospective parolees' age and developmental status at the time of offense and conviction.
- Ensure that actuarial risk assessment instruments are validated for adolescents in adult systems, and require pre-parole clinical interviews as well as actuarial assessments for this population.
- Provide access to counsel at parole hearings and on appeal from denials of parole for inmates convicted as adolescents.

C. Judicial Review
- Create new mechanisms for post-conviction review of adolescent sentences (including, for example, judicial early release procedures similar to those that exist in some juvenile courts).
- Enact less deferential standards of judicial review of parole board determinations.

Cohen, *supra* note 222, at 1087-88.

See also Bierschbach & Bibas, *supra* note 198, at 450-51 arguing for "parole juries"; *Green*, *supra* note 160, at 30-38 (describing "a separately created prison

which the Court has left up to state policymakers to work out.[228] I have made no attempt here to examine how such matters could or should be implemented. Instead, I have attempted to flesh out the meaning of the individual constitutional rights entailed in the Court's Eighth Amendment juvenile cases, leaving it to others to translate those principles to practical, structural reforms.[229]

V. JUVENILE JUSTICE SYSTEM IMPLICATIONS

In this Part, I consider the impact on juvenile justice systems should the rehabilitation right be extended to its logical conclusions. That impact would be significant in four ways: 1) a rehabilitative juvenile justice system is now constitutionally mandated;[230] 2) the waiver standards in most, if not all, jurisdictions are now constitutionally inadequate; 3) judicial hearings in juvenile court are now constitutionally required as prerequisites to any possible trial in criminal court, thus making legislative exclusion and direct file statutes unconstitutional; and 4) punishment of juveniles within the juvenile system must now be governed by the same pre-sentence hearing and parole release requirements discussed above in the context of criminal court punishment.

A. Juvenile Courts as Constitutionally Mandated

With the recent movement towards punishment within the juvenile justice system,[231] Barry Feld and others have argued that juvenile courts should be abolished.[232] As they become increasingly

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release model for juvenile life sentence offenders"); *Marquis*, *supra* note 160, at 282-86 (describing state parole requirements for complying with *Graham*); Russell, *supra* note 143 (detailing: 1) a chance for release at a meaningful point in time; 2) provisions promoting a realistic likelihood of release for the rehabilitated; and 3) measures assuring a meaningful opportunity to be heard).

228. *Supra* note 160 and accompanying text.

229. *See* Bierschbach & Bibas, *supra* note 198, at 436.

230. Some leading commentators have long urged abolishing the juvenile justice system. *See infra* note 232 and accompanying text.

231. *See supra* notes 80-93 and accompanying text.

232. Feld, *Abolish the Juvenile Court*, *supra* note 44; NICHOLAS N. KITTRIE, THE RIGHT TO BE DIFFERENT 106-07 (1971); Janet E. Ainsworth, *Re-Imaging Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991) [hereinafter *Abolishing the Juvenile Court*]; Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927 (1995) [hereinafter *Youth Justice*]; Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23 (1990); Sanford J. Fox, *Abolishing the*

punitive, in some places juvenile courts have become indistinguishable from their adult criminal counterparts, thus calling into serious question the rationale for continuing a separate juvenile system.[233] Hence, juvenile court abolitionists argue for doing away with the juvenile system so long as criminal courts impose scaled-down punishments to accommodate the diminished culpability of juveniles.[234]

While some have responded to the abolitionists with a variety of policy considerations supporting retention of the juvenile court system,[235] the implications of the newly-recognized rehabilitation

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Juvenile Court, 28 HARV. L. SCH. BULL. 22 (1977); Francis Barry McCarthy, *Delinquency Dispositions Under the Juvenile Justice Standards: The Consequences of a Change of Rationale*, 52 N.Y.U. L. REV. 1093 (1977); Stephen Wizner & Mary F. Keller, *The Penal Model of Juvenile Justice: Is Juvenile Court Delinquency Jurisdiction Obsolete?*, 52 N.Y.U. L. REV. 1120 (1977).

233. In language no longer defensible in light of the Supreme Court's recent recognition of the unique status of children, Janet Ainsworth argued that the movement towards punitive juvenile justice manifests a recognition that the sharp child-adult dichotomy assumed by the originators of the juvenile court movement has broken down. Adolescents are viewed more as a subclass of adults than as a subclass of child. Ainsworth, *Youth Justice*, *supra* note 232, at 931-41. If adolescents are not "essentially" different from adults, "[t]he continued existence of a separate juvenile court system [is] difficult . . . to sustain." *Id.* at 936. "With its philosophical underpinnings no longer consonant with the current social construction of childhood, the juvenile court now lacks a rationale for its continued existence other than sheer institutional inertia." Ainsworth, *Abolishing the Juvenile Court*, *supra* note 232, at 1118. Barry Feld agrees: "[O]nce a state separates social welfare from criminal social control, no role remains for a separate juvenile court for delinquency matters." Feld, *Abolish the Juvenile Court*, *supra* note 232, at 69.

234. Feld, *Abolish the Juvenile Court*, *supra* note 232.

235. For example, Professor Irene Rosenberg argues against "[a]bandoning the juvenile court [as] an admission that its humane purposes were misguided or unattainable. . . . We should stay and fight . . . for a reordering of societal resources . . . that will protect and nourish children." Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 184. She further argues:

> Despite all their failings . . . the juvenile courts do afford benefits that are unlikely to be replicated in the criminal courts, such as the institutionalized intake diversionary system, anonymity, diminished stigma, shorter sentences, and recognition of rehabilitation as a viable goal. We should build on these strengths rather than abandon ship.

Id. at 184-85 (footnotes omitted). For a similar argument favoring separate juvenile and criminal systems, see Martin L. Forst & Matha-Elin Bloomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L.

right now provide a powerful constitutional argument against juvenile court abolition.[236] In short, juvenile offenders now appear to have a constitutional right to a meaningful opportunity for rehabilitation which translates to a *prima facie* right to have their cases originate in a forum dispensing rehabilitation rather than punishment. Under present circumstances, that forum is the juvenile court, which would now be required to exercise jurisdiction over all juvenile offenders except those whose danger to the public or nonamendability to rehabilitation disposition is sufficiently strong to override the presumption of juvenile court disposition.[237]

As one commentator has argued, after *Graham* "[l]awyers may . . . create successful arguments that juveniles have a substantive right to juvenile treatment if they are able to pair arguments based on the right to rehabilitation with empirical data showing that treatment available within the juvenile system is the only realistic way for the youth to achieve that rehabilitation."[238] Such data exists.[239]

1. Juvenile Courts as Best Rehabilitative Alternative for Youthful Offenders

Although juvenile systems have become increasingly punitive, none has abandoned rehabilitation as an important goal.[240] State statutes continue to manifest an ongoing commitment to the rehabilitation and treatment of children by mandating dispositions

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ETHICS & PUB. POL'Y 323, 335-36, 359-69 (1991).

236. For Professor Scott, the mitigation of culpability recognized by the *Roper*, *Graham*, and *Miller* also provides a rationale for "retaining most juveniles in a separate justice system that systematically deals with offenders within its jurisdiction more leniently than does the criminal justice system." Scott, *supra* note 142, at 98.

237.

> While all youth, even those charged with the most heinous of offenses, are amenable to rehabilitation, the fact remains that there may always be a very small, discrete number of youth who remain a danger to the public. . . . [W]e will need a safety net for the public that operates *after* the juvenile justice system has failed, rather than *before* youth are given an opportunity to change.

Arya, *supra* note 98, at 155.

238. *Id.* at 152.

239. See *infra* text and notes 242-254.

240. Kristin Henning, *What's Wrong with Victim's Rights in Juvenile Court?* 97 CALIF. L. REV. 1107, 1119 (2009).

that promote the best interest of juveniles through state services aimed at making them productive citizens. While the juvenile system has not been widely successful in dispensing effective rehabilitation,[241] some commentators are optimistic that meaningful treatment can occur within the system.[242] Moreover, it is clear that the criminal justice system is no better and probably worse. In fact, the Supreme Court recently cited congressional findings that the federal prison system's "attempt to 'achieve rehabilitation of offenders [has] failed.'"[243] On balance, it is likely that rehabilitative benefits are more forthcoming from the present juvenile system

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241. *Id.* Clearly, not all juvenile offenders emerge from rehabilitative programs as "productive citizens." As Professor Feld notes, while numerous studies of the efficacy of juvenile correctional have been conducted, "[f]ew have encouraged proponents of rehabilitation." Barry C. Feld, *The Constitutional Tension Between* Apprendi *and* McKeiver: *Sentence Enhancements Based on Delinquency in Juvenile Courts*, 38 WAKE FOREST L. REV. 1111, 1118 n.18 (2003). The Supreme Court itself expressed doubt about whether young people subjected to juvenile court jurisdiction in fact received the "solicitous care and regenerative treatment postulated for children." *Kent*, 383 U.S. at 556; *In re* Gault, 387 U.S. 1, 17, 18, (1967) ("the results of the juvenile system have not been entirely satisfactory").

242. *See, e.g.*, Kim Taylor-Thompson, *Minority Rule: Redefining the Age of Criminality*, 38 N.Y.U. REV. L. & SOC. CHANGE 143, 194-98 (2014) (praising the rehabilitative efforts of the "Missouri Model"); Feld, *supra* note 241 (citing Lipsey & Wilson as a source describing characteristics of successful treatment programs for serious juvenile offenders); *see also* Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299, 315-16 (1999) (identifying the three attributes of juvenile treatment programs most likely to "work" in reducing recidivism). Some even make the modest claim that widespread rehabilitative success is not necessary to satisfy the juveniles' right to an initial rehabilitative disposition:

> To comply with *Graham*, involvement in the juvenile justice system must not *impede* a child's rehabilitation . . . [P]olicies that make it more difficult for a child to demonstrate maturity and rehabilitation than it would be without system involvement do not constitute a meaningful opportunity, and thus do not comply with *Graham*.

Sussman, *supra* note 156, at 386-87.

Although the Supreme Court has been pessimistic about the effectiveness of the juvenile courts in delivering effective rehabilitation, *see supra* note 241, the Court never completely gave up on the ability of the system to achieve its purposes. A plurality of the Court stated that they were "reluctant to say that, despite disappointments of grave dimensions, [the juvenile system] still does not hold promise." McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971).

243. Tapia v. United States, 131 S. Ct. 2082, 2087 (2011) (quoting Mistretta v. United States, 488 U.S. 361, 366 (1989)).

administered by court personnel experienced in working with young people.[244]

Furthermore, it is well established that stigmatizing offenders often hinders their prospects for rehabilitation.[245] Because the consequences of conviction in juvenile courts are likely less stigmatic than those attending convictions in criminal courts,[246] retaining a

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244. Leading commentators argue:

> The most effective means to implement the lessons from developmental psychology is to maintain a system of adjudication and disposition that is separate from the adult criminal justice system. First, a juvenile court can better recognize and accommodate the reduced culpability and more limited trial competence of younger offenders. Moreover, a separate juvenile correctional system is more likely to utilize dispositional strategies, goals, and approaches that are grounded in developmental knowledge. . . . The ability or inclination of the criminal justice system to tailor its response to juvenile crime so as to utilize the lessons of developmental psychology is questionable. The evidence suggests that political pressure functions as a one-way ratchet, in the direction of ever-stiffer penalties. Programs designed for adolescents and sentencing distinctions between adults and juveniles will be much harder to maintain in a unified system in which juveniles are otherwise treated as adults; it seems predictable that the lines between age groups will become blurred.

Scott & Grisso, *supra* note 59, at 188-89.

Finally, evidence suggests that "approximately 34%" of juveniles transferred to criminal court are more likely to recidivate than similarly situated juveniles retained in juvenile court. Arya, *supra* note 98, at 141 (citing studies).

245. *See, e.g.*, Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 1 (2003) (a criminal record presents a major barrier to employment); Richard D. Schwartz & Jerome Skolnick, *Two Studies of Legal Stigma*, 10 SOC. PROBS. 133 (1962); Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519 (1996) (discussing ways in which convicted criminals suffer stigma manifested through the reluctance of others to interact with them economically and socially).

246. In discussing why separate juvenile courts should be retained, even ones dispensing punishment, one commentator observed:

> If shorter sentences were all that were involved, there would be no need for a separate juvenile court; criminal court judges could simply take a juvenile's age into account in setting the sentence. But more *is* involved. Juveniles' capacity for change means that less stigma should be attached to conviction and punishment of a juvenile than of an adult; a teenager's criminality should not hang over him like a cloud for the rest of his life. . . . [T]he stigma [of juvenile courts] is milder and less enduring that that provided by the criminal courts.

separate system of juvenile courts is more consistent with the rehabilitative interests of youthful offenders than would be the case if all juvenile cases were tried in criminal court, even if scaled-down punishments were implemented.[247] While not beyond dispute, being labeled a "delinquent" by a juvenile court appears less stigmatic—both in the minds of offenders[248] and to the community at large—than that attached to "criminals" convicted in adult court.[249] Given that the vast majority of young people who commit criminal acts while minors eventually outgrow their deviance,[250] the "delinquent" label connotes understandable, for some even *normal*, behavior.[251] Furthermore, given the tendency to transfer serious juvenile offenders to criminal court,[252] the delinquency label connotes not simply that the individual offender is similar to many other young people, but also that he or she likely committed a relatively minor offense.[253] None of this follows when one is stigmatized "criminal," a label connoting neither immature foolishness nor minor offense.

CHARLES E. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 356 (1978).

"[T]he end result of a declaration of delinquency '*is* significantly different from and less onerous than a finding of criminal guilt.'" McKeiver v. Pennsylvania, 403 U.S. 528, 540 (1971) (quoting *In re* Terry, 265 A.2d 350, 355 (Pa. 1970)). Another commentator concluded that the stigma of being classified a delinquent has been overestimated. *Supra* note 227, at 1157. *But see* Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1231 (1970) (stating a "juvenile delinquent is viewed as a junior criminal hardly less threatening . . . than his more mature counterpart"); Francis Barry McCarthy, *The Role of the Concept of Responsibility in Juvenile Delinquency Proceedings*, 10 U. MICH. J.L. REFORM 181, 213 (1977) ("[A] stigma attaches to a delinquent in a manner similar to an adult criminal.").

247. *Supra* note 246. I have made this argument elsewhere. *See* Gardner, *Punitive Juvenile Justice*, *supra* note 20, at 68-70; Martin R. Gardner, *Punitive Juvenile Justice: Some Observations on a Recent Trend*, 10 INT'L. J.L. & PSYCHIATRY 129, 148-49 (1987).

248. *See* Jack Donald Foster et al., *Perceptions of Stigma Following Public Intervention for Delinquent Behavior*, 20 SOC. PROBS. 202 (1972) (finding that only a few boys adjudicated delinquent felt seriously handicapped by their encounter with the juvenile court relative to their interpersonal relationships with family, friends, or teachers).

249. *See supra* note 246.

250. *Supra* note 205.

251. *Id.*

252. *See supra* note 83 and accompanying text.

253. Theorists point out that the term "criminal" tends to "over label" through its failure to describe precise types of deviant behavior(s) triggering the label, the seriousness of those behaviors, or their social context. Ronald A. Feldman, *Legal Lexicon, Social Labeling, and Juvenile Rehabilitation*, 2 OFFENDER REHAB. 19, 24-25 (1977). The term "delinquent," on the other hand, connotes an offense committed by a

All of these considerations argue that the rehabilitative interests of young people are better protected in juvenile rather than in criminal courts. As a "constitutionally exceptional class,"[254] juvenile offenders are entitled to a meaningful opportunity for rehabilitation to demonstrate maturity and reform[255]—an opportunity that implicitly must begin in juvenile court.

2. Waiver Criteria

If the juvenile system is not likely to allow a juvenile a "meaningful opportunity" to be rehabilitated, then transfer to criminal court may be appropriate. The only relevant transfer consideration is, therefore, whether a particular offender is amenable to rehabilitation in juvenile court.[256]

However, as noted above,[257] state waiver statutes routinely include considerations in addition to amenability to rehabilitation, such as the seriousness of the crime charged and the perceived dangerousness of the juvenile,[258] considerations, which speak to

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minor which, while perhaps serious, is at least not necessarily serious enough to merit disposition in criminal court. As one commentator observed: "When a juvenile is transferred and tried in adult court, the consequences of criminal conviction are readily apparent and warrant a vigorous defense, but for a child facing a delinquency adjudication, the criminal consequences of his or her adjudication may not be clear." Courtney P. Fain, *What's in a Name? The Worrisome Interchange of Juvenile "Adjudications" with Criminal "Convictions,"* 49 B.C. L. REV. 495, 523 (2008).

254. Colgan, *supra* note 190, at 85. Professor Scott sees a "special status" for juveniles under the Eighth Amendment. Scott, *supra* note 142, at 75.

255. *See supra* notes 157-58 and accompanying text.

256. *See supra* note 237. If the right to rehabilitation is to be given meaning, waiver standards should focus only on amenability to rehabilitation. As Christopher Slobogin puts it "only if no treatment is available in the juvenile system should transfer to adult court be considered." Slobogin, *supra* note 242, at 299. If juveniles are amenable to treatment, they by definition pose no future danger to society if their rehabilitation is successful. On this view, the seriousness of the crime charged is irrelevant to the transfer decision. Seriousness of the offense is a retributive consideration and along with the blameworthiness of the offender, goes to giving offenders their just deserts. ANDREW VON HIRSCH, DOING JUSTICE, *supra* note 1, at 6 (people should be punished because they deserve it, severity of punishment depends on the seriousness of the crime); FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 49 (2005) (seriousness of an offense is a factor in determining the amount of punishment the offense deserves). As Slobogin puts it: "Intuitively and empirically, the nature of the offense in the abstract bears no relationship to treatability" and may in fact bear "a negative relationship to treatability." Slobogin, *supra* note 242, at 317.

257. *Supra* notes 96-98 and accompanying text.

258. The seriousness of the crime charged and concerns with incapacitating

interests different from[259]—and which often override—the rehabilitation factor in judicial waiver decisions.[260] While such multi-factored criteria were acceptable prior to the Supreme Court's identification of juveniles as a categorically distinct constitutional class,[261] those criteria would constitute unconstitutional infringements of a juvenile offender's rehabilitation right.

In addition to the requirements just noted, juveniles in waiver hearings are, of course, still entitled to the procedural protections guaranteed by the Supreme Court in the *Kent* case.[262] These protections include the right to counsel, access to social reports assessing the circumstances of the juvenile, and a record of the waiver court's findings for possible appellate review purposes.[263]

If, after a consideration of an accused offender's amenability to rehabilitation, the juvenile court judge concludes that a particular juvenile is not likely to be rehabilitated in the juvenile system,[264] the

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perceived dangerous offenders routinely join, and often override, the amenability to treatment criterion. Summarizing the empirical research on the matter, Slobogin concludes that "the amenability to treatment inquiry often ends up being an inquiry about something else. Rather than focusing on treatability, the courts appear to be driven by a mix of incapacitative, retributive and rehabilitative concerns, with the latter focus routinely taking a back seat to the first two objectives." Slobogin, *supra* note 242, at 300. He thus concludes that "[r]ather than representing a genuine attempt to assess a child's treatability, courts' evaluation of amenability focuses more on culpability and dangerousness." *Id.* at 330.

While such a situation was constitutionally permissible prior to the *Roper*, *Graham*, and *Miller* cases, when "juveniles [had] no 'right' to juvenile court disposition in the first place," *id.* at 323 (citing cases), waiver standards allowing a focus on anything other than amenability to rehabilitation would run afoul of a juvenile offenders *prima facie* right to rehabilitation within the juvenile justice system. Thus, the waiver standard statutes of virtually all states are now unconstitutional.

259. The seriousness of the crime speaks to retributive demands for doing justice while the dangerousness factor speaks to protecting the public through incapacitating those posing a threat with no suggestion of rehabilitation. *See supra* notes 256, 258.

260. *See supra* note 258.

261. Indeed, the criteria are either identical, or very similar, to those recommended by the Supreme Court itself in the *Kent* case, *supra* notes 96-97 and accompanying text.

262. *See supra* note 96.

263. *Id.*

264. A host of complicated issues are involved in determining amenability to treatment. In the first place, a viable treatment program must be available within the state's juvenile system. If such is not the case, the state will be under an obligation to create effective services for juvenile offenders similar to the requirements imposed by the Court in implementing *Graham*'s parole release

judge may transfer the case to criminal court where, as discussed above,[265] upon conviction the juvenile would enjoy a right to a *Miller* pre-sentence hearing and a sentence providing a realistic opportunity for rehabilitation with possible parole release, and—if deemed amenable to rehabilitation at the pre-sentence hearing—a disposition in the juvenile system if that affords the best rehabilitative opportunity.[266]

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requirement. *See supra* note 160. Even before the emergence of the right to rehabilitation, some commentators had argued the Supreme Court case law might mandate treatment that "obviates the need for pure incapacitation." Slobogin, *supra* note 242, at 324.

Assuming adequate state programs are in place, determining a particular juvenile's amenability to success therefrom is a difficult matter within the short time frame of a waiver hearing. Moreover, a particular problem arises: Juveniles approaching the age of termination of juvenile court jurisdiction who are amenable to treatment within a reasonable period of time are routinely deemed "nonamenable" simply because they will reach the cutoff age for juvenile court jurisdiction before successful rehabilitation could likely occur. Slobogin, *supra* note 242, at 326. A solution to this problem could be achieved if, as in many states, the dispositional age of jurisdiction is extended to 21 or beyond. *Id.* at 326.

Also relevant in predicting amenability to treatment is whether the juvenile has committed past offenses. Slobogin points out that "[i]f past offenses did not trigger meaningful treatment, or ended in diversion out of the system, then they should ordinarily not weigh heavily in the amenability determination." *Id.* at 318. Thus, past treatment attempts become a crucial consideration. "Ideally, courts would examine the precise type of treatment provided in the past to ascertain whether the proper treatment course was utilized and, if so, whether it was effectively implemented." *Id.* at 319.

Without going into all the problems entailed in clarifying the meaning treatment amenability, it is helpful to consider Professor Slobogin's proposed definition:

> A juvenile's amenability to treatment depends upon the extent to which: (1) those aspects of the juvenile's personality and environment (2) that contribute significantly to an increased risk of criminal behavior (3) can be ameliorated by age [21] through individual, family or community-oriented intervention (4) that is available under the juvenile court system and applicable law.

Id. at 331.

265. *Supra* notes 204-28 and accompanying text.

266. *Supra* notes 204-14 and accompanying text. Again, a juvenile court judicial waiver proceeding does not satisfy the *Miller* hearing requirement.

B. Legislative Exclusion and Direct File Now Unconstitutional

If judicial waiver hearings are constitutionally mandated for all offenders, it follows that legislative exclusion and direct file provisions are unconstitutional. The discussion immediately below so demonstrates.

1. Legislative Exclusion

As noted above, statutes in most states grant criminal courts exclusive jurisdiction over youths of certain ages charged with certain offenses, thus precluding any consideration of amenability to treatment through the juvenile court.[267] Historically, the courts have upheld the constitutionality of such statutes.[268]

A leading 1972 case, *United States v. Bland*,[269] from the Court of Appeals for the District of Columbia Circuit provides a vivid illustration of how the rehabilitation right changes the legislative exclusion landscape. The *Bland* Court upheld amendments to the District of Columbia juvenile code which repealed earlier provisions granting juvenile courts exclusive original jurisdiction over all juvenile cases while instead granting criminal court jurisdiction over minors between sixteen and eighteen charged with certain serious offenses.[270] The statute required trial of these offenses in criminal

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267. See *supra* notes 108-09 and accompanying text.

268. *See, e.g.*, Bishop v. State, 462 S.E.2d 716 (Ga. 1995) (upholding against due process and separation of powers attack regarding a Georgia statute granting exclusive original jurisdiction to criminal courts over juveniles age 13 and over charged with enumerated serious crimes but allowing prosecutorial discretion in cases of "extraordinary cause" to decline to prosecute in criminal court and bring the case in juvenile court); People v. J.S., 469 N.E.2d 1090 (Ill. 1984) (upholding against due process and equal protection attack on an Illinois statute exempting from juvenile court jurisdiction 15 and 16-year-olds charged with enumerated serious offenses); State v. Leach, 425 So. 2d 1232 (La. 1983) (upholding against equal protection attack a Louisiana statute exempting from juvenile court jurisdiction cases of juveniles 15 years of age and over charged with committing enumerated serious offenses); *In re* Boot, 925 P.2d 964 (Wash. 1996) (upholding against equal protection and due process attack on a Washington statute granting exclusive original jurisdiction in criminal courts over cases of juveniles age 16 and over charged with committing enumerated serious offenses).

269. United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972), *cert. denied* 412 U.S. 909 (1973). Professor Feld describes *Bland* as "the leading case on legislative offense exclusion statues." FELD, *supra* note 94, at 240.

270. Prior to their amendment, the District of Columbia statutes granted juvenile courts exclusive jurisdiction over all "children," defined as "a person under 18 years of age." U.S. v. Bland, 472 F.2d 1329, 1330-31 (1972) (Wright, J.,

court, thus foreclosing a juvenile court waiver hearing with the attendant due process protections required by *Kent*.[271] The *Bland* court distinguished *Kent*, finding it applicable only to statutory models fixing original jurisdiction in juvenile courts with possible judicial waiver to criminal court,[272] concluding that access to juvenile court was essentially a matter of legislative grace and not constitutional entitlement.

With this understanding, the *Bland* court disagreed with the spirited dissent of Judge Skelly Wright who argued that "a child may [not] be summarily deprived of his right to juvenile treatment without being heard,"[273] claiming that the "crucially important [decision] between the treatment afforded children in an adult court and that granted them in [juvenile court]" could not be made without the protections of a judicial waiver hearing with *Kent* protections.[274]

The essence of Judge Wright's argument was that juveniles charged with criminal offenses have *prima facie* rights to treatment—rehabilitation—within the juvenile system that cannot be denied without a showing that the particular accused offender could not benefit from that system. The weakness of Wright's position was, of course, simply that there existed no legal support for his claim. Prior to the Supreme Court's recent identification of juveniles as a constitutionally-distinct class, the courts had consistently held with the *Bland* majority that juvenile court

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dissenting). The amendment (16 D.C. CODE ANN. § 2301)(3)(A) (1972)) excluded from the definition of "child" individuals who are sixteen years of age or older and charged with murder, forcible rape, first degree burglary, armed robbery, and certain other offenses. *Bland*, 472 F.2d at 1330-31 (Wright, J., dissenting).

While charges brought under the § 2301(3)(A) amendment granted exclusive jurisdiction to the criminal courts, federal prosecutors could choose not to charge under the amendment and instead bring a case in juvenile court, even though the crime charged was one included under the amendment. *See* Pendergast v. United States, 332 A.2d 919, 922-23 (D.C. 1975) (juvenile charged in juvenile court with assault with intent to kill, an offense which could have been brought under § 2301(3)(A)). In this sense, the statute in *Bland* could be understood as a concurrent jurisdiction, direct file measure. Indeed, in his treatise Dean Davis categorizes *Bland* under his § 2:9 "prosecutorial discretion" section rather than under his § 2:8 "exclusion of certain conduct from jurisdiction" section. DAVIS, RIGHTS OF JUVENILES, *supra* note 15, at 40, 30-38.

271. For discussion of *Kent*, *see supra* note 96.

272. The court appealed to separation of powers principles in finding that it was "without power to interfere with or override [or review] the exercise of [federal prosecutors'] discretion" to charge juveniles with crimes within the exclusive jurisdiction of the criminal court. *Bland*, 472 F.2d at 1337.

273. *Id.* at 1348 (Wright, J., dissenting).

274. *Id.* at 1344.

treatment was statutorily based and not a matter of constitutional right.[275] After the *Roper/Graham/Miller* cases, however, with their support for a right to an opportunity for rehabilitation, Judge Wright's position becomes compelling.

Indeed, as shown above, under the implications of *Roper/Graham/Miller* juveniles are now entitled to judicial hearings in juvenile court before their cases could be transferred to criminal court. Because legislative exclusion statutes provide no such hearing,[276] these statutes are unconstitutional.[277]

Thus, a right to a judicial waiver in juvenile courts would not be satisfied by "reverse certification" provisions in some states that grant original jurisdiction over certain offenses to criminal courts with authority—often discretionary—to transfer cases to juvenile court,[278] sometimes with a rebuttable presumption in favor of keeping cases in criminal court.[279] While historically courts have

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275. *See, e.g.*, State v. Martin, 530 N.W.2d 420 (Wis. Ct. App. 1995) (juveniles do not have a "due process right to individualized treatment" in waiver procedures or at sentencing because such "is neither explicitly nor inherently found in the Constitution"); State v. A.L., 638 A.2d 814, 818 (N.J. Super. Ct. App. Div. 1994) ("statutes governing transfer from juvenile court do not involve a fundamental right"); Lane v. Jones, 257 S.E.2d 525, 527 (Ga. 1979) ("[t]reatment as a juvenile is not an inherent right but one granted by the [legislature which] . . . may restrict or qualify that right as it sees fit").

276. There are numerous legislative exclusion statutes in many states. For some examples, see N.C. GEN. STAT. § 7B-2200 (West 2014) (mandating criminal court jurisdiction for juveniles over age 13 charged with class A felonies); ALA. CODE § 12-15-102(6) (West 2014) (exempting enumerated offenses from juvenile court jurisdiction); N.M. STAT. ANN. § 32A-2-3(H) (West 2014) (exempting from juvenile court jurisdiction individuals 15 or older charged with committing first-degree murder). For an extensive list of examples of legislative exclusion statutes, see DAVIS, RIGHTS OF JUVENILES, *supra* note 15, at 31-34 n. 3.

277. While legislative exclusion statutes often apply only to older juveniles committing serious crimes, *see supra* note 108 and accompanying text, there is nothing about the age of an offender or the seriousness of the crime charged which necessarily precludes amenability for treatment in the juvenile system. *See supra* note 264. Therefore, individual judicial waiver hearings are necessary to determine a particular juvenile's amenability to rehabilitation.

278. The process is called "reverse certification" because it is the reverse of the usual process by which cases arrive in criminal court after a waiver hearing in juvenile court. DAVIS, CHILDREN'S RIGHTS, *supra* note 54, at 262 n. 56.

279. *See, e.g.*, S.D. CODIFIED LAWS § 26-11-3.1 (Supp. 2015), which provides:

> Any delinquent child sixteen years of age or older against whom [designated felony] charges have been filed shall be tried in circuit court as an adult. However, the child may request a transfer hearing which shall be conducted . . . to determine if it is in the best interest of the public that the child be

upheld these provisions,[280] they obviously circumvent the right to original juvenile court jurisdiction. None of the reverse certification measures presently in place require the decision to be solely in terms of the accused offenders' amenability to rehabilitation, as I have argued, is now constitutionally required.[281] But even if that criterion were applied in reverse certification hearings, the process would still inadequately protect the juvenile's right to a judicial waiver as a prerequisite to punishment. Juvenile court judges—with their access to the resources of the juvenile system and their considerable experience in dealing with youthful offenders—are arguably better able to assess amenability to rehabilitation than are their criminal court counterparts. Moreover, the process of reverse certification unnecessarily casts the "criminal" label on the juvenile, even if he or she is ultimately transferred to juvenile court. The stigma of being initially charged as a criminal in criminal court would still attach.[282] These considerations strongly suggest that reverse certification procedures do not comply with a juvenile's right to a meaningful opportunity for rehabilitation entailed in *Roper/Graham/Miller*.

2. Direct File, Concurrent Jurisdiction

As already mentioned, a dozen or so states grant concurrent jurisdiction to either juvenile or criminal courts to adjudicate certain juvenile cases.[283] Under such measures, prosecutors are granted discretion as to which court to bring these cases. While one state, Arkansas, allows juveniles a right to a waiver hearing in juvenile court upon request as a prerequisite to assumption of jurisdiction by

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> tried in circuit court as an adult. In such a transfer hearing, there is a rebuttable presumption that it is in the best interest of the public that any child, sixteen years of age or older, who is charged with a [designated felony], shall be tried as an adult.

Id. *See infra* note 285 for other examples of reverse certification provisions.

280. *See, e.g.*, Commonwealth v. Cotto, 753 A.2d 217 (Pa. 2000) (due process not violated by statute placing burden of proof on juvenile seeking transfer from adult criminal court to juvenile court); State *ex rel.* Coats v. Rakestraw, 610 P.2d 256 (Okla. Crim. App. 1980) (reverse certification does not violate equal protection or due process); State v. Martin, 530 N.W.2d 420 (Wis. Ct. App. 1995) (reverse certification presuming juvenile will be kept in the adult system unless it is found that he or she cannot receive adequate treatment does not violate due process or equal protection).

281. For examples of reverse certification provisions in the context of direct file statutes, see *infra* note 285.

282. *See supra* notes 245-53.

283. *See supra* text and notes 114-16.

the criminal court,[284] all other direct file jurisdictions deny juvenile court waiver hearings, although most allow for reverse certification hearings in criminal court.[285]

When attacked, the courts historically have upheld the constitutionality of concurrent jurisdiction direct file measures.[286] A

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284. *See* ARK. CODE ANN. § 9-27-318(2) (2015) (direct file option for 14 or 15-year-olds charged with enumerated serious offenses with, upon motion of "any party," a hearing in juvenile court as prerequisite to transfer to criminal court).

285. *See, e.g.*, ARIZ. REV. STATS § 13-501(B), (C), (E) (West 2014) (direct file option for enumerated serious felonies with a criminal court order required, after a hearing, to transfer non "chronic felony offenders" to juvenile court); COLO. REV. STAT. Ann. § 19-2-517(1), (3)(a) (2015) (direct file option for juveniles 16 and older charged with enumerated serious felonies with a right to a "reverse transfer hearing" upon request by the juvenile); GA. CODE ANN. § 15-11-2(15), 15-11-560(a)(e) (2014) (juvenile and criminal courts have concurrent jurisdiction over juveniles charged with offenses which are punishable by loss of life, LWOP, or life imprisonment, with possible reverse certification for "extraordinary cause" of juveniles 13 to 17 years of age charged with enumerated offenses); MONT. CODE ANN. § 41-5-206(1), (3) (2015) (direct file option for juveniles over age 12 charged with enumerated serious offenses with a required hearing in criminal court to determine "whether the matter must be transferred back to juvenile courts"); OKLA. STAT. ANN. tit. 10A, § 2-5-206(A) to (C), (F) (Supp. 2015) (direct file option for "youthful offenders" over age 15 charged with enumerated offenses with optional reverse certification hearing); VT. STAT. ANN., tit. 33, §§ 5102(a)(2)(C); 5203(b) (2014) (direct file option for juvenile over age 16 charged with enumerated serious offenses with criminal court discretion to transfer the proceedings to juvenile court); WYO. STAT. ANN. §§ 14-6-203(f), 14-6-237 (West 2014) (direct file option—with specified determinative factors for prosecutorial consideration—for juveniles age 17 charged with felonies with criminal court discretion to order a reverse certification hearing).

Several states allow for direct file in criminal court while apparently denying the possibility of reverse certification. *See, e.g.*, CAL. WELF. & INST. CODE § 707(d) (West 2014) (direct file option for juveniles 16 and older charged with enumerated offenses and for juveniles 14 and older for enumerated offenses under certain circumstances); FLA. STAT. ANN. § 985.557(1)(a)(1), (b) (West 2014) (direct file option for juveniles 14 or older charged with enumerated offenses and for juveniles 16 or older charged with any felony offense); LA. CHILD. CODE ANN. art. 305(B)(3) (2016) (direct file option for juveniles charged with enumerated offenses); MASS. GEN. LAWS Ann. ch. 119, § 54 (West 2014) (direct file option for juveniles 14 and older charged with enumerated offenses who have previously been committed to Department of Youth Services or who have committed an offense involving illegal infliction, or threat, of serious bodily harm); MICH. COMP. LAWS ANN. § 764.1f(1)(2) (West 2014) (direct file option for juveniles over 14 charged with committing enumerated offenses); VA. CODE ANN. § 16.1-269.1(D) (West 2014) (direct file for juveniles 14 and older committing enumerated offenses if juvenile court fails to find probable cause or dismisses warrant or petition).

286. *See, e.g.*, Walker v. State, 827 S.W.2d 637 (Ark. 1992) (upholding direct file measure and allowing criminal court to retain jurisdiction even though charge

California case, *Manduley v. Superior Court*,[287] is representative. Pursuant to the California statute,[288] a prosecutor filed enumerated felony charges against juveniles directly in criminal court. Upholding the statute against, *inter alia*, separation of powers, due process and equal protection attacks, the California Supreme Court rejected claims of a statutory right to be subject to juvenile court jurisdiction, holding that

> [W]hen governing statutes provide that the juvenile court and the criminal court have concurrent jurisdiction, minors who come within the scope of [such statutes] do not possess any right to be placed under the jurisdiction of the juvenile court before the prosecutor initiates a proceeding accusing them of a crime. Thus, the asserted interest that petitioners seek to protect through a judicial hearing does not exist.[289]

The court found similarly unpersuasive a claim that juvenile offenders possess a constitutionally-protected liberty interest in their cases originating in the juvenile system, which would preclude the prosecutor from directly filing their cases in criminal court.[290] Distinguishing *Kent*, the court found "no . . . protected interest in remaining in the juvenile system."[291] Therefore "[a] statute that authorizes discretionary direct filing in criminal court . . . does not require [the *Kent*] procedural protections."[292]

As with the legislative exclusion statutes discussed above,[293] direct file provisions are unconstitutional if the implications of *Graham* are fully realized.[294] Again, the "meaningful opportunity for

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reduced to a lesser-included offense not otherwise within the scope of the direct file statute); Chapman v. State, 385 S.E.2d 661, 662 (Ga. 1989) (direct file upheld, no constitutional right to juvenile court adjudication); Myers v. District Court 518 P.2d 836 (Colo. 1974) (direct file statute upheld).

287. Manduley v. Superior Court, 41 P.3d 3 (Cal. 2002).

288. *See supra* note 285 for reference to the statute.

289. *Manduley*, 41 P.3d at 20.

290. *Id.* at 21.

291. *Id.*

292. *Id.* at 22.

293. *See supra* notes 267-77.

294. Again, none of statutory elements permitting direct file necessarily preclude the accused's amenability to rehabilitation. *See supra* note 277. Thus, for example, the mere fact of past adjudication for a felony does not necessarily mean an accused has exhausted his or her right to rehabilitation, as illustrated by *State v. Cain*, 381 So.2d 1361 (Fla. 1980). In *Cain*, the Florida Supreme Court upheld a direct file provision allowing prosecutors to file charges in criminal court against juveniles 16 and older who have in the past committed two delinquent acts, one of which involved

rehabilitation" would require judicial waiver hearings in juvenile court as a prerequisite to any trial in criminal court.

C. Punishment within the Juvenile Justice System

While current juvenile systems have become increasingly punitive,[295] they accommodate the reduced culpability of juveniles by scaling down the severity of sentences from those imposed on adults in the criminal system committing the same crime.[296] Two conflicting policy considerations are reflected in the emergence of punishment within the traditional non-punitive model.[297] For some theorists, punishment in the juvenile system is, in a sense, actually good for juvenile offenders[298] and is thus at home with rehabilitative goals, especially when followed by extensive follow-up counseling.[299]

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a felony. *Id.* at 1362. Again, the statutory requirements of past adjudication and disposition in juvenile court do not necessarily mean that juveniles whose cases are directly filed in criminal court under these conditions have had a meaningful opportunity for rehabilitation. Treatment may not even have been offered, and if it was, it might not have been meaningful. *See supra* note 264.

295. *See supra* notes 82-93 and accompanying text.

296. *Supra* note 88 and accompanying text.

297. *See supra* notes 54-69 and accompanying text.

298. Even though many theorists recognize that most juveniles outgrow their acts of delinquency, some argue that does not mean that they should not receive some punishment for their offences. Developmental psychologists recognize the importance of lessons in accountability amounting to more than mere slaps on the wrist. Scott & Grisso, *supra* note 59, at 187. "The fact that many youthful offenders will desist in their criminal activity as they mature does not justify a license to offend during adolescence." *Id.* Franklin Zimring expresses similar views:

> [N]o learning role is complete without, in some measure, learning responsibility for conduct. . . . Just as the learning theory of adolescence implies a transition toward adulthood, so too it also implies a progression toward adult levels of responsibility. The adolescent must be protected from the full burden of adult responsibilities, but pushed along by degrees toward the moral and legal accountability that we consider appropriate to adulthood.

FRANKLIN E. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 95-96 (1982). In the words of one commentator: "[T]he very concept of rehabilitation may include a serious message that consequences follow conduct. . . . When children commit heinous crimes, swift and definite punishment is an essential part of both 'justice' and 'rehabilitation.' Catherine J. Ross, *Disposition in a Discretionary Regime: Punishment and Rehabilitation in the Juvenile Justice System*, 36 B.C. L. REV. 1037, 1059 (1995).

299. *See* Sheffer, *supra* note 51.

For others, the move to punitive dispositions constitutes a decision to deemphasize rehabilitation in favor of just deserts and deterrence theory.[300] In any event, with punishment comes possible scrutiny under the Cruel and Unusual Punishments Clause of the Eighth Amendment.[301] Thus, the principles of the *Roper/Graham/Miller* cases speak to both the criminal and juvenile justice systems.

Punishment is manifested in juvenile systems in two contexts: 1) through systematic and explicit determinate statutory provisions linking punitive dispositions to specific offenses; and 2) through pockets of punitive dispositions within otherwise indeterminate, rehabilitative models. The manner in which the right to rehabilitation affects these two contexts will be discussed in turn.

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300. Feld, *The Juvenile Court Meets . . . Punishment*, *supra* note 44, at 852-53 (describing the Washington system as embracing "just deserts" sentencing principles aimed at assuring individual accountability, rather than rehabilitation).

301. While the Supreme Court has held that the Eighth Amendment applies only to "criminal punishment," it is surely arguable that punishment by juvenile courts for acts of delinquency, which entail commission of "criminal" statutes, would qualify for Eighth Amendment coverage. Ingraham v. Wright, 430 U.S. 651 (1977). The Supreme Court has required that virtually all the procedural protections of criminal trials be afforded juveniles in delinquency proceedings. *See In re* Gault, 387 U.S. 1 (1967) (rights to notice of charges, assistance of counsel, rights of confrontation and cross-examination, and protections of the privilege against self-incrimination); *In re* Winship, 397 U.S. 358, 367 (1970) (beyond a reasonable doubt standard of proof required in criminal trials also required in delinquency adjudications); Breed v. Jones, 421 U.S. 519, 545 (1975) (delinquency adjudications constitute being placed in jeopardy for purposes of the Double Jeopardy Clause). *But see* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (jury not constitutionally required in delinquency proceedings). These decisions among other things, have led Professor Feld to see juvenile courts as "scaled-down, second class criminal court[s] for young offenders." FELD, JUVENILE JUSTICE ADMINISTRATION, *supra* note 94, at 22.

For a case applying the Eighth Amendment to a juvenile court disposition, see *In re* C.P., 967 N.E.2d 729 (Ohio 2012) (holding sex offender registration and notification requirements on juvenile sex offenders to be cruel and unusual punishment, relying on *Graham*). One dissenter in *C.P.* argued that the disposition was not punitive and was thus outside Eighth Amendment protection. *Id.* at 752-55 (O'Donnell, J., dissenting).

For a case applying the Eighth Amendment to a juvenile disposition, but finding it not disproportionately severe, see *In re* Sturm, 2006 WL 3861074 (Ohio Ct. App. 2006) (upheld serious youthful offender dispositional sentencing scheme). For cases denying Eighth Amendment coverage because juvenile dispositions were deemed rehabilitative and not "punishment" under the Eighth Amendment, see *In re* B.Q.L.E., 676 S.E.2d 742 (Ga. App. 2009); *In re* Rodney H., 861 N.E. 2d 623 (Ill. 2006); *In re* Kelly, No. 98AP-588, 1999 WL 132862 (Ohio App. 1999).

1. Systematic Punishment

As mentioned above, Washington was the first state to enact a systematically punitive juvenile system. The Washington example is thus useful in examining the impact of the right to rehabilitation on punitive juvenile justice systems. As with other such models, Washington imposes punishments scaled-down from those imposed on similarly situated adult offenders. Sentences are determined by presumptive sentencing guidelines that fix dispositions to the seriousness of the offense[302] and increase their severity with the advancing age of the offender, thus reflecting the increased culpability of older juveniles.[303] Thus, legislative purpose statements declare that the system is intended to be punitive.[304] Therefore, sentences administered through the system clearly constitute punishment.[305]

Therefore, the demands of *Graham* and *Miller* apply. This means that mandatory punitive sentences[306] deny the right to pre-sentencing *Miller* hearings required in order to assess the offender's amenability to rehabilitation.[307] No present systematically punitive system meets these demands.

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302. *See* Feld, *Juvenile Court Meets . . . Punishment*, *supra* note 44, at 853.

303. Walkover, *supra* note 55, at 531.

304. *Supra* note 86 and accompanying text; Henning, *supra* note 240, at 1113-14, 1133 (purpose clauses reflecting growing concern for "accountability of offending youth," an attempt to "soft pedal the introduction of retributivist goals into juvenile court").

305. *See supra* note 36 and accompanying text for a definition of "punishment."

306. The Washington system allows judges to suspend a statutorily-defined disposition and order the offender to participate in a treatment program. WASH. REV. CODE ANN. §13.40.0357 (2014) (Option B). Similarly, the Kansas system, which is also systematically punitive, grants the court discretion to impose non-punitive sentencing alternatives, some rehabilitative in nature, e.g. probation, counseling and drug evaluation. KAN. STAT. ANN. § 38-2361 (2014). For a case describing the punitive nature of the Kansas system, see *In re* L.M., 186 P.3d 164 (Kan. 2008) (holding that a sentence constituted punishment, thus recognizing the juvenile offender's right to a jury trial under the Sixth Amendment). While not as systematically punitive as Washington or Kansas, New Jersey provides a table of sentences authorizing substantial sentences for the most serious offenses and proportionally shorter sentences for less serious offenses. N.J. STAT. ANN. 2A:4A-44(d) (West 2014). However, juvenile court judges retain discretion over whether to impose a punitive sentence, which if imposed must be based on legislatively described offense-based criteria. *Id.* at §§ 2A:4A-43(a), 44(d) (West 2014).

307. *See supra* notes 190-221 and accompanying text for discussion of the presentencing requirement. Neither Washington nor Kansas requires a showing of non-amenability to rehabilitation as a precondition of a punitive disposition.

Moreover, whenever a rigorous pre-sentence hearing establishes that a given offender is not amenable to rehabilitation, the offender may be sentenced to a term of punishment so long as a parole release mechanism is in place should the offender be rehabilitated during the punishment term.[308] Thus, mandatory minimum sentences are no longer constitutional.[309] If the pre-sentence hearing reveals that the offender is amenable to treatment, he or she is entitled to a rehabilitative disposition in lieu of a term of punishment.

These considerations require that courts carefully distinguish punitive and rehabilitative dispositions. If dispositions are rehabilitative and not punitive, the requirement of an Eighth Amendment pre-adjudication *Miller* hearing would be unobtainable. This means that for rehabilitative dispositions, bifurcated adjudication and disposition hearings would not be required, rendering constitutionally permissible the practice in some states of allowing juvenile court judges to order dispositions immediately upon adjudication.[310] If, on the other hand, a disposition is punitive, a *Miller* hearing separate from the adjudication hearing is required. Thus, in this context, the conceptual distinction between punishment and rehabilitation described above[311] becomes central as a constitutionally necessary vehicle for defining the scope of the Eighth Amendment rehabilitation right.[312]

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308. *See supra* 190-221 and accompanying text for a discussion of the parole release requirement.

309. Both the Washington and Kansas systems appear unconstitutional for failing to provide parole release mechanisms.

310. *See* DAVIS, RIGHTS OF JUVENILES *supra* note 15 (discussing cases upholding the constitutionality of dispositions imposed immediately upon adjudication).

311. *See supra* text notes 36-44 and accompanying text.

312. Even in systems as obviously punitive as Washington's, courts sometimes fail to honor the constitutional consequences of this distinction by mischaracterizing punishment as "rehabilitation." *See, e.g.*, State v. Chavez, 180 P.3d 1250 (Wash. 2008) (denying jury trial rights because the court deemed the juvenile system only partially punitive and primarily rehabilitative).

Sometimes courts make the opposite mistake of characterizing as "punitive" dispositions that are in fact rehabilitative, often applying the misguided "impact theory" described *supra* at note 39. *See, e.g.*, *In re* Hezzie R. 580 N.W.2d 660 (Wis. 1998) (merely housing juveniles in adult facilities constituted "punishment" even though the terms of confinement were indeterminate and individualized plans were in place aimed at reuniting juveniles with their families—as a result, juveniles could not be transferred to such adult facilities without a jury determination).

2. Punishment Within Rehabilitative Systems

Unlike states like Washington and Kansas, the juvenile systems in most states continue to embrace the rehabilitative ideal, imposing indeterminate dispositions aimed at reforming the offender.[313] Nevertheless, within these systems pockets of punishment sometimes exist, triggering the same Eighth Amendment implications as those visited upon systematically punitive models. Proper application of the Eighth Amendment depends, of course, on recognizing a sanction as punitive. Unfortunately, courts have often failed in this recognition, mistakenly characterizing punitive dispositions as rehabilitative.[314]

A Delaware case, *State* v. *J.K.*,[315] provides a vivid example. A state statute required that juveniles adjudicated delinquent be confined for at least six months[316] if they had committed two or more statutorily enumerated felonies within a one-year period. Despite the fact that such sentences clearly evidenced punishment—imposing on their recipients determinate terms of unpleasantness through institutional confinement because of the commission of prohibited offenses[317]—the Delaware court nevertheless found them rehabilitative, thus defeating claims that the sentences could not be imposed without jury determinations of guilt.[318]

Instead of carefully considering whether the sentences might be punitive, the *J.K.* court simply begged the constitutional question by appeal to the statute's purpose clause, which characterized delinquency matters as "civil" in nature with the aim of achieving "control, care, and treatment" of juveniles.[319] The court added that the rehabilitative interests were actually reflected in the mandatory sentencing law, which it characterized as "an attempt to salvage something in a juvenile who has committed . . . two separate felonies

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313. *See supra* note 84 (as of 1988 two-thirds of the states had failed to embrace offense-based determinate sentencing. Despite the emergence of punitive aspects, "the ameliorative purposes, and the rehabilitative philosophy for the most part has endured" in the juvenile court movement. DAVIS, RIGHTS OF JUVENILES, *supra* note 15, at 5.

314. *See, e.g.*, *supra* note 312 (the *Chavez* case).

315. State v. J.K., 383 A.2d 283 (Del. 1977).

316. The statute actually required institutional confinement for one year, but allowed judges' discretion to suspend confinement in excess of six months. *Id.* at 285.

317. See the definition of punishment, *supra* note 36 and accompanying text.

318. Technically, the court did not rule on the jury trial issue because it was not adequately briefed, but with its finding that the sentences involved in the case were non-punitive, it essentially eliminated any claim for a right to trial by jury.

319. *J.K.*, 383 A.2d at 286-87.

in one year [which] begin[s] with a mandatory commitment for a six-month minimum."[320]

Such careless analysis would deny juveniles realization of their rehabilitation right. How that right would be implicated when provisions like the statute in *D.K.* are correctly characterized as punitive can be illustrated by a consideration of the current version of the Delaware statute.

Similar to the statute in *D.K.*, current Delaware law requires juvenile court judges to impose minimum sentences of six months upon "child[ren] in need of mandated institutional treatment."[321] Such children are those who have been adjudicated delinquents for committing felonies and who commit subsequent felonies within a twelve-month period. Juveniles committed under these provisions must serve at least six months unless the court determines that it is in the "best interest of the child's treatment" to participate in programs outside the institution, or a judge determines that "the child has so progressed in a course of mandated institutional treatment [so] that release would best serve both the welfare of the public and the interest of the child."[322]

Despite its characterization as "mandated institutional treatment," the offense-based, determinate nature of the Delaware disposition belies a rehabilitative characterization and instead renders the disposition punitive.[323] Thus the *Graham* and *Miller* requirements of a rigorous pre-sentence hearing and a parole release mechanism are applicable. The mandatory commitment under the Delaware statute is triggered by past adjudications, which do not necessarily entail exhaustion of the offender's right to a meaningful opportunity for rehabilitation.[324] Thus, unless it could be shown that a particular juvenile had been exposed to effective treatment in the past,[325] a pre-sentencing *Miller* amenability hearing is required prior to imposing the mandated institutional punishment, a disposition that would be permissible only if the juvenile is shown not to be amenable to rehabilitation. As for *Graham*'s parole release requirement, the Delaware statute satisfies that demand.[326]

Punishment provisions in numerous states would be affected should the implications of *Graham*'s meaningful opportunity for

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320. *Id.* at 289.

321. DEL. CODE ANN. tit. 10, § 1009 (West 2014).

322. *Id.* at (e)(1), (2), (3).

323. See the distinction between punishment and rehabilitation, *supra* notes 36-44 and accompanying text.

324. *Supra* note 264.

325. *Id.*

326. *See supra* note 322 and accompanying text.

rehabilitation requirement and *Miller*'s pre-sentencing hearing mandate be given full effect.[327] A cursory sample of the statutes suggests that many statutes provide neither a *Miller* hearing nor a *Graham* opportunity for rehabilitation and parole.[328]

D. Summary

Recognition of the principles entailed in the Supreme Court's *Graham* and *Miller* cases would require that juvenile courts exercise original jurisdiction over all alleged juvenile offenders, transferring them to criminal court only upon a judicial finding that a given juvenile is not amenable to rehabilitation in the juvenile system. This requirement would mean that many, if not all, of the waiver criteria standards presently employed in juvenile systems are unconstitutional, as are the legislative exclusion and direct file statutes widely in place throughout the nation. Moreover, mandatory punitive sentencing within juvenile systems would also be unconstitutional.

These manifestations of the right to rehabilitation conceived in the Court's Eighth Amendment cases would be significant, impacting virtually all juvenile justice systems in one way or another. Whether courts and policy makers actually follow the *Graham* and *Miller* cases to their logical conclusions is, of course, not clear. But if they do, the effect will be to bring juvenile courts back to their original rehabilitative roots, a welcome development for those championing the "humane purposes" of a juvenile system aimed at "protect[ing] and nourish[ing] children."[329]

VI. WAIVING THE RIGHT TO REHABILITATION?

However Far It Will Eventually Extend, The Right To A Meaningful Opportunity For Rehabilitation Granted To Juveniles By *Graham* and *Miller* is an individual constitutional right protected by

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327. *See* Feld, *Juvenile Court Meets . . . Punishment*, *supra* note 45, at 862-79 for references to various statutes.

328. *See, e.g.*, ALA. CODE § 12-15-219 (West 2014) (children committing enumerated felonies "shall be committed to the custody of the Department of Youth Services where he or she shall remain for a minimum of one year"); CONN. GEN. STAT. ANN. § 46b-140(i) (West 2014) (court given discretion to set a minimum twelve month sentence to a residential facility for juveniles committing "serious" offenses); N.Y. FAM. CT. ACT § 353.5(3),(4)(a)(ii), (4)(a)(iv) (2008) (mandatory sentences of twelve to eighteen months for offenders committing "designated felon[ies]" with no release during the set term of the sentence).

329. *Supra* note 235.

the Eighth Amendment, similar to the due process procedural protections granted to juveniles in cases like *Kent*, *Gault*, and *Winship*.[330] As with those rights, individual juveniles are now arguably entitled to governmental recognition of a rehabilitation right, to the extent it has been defined in this Article.

As with their other rights, juveniles would almost always gladly accept, and demand if not granted, the manifestations of their new Eighth Amendment right. But what if an accused or convicted juvenile disavows the rehabilitation right and instead asserts Professor Fox's right to be punished—not rehabilitated—[331] along the lines proposed for mature persons by Herbert Morris?[332] Indeed, Florida law presently affords juveniles a statutory right to be punished, permitting them to opt out of dispositions in juvenile court and demand criminal court trial.[333] Upon such demand, the juvenile court must transfer the case to criminal court.[334] Assuming recognition of an Eighth Amendment right to a judicial waiver hearing in juvenile court,[335] would it be constitutionally permissible for juveniles to waive this right? Would the other manifestations of the rehabilitation right described in this Article be waiveable?

The Supreme Court has recognized that in some contexts juveniles are permitted to waive constitutionally-mandated rights. Thus, for example, the Court held in *In re Gault* that, while juveniles are entitled to the assistance of counsel at delinquency adjudications, accused juveniles may waive their counsel rights if they do so intelligently and knowingly.[336]

Whatever the waiver status of other constitutional rights, the right to be free from cruel and unusual punishment under the Eighth Amendment is almost certainly not waivable.[337] One cannot

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330. *Supra* notes 96, 301 and accompanying text.

331. I have shown concepts of rehabilitation and punishment are theoretically antithetical. *Supra* notes 36-53 and accompanying text. *See supra* text note 9 and accompanying text.

332. *Supra* notes 1-8 and accompanying text.

333. FLA. R. JUV. P. Form 8.937 (West 2014) permits a "child" and his or her parent to "demand . . . voluntary waiver of [juvenile court] jurisdiction" and have the case brought to trial "in adult court as if the child were an adult to face adult punishments . . . ."

334. "On demand . . . the court shall . . . certify[ ] the case for trial as if the child were an adult." FLA. R. JUV. P. RULE 8.105 (West 2014).

335. For discussion of the right to a judicial waiver hearing, see *supra* notes 236-66 and accompanying text.

336. *In re* Gault, 387 U.S. 1 (1967) (juvenile can waive counsel right if done so intelligently and knowingly).

337. There are apparently no Supreme Court opinions directly on point, but lower courts have found the right to be free from cruel and unusual punishment not

demand to be subjected to cruel punishment. As Justice White put it, "the consent of a convicted defendant in a criminal case does not privilege a state to impose a punishment otherwise forbidden by the Eighth Amendment"[338] Justice Marshall has noted that, while Eighth Amendment rights are possessed by individuals, society shares an interest in living in a culture where cruel punishments are not imposed: "Society's independent stake in enforcement of the Eighth Amendment's prohibition against cruel and unusual punishment cannot be overridden by a defendant's purported waiver."[339] This means that juveniles would not be allowed to waive any of the manifestations of the rehabilitation right identified in this Article.[340] It also means that the Florida law noted above allowing a waiver of a judicial transfer hearing in juvenile court[341] is unconstitutional.

Unlike the right to be punished arguably possessed by autonomous moral agents, the right to a meaningful opportunity for rehabilitation flowing from the *Roper*, *Graham*, and *Miller* cases is premised on the view that adolescents are a class distinct from fully-accountable moral agents. Therefore, paternalistic responses to juvenile offenders are not only appropriate, but also necessary, lest these offenders be "abandoned" to the same practices and punishments applicable to adults[342]—practices and policies that disregard both the minimal culpability and the unique rehabilitative amenability of young people.

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waivable. *See, e.g.*, Commonwealth v. McKenna, 383 A.2d 174, 181 (Pa. 1978) ("the waiver concept was never intended as a means of allowing a criminal defendant to choose his own sentence," thus waivers can never require courts to impose "an illegal execution of a citizen"); State v. Brown, 326 S.E.2d 410, 411 (S.C. 1985) (defendants demanded castration, a form of cruel and unusual punishment under state analogue to Eighth Amendment).

338. Gilmore v. Utah, 429 U.S. 1012, 1018 (White, J., dissenting) (court held convicted defendant validly waived his right to appeal his death sentence).

339. Lenhard v. Wolff, 444 U.S. 807, 811 (1979) (Marshall, J., dissenting) (court denied stay of convicted offender's execution). A leading commentator agrees. Professor Richard Bonnie has stated that "it is clear that [one] may not waive [a] constitutional ban and thus empower the state to impose a punishment that it is otherwise forbidden to inflict." Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1371 (1988). *See also* Lystra Batchoo, *Waiving the Eighth Amendment Protection from Cruel and Unusual Punishment*, 72 BROOK. L. REV. 689, 712-13 (2007).

340. *See supra* notes 205-215; 254-56, 306-309 and accompanying text.

341. *See supra* notes 332-33 and accompanying text.

342. Bruce Hafen has counseled against "abandoning youth" to adult rights and responsibilities. *See generally* Hafen, *supra* note 118.

CONCLUSION

The Supreme Court's recent Eighth Amendment cases have made clear, seemingly once and for all, what all mothers know as a matter of common sense: kids are different. However, the Court's knowledge comes not just from common sense but, more significantly, from a vast body of social science research documenting the differences between adolescents and adults. In recognizing these differences, the Court has blessed young people with a unique constitutional status.

In this Article, I have explored the ramifications of this newly-recognized status in terms of a non-waiveable rehabilitation right spawned by in the *Roper*, *Graham*, and *Miller* cases—a right representing the antithesis of the right to punishment arguably possessed by adults. This right, if followed to its logical conclusions, would grant juveniles in both the criminal and juvenile systems a meaningful opportunity for rehabilitation.

Specifically, I have argued that this right means that, for accused offenders, jurisdiction would necessarily originate exclusively in juvenile court, with transfer to criminal court permitted only if a juvenile court judge finds that a given juvenile is not amenable to rehabilitation within the juvenile system. Punishment within that system could not be imposed unless it were shown at a pre-dispositional hearing that an adjudicated delinquent is not amenable to rehabilitation. Moreover, any punishment within the juvenile system would be required to afford a meaningful opportunity for rehabilitation and parole.

When juveniles are transferred to the criminal system, they would be entitled to less severe punishment than that imposed on adults committing the same crime. Upon conviction, they would be entitled to a rigorous pre-sentencing hearing, taking into account amenability for rehabilitation. If a given offender is deemed unamenable to rehabilitation by the criminal court, he or she could be given punitive sentences, so long as they carry a realistic possibility of rehabilitation and parole if rehabilitation is achieved during the sentence. If an offender is adjudged amenable to rehabilitation at the pre-sentencing hearing, he or she should receive a juvenile court disposition if that affords the best rehabilitative opportunity.

I have shown that these requirements are entailed in the *Roper*, *Graham*, and *Miller* cases, and, if put into effect by courts and legislatures, would significantly impact both the criminal and juvenile justice systems. Time will tell the extent of that impact. As for the wisdom of recognizing the broad implications of the rehabilitation right, if the science is correct and juveniles are indeed uniquely amenable to reformation, implementing the reforms

discussed in this Article would constitute a compassionate recognition of that amenability and would likely pose little increased risk to, and perhaps even greater protection of, society's interest in being safeguarded from crime.