# The *Miller* Revolution

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*ABSTRACT: In a series of cases culminating in* Miller v. Alabama, *the United States Supreme Court has limited the extent to which juveniles may be exposed to the harshest criminal sentences. Scholars have addressed discrete components of these recent decisions, from their Eighth Amendment methodology to their effect upon state legislation. In this Article, I draw upon that scholarship to make a broader claim: the* Miller *trilogy has revolutionized juvenile justice. While we have begun to see only the most inchoate signs of this revolution in practice, this Article endeavors to describe what this revolution may look like both in the immediate term and in years to come. Part II demonstrates how the United States went from being the leader in progressive juvenile justice to being an international outlier in the severity of its juvenile sentencing. Part III examines the* Miller *decision, as well as its immediate predecessor cases, and explains why* Miller *demands a capacious reading. Part IV explores the post-*Miller *revolution in juvenile justice. Specifically, Part IV makes the case for two immediate groundbreaking corollaries that flow from* Miller*: (1) the creation of procedural safeguards for juveniles facing life without parole ("LWOP") comparable to those recommended for adults facing the death penalty; and (2) the elimination of mandatory minimums for juveniles altogether. Part IV also identifies ways in which juvenile justice advocates can leverage the moral leadership of the* Miller *Court to seek future reform in three key areas: juvenile transfer laws; presumptive sentencing guidelines as they apply to children; and juvenile conditions of confinement.*

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## I. INTRODUCTION

A juvenile justice revolution in America is underway. After decades of increasingly punitive treatment of juveniles in our criminal justice system,[1] the tide is turning. Legislatures, courts and executive actors are reconsidering the propriety of criminal laws as they apply to children in fundamental ways. In one way or another,[2] this revolution can be linked to the Supreme Court's

1. *See infra* Part II.

2. There is great debate over whether the Supreme Court can generate social change or whether it responds to social change once it is underway. That debate is not the focus of my Article. For a discussion of those issues see generally GERALD N. ROSENBERG, THE HOLLOW HOPE:

recent decision in *Miller v. Alabama*, where the Court held that the Eighth Amendment prohibits mandatory life without parole ("LWOP") sentences for juveniles—even those convicted of homicide.[3] Following *Roper v. Simmons*[4] and *Graham v. Florida*,[5] *Miller* was the last of three recent Supreme Court cases dealing with juvenile sentencing.[6] Together these cases—which I refer to as the *Miller* trilogy—stand for the proposition that children are constitutionally different for sentencing purposes, and state practices must reflect that fact.

This Article maintains that *Miller* was a revolutionary decision and that it portends a tremendous shift in juvenile justice policy and practice.[7] Some scholars and advocates have begun to recognize the outer limits of the *Miller* decision and have articulated expansive readings of the *Miller* trilogy. For example, Professor Will Berry has argued that *Miller*'s call for individualized sentencing for juveniles should apply to all instances where the defendant faces a death-in-custody sentence.[8] Professor Barry Feld has called for legislation that would respond to *Graham* and *Miller* by imposing a categorical "Youth Discount" at sentencing.[9] Many have called for a re-examination of juvenile justice practices across the board in the wake of *Miller*.[10] The premise of these arguments—that the language, logic, and science of the *Miller* decision demand a capacious reading—is sound.

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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) (suggesting that despite judicial constraints courts can 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).

3. Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

4. Roper v. Simmons, 543 U.S. 551 (2005).

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

6. The Court also dealt with the retroactivity of *Miller* in its recent decision, *Montgomery v. Louisiana*, but I refer to the *Miller* trilogy in this Article as the three cases that dealt with constitutional sentences for juveniles on the merits. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016) (holding that *Miller* is retroactively applicable).

7. In the wake of *Miller*, courts and scholars have grappled with the often-messy questions of implementation: Is *Miller* retroactive? Are life sentences or de facto life sentences also within the purview of *Graham* and *Miller*? How do states that long ago abolished parole afford juveniles relief under *Graham* and *Miller*? These questions are vitally important, and I have weighed in on some of them in prior works. *See generally* Cara H. Drinan, Graham *on the Ground*, 87 WASH. L. REV. 51 (2012); Cara H. Drinan, *Misconstruing* Graham *&* Miller, 91 WASH. U. L. REV. 785 (2014). They are not, however, the focus of this Article.

8. William W. Berry III, *The Mandate of* Miller, AM. CRIM. L. REV., Spring 2014, at 345.

9. Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy:* Roper, Graham, Miller/Jackson, *and the Youth Discount*, 31 LAW & INEQ. 263, 264 (2013).

10. *See, e.g.*, Elizabeth S. Scott, *"Children are Different": Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 73 (2013); *see also id.* at 75 (arguing that "[t]he recent Supreme Court opinions reinforce [a] developmental approach [to youth crime regulation] and elevate its stature to one grounded in constitutional principle").

In this Article, I build upon these arguments and identify truly revolutionary changes in juvenile justice policy and practice that are possible post-*Miller*. Some of these changes are already underway. For example, one state supreme court has banned mandatory sentences for juveniles across the board—an unthinkable action even as recently as the late 20th century.[11] Other changes are nascent and demand greater exploration so that they can be pursued in the years to come, including repealing mandatory juvenile transfer laws and overhauling juvenile conditions of confinement.

This Article proceeds in three Parts. Part II demonstrates how this nation went from being the leader in progressive juvenile justice to being an international outlier in the severity of its juvenile sentencing. In answering this question, Part II traces the development of mandatory juvenile sentences in this country and identifies two forces driving that development: the practice of transferring juvenile cases to adult court and the emergence of determinate sentencing schemes. Part III examines the *Miller* decision and the cases immediately preceding it at a granular level and explains why *Miller* demands a capacious reading. Part IV then explores the post-*Miller* revolution in juvenile justice that is afoot in two ways. Part IV first makes the case for two immediate corollaries that flow from *Miller*: (1) the creation of procedural safeguards for children facing life without parole comparable to those recommended for adults facing the death penalty; and (2) the elimination of mandatory minimums for children altogether. Part IV then turns to the juvenile justice frontier and articulates several revolutionary changes that should be explored post-*Miller*. These include repealing mandatory transfer laws, changing presumptive sentencing guidelines as they apply to children, and rethinking juvenile conditions of confinement. Such actions could set in motion a return to the rehabilitative juvenile justice model this country began with more than a century ago. This Article concludes by addressing the issue of political feasibility and identifies data that suggests state actors can partake in the *Miller* revolution that is underway.

## II. THE ARC OF AMERICAN JUVENILE JUSTICE: FROM PROGRESSIVE LEADER TO INTERNATIONAL OUTLIER

Juvenile courts and the distinct treatment of juveniles charged with crimes are now established features of the American criminal justice system—features that have been emulated globally.[12] In recent years, however, two developments in American criminal procedure converged to expose juveniles to potentially extreme mandatory sentences: (1) the transfer of juvenile delinquents to adult criminal court; and (2) the trend toward determinate sentencing schemes. These two developments were the perfect storm that

11. *See infra* note 192 and accompanying text.

12. *See* Franklin E. Zimring & David S. Tanenhaus, *Introduction* to CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 1 (Franklin E. Zimring & David S. Tanenhaus eds., 2014).

generated mandatory, extreme sentences for children in the criminal justice system. In this Part of the Article, I provide a brief historical overview of American juvenile justice and then turn to illustrating how juvenile transfer laws and determinate sentencing schemes together exposed our youth to the most severe sanctions without any room for discretion.

### *A. GENERAL OVERVIEW OF JUVENILE JUSTICE*

Juvenile justice is now a well-established feature of our criminal justice system. Established in Illinois in 1899, every jurisdiction in the country has a separate juvenile justice system.[13] Prompted by Progressive Era reformers, the early juvenile court was attentive to the differences between adults and children and emphasized age-appropriate punishment and treatment for juvenile offenders.[14] As described by Aaron Kupchik:

> Founders of the juvenile justice system believed that juveniles who misbehaved were products of pathological environments rather than intrinsically evil. The target of the juvenile justice system was the deprivation, not the depravation, of delinquent youth. The court's mission was to resocialize youth and provide them with the necessary tools for adopting a moral lifestyle.[15]

Over time, several features emerged as defining attributes of the American juvenile justice system: (1) a degree of informality relative to criminal court proceedings; (2) great discretion afforded to the judge who was able to tailor the intervention to the particular juvenile in each case; and (3) a fundamental shared belief that childhood is a period of dependency and risk, where the state had a role to play for a child in jeopardy.[16] Today, developed countries around the world have installed juvenile justice systems modeled after the American system.[17]

Professor Terry Maroney has described three primary phases in the development of American juvenile justice prior to the immediate post-*Miller* era.[18] The first phase, discussed above, was prompted by the rehabilitative

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13. *Id.*

14. AARON KUPCHIK, JUDGING JUVENILES: PROSECUTING ADOLESCENTS IN ADULT AND JUVENILE COURTS 10–11 (2006).

15. *Id.* at 11.

16. FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 6–7 (2005); *see also* KUPCHIK, *supra* note 12, at 51.

17. Zimring & Tanenhaus, *supra* note 12, at 1; *see also* ZIMRING, *supra* note 16, at 33 ("No legal institution in Anglo-American legal history has achieved such universal acceptance among the diverse legal systems of the industrial democracies.").

18. Terry A. Maroney, *The Once and Future Juvenile Brain*, *in* CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE, *supra* note 12, at 189, 189. Juvenile justice scholars agree that we have entered a new era of policy in the last decade. *See, e.g.*, *id.* ("We surely now have moved into a new era of juvenile justice."); Elizabeth S. Scott, Miller v. Alabama *and the (Past and) Future of*

ideal of the late 19th century and expressed optimism about the juvenile's capacity for change and society's obligation to support that change.[19] By the middle of the 20th century, the Supreme Court recognized the evolving punitive nature of "civil" juvenile proceedings and granted juveniles[20] many of the procedural safeguards associated with the adult criminal justice system.[21] The zenith of this "due process era" of juvenile justice was the Supreme Court's decision in *In re Gault*, which held that juveniles had the right to counsel during delinquency proceedings.[22] Finally and most recently, American juvenile justice shifted radically to a posture of fear and containment. In the 1990s, fueled by criminologists who predicted a wave of juvenile "super-predators" and skyrocketing homicide rates, state laws shifted to expose children to even harsher procedures and punishments.[23]

By the beginning of the 21st century, the United States was an international outlier in its harsh sentences for juvenile criminal defendants. Until 2005, the United States was the only developed country that subjected children to the death penalty.[24] Today it is the only nation that employs juvenile life without parole.[25] Two recent developments, in particular, led to the practice of extreme sentences for juvenile offenders: juvenile transfer laws which removed children from juvenile proceedings and placed them under the jurisdiction of adult criminal courts and the general trend toward determinate sentencing schemes.

### *B. JUVENILE TRANSFER LAW: KIDS IN ADULT COURT*

From the inception of the juvenile court to the mid-1970s, a child who was accused of committing a crime was initially and usually processed in the

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*Juvenile Crime Regulation*, 31 LAW & INEQ. 535, 536 (2013) (discussing the moral panic that drove policies of the 1990s and the shifts that have emerged in the last decade).

19. Maroney, *supra* note 18, at 189.

20. Some academics have suggested that juvenile defendants have fared worse in the post-*Gault* era. *See, e.g.*, Franklin E. Zimring & David S. Tanenhaus, *On Strategy and Tactics for Contemporary Reforms*, *in* CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE, *supra* note 12, 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).

21. *See* Maroney, *supra* note 18, at 189.

22. *In re* Gault, 387 U.S. 1, 4 (1967).

23. Maroney, *supra* note 18, at 189. *See generally* Franklin E. Zimring, *American Youth Violence: A Cautionary Tale*, *in* CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE, *supra* note 12, at 7; *see also* Scott, *supra* note 18, at 537–41.

24. 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.").

25. Brief of Amici Curiae Amnesty Int'l, et al. Supporting Petitioners at 5–6, Miller v. Alabama, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647), 2012 WL 174238.

juvenile justice system.[26] In that system, the judge enjoyed great power and flexibility relative to today's criminal court judges. The ethic of "*parens patriae*" permeated the juvenile court and typically prompted judges to provide social services that were lacking for the youth offender.[27] In this context, it was the juvenile judge's decision when and if to transfer a child to adult court.[28] The transfer decision involved a hearing at which the state had to persuade the juvenile judge that the juvenile was not amenable to rehabilitation, had committed a crime too serious for adjudication in juvenile court given its punitive limits, or both.[29]

Transfer was not common; it was the exception. In recent years, though, an increasing number of children have been transferred from juvenile court to adult court. This trend, and the psychology accompanying it, has changed the model of criminal justice for kids altogether. Beginning in the 1970s, states amended their laws in a number of ways, making it easier for children to be prosecuted in adult criminal courts.[30] Some state laws reduced the age at which a juvenile judge was authorized to transfer a child to adult court, while others state laws automatically excluded certain juvenile defendants from the juvenile court's jurisdiction based upon the child's age or the charged offense.[31] Finally, some states amended their laws to vest the prosecutor with unilateral power to make the juvenile transfer decision.[32]

Laws granting this unilateral discretion to prosecutors, also known as "direct file" laws, have been most problematic, as scholars and the Supreme Court have noted.[33] Professor Franklin Zimring, for example, has posited that get-tough transfer legislation from 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."[34] Whether intentional or not, direct file laws certainly "create[] more power or less work for juvenile court

26. KUPCHIK, *supra* note 14, at 1.

27. *Id.* at 11 ("The founders of the juvenile court imagined a judge and probation officer, assisted by medical and psychological treatment professionals, diagnosing and remedying a youth's problems without the need to constrict due process rules.").

28. Franklin E. Zimring, *The Power Politics of Juvenile Court Transfer in the 1990s, in* CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE, *supra* note 12, at 37, 42 ("The long-standing method of transfer was a hearing held before a juvenile court judge who had the power to waive the juvenile court's jurisdiction.").

29. *Cf.* ZIMRING, *supra* note 16, at 141–44 (discussing the mission of juvenile court as being its primary limitation in that some juvenile cases warrant a punishment response the juvenile court cannot impose).

30. KUPCHIK, *supra* note 14, at 154–59.

31. *See id.*

32. *Id.* at 156–58.

33. *Id.* (defining the process and explaining its problems).

34. Zimring, *supra* note 28, at 44.

prosecutors, or both."[35] In *Miller*, the Supreme Court also noted the dangers of direct file laws for juveniles: "several States at times lodge this decision exclusively in the hands of prosecutors, again with no statutory mechanism for judicial reevaluation. And those 'prosecutorial discretion laws are usually silent regarding standards, protocols, or appropriate considerations for decision-making.'"[36]

While state transfer laws vary in their scope and mechanism, in the aggregate, they result in many children being tried in adult court and exposed to generally applicable penalty provisions.

### *C. DETERMINATE SENTENCING SCHEMES: A PARALLEL TREND*

Around the same time that states were amending their transfer laws, state and federal governments also implemented mandatory sentencing schemes for adult offenders.[37] Beginning in the 1970s, lawmakers and politicians embraced a tough-on-crime stance across the board. By the 1990s, criminologists predicted increasing rates of violent crime and the emergence of a juvenile "super-predator."[38] Nationwide, lawmakers responded in several ways, one of which entailed shifting from indeterminate sentencing schemes where judges had discretion regarding a defendant's sentence, to a scheme that imposed mandatory minimums. "On the state level this trend began in New York in 1973, with California and Massachusetts following soon thereafter. While the trend toward mandatory minimums in the states was gradual, by 1983, 49 of the 50 states had passed such provisions."[39] At the same time, states increased the number of crimes on the books[40] and eliminated or narrowed parole provisions.[41]

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35. *Id.*; *see also id.* at 45 ("So the proliferation of direct file provisions is really an enhancement of prosecutorial power as much as it is a legislative judgment about which juveniles should be transferred to criminal court, because it is contingent on prosecutorial charging discretions.").

36. Miller v. Alabama, 132 S. Ct. 2455, 2474 (2012) (citing P. GRIFFIN ET AL., DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 5 (2011)).

37. The *Miller* Court noted that state legislators were not necessarily considering the interaction of these separate legislative efforts, and yet the consequences were dire for juveniles. *Id.* at 2472.

38. *See* Zimring & Tanenhaus, *supra* note 12, at 105–06.

39. U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 9 (1991), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf.

40. *Cf.* Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, WALL STREET J. (July 23, 2001), http://online.wsj.com/news/articles/SB100014240527023043198045763896010797289 20 (estimating that there are at least 3000 federal criminal laws and recognizing that the true number is probably beyond estimation).

41. Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, AM. CRIM. L. REV., Spring 2013, at 315–20 (describing the "death of parole" at the state and federal level).

These two parallel trends created the perfect storm for juveniles in the criminal justice system. State law often made it very easy for a child to be tried in adult court. Once a child was in adult court, he was exposed to generally applicable mandatory minimum sentences. The two inmates whose cases were addressed by the *Miller* Court provide good illustrations of this dynamic. Kuntrell Jackson was charged with capital felony murder, and Arkansas law permitted the prosecutor to charge him as an adult based on the nature of the charge itself.[42] Once in adult court, a jury convicted Jackson of both capital murder and aggravated robbery.[43] As the judge noted in Jackson's case, Arkansas law permitted only one sentence: life without parole.[44] Similarly, in Evan Miller's case, the prosecutor moved to transfer his case to adult court in Alabama, succeeded in that transfer, and charged Miller with murder in the course of arson.[45] A jury found Miller guilty, and again, Alabama law permitted only one sentence: life without parole.[46]

The statutes at issue in *Miller* were not outliers. As the *Miller* Court noted, 28 states and the Federal Government imposed mandatory life without parole on some juveniles convicted of murder in adult court.[47] The Court also noted that many state transfer laws 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."[48] Thus the *Miller* Court squarely addressed the two dynamics that I have discussed in this Part of the Article: parallel state trends toward trying children in adult court and toward imposing mandatory minimums. These two trends converged to expose our nation's children to severe, mandatory sentences. By 2005, the Supreme Court took up the issue of extreme juvenile sentences, scaling back the extent to which states could impose those sentences on children.

## III. THE MILLER TRILOGY

This Part begins by examining the *Miller* decision, as well as its immediate predecessor cases, at a granular level; it then goes on to explain why *Miller* demands a capacious reading by courts and scholars.

### *A. THE* MILLER *TRILOGY:* ROPER, GRAHAM *&* MILLER

The road to *Miller* began with *Roper v. Simmons* in 2005.[49] In *Roper*, the Supreme Court held that executing individuals who had committed their

42. *Miller*, 132 S. Ct. at 2461.
43. *Id.*
44. *Id.*
45. *Id.* at 2462.
46. *Id.* at 2462–63.
47. *Id.* at 2471.
48. *Id.* at 2474.
49. Roper v. Simmons, 543 U.S. 551 (2005).

crimes prior to the age of 18 was unconstitutional.[50] The *Roper* Court employed longstanding Eighth Amendment analysis for the capital setting: it examined juveniles as a group and asked whether the use of execution was proportionate given the diminished culpability of juvenile offenders.[51] In assessing 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."[52] The *Roper* Court ultimately found that a majority of states forbid the practice of juvenile capital punishment; that it was rarely employed in the states that permitted it; and that the national trend was moving away from subjecting juveniles to the death penalty.[53] On this basis, the Court held that the Eighth Amendment forbids juvenile execution.[54]

Having demonstrated that the practice was inconsistent with "evolving standards of decency," the *Roper* Court proceeded to render its own judgment regarding the penalty as it applied to juveniles.[55] The Court focused on three reasons why juveniles are categorically different from adults and thus should not be exposed to capital punishment: they lack maturity; they are far more susceptible to external pressures; and their moral character is still fluid.[56] Finally, the Court held that, in light of juveniles' diminished culpability, neither stated rationale for the death penalty, deterrence or retribution, was adequate justification.[57]

Two aspects of the *Roper* decision are noteworthy in the context of *Miller* and its import. First, the *Roper* Court drew upon science and the proven fact that children are not just small adults. The Court's discussion of the unique attributes of children was anchored in social science work, documenting the inchoate nature of the adolescent brain.[58] The scientific bent to the *Roper* Court's decision laid important foundation for both the *Graham* and *Miller* decisions.

Second, the *Roper* Court noted that the United States was out of sync with the rest of the world in its use of juvenile capital punishment. While the Court explained that its decision rested on an analysis of legislative trends coupled with its own independent judgment, the Court said: "Our determination that the death penalty is disproportionate punishment for offenders under 18

50. *Id.* at 577–78.
51. *Id.* at 564.
52. *Id.*
53. *Id.* at 567–68.
54. *Id.* at 578.
55. *Id.* at 563, 568.
56. *Id.* at 569–70.
57. *Id.* at 571–72.
58. *Id.* at 569–70 (discussing the lack of maturity and recklessness, susceptibility to negative outside influences, and transient character of youth, citing the science behind each point).

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."[59] The *Roper* Court's reference to American sentencing practices relative to the international arena was also important to the *Graham* and *Miller* decisions, as those cases also examined a sentencing practice foreign to most developed countries.

Five years after *Roper*, in *Graham v. Florida*, the Court took up the question of whether a life without parole sentence was permissible for a nonhomicide juvenile offender.[60] Writing for the majority, Justice Kennedy held that the Constitution categorically forbids such a sentence.[61] First, he explained that the Eighth Amendment bars both "barbaric" punishments and punishments that are disproportionate to the crime committed.[62] 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.[63] 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.[64]

Just as the Court had done in *Roper*, the *Graham* Court looked to objective indicia of national consensus, beginning with relevant legislation regarding juvenile life without parole. Justice Kennedy explained that while 37 states, the District of Columbia, and the federal government permitted life without parole sentences for nonhomicide juvenile offenders, the actual sentencing practices of these jurisdictions told another story.[65] Based on the evidence before it, the Court determined that at the time of the decision, there were only 123 nonhomicide juvenile offenders serving life without parole sentences nationwide with 77 of them being in Florida prisons.[66] 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 nonhomicide juvenile offenders.[67]

Consistent with *Roper*, the *Graham* Court acknowledged that "community consensus" was "entitled to great weight," but it proceeded to render its own

59. *Id.* at 575.
60. Graham v. Florida, 560 U.S. 48, 52–53 (2010).
61. *Id.* at 79.
62. *Id.* at 59.
63. *Id.* at 59–61.
64. *Id.* at 61–62.
65. *Id.* at 62–63.
66. *Id.* at 64.
67. *Id.* at 67.

judgment regarding the constitutionality of Graham's sentence.[68] The Court focused on two aspects of the case: first, the uniqueness of juvenile offenders—specifically their lessened culpability and their greater capacity for reform—and second, the historical treatment of nonhomicide crimes as less severe than crimes where a victim is killed.[69] Looking at these two features, the Court reasoned that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."[70] The Court also examined the various justifications for criminal sanctions and determined that none could justify life without parole for juvenile defendants like Graham. Accordingly, the Court held:

> 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. . . . 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 prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.[71]

Thus, the Court found life without parole sentences unconstitutional for juvenile nonhomicide offenders and, with its decision, entitled Terrence Graham and those similarly situated to a new sentence.

As the Supreme Court acknowledged in *Graham*, its decision applied to only a small number of inmates nationwide.[72] However, more than 2000 inmates nationwide were serving life without parole on the basis of a juvenile homicide conviction. In this sense, the *Graham* decision begged the question: whether the Eighth Amendment also precluded life without parole for juveniles convicted of homicide offenses. Two years later, the Court took up that question in *Miller v. Alabama*. In an opinion authored by Justice Kagan, the majority held that the Eighth Amendment bars mandatory life without parole for juveniles—even those convicted of a homicide offense.[73]

The *Miller* Court explained that its decision rested on two relevant strands of precedent: (1) its line of cases adopting categorical bans on certain sentencing practices; and (2) its line of cases requiring certain procedural

68. *See id.* at 67–75.

69. *Id.* at 68–69.

70. *Id.* at 69.

71. *Id.* at 75.

72. *Id.* at 64 ("Thus, adding the individuals counted by the study to those we have been able to locate independently, there are 123 juvenile nonhomicide offenders serving life without parole sentences. A significant majority of those, 77 in total, are serving sentences imposed in Florida. The other 46 are imprisoned in just 10 States—California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and Virginia." (citation omitted)).

73. Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012).

safeguards in the capital sentencing context.[74] As to the first line of cases, the Court viewed its ban on mandatory life without parole for juveniles as analogous to its ban on the death penalty for the intellectually disabled or its ban on life without parole for nonhomicide juvenile offenders. In both cases, the Court determined that the sentence at issue was disproportionate in light of the mitigating attributes of the defendant.[75] As to the second line of cases, the *Miller* Court explained that, for juveniles, life without parole is analogous to the death penalty:

> And this lengthiest possible incarceration is an "especially harsh punishment for a juvenile," because he will almost inevitably serve "more years and a greater percentage of his life in prison than an adult offender." The penalty when imposed on a teenager, as compared with an older person, is therefore "the same . . . in name only."[76]

In light of these two lines of precedent—those finding certain punishments excessive for classes of offenders and those dealing with procedural safeguards required in the capital context—the *Miller* Court forbade the states from sentencing juveniles to life without parole under a mandatory sentencing scheme.[77] The *Miller* trilogy stands for the proposition that children are different in the eyes of the law. These cases also send important signals to state actors about the propriety of various juvenile justice practices.

### *B. COURTS SHOULD READ* MILLER *CAPACIOUSLY*

A narrow reading of *Miller* says that juveniles may not be sentenced to life without parole under a mandatory sentencing scheme—that the sentence is still permissible, but states must implement a new process for its use.[78] However, the language, logic, and science of the decision demand a broader and richer reading.

To begin, the four dissenting Justices in *Miller* recognized the decision for what it was—nothing short of revolutionary. Chief Justice Roberts posited

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74. *Id.* at 2463–64.

75. *Id.*

76. *Id.* at 2466 (citation omitted) (quoting Graham v. Florida, 560 U.S. 48, 70 (2010)).

77. *Id.* ("[T]he mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That 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.").

78. *See, e.g.*, Chambers v. State, 831 N.W.2d 311, 328–31 (Minn. 2013) (holding *Miller* is procedural and not retroactive), *abrogated by* Montgomery v. Louisiana, 135 S. Ct. 718, 736 (2016) (holding *Miller* is substantive and retroactive).

that "[t]he principle behind today's decision seems to be *only* that because juveniles are different from adults, they must be sentenced differently,"[79] and that such a principle and the process the majority employed in applying it "has no discernible end point."[80] Similarly, Justice Thomas wrote that *Miller* "lays the groundwork for future incursions on the States' authority to sentence criminals."[81]

Beyond the fact that the dissenting Justices recognized the breadth of the decision, there are at least four reasons why an expansive reading is warranted. First, the *Miller* decision (and the work that the *Graham* Court had done in laying the foundation for *Miller*) was an enormous break from Eighth Amendment precedent dealing with non-death sentences. The Court made this break because it was dealing with children. Prior to *Graham*, the Court had not invalidated a custodial sentence since its 1983 decision in *Solem v. Helm*.[82] In the three decades between *Solem* and the culmination of the *Miller* trilogy, the Court examined other proportionality challenges to equally draconian custodial sentences and rejected the inmate's challenge in each instance.[83] Equally important, the Court historically had made clear that the bar for making such a challenge was an incredibly high one: "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.'"[84] Thus, the mere fact that the Court agreed with a defendant's proportionality challenge outside the death penalty context in the *Graham* and *Miller* decisions renders the decisions monumental in their own right.

Second, the *Miller* opinion insists that a child's developmental environment matters at sentencing, and thus state actors cannot comply with the decision in a perfunctory manner. The *Miller* Court explained that mandatory life without parole "precludes consideration of [the juvenile's] 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

79. *Miller*, 132 S. Ct. at 2482 (Roberts, C.J., dissenting) (emphasis added).

80. *Id.* at 2481.

81. *Id.* at 2486 (Thomas, J., dissenting).

82. *See generally* Solem v. Helm, 463 U.S. 277 (1983) (finding unconstitutional a life without parole sentence under a South Dakota recidivist statute for a defendant who passed a bad check).

83. *See generally* Ewing v. California, 538 U.S. 11 (2003) (rejecting petitioner's proportionality challenge to a sentence of 25 years to life under state's three strikes law); Harmelin v. Michigan, 501 U.S. 957 (1991) (rejecting petitioner's proportionality challenge to a sentence of mandatory term of life in prison without the possibility of parole for possessing more than 650 grams of cocaine).

84. *Harmelin*, 501 U.S. at 1001 (alteration in original) (citation omitted) (quoting *Solem*, 463 U.S. at 289–90).

dysfunctional."[85] Mandatory life without parole also precludes the sentencer from considering the role that the juvenile played in the crime and whether he may have been charged with a lesser crime but for his immaturity and incompetency in navigating the criminal justice process.[86] Thus, according to the *Miller* Court, context matters—both life context and crime context—and the sentencer must take both into account before imposing the harshest sentence upon a juvenile.

Relatedly, the *Miller* Court made clear that in order to appreciate the context in which the juvenile has committed a homicide crime (or at least been convicted of one), states must employ a process that allows the defendant to explain his life context. The majority explained that "the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations."[87] Further, it noted that, since the early 1980s, the Court had recognized youth itself as a relevant mitigating factor at sentencing and that "'[J]ust 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."[88] Thus, *Miller* demands an expansive reading because the decision is so heavily focused on the juvenile's developmental context and procedural safeguards that can illuminate that context.

Third, the *Miller* Court continued to emphasize—as the *Roper* and *Graham* Courts had done—science as it relates to juveniles, noting that brain science suggests that children should be treated differently than adults in the criminal justice process. Referring to its earlier decisions in *Roper* and *Graham*, the *Miller* Court explained that those "decisions rested not only on common sense—on what 'any parent knows'—but on science and social science as well."[89] The *Miller* Court went on to reiterate how that science informs legal decisions. The science shows that only a relatively small percentage of juvenile offenders later "develop entrenched patterns of problem behavior."[90] The same body of science tells us that juvenile brains have not developed fully, especially in the areas that relate to behavioral control.[91] The science further shows that, because adolescence is "transient" by definition, we can expect

85. *Miller*, 132 S. Ct. at 2468.

86. *Id.* at 2468–69 ("[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings." (alteration in original) (quoting Graham v. Florida, 560 U.S. 48, 78 (2010))).

87. *Id.* at 2466.

88. *Id.* at 2467 (alteration in original) (quoting Eddings v. Oklahoma, 455 U.S. 104, 116 (1982)).

89. *Id.* at 2464 (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).

90. *Id.* (quoting *Roper*, 543 U.S. at 570).

91. *Id.*

juveniles to possess greater capacity for reform and rehabilitation than their adult counterparts.[92]

Finally, the *Miller* Court suggested in dicta that it was concerned with juvenile justice practices beyond the juvenile LWOP schemes at issue in that case. The Court spent a significant amount of time responding to the states' claim that youth was already taken into account at the transfer stage and thus need not also be taken into account at the final sentencing stage.[93] It explained that many states use mandatory transfer systems and that even in states where the transfer system provides some discretion, it is often "lodge[d] . . . exclusively in the hands of prosecutors . . . . [a]nd those 'prosecutorial discretion laws are usually silent regarding standards, protocols, or appropriate considerations for decision-making.'"[94]

The majority went on to explain that, even where judges enjoy some discretion regarding the transfer decision, the system is poorly designed to protect the interests of the child.[95] Not only does the judge have limited information at the transfer juncture, but the judge often faces extreme choices between a lenient sentence in juvenile court and an extreme one in adult court.[96] Finally, the *Miller* majority stated that, in light of its reasoning in the *Miller* trilogy, juvenile life without parole should be a rare sentence—even for juveniles who commit homicide.[97] In doing so, the *Miller* majority made clear that its opinion was an indictment of broader juvenile justice practices and not simply a decision requiring a certain process before states could impose life without parole.

For the reasons discussed above, we must read *Miller* broadly and recognize it as a radical decision aimed at prompting juvenile justice reform.[98] *Roper* abrogated the Court's relatively recent position on the death penalty for juveniles because science revealed that children were different from a neurological and psychological standpoint.[99] *Graham* departed from three decades of the Supreme Court rejecting term-of-years proportionality challenges precisely because the case dealt with children. And *Miller* was the apex of these decisions because, again, there the Court concluded that

92. *Id.* at 2464–65.

93. *Id.* at 2474–75.

94. *Id.* at 2474.

95. *Id.*

96. *Id.* at 2474–75.

97. *Id.* at 2469 ("[G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.").

98. *Cf.* Nancy Gertner, Miller v. Alabama*: What It Is, What It May Be, and What It Is Not*, 78 MO. L. REV. 1041 (2013) (exploring the question of whether *Miller* was a watershed opinion and concluding that it was for juveniles but not for Eighth Amendment analysis more generally).

99. Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (holding that the Eighth Amendment did not prohibit imposing the death penalty on 16- and 17-year-old children), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005).

"imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."[100] The *Miller* trilogy represents the Court's attempt to provide some outer limits on the manner in which children are sentenced and the extent to which they can be exposed to the law's harshest sentences.

Chief Justice Roberts dismissed the majority's logic, suggesting that "[t]he principle behind today's decision seems to be *only* that because juveniles are different from adults, they must be sentenced differently."[101] Indeed, that allegation may be true. But to the extent that it is, the *Miller* decision cannot be said to rest on flimsy chronological line-drawing. Rather, the *Miller* opinion reflects nothing more than a return to the original American mode of sentencing juveniles—a mode recognizing that because children have not yet fully matured they deserve to be treated differently when the state metes out a custodial sentence. This recognition is what shaped the early American juvenile justice system, and it is the basis upon which our society has deemed juveniles unprepared to vote, to purchase alcohol, and to enlist in the military. Thus, the child-centric nature of the *Miller* trilogy calls on states to rethink the manner in which children are treated in criminal proceedings.

## IV. THE MILLER REVOLUTION UNDERWAY AND ON THE HORIZON

In the wake of the *Miller* decision, juvenile justice reform is possible—indeed happening—in ways that were inconceivable even 20 years ago.[102] This Part advances the central thesis of the Article: that *Miller*'s moral leadership

100. *Miller*, 132 S. Ct. at 2466.

101. *Id.* at 2482 (Roberts, C.J., dissenting) (emphasis added).

102. Many scholars have begun to explore the ways in which the *Miller* trilogy has opened the door to legislative and judicial reform of juvenile justice practices. *See, e.g.*, Berry, *supra* note 8, at 338–48 (arguing for extension of *Miller* rule to all cases where defendant faces death-in-custody sentence); Amy E. Halbrook, *Juvenile Pariahs*, 65 HASTINGS L.J. 1, 4–7 (2013) (positing that *Miller* undermines the legitimacy of mandatory sex offender registries for juveniles); Janet C. Hoeffel, *The Jurisprudence of Death and Youth: Now the Twain Should Meet*, 46 TEX. TECH L. REV. 29, 51–55 (2013) (arguing that *Miller* calls into question current juvenile transfer laws); Emily C. Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of* Roper, Graham *&* J.D.B., 11 CONN. PUB. INT. L.J. 297, 308–18 (2012) (arguing pre-*Miller* that juvenile life without parole sentences are unconstitutional for felony murder offenses); Scott, *supra* note 10, at 101–03 (suggesting *Miller* requires states to rethink not just sentencing but modes of incarceration and rehabilitation altogether); Sarah A. Kellogg, Note, *Just Grow Up Already: The Diminished Culpability of Juvenile Gang Members After* Miller v. Alabama, 55 B.C. L. REV. 265, 266–68 (2014) (*Miller* calls into question general legislation designed to address gang crime as it applies to juveniles.); Mariko K. Shitama, Note, *Bringing Our Children Back from the Land of Nod: Why the Eighth Amendment Forbids Condemning Juveniles to Die in Prison for Accessorial Felony Murder*, 65 FLA. L. REV. 813, 845–53 (2013) (arguing post-*Miller* that juvenile life without parole sentences are unconstitutional for felony murder offenses for same); Andrea Wood, Comment, *Cruel and Unusual Punishment: Confining Juveniles with Adults After* Graham *and* Miller, 61 EMORY L.J. 1445, 1482–85 (2012) (suggesting *Miller* requires states to rethink not just sentencing but modes of incarceration and rehabilitation altogether).

has enabled revolutionary changes to juvenile justice policy and practice in this country. It proceeds in two Subparts. In the first Subpart, I make the case for two immediate corollaries that flow from *Miller*: (1) the creation of procedural safeguards for children facing LWOP comparable to those recommended for adults facing the death penalty; and (2) the elimination of mandatory minimums for children altogether. While these shifts in juvenile justice practice may be radical, they are readily defensible post-*Miller*. In the second section, I turn to the juvenile justice frontier and articulate several revolutionary changes that can and should be explored post-*Miller*. Specifically, I address mandatory transfer laws, presumptive sentencing guidelines as they apply to children, and juvenile conditions of confinement.

### A. *THE* MILLER *REVOLUTION UNDERWAY*

In this Subpart, I argue that two juvenile sentencing reform measures, while groundbreaking, flow directly from the *Miller* decision and are readily achievable if not already underway: (1) the creation of procedural safeguards for children facing LWOP comparable to those recommended for adults facing the death penalty; and (2) and the elimination of mandatory minimums for children altogether. I discuss each claim in greater detail below.

#### 1. *Miller* Suggests a *Wiggins* Requirement for Juveniles Facing LWOP

Recognizing that death is distinct from custodial sentences,[103] the Supreme Court has established constitutionally required procedural safeguards in the capital sentencing context.[104] Children now have a constitutional right to similar safeguards because in *Graham*, and especially *Miller*, the Court treated LWOP as tantamount to the death penalty for children.[105] When the state seeks to impose life without parole upon a juvenile homicide defendant, the state court judge should ensure that the child facing that sentence has a right to representation on par with that of a capital defendant[106]—qualified counsel, a team that includes a mitigation specialist, and perhaps more specific juvenile expertise.[107]

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103. Ford v. Wainwright, 477 U.S. 399, 411 (1986) ("[E]xecution is the most irremediable and unfathomable of penalties . . . death is different.") (citing Woodson v. North Carolina, 428 U.S. 280, 305 (1976)).

104. *See infra* notes 119–37 and accompanying text.

105. David Siegel, *What Hath* Miller *Wrought: Effective Representation of Juveniles in Capital-Equivalent Proceedings*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 363, 363–64 (2013).

106. To be sure, there are many places in the country where courts do not adequately safeguard the rights to which capital defendants are entitled. My point here is that, to the extent that the Supreme Court has articulated the right of effective representation for capital defendants, that same articulation now applies to children facing life without parole.

107. *See generally* GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES (AM. BAR ASS'N 2003).

*i. Procedural Safeguards in the Death Penalty Context*

The Supreme Court first established the constitutional standard for review of ineffective assistance of counsel claims in *Strickland v. Washington*.[108] Clients challenging the efficacy of their representation under *Strickland* are required to show that: (1) counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense.[109] In terms of the first prong, the Court has identified certain minimum attributes of effective representation, such as maintaining conflict-free representation, consulting the client on major decisions, keeping the client informed of developments in the case, and bringing to bear the skill necessary to subject the outcome of the case to adversarial testing.[110]

Beyond these threshold components, though, the Court has been reticent to define the contours of defense counsel's specific obligations under the first prong of *Strickland*. As the *Strickland* Court explained: "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. More specific guidelines are not appropriate. . . . The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[111]

As for the second prong of the *Strickland* test, the Supreme Court has imposed an incredibly high burden—indeed, some have argued insurmountable burden[112]—upon clients claiming ineffective assistance. The *Strickland* Court explained that "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[113] Analysis under this prong should be highly deferential to defense counsel and the range of judgment calls that counsel are required to make.[114]

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108. Strickland v. Washington, 466 U.S. 668 (1984).

109. *Id.* at 687.

110. *Id.* at 687–88.

111. *Id.* at 688 (explaining that ABA Standards may serve as "guides" for determining objectively reasonable performance).

112. *See, e.g.*, Stephen F. Smith, *Taking* Strickland *Claims Seriously*, 93 MARQ. L. REV. 515, 518–26 (2009) (explaining the *Strickland* test and identifying its flaws in application); *see also id.* at 526 ("Courts rarely reverse convictions for ineffective assistance of counsel, even if the defendant's lawyer was asleep, drunk, unprepared, or unknowledgeable. In short, any 'lawyer with a pulse will be deemed effective.'" (quoting Stephanos Bibos, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 1 (footnote omitted))).

113. *Strickland*, 466 U.S. at 694.

114. *Id.* at 689 ("Judicial scrutiny of counsel's performance must be highly deferential . . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's

Under this approach, the Court has rejected *Strickland* claims where defense counsel refused to cooperate in presenting perjured testimony;[115] where defense counsel appeared by speakerphone at a plea hearing;[116] where defense counsel advised a quick no-contest plea without first filing a motion to suppress one of defendant's confessions;[117] and where a trial court prevented the defendant from conferring with counsel between direct and cross-examination.[118] Lower courts have followed suit, applying *Strickland* in a way that largely insulates defense counsel from ineffective assistance of counsel claims.[119]

Despite this generally deferential standard for defense counsel, the Court has applied the *Strickland* test with more bite in the capital context. The Supreme Court has emphasized in a series of cases that capital defense counsel have a special obligation to gather and present mitigating evidence that may persuade a jury to spare the defendant's life. In *Williams v. Taylor*, defense counsel failed to discover and present evidence related to Williams' childhood abuse and neglect; his parents' imprisonment for that abuse; his abusive experience in foster care while his parents were incarcerated; and evidence that he was borderline mentally retarded and had suffered several head injuries.[120] In applying the *Strickland* test, the Court held that counsel's representation of Williams had been deficient and that the inefficacy prejudiced the outcome of his case.[121]

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conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" (citation omitted) (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)); *see also* Lockhart v. Fretwell, 506 U.S. 364, 368–71 (1993) (explaining that the central question in *Strickland* claims is whether counsel's performance compromised defendant's right to a fair trial).

115. *See* Nix v. Whiteside, 475 U.S. 157, 186–87 (1986) (Blackmun, J., concurring) ("To the extent that Whiteside's claim rests on the assertion that he would have been acquitted had he been able to testify falsely, Whiteside claims a right the law simply does not recognize. . . . Since Whiteside was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice." (citation omitted)).

116. *See* Wright v. Van Patten, 552 U.S. 120, 125–26 (2008) (per curiam) (finding that lower court's determination on the issue was not an unreasonable application of law and thus denying petitioner's request for habeas relief).

117. *See* Premo v. Moore, 562 U.S. 115, 122–25 (2011). "In determining how searching and exacting their review must be, habeas courts must respect their limited role in determining whether there was manifest deficiency in light of information then available to counsel." *Id.* at 125.

118. *See* Perry v. Leeke, 488 U.S. 272, 283–85 (1989).

119. *See, e.g.*, Halverson v. State, 372 N.W.2d 463, 466 (S.D. 1985) ("Halverson's allegations as to ineffective counsel fail. He has not shown by a preponderance of the evidence that a different result would have occurred if his attorney had been awake at the arraignment and objected when the state's attorney made a plea for a longer sentence."); Moore v. State, 227 S.W.3d 421, 426 (Tex. App. 2007) (rejecting *Strickland* claim on basis of attorney falling asleep during state's cross-examination of defendant).

120. Williams v. Taylor, 529 U.S. 362, 370 (2000).

121. *Id.* at 399.

Four years later, the Court again found defense counsel's performance ineffective in the capital case of *Wiggins v. Smith*.[122] In that case, defense counsel failed to put on any evidence regarding the defendant's childhood, which was marked by neglect, an alcoholic mother, repeated foster home stints, long absences from school, and at least one episode of being abandoned for days with no food.[123] The Court held that counsel did not comport with prevailing standards of performance. In reaching its conclusion, the Court referred both to standard practice in Maryland at the time of defendant's trial and to the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("Guidelines").[124] The *Wiggins* Court explained:

> The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources.[125]

Scholars have recognized that the *Wiggins* Court "promoted a longstanding guideline of the ABA—that capital counsel thoroughly explore the social background of the defendant—to the level of constitutional mandate."[126] And in the wake of *Wiggins*, the Supreme Court has continued to emphasize the importance of mitigating evidence in capital trials.[127]

In addition to the emphasis on mitigation, there are two other aspects to capital defense that are relevant to children facing LWOP and the lawyers representing them. First, capital defense counsel must be attuned to the question of whether their client is intellectually disabled and thus ineligible for the death penalty under *Atkins v. Virginia*.[128] The *Atkins* Court employed clinical definitions of intellectual disability and noted that they "require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that

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122. Wiggins v. Smith, 539 U.S. 510 (2003).

123. *Id.* at 525.

124. *Id.* at 524–25.

125. *Id.* at 524 (citation omitted).

126. *Leading Cases*, 117 HARV. L. REV. 226, 282 (2003); *see also* Cara H. Drinan, *The Revitalization of* Ake*: A Capital Defendant's Right to Expert Assistance*, 60 OKLA. L. REV. 283, 298–300 (2007) (discussing the interplay of *Wiggins* and *Ake*).

127. *See, e.g.*, Porter v. McCollum, 558 U.S. 30, 42–44 (2009) (holding that defense counsel's failure to uncover and present mitigation evidence regarding defendant's mental health, family background, and military service was deficient).

128. Atkins v. Virginia, 536 U.S. 304, 311–12, 321 (2002) (holding that execution of the intellectually disabled is cruel and unusual punishment).

became manifest before age 18."[129] Since *Atkins*, states have developed their own definitions of intellectual disability for *Atkins* purposes.[130] Defense counsel is obligated to explore whether the defendant's social history presents a possible *Atkins* claim. If so, special, nonlegal expertise will be required.[131]

Finally, in capital cases where "the defendant's mental condition is seriously in question," the defendant has a constitutional right to expert psychiatric assistance at the state's expense if necessary.[132] In *Ake v. Oklahoma*, the Supreme Court recognized that, when the state relies upon expert testimony to secure a death sentence, the defendant must have an adequate opportunity to rebut that expert testimony.[133] In Ake's case, defense counsel requested funding to secure a psychiatric determination of his sanity at the time of the crime.[134] The trial court denied the funds, and the state not only convicted Ake, but also used psychiatric expertise to prove at sentencing that he posed a future danger to society.[135] The jury sentenced Ake to death.[136] The *Ake* Court held that this denial of expert assistance worked a fundamental unfairness in Ake's trial and that the due process clause required state-funded expert assistance on such facts.[137] Since *Ake*, indigent defendants have argued for, and have obtained, state-funded experts to testify on a wide range of psychiatric issues.[138]

Thus, in capital cases, the Supreme Court has imposed enhanced procedural safeguards to ensure the fairness of the trial and its outcome. As discussed above, the *Strickland* test applies with its greatest force in the capital context; the *Atkins* decision imposes upon capital defense counsel a heightened duty to explore clients' intellectual disabilities; and the *Ake* decision requires states to fund psychiatric experts when necessary in capital trials. Because the Supreme Court has treated LWOP for children as tantamount to the death penalty, these procedural safeguards now apply to children facing LWOP.

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129. *Id.* at 318; *see also* John H. Blume et al., *Of* Atkins *and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL'Y 689, 694–97 (2009) (describing the clinical definitions and the *Atkins* framework).

130. Blume et al., *supra* note 129, at 697–703 (highlighting the flaws in many of these definitions).

131. *See, e.g.*, Nancy Haydt, *Intellectual Disability: A Digest of Complex Concepts in* Atkins *Proceedings*, CHAMPION, Jan.–Feb. 2014, at 44 (arguing that too many ill-qualified individuals are permitted to testify as so-called *Atkins* experts and identifying skills and training that mental health professionals must have for *Atkins* expert status); *id.* at 45. ("Because intellectual disability is a clinical diagnosis, *Atkins* proceedings require expert testimony.").

132. Ake v. Oklahoma, 470 U.S. 68, 82–83 (1985).

133. *Id.* at 81–82.

134. *Id.* at 72.

135. *Id.* at 72–73.

136. *Id.* at 73.

137. *Id.* at 80–83.

138. Drinan, *supra* note 126, at 287–88 (describing the expansion of the *Ake* entitlement outside the capital context and outside the psychiatric context).

### *ii. The* Miller *Court Treated LWOP Like a Death Sentence for Kids*

*Graham* and *Miller* suggest that LWOP for children is tantamount to the death penalty. In *Graham*, the Court employed its categorical approach in assessing Graham's proportionality challenge—an approach it had previously reserved for capital cases.[139] In assessing Graham's challenge, the Court noted that "[LWOP] sentences share some characteristics with death sentences" in that "the sentence alters the offender's life by a forfeiture that is irrevocable."[140] Further, the *Graham* Court recognized that LWOP as applied to children is especially harsh, noting that "a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only."[141]

The *Miller* Court further developed the concept that LWOP for children is akin to the death penalty. Citing *Woodson v. North Carolina*,[142] where the Court held unconstitutional a mandatory death sentence for first degree murder, the *Miller* Court recognized that in capital cases it "has required sentencing authorities to consider the characteristics of a defendant and the details of his offense before sentencing him to death."[143] The Court then noted that, because "*Graham* . . . likened life without parole for juveniles to the death penalty itself," the same individualized sentencing requirement must pertain when a juvenile faces an LWOP sentence.[144] In exposing the constitutional infirmity of mandatory LWOP schemes, the *Miller* Court explained that youth itself is "more than a chronological fact" and may be the most powerful mitigating factor available to a defendant.[145]

The Court has now joined these two lines of precedent—the line elevating mitigation to a constitutional requirement for capital defendants and the line treating LWOP as tantamount to a death sentence for children.

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139. Graham v. Florida, 560 U.S. 48, 60–62 (2010).

140. *Id.* at 69.

141. *Id.* at 70.

142. Woodson v. North Carolina, 428 U.S. 280 (1976).

143. Miller v. Alabama, 132 S. Ct. 2455, 2458 (2012).

144. *Id.* at 2463–64.

145. *Id.* at 2467 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)); *see also id.* at 2468 ("Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. 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. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." (citations omitted)).

Accordingly, state court judges should ensure that juveniles facing LWOP receive representation on par with best practices for death penalty representation. In other words, the same enhanced procedural safeguards required for capital cases now apply to cases where children face LWOP.

### *iii.* Wiggins/Atkins/Ake *for Kids*

What exactly should enhanced procedural safeguards for children facing LWOP look like? The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("Guidelines") provide a good starting point, as the Court has incorporated the Guidelines into its Sixth Amendment efficacy analysis.[146] To begin, the Guidelines state that defense counsel in capital cases must have sufficient training and expertise in capital representation.[147] They also highlight the importance of mitigation evidence through standards that require defense counsel to have sufficient skill in investigating and presenting mitigation evidence, as well as experience working with expert witnesses, especially mental health experts.[148]

Given the complexity of capital cases, even qualified defense counsel cannot work alone. The Guidelines describe a "Defense Team," which includes lead counsel and at least one associate counsel.[149] Lead counsel is then advised to retain as additional members of the Team: "at least one mitigation specialist and one fact investigator; at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments; and any other members needed to provide high quality legal representation."[150] The Commentary to the Guidelines makes clear that the Team described in the Standard is a minimum and that lead counsel is responsible for ensuring that other members will be added to the team if additional skill and expertise are required (or if funds are not available, the issue is at least preserved for appeal).[151]

In sum, the Guidelines set forth a standard for high-quality legal representation in the death penalty setting, including a team of relevant specialists working to buttress the legal skills of qualified counsel. Because the Supreme Court has treated LWOP for kids as analogous to a death sentence for adults, it then follows that juveniles facing LWOP should enjoy protections analogous to those set forth in the Guidelines. This imposes several obligations upon states trying juveniles for crimes that carry possible LWOP

146. *See generally* GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES (AM. BAR ASS'N 2003).

147. *Id.* §§ 5.1, 8.1.

148. *Id.* § 5.1.

149. *Id.* § 10.4(A).

150. *Id.* § 10.4(C).

151. *Id.* § 10.4 cmt.

sentences. First, just as the Guidelines require that defense counsel in capital cases have sufficient training and expertise in capital representation,[152] juveniles facing an LWOP sentence should also have counsel experienced in the representation of juveniles facing adult sentences in adult court.[153] The National Juvenile Defender Center has promulgated standards that address in great detail the obligations of counsel representing juveniles from initial client contact through the pretrial process, at adjudicatory hearings, and when the client faces the risk of adult prosecution.[154] For a juvenile facing a murder charge in adult court and an LWOP sentence, Standard 8.1 is most relevant. It says that "[s]pecialized training and experience are prerequisites to providing effective assistance of counsel to youth facing adult prosecution."[155] Such training and experience are required because the lawyer must be familiar with the process by which the juvenile defendant will be transferred out of juvenile court; the presumption for or against keeping the defendant in juvenile court; and adult criminal court rules.[156]

Counsel must also have specialized training in child and adolescent development so that she can educate the court as to how youth alone places a defendant at a significant disadvantage in the criminal justice process. For example, the Supreme Court has acknowledged what "any parent knows:"[157] that children are less mature and less responsible than adults; that children do not have the same capacity to appreciate the long-term consequences of their decisions; and that children may be overwhelmed by potentially coercive environments, even when a reasonable adult would not be.[158] Competent counsel for a juvenile facing LWOP must be able to explain her client's developmental issues and the impact they have on her client's competency to stand trial, to assist with their own defense, and to endure adult protocols and facilities.[159]

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152. *Id.* §§ 5.1, 8.1.

153. Expertise in juvenile representation is required whenever a child faces detention. For example, even in a discretionary transfer hearing, the lawyer must have experience with, and ability to explain, juvenile rehabilitation to a judge. *See generally* Thomas F. Geraghty & Will Rhee, *Learning from Tragedy: Representing Children in Discretionary Transfer Hearings*, 33 WAKE FOREST L. REV. 595 (1998). Because a child would only face an LWOP sentence in adult court, I am not addressing the issues of representation in juvenile delinquency proceedings, an issue fraught with its own challenges. *See generally* Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245 (2005).

154. *See generally* NAT'L JUVENILE DEF. STANDARDS (NAT'L JUVENILE DEF. CTR. 2012).

155. *Id.* § 8.1.

156. *Id.* § 8.1(a).

157. Roper v. Simmons, 543 U.S. 551, 569 (2005).

158. J. D. B. v. North Carolina, 564 U.S. 261, 272–73 (2011).

159. NAT'L JUVENILE DEF. STANDARDS §§ 8.1(b)–(d); *see also id.* § 8.6 ("Upon determination that the client will be prosecuted in adult court, counsel must zealously oppose placement of the client in adult jail or detention. Counsel must be aware of and raise the risks associated with incarcerating young people among adults, and be able to propose alternative placements in the juvenile justice system and/or release of the client on bail.").

Related, counsel for a juvenile defendant facing LWOP must be able to communicate with her client in a "developmentally appropriate" way regarding a number of key issues.[160] She must be able to discuss with her client the transfer process and all of its components, including factors relevant to the transfer decision such as whether to participate in diagnostic programs, and the severe consequences that can attach if the defendant is tried as an adult.[161] Counsel should also be able to discuss sentencing possibilities in an appropriate way. Many juveniles serving extreme custodial sentences have reported that they simply did not appreciate the meaning of a lengthy sentence—either they did not think they would actually serve such a long time or they simply could not grasp what such a sentence would entail.[162] Thus, competent counsel will have the specialized training and experience to communicate with and represent a juvenile facing an LWOP sentence.

Second, the same emphasis that *Wiggins* put upon mitigation for capital representation should apply to the representation of juveniles facing LWOP. In fact, the sentencing phase of a capital trial entails an inquiry comparable to that described by the *Miller* Court for children facing LWOP. The Eighth Amendment requires that the sentencer in a capital case be able to consider *all* relevant mitigation evidence: "A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed."[163] Similarly, the *Miller* Court condemned mandatory imposition of LWOP on children:

> 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.[164]

According to *Miller*, before imposing LWOP on a juvenile, a sentencing body must consider: (1) the aspects of youth itself that may explain the criminal act, the defendant's reduced culpability, and the defendant's compromised ability to participate in his own defense;[165] (2) the defendant's

160. *Id.* § 8.2 ("Counsel must use developmentally appropriate language to fully advise the client of the procedures that may lead to adult prosecution and the various ways that the state could proceed.").

161. *Id.* § 8.2, cmt.

162. AMNESTY INT'L & HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 52–53 (2005), https://www.amnesty.org/en/documents/AMR51/162/2005/en (citing examples of juvenile defendants who simply did not grasp what a life sentence would entail).

163. Jurek v. Texas, 428 U.S. 262, 271 (1976).

164. Miller v. Alabama, 132 S. Ct. 2455, 2767–68 (2012).

165. *Id.* at 2468 ("Mandatory life without parole for a juvenile precludes consideration of

family and home environment;[166] and (3) the circumstances of the homicide offense, including the extent to which accomplices and external influences were involved.[167] This inquiry into relevant mitigation, as described by the *Miller* Court, mirrors the mitigation inquiry of a capital trial's sentencing phase.

In order to gather and prepare such mitigation evidence, counsel for a juvenile defendant facing LWOP will need team members comparable to those contemplated by the ABA guidelines for death penalty cases.[168] At a minimum, this means that the team should include a mitigation specialist and some member who is trained to screen for mental health issues.[169] A mitigation specialist is tasked with an enormous job. She is responsible for conducting a comprehensive investigation of the defendant's life history, including family and educational background, biological issues, psychological issues, and social environment.[170] To compile this history, the mitigation specialist typically needs to conduct repeated, extensive interviews with the defendant and his family members,[171] as well as other individuals who can illuminate the defendant's life, such as friends, doctors, teachers, and employers.[172] The mitigation specialist will also need to do an exhaustive review of all relevant documents and records in the defendant's life history—such as medical records, school records, and behavioral records during periods of incarceration.[173] These records may reveal that the defendant had

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his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences."); *see also id.* (stating that mandatory LWOP "ignores that [a defendant] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys").

166. *Id.* (stating that mandatory LWOP "prevents taking into account the family and home environment that surrounds [a defendant]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional").

167. *Id.* (stating that mandatory LWOP "neglects the circumstances of the homicide offense, including the extent of [a defendant's] participation in the conduct and the way familial and peer pressures may have affected him").

168. *See supra* notes 149–51 and accompanying text.

169. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES § 10.4(C)(2) (AM. BAR. ASS'N 2003).

170. Daniel L. Payne, *Building the Case for Life: A Mitigation Specialist as a Necessity and a Matter of Right*, 16 CAP. DEF. J. 43, 45–48 (2003).

171. Interviewing the defendant's family members can be especially complex and time-consuming. *See id.* at 46 ("The family will likely have firsthand knowledge of many of the events in the defendant's life and can detail many of the most traumatic experiences of the defendant's childhood. Unfortunately, this group often can be the least likely to give a complete and accurate description of a defendant's life because they do not want to believe that their own shortcomings in raising and relating to the defendant were in any way responsible for his criminal activity. Multiple visitations are often required to convince these people that the mitigation evidence that they can offer will not shift the blame to them, but rather offer an explanation of the circumstances that led to the crime that may be useful in saving the defendant's life." (citations omitted)).

172. *Id.* at 47.

173. *Id.*

intellectual impairments from an early age, suggesting a need for further testing; or they may indicate that the defendant suffered abuse at an early age that could have shaped his behavior and criminal conduct. Only a mitigation specialist can properly conduct this time-intensive inquiry,[174] and it may generate evidence that is lifesaving for the capital defendant or juvenile defendant facing LWOP.

Just as the Guidelines state that death penalty counsel should retain "any other members needed to provide high quality legal representation,"[175] this is also true in juvenile LWOP cases. Because of the unique characteristics of youth, this may require defense counsel to retain an expert who can testify to those features of youth that render a juvenile defendant less culpable and more amenable to rehabilitation. In the same way that *Atkins* experts have emerged to educate courts regarding intellectually disabled capital defendants, there may be a need for "*Miller* experts" to educate courts regarding youthful defendants facing LWOP. A so-called *Miller* expert could address a wide range of issues related to youthful defendants and their involvement in the criminal justice system. For example, a *Miller* expert could testify to the following mitigating facts: that youth are biologically less culpable than adult defendants;[176] that youth are more likely to commit crimes out of peer pressure and circumstantial factors than adults;[177] that the majority of youthful offenders will outgrow their unlawful behavior;[178] and that incarceration in adult prison not only fails to rehabilitate youth, but actually has a criminogenic effect on them.[179] Finally, under *Ake*, counsel representing a juvenile facing LWOP should argue, if necessary, that state funds are required to compensate a mitigation specialist or a *Miller* expert

174. *Id.* at 48–49. ("Because only an individual with education and experience in social work is qualified to make a thorough and complete investigation into a defendant's biosocial and psychosocial history, a mitigation specialist is the only individual who can sufficiently complete this type of investigation in a capital case. Furthermore, the need for a detailed investigation into a defendant's records and repeated interviews with those who have contact with the defendant effectively precludes any other member of the defense team from being able to complete the mitigation investigation." (citations omitted)).

175. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES § 10.4.

176. *See generally* Beatriz Luna, *The Relevance of Immaturities in the Juvenile Brain to Culpability and Rehabilitation*, 63 HASTINGS L.J. 1469 (2012).

177. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 830 (2003) ("[Y]ouths are likely to act more impulsively and to weigh the consequences of their options differently from adults, discounting risks and future consequences, and over-valuing (by adult standards) peer approval, immediate consequences, and the excitement of risk taking.").

178. *Id.* at 834 ("Most youths will outgrow their inclination to get involved in crime and mature into persons who do not reject the law's values.").

179. Robert E. Pierre, *Adult System Worsens Juvenile Recidivism, Report Says*, WASH. POST (Nov. 30, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/11/29/AR2007112901936.html.

because only with such expertise can the defendant have a fair trial consistent with the *Miller* Court directives.

Recognizing the specialized nature of juvenile representation in LWOP proceedings, the Campaign for the Fair Sentencing of Youth released standards for the practice in 2015.[180] The first of its kind, Trial Defense Guidelines: Representing a Child Client Facing a Possible Life Sentence ("Trial Defense Guidelines") draws heavily on the best practices articulated in the ABA Death Penalty Guidelines and the National Juvenile Defense Standards discussed above. The new Trial Defense Guidelines address basics such as the necessary members of a legal team representing a child client facing a possible life sentence, including two attorneys, an investigator, and a mitigation specialist.[181] But the Trial Defense Guidelines also set forth detailed qualifications for each team member, the most important of which is that each member "will advocate zealously for a sentence other than life."[182] Moreover, the Trial Defense Guidelines address challenges such as managing interaction with the child-client's family and ensuring that the child-client be held in a juvenile facility until the maximum age allowed and that he receive "legally mandated safety protections."[183] The Trial Defense Guidelines are comprehensive and ambitious,[184] and they provide practitioners in this field a practical way to implement the constitutional arguments advanced in this Part of the Article.

In sum, the *Miller* Court joined two lines of precedent: the line of cases elevating mitigation to a constitutional requirement in capital cases, and the line of cases treating LWOP for children as comparable to the death penalty for adults. As a result, children facing LWOP now have a right to enhanced procedural safeguards on par with what the Court has laid out for capital defendants, and as reflected in the newly released Trial Defense Guidelines. By ensuring that juveniles facing LWOP have representation that meets these standards, state court judges can guarantee that juveniles facing LWOP receive an individualized sentence as contemplated by the *Miller* Court, and that LWOP is imposed only in the most extreme cases.[185]

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180. *See generally* THE CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, TRIAL DEFENSE GUIDELINES: REPRESENTING A CHILD CLIENT FACING A POSSIBLE LIFE SENTENCE (2015), http://fairsentencingofyouth.org/wp-content/uploads/2015/03/Trial-Defense-Guidelines-Representing-a-Child-Client-Facing-a-Possible-Life-Sentence.pdf.

181. *Id.* § 1.1.

182. *Id.*

183. *See id.* §§ 1.4, 2.8.

184. The Guidelines are also very new, and they have yet to be cited by any court (at least according to a Westlaw search performed by the author on February 1, 2016). Nonetheless, counsel should urge courts to adopt the Guidelines as the relevant standard for implementing the mandate of the *Miller* decision.

185. *Cf.* Miller v. Alabama, 132 S. Ct. 2455, 2469 ("Because that holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those

### 2. *Miller* Signals the End to Juvenile Mandatory Minimums

Since the *Miller* decision, states' responses—both legislative and judicial—have run the gamut. Some states have responded in salutary ways by enacting reforms that address not just the immediate requirements of *Miller*, but also the animating principles of the decision. However, other states have enacted legislation that may comply with a hyper-technical reading of *Miller*, but eviscerate its larger message regarding the diminished culpability of children. This section surveys the spectrum of responses to the question of what sentences are permissible post-*Miller*. Having done so, I argue that *Miller* should be read to preclude mandatory minimums for juveniles, and thus legislation that simply replaces juvenile LWOP with alternative mandatory sentences, especially steep ones, violates *Miller*.

#### *i. The Spectrum of State Responses*

In the last four years, states have responded to *Miller* in a wide variety of ways. While *Miller* presented many issues of implementation for lower courts and legislatures,[186] in this Article I am particularly interested in how states have answered the following question: if *Miller* holds that juveniles convicted of homicide may not be sentenced to mandatory LWOP, what sentence is permissible for a juvenile homicide defendant?

Some states have heeded the call of the *Miller* Court and have comprehensively reconsidered LWOP and extreme custodial sentences as they apply to children. To begin, nine states have abolished juvenile LWOP, and three more have banned it for some categories of juveniles.[187] Two of these states—West Virginia and Delaware—also provide for ongoing, periodic review of children serving lengthy custodial sentences.[188] Under West Virginia's new law, a juvenile convicted of an offense that would otherwise

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14 and younger. But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.").

186. Two issues have been particularly vexing for actors implementing *Miller*. First, lower courts have been split on the question of whether *Miller* applies retroactively, though the Supreme Court just resolved that issue. *See supra* note 6. Second, courts have grappled with whether *Miller* also sweeps more broadly than LWOP sentences and addresses mandatory life sentences and mandatory term-of-years sentences that are tantamount to life sentences. *Compare* Goins v. Smith, 556 Fed. Appx. 434, 440 (6th Cir. 2014) (affirming juvenile defendant's 84-year sentence post-*Graham* and *Miller*), *with* Bear Cloud v. State, 334 P.3d 132, 141–42 (Wyo. 2014) (holding that aggregate sentence of more than 45 years was de facto LWOP and was barred by *Miller*).

187. *See generally* THE SENTENCING PROJECT, SLOW TO ACT: STATE RESPONSES TO 2012 SUPREME COURT MANDATE ON LIFE WITHOUT PAROLE 2 (2014) (listing Hawaii, Massachusetts, Texas, West Virginia, and Wyoming as states that have abolished juvenile LWOP post-*Miller*), http://sentencingproject.org/doc/publications/jj_State_Responses_to_Miller.pdf; *see also Two Years Since* Miller v. Alabama, CAMPAIGN FOR FAIR SENT'G YOUTH (June 25, 2014), http://fairsentencingofyouth.org/2014/06/25/two-years-since-miller-v-alabama.

188. *See* H.B. 4210, 82d Leg., 1st Sess. (W. Va. 2014); S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013).

permit an LWOP sentence is eligible for parole review after serving 15 years. The West Virginia law also requires the sentencing court to consider a comprehensive list of mitigating factors drawn from the *Miller* Court's language before imposing any sentence on a juvenile transferred to adult criminal court.[189] Similarly, Delaware's new law precludes LWOP for juveniles and instructs the sentencing judge to exercise discretion when imposing a juvenile homicide sentence in light of the mitigating aspects of youth addressed in *Miller*.[190] The new legislation also applies retroactively, thereby entitling Delaware inmates currently serving an LWOP sentence for a juvenile crime to a resentencing hearing.[191]

Some state supreme courts have also read *Miller* broadly. The Massachusetts high court held that *Miller* applies retroactively and precludes juvenile LWOP under any circumstance,[192] and the Iowa Supreme Court, applying the *Miller* framework, held that all mandatory minimums for juveniles are unconstitutional.[193] These legislative and judicial responses reflect a holistic interpretation of the *Miller* decision and its motivating rationales.

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189. W. Va. H.B. 4210 (codified at W. VA. CODE §§ 61-11-23(c)(1–15)) (listing the following 15 factors: "(1) [a]ge at the time of the offense; (2) [i]mpetuosity; (3) [f]amily and community environment; (4) [a]bility to appreciate the risks and consequences of the conduct; (5) [i]ntellectual capacity; (6) t]he outcomes of a comprehensive mental health evaluation conducted by an mental health professional licensed to treat adolescents in the State of West Virginia . . . ; (7) [p]eer or familial pressure; (8) [l]evel of participation in the offense; (9) [a]bility to participate meaningfully in his or her defense; (10) [c]apacity for rehabilitation; (11) [s]chool records and special education evaluations; (12) [t]rauma history; (13) [f]aith and community involvement; (14) [i]nvolvement in the child welfare system; and (15) [a]ny other mitigating factor or circumstances)." The new legislation similarly sets forth factors that the parole board should take into account when periodically assessing the parole eligibility of juveniles. *See id.* (codified at W. VA. CODE § 62-12-13b(b)) (requiring the parole board to consider "the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner during incarceration" and requiring the board to consider: (1) "educational and court documents; (2) [p]articipation in available rehabilitative and educational programs while in prison; (3) [a]ge at the time of the offense; (4) [i]mmaturity at the time of the offense; (5) [h]ome and community environment at the time of the offense; (6) [e]fforts made toward rehabilitation; (7) [e]vidence of remorse; and (8) [a]ny other factors or circumstances the board considers relevant.").

190. *See* Del. S.B. 9; *see also Delaware Enacts Sentence Review Process for Youth*, CAMPAIGN FOR FAIR SENT'G YOUTH (June 10, 2013), http://fairsentencingofyouth.org/2013/06/10/delaware-entacts-sentence-review-process-for-youth.

191. *Delaware Eliminates Death in Prison Sentences for Children*, EQUAL JUST. INITIATIVE (June 13, 2013), http://www.eji.org/node/779.

192. Diatchenko v. Dist. Attorney, 1 N.E.3d 270, 281–82 (Mass. 2013) (holding that *Miller* applies retroactively and that the Massachusetts Declaration of Rights forbids LWOP sentence for juveniles).

193. State v. Lyle, 854 N.W.2d 378, 384, 400 (Iowa 2014) (interpreting the Iowa state constitution to prohibit "all mandatory minimum sentences of imprisonment for youthful offenders"); *see also infra* notes 218–24 and accompanying text.

On the other end of the spectrum, some states have missed the mark by replacing mandatory juvenile LWOP with another mandatory juvenile sentence and, in some cases, still leaving juveniles exposed to an LWOP sentence.[194] For example, two states have enacted post-*Miller* legislation that replaces mandatory LWOP with a mandatory minimum of 40 years for juveniles convicted of homicide.[195] Other states have imposed similarly steep mandatory minimums and still permit juvenile LWOP. For example, Pennsylvania's new legislation permits an LWOP sentence and simply adds less punitive alternatives for juveniles convicted of first and second-degree murder.[196] Under the new law, a Pennsylvania juvenile convicted of first-degree murder may be sentenced either to LWOP or a minimum of 35 years to life if the defendant is between 15 and 17 years. Similarly, Louisiana's revised law requires juveniles convicted of murder to serve a mandatory minimum of 35 years before parole eligibility, and it too permits juvenile LWOP.[197]

Of the 13 states that have passed legislation in response to *Miller*, nine still permit juvenile LWOP, and none set an alternative minimum sentence at less than 25 years.[198] While some response is better than none,[199] state legislation that replaces mandatory juvenile LWOP with an alternative, steep sentence and that fails to account for the mitigating qualities of youth at sentencing does not do justice to the *Miller* decision. As illustrated in the next subsection, *Miller* precludes mandatory minimums for juveniles. State actors should bear that in mind when crafting their responses to *Miller*.[200]

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194. *See generally* THE SENTENCING PROJECT, *supra* note 187 (documenting states' responses to the *Miller* decision).

195. *Id.* at 2 (citing Nebraska and Texas legislation that requires a minimum of 40 years for juveniles convicted of homicide).

196. *See generally* Act of Oct. 25, 2012, 2012 Pa. Laws 1655 (2012). *See also Juvenile Life Without Parole (JLWOP) in Pennsylvania*, JUV. L. CTR., http://www.jlc.org/current-initiatives/promoting-fairness-courts/juvenile-life-without-parole/jlwop-pennsylvania (last updated Mar. 26, 2013).

197. H.B. 152, 2013 Leg., Reg. Sess. (La. 2013). The same terms also apply under Florida's post-*Miller* legislation. *See* THE SENTENCING PROJECT, *supra* note 187, at 2.

198. THE SENTENCING PROJECT, *supra* note 187, at 2.

199. 28 states had mandatory LWOP sentences for juveniles convicted of homicide when *Miller* was decided in 2012. Miller v. Alabama, 132 S. Ct. 2455, 2471 (2012). 15 states have yet to respond with legislation to address the *Miller* ruling. THE SENTENCING PROJECT, *supra* note 187, at 2. This does not mean that all 15 states continue to violate *Miller*. For example, in Massachusetts, there has been no legislative response, *id.*, but because the state Supreme Court has abolished juvenile life without parole, one is not required. *See supra* note 187 and accompanying text.

200. Even in jurisdictions where the state legislature has enacted post-*Miller* sentencing protocols, executive and judicial actors can challenge the constitutionality of such laws on a facial and as-applied basis. Moreover, 15 states have yet to respond and still have the opportunity to craft legislation that is devoid of mandatory minimums for children.

*i.* Miller *Precludes Mandatory Minimums for Juveniles*

While mandatory minimum sentences have been unsuccessfully challenged on various constitutional grounds in the past,[201] *Miller* has breathed new life into such challenges as they apply to juveniles. In fact, even before *Graham* and *Miller*, post-*Roper*, Professor Feld argued that:

> The reduced criminal responsibility of adolescents is equally diminished when states sentence juveniles to Life Without Parole (LWOP) and the functional equivalents of 'virtual life.' Although the Supreme Court's capital punishment jurisprudence insists that 'death is different,' no principled bases exist by which to distinguish the diminished responsibility that bars the death penalty from adolescents equally reduced culpability that warrants shorter sentences for all serious crimes.[202]

After the *Graham* Court barred LWOP for nonhomicide juvenile defendants, Professor Martin Guggenheim argued in a comprehensive article that *Graham* rendered applying adult mandatory minimums to juveniles unconstitutional.[203] As he explained:

> A state sentencing statute that requires, regardless of the defendant's age, that a certain sentence be imposed based on the conviction violates a juvenile's substantive right to be sentenced based on the juvenile's culpability. When the only inquiry made by the sentencing court is to consult the legislature's mandatory punishment for the crime, without any further inquiry into whether the punishment is appropriate for a juvenile, for no other reason than it is appropriate for an adult, the Constitution requires more.[204]

In a prior essay, I suggested that the *Miller* decision rendered invalid mandatory sentences for juveniles.[205] This Article aims to further develop that claim with two points.[206] First, one cannot square mandatory sentencing of

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201. Alex Dutton, Comment, *The Next Frontier of Juvenile Sentencing Reform: Enforcing* Miller*'s Individualized Sentencing Requirement Beyond the JLWOP Context*, 23 TEMP. POL. & C.R. L. REV. 173, 178–79 (2013) ("Mandatory minimums have been challenged on separation of powers, due process, and equal protection grounds. No matter the legal basis, the clear consensus from the courts is that legislatures control sentencing policy." (citations omitted)).

202. Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & FAM. STUD. 11, 61–62 (2007) (footnotes omitted).

203. Martin Guggenheim, Graham v. Florida *and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 490–91 (2012).

204. *Id.* (emphasis omitted).

205. Drinan, *supra* note 7, at 789 n.26 ("The claim that *Miller* rendered invalid any and all mandatory minimums for juveniles is outside the scope of this Essay, but I think the *Miller* opinion supports that position. As noted [above] the *Miller* Court consistently insisted upon the importance of discretion at post-trial sentencing of a juvenile. One has to wonder how the discretion described by the *Miller* Court can exist under a mandatory sentencing scheme of any kind.").

206. I am aware of only two other authors who have argued post-*Miller* that the Court's

juveniles with the language of the *Miller* Court. The *Miller* opinion is replete with discussion of process and the importance of discretion for juvenile sentencing. The Court explained that "[s]uch 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."[207] And later: "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences."[208] To be sure, the *Miller* Court was examining and speaking of LWOP, but in an earlier part of the decision, the majority recognized that "none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific."[209] This language suggests that states cannot comport with *Miller* by replacing mandatory life without parole with another mandatory sentence—let alone a steep one.

The *Miller* decision recognizes that nothing about the Court's children-are-different jurisprudence is crime-specific; it also recognizes that process matters when sentencing children. The Court's position that "none of what [*Graham*] said about children . . . is crime-specific"[210] is really no different from the position that none of what *Roper*, *Graham*, and *Miller* said about children is *sentence*-specific. The sentencing process and discretion called for by the *Miller* Court are simply incompatible with a mandatory sentencing scheme—whether it is a mandatory sentence of life without parole or a mandatory sentence of 35 years.

Second, one cannot square mandatory sentencing for juveniles with the *logic* of the *Miller* Court. The *Miller* Court drew on two separate strands of precedent: its cases dealing with categorical bans on certain sentencing practices and its line of cases prohibiting the mandatory imposition of capital punishment.[211] The first line of cases to which the *Miller* Court refers says "that children are constitutionally different from adults for purposes of sentencing."[212] It went on to reiterate what *Roper* and *Graham* had recognized: that brain and social science confirm children are less culpable and more amenable to reform and that these differences must be taken into account at

decision renders unconstitutional mandatory minimums for juveniles. *See generally* Dutton, *supra* note 201 (suggesting advocates can challenge mandatory non-JLWOP sentences using *Miller*'s approach and using California's mandatory gang and firearm enhancement laws as examples); Rachael Frumin Eisenberg, Comment, *As Though They Are Children: Replacing Mandatory Minimums with Individualized Sentencing Determinations for Juveniles in Pennsylvania Criminal Court After* Miller v. Alabama, 86 TEMP. L. REV. 215 (2013) (arguing that Pennsylvania's use of adult mandatory minimums for juveniles was unconstitutional post-*Miller*).

207. Miller v. Alabama, 132 S. Ct. 2455, 2467 (2012).

208. *Id.* at 2468.

209. *Id.* at 2465.

210. *Id.*

211. *Id.* at 2463–64.

212. *Id.* at 2464.

sentencing.[213] Because the *Miller* Court cemented this "kids are different" approach, one cannot claim post-*Miller* that such differences are irrelevant outside the context of LWOP. Rather, the *Miller* trilogy leads to the conclusion that kids are fundamentally different for purposes of culpability and rehabilitation and that these differences should be considered whenever a child faces a custodial sentence.

Further, the *Miller* Court drew on its line of cases requiring "that capital defendants have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors,"[214] especially those dealing with "the 'mitigating qualities of youth.'"[215] This line of cases requires the states to provide defendants with an opportunity to present mitigating factors that may impact the sentence—including youth, substance abuse, a history of violence within the family, developmental challenges, or traits that suggest amenability to rehabilitation. The *Miller* Court borrowed from this line of cases to say that kids are different and that these differences should be illuminated in an individualized, discretionary sentencing scheme. Thus, the logic of *Miller*, in addition to its language, suggests that mandatory minimums—schemes that preclude individual consideration of mitigating factors, including youth—are incompatible with the *Miller* trilogy.[216]

Critics will argue that there is no limiting principle to this claim—that if indeed juveniles cannot be subject to mandatory sentences, the entire process of sentencing juveniles in adult court is undermined, as determinate sentencing schemes are the national norm.[217] However, that outcome does not necessarily follow. Prohibiting mandatory minimums for juveniles does not preclude their appearance in adult criminal court, although it may make juvenile sentencing in adult court more time-consuming and resource intensive. But as the Supreme Court has held before, efficiency and fiscal constraints must yield to the observance of constitutional rights.[218] Further, if

213. *Id.* at 2464–65 (discussing social sciences studies regarding the development of the juvenile brain that were relied on in earlier Supreme Court cases).

214. *Id.* at 2467.

215. *Id.* (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

216. It is also important to consider the question of juvenile mandatory minimums in the context of mandatory minimums altogether. Criminal justice reform advocates have argued for years that mandatory minimums not only dehumanize the criminal defendant facing them, but also that they place an unsustainable burden on our criminal justice system by leading to bloated prison populations. *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). In recent years, as states have faced significant corrections costs and budget shortfalls, lawmakers have looked for ways to unravel the impact of mandatory minimums on prison populations. In this climate, the moral leadership of the *Miller* decision may facilitate the elimination of juvenile mandatory minimums, and juvenile justice advocates should seize upon the opportunity.

217. *See supra* Part II.C.

218. *See, e.g.*, Brown v. Plata, 563 U.S. 493, 510–11, 543–44 (2011) (affirming finding of

it is simply too onerous for states to sentence juveniles in adult court without relying upon mandatory sentencing schemes, that reality may compel prosecutors and legislators to reconsider when, and how frequently, children should be transferred to adult court.

The Iowa Supreme Court's recent decision in *State v. Lyle* illustrates these issues well.[219] In *Lyle*, the Iowa Supreme Court became the first in the nation to declare that its state constitution barred mandatory minimum sentences for juveniles.[220] The defendant in that case, 17-year-old Andre Lyle, Jr., was involved in "inane juvenile schoolyard conduct."[221] Lyle and his companion punched the victim outside of their high school "and took a small bag of marijuana from him," claiming that they had paid five dollars for the marijuana bag and that it had not been delivered.[222]

Lyle was charged as an adult in criminal court and the trial judge imposed the mandatory sentence applicable to his case: ten years, seven of which Lyle would be required to serve before parole consideration.[223] In an expansive opinion documenting the evolution of juvenile justice in this country and the United States Supreme Court's recent juvenile cases, the Iowa Supreme Court rejected the concept of mandatory minimums for children, explaining that such sentences are "too punitive for what we know about juveniles."[224] The Court reasoned that:

> *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.[225]

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Eighth Amendment violation due to prison overcrowding and requiring state to either improve conditions at state's expense or release inmates); Gideon v. Wainwright, 372 U.S. 335, 343–44 (1963) (holding that the Sixth Amendment right to counsel applies to states and thus imposing burden on states to pay for that representation).

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

220. *Id.* at 398. ("Upon exercise of our independent judgment, as we are required to do under the constitutional test, we conclude that 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."). *But see, e.g.*, State v. Imel, No. 2 CA-CR2015-0112, 2015 WL 7373800, at *3 (Ariz. Ct. App. Nov. 20, 2015) (rejecting *Lyle*'s reasoning); State v. Taylor G., 110 A.3d 338, 346–47 (Conn. 2015) (rejecting claim that *Miller* precludes mandatory minimums for juveniles); State v. Brown, 331 P.3d 781, 796–97 (Kan. 2014) (finding 20-year juvenile mandatory minimum permissible after *Miller*).

221. *Lyle*, 854 N.W.2d at 401.

222. *Id.* at 381.

223. *Id.*

224. *Id.* at 400.

225. *Id.* at 402.

The dissenting justices expressed great concern about the administrative burdens that will be imposed on district courts in the absence of mandatory minimums for juveniles.[226] Justice Zager estimated that there are more than 100 Iowan inmates serving a mandatory sentence that was imposed upon them as a juvenile.[227] He recognized that "[b]ased 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."[228] Worse still, according to the dissenting justices, defendants will have the right to put on expert and other relevant witnesses and district courts will be required to take into consideration *Miller* factors such as juveniles' diminished culpability and their capacity for rehabilitation.[229] The dissenting justices expressed fear that "[i]n sum, 'the trial court must consider all relevant evidence' of the distinctive youthful attributes of the juvenile offender. The possibilities are nearly endless."[230] And yet the majority was undeterred by these administrative realities and recognized that "individual rights are not just recognized when convenient."[231]

*Lyle*, then, demonstrates a critical tension around the claim that juveniles ought not be subject to mandatory minimums. It is true that precluding mandatory minimums for juveniles increases the administrative burden on the judicial system. However, it is not true that precluding mandatory minimums for children bars the executive from prosecuting a juvenile in adult court. Nor is it true that precluding mandatory minimums for children bars a judge from sentencing a juvenile to a statutorily set minimum term;

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226. The dissenting Justices also disagreed fundamentally with the majority's reading of *Miller* and the state Constitution. *See generally id.* at 404–20.

227. *Id.* at 419 (Zager, J., dissenting).

228. *Id.*

229. *Id.* ("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."); *see also id.* ("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. 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.' 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.'" (citations omitted)).

230. *Id.* at 420 (citation omitted).

231. *Id.* at 403 ("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.").

rather, judges may do so *after* considering the individual juvenile before them.[232]

In Lyle's case, according to the majority's rule, the district court judge would have been able to sentence Lyle to ten years in prison for the schoolyard fight, so long as she had come to that judgment after considering Lyle's youth and all of its attendant circumstances. It may be the case that exercising that judgment is more time-consuming for the courts; it may be that a judge would be unlikely to impose such a sentence after considering Lyle's age and other relevant factors. But precluding mandatory minimums for children is not tantamount to ending the prosecution of children in adult court.

However, suppose that state court judges in Iowa dread juvenile sentencing because of the *Miller* protocol that the state Supreme Court has now mandated. Or suppose that prosecutors do not want to pursue an adult criminal sentence except in rare cases because of the burden of justifying such sentences under the *Miller* factors. It may turn out that precluding juvenile mandatory minimums forces state actors to internalize the full costs of prosecuting children as adults. And it may follow that, as a result of internalizing those costs, over time, state actors charge juveniles as adults only very sparingly. Given what science has revealed about juveniles and their capacity for change and the Supreme Court's incorporation of that science, such an outcome seems logical. In fact, such an outcome would merely be a return to the juvenile justice model that was founded in this country more than a century ago.[233]

This section argued that *Miller* was a revolutionary decision and that it has enabled groundbreaking juvenile justice reforms such as procedural safeguards for children facing LWOP on par with best practices in capital representation and the elimination of mandatory minimums for juveniles. As groundbreaking as these measures may sound to those who still recall the juvenile super-predator fear of the 1990s,[234] these two measures are readily defensible under *Miller* and to some extent they are already underway.

### *B. THE* MILLER *REVOLUTION ON THE HORIZON*

While some reform measures flow directly from *Miller* and are within the grasp of juvenile justice advocates, others are farther away on the horizon but

232. *Id.* ("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.").

233. *See supra* Part II.A.

234. Nick Straley, Miller*'s Promise: Re-evaluating Extreme Criminal Sentences for Children*, 89 WASH. L. REV. 963, 990–93 (2014) (discussing the juvenile super-predator prediction of the early 1990s and its impact on juvenile justice policy).

still achievable post-*Miller*. This subsection addresses three areas ripe for reform in the wake of *Miller*: (1) juvenile transfer laws; (2) presumptive sentencing guidelines as they apply to children; and (3) juvenile conditions of confinement.

### 1. Juvenile Transfer Laws

Juvenile justice advocates have recognized for years that juvenile transfer laws have made it too easy and too common for children to be tried and convicted in adult criminal court.[235] Past challenges to various transfer laws have been unfruitful.[236] But today, in the wake of the *Miller* trilogy, there is newfound traction to these claims challenging the constitutionality of mandatory transfer laws.

As was addressed in Part III, *Miller* and its immediate predecessor cases changed the landscape for the treatment of children in the criminal justice system. After *Miller*, it is now possible to challenge automatic transfer laws as impermissible "one size fits all" treatment of juveniles. In fact, the *Miller* Court not only took issue with conflating adult and juvenile sentencing generally, but it also criticized mandatory transfer provisions explicitly.[237] It explained that mandatory transfer laws, depending upon their operation, can vest prosecutors with too much unbridled discretion, force judges into making extreme sentencing choices, and jeopardize a child's well-being.[238]

The language and logic of the *Miller* trilogy, then, have further eroded the legitimacy of transfer laws—laws that have been under attack for decades. Scholars have seized upon this newfound basis for challenging juvenile transfer laws. Professor Hoeffel recently argued that juvenile transfer laws should be reconsidered through the lens of capital jurisprudence.[239] Noting that transfer and death penalty proceedings have much in common in their stakes and finality,[240] she argues for two developments. First, Hoeffel argues that the current transfer laws should be amended to narrow the pool of

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235. *See, e.g.*, David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555 (2004) (arguing against the trend of transferring juvenile cases to adult court).

236. *See, e.g.*, Commonwealth v. Cotto, 753 A.2d 217, 224 (Pa. 2000) (rejecting claim that juvenile transfer statute violated Due Process Clause); *In re* Interest of D. M. L., 254 N.W.2d 457, 459 (S.D. 1977) (rejecting claim that juvenile transfer statute was unconstitutionally vague).

237. *See supra* notes 93–97 and accompanying text.

238. Miller v. Alabama, 132. S. Ct. 2455, 2474–75 (2012).

239. Hoeffel, *supra* note 102, at 31.

240. *Id.* at 30 ("The parallels between the death penalty and juvenile transfer are striking. Both involve a decision to expose a person to the most severe set of penalties available to the relevant justice system: a death sentence for adults in adult court; a transfer to adult court for youth in juvenile court. The decision to send an adult to his death is a decision to end his life; the decision to send a juvenile to adult court is a decision to end his childhood. Both decisions signify a life not worth saving, and therefore, both decisions are to apply to the 'worst of the worst.' As a result of the finality and seriousness of their consequences, both processes should require the strictest of procedures for reliable imposition of those consequences." (footnote omitted)).

juveniles who are eligible for transfer to adult court in the first place.[241] Second, she argues that the transfer decision-making process should be done on an individual basis—like capital sentencing proceedings—incorporating all relevant mitigation evidence.[242] Hoeffel therefore unites both capital and juvenile strands of case law to challenge existing transfer laws.[243] Other scholars have proposed similar reforms post-*Miller*.[244] Amending juvenile transfer law is now clearly on the horizon.[245]

### 2. Presumptive Sentencing Guidelines for Children

As explained above, mandatory minimums arguably are now unconstitutional under *Miller*, and one state Supreme Court has already held as much.[246] For the same reason, juvenile justice advocates should look to challenge presumptive and advisory sentencing guidelines if they do not account for youth as a mitigating factor.

Sentencing guidelines range from mandatory to advisory. If a sentence is truly mandatory, it means that once the jury has convicted the defendant of a certain charge, the judge has no choice but to impose the sentence prescribed by the legislature for that crime.[247] A presumptive sentencing guideline, however, suggests a predetermined sentence for a crime, but permits the judge to impose a more lenient alternative sentence if the judge determines that there are mitigating circumstances. Typically, the legislature determines in advance what mitigating factors might justify a downward departure from the presumptive sentence.[248] Advisory guidelines are voluntary in that they

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241. *Id.* at 47–49 (suggesting several bright-line rules to narrow the pool of juveniles eligible for transfer to adult court).

242. *Id.* at 49–55.

243. *Id.* at 30. ("The Court's recent insistence that 'if . . . 'death is different,' children are different too' gives weight to the application of Eighth Amendment death penalty jurisprudence to juvenile sentences other than death in *Graham v. Florida* and *Miller v. Alabama*." (footnotes omitted)).

244. Brice Hamack, *Go Directly to Jail, Do Not Pass Juvenile Court, Do Not Collect Due Process: Why Waiving Juveniles into Adult Court Without a Fitness Hearing Is a Denial of Their Basic Due Process Rights*, 14 WYO. L. REV. 775, 805–27 (2014) (relying upon the "juveniles are different" line of cases to argue that transfer without a hearing violates due process rights); Wendy N. Hess, *Kids Can Change: Reforming South Dakota's Juvenile Transfer Law to Rehabilitate Children and Protect Public Safety*, 59 S.D. L. REV. 312, 331–32 (2014) (arguing for a return to discretionary, individual juvenile transfer post-*Miller*); Christopher Slobogin, *Treating Juveniles Like Juveniles: Getting Rid of Transfer and Expanded Adult Court Jurisdiction*, 46 TEX. TECH L. REV. 103, 121–29 (2013) (arguing for a juvenile justice system without transfer post-*Miller*); Rachel Jacobs, Note, *Waiving Goodbye to Due Process: The Juvenile Waiver System*, 19 CARDOZO J.L. & GENDER 989, 992 (2013) (arguing that existing waiver procedures violate Due Process).

245. *But see* People v. Patterson, 25 N.E.3d 526, 553 (Ill. 2014) (rejecting an Eighth Amendment challenge to a mandatory transfer law based on *Miller*).

246. *See supra* notes 212–19 and accompanying text.

247. As discussed in Part III of this Article, Evan Miller was sentenced to life without parole in Alabama under a mandatory sentencing scheme.

248. *See* Kim S. Hunt & Michael Connelly, *Advisory Guidelines in the Post-*Blakely *Era*, 17 FED. SENT'G REP. 233, 233–35 (2005) (providing overview of presumptive sentencing guidelines and

provide a benchmark for the sentencing judge, but the judge may depart from the suggested sentence with or without explanation.[249]

In light of *Miller*, juvenile justice advocates should insist that youth itself be a relevant mitigating factor when presumptive sentencing guidelines apply. As the *Miller* Court explained, there are many "mitigating qualities of youth."[250] Youth is a "time of immaturity, irresponsibility, impetuousness[,] and recklessness," and it is a period during which "a person may be most susceptible to influence and to psychological damage."[251] Thus, youth alone should at least be permissible grounds for a judge to impose a more lenient sentence than what the presumptive guideline suggests.

But not all presumptive sentencing guidelines include youth as a mitigating factor in its own right. For example, Alaska provides presumptive sentencing guidelines for felonies and separately lists aggravating factors and mitigating factors in the statute.[252] The Alaska statute lists 20 separate mitigating factors that "may allow imposition of a sentence below the presumptive range."[253] Only one of the 20 mitigating factors relates to youth, and it does not recognize youth in its own right as a mitigating variable. The statute permits a lesser sentence than the presumptive one if "the conduct of a youthful defendant was substantially influenced by another person more mature than the defendant."[254] Moreover, the burden is on the defendant to prove to the judge by clear and convincing evidence each mitigating factor.[255] Alaska is not alone in its disregard for youth as a mitigating factor in and of itself.[256] Because the Supreme Court has elevated youth in its own right to be

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the rationales for them); *see also* CONN. GEN. ASSEMBLY, LEGISLATIVE PROGRAM REVIEW AND INVESTIGATIONS COMM., CONNECTICUT MANDATORY MINIMUM SENTENCES BRIEFING (2005), http://www.cga.ct.gov/2005/pridata/Studies/Mandatory_Minimum_Senteces_Briefing.htm (providing examples of crimes that carry a presumptive minimum versus those that carry a mandatory minimum).

249. *See, e.g.*, *Sentencing Guidelines Overview*, MD. ST. COMMISSION ON CRIM. SENT'G POL'Y, www.msccsp.org/Guidelines/Overview.aspx (last visited Apr. 22, 2016) ("The sentencing guidelines are advisory and judges may, at their discretion, impose a sentence outside of the guidelines. If judges choose to depart from the sentencing guidelines, the Code of Maryland Regulations (COMAR) 14.22.01.05(A) mandates 'The judge shall document on the guidelines worksheet the reason or reasons for imposing a sentence outside of the recommended guidelines range.' In practice, however, the judiciary has generally neglected to provide an explanation for departure. For example, in 61% of the fiscal year 2005 cases that resulted in a departure from the guidelines, the reason(s) for departure was not provided."). *See generally* Hunt & Connelly, *supra* note 248.

250. Miller v. Alabama, 132 S. Ct. 2455, 2467 (2012) (citation omitted).

251. *Id.* (alteration in original) (citations omitted).

252. ALASKA STAT. § 12.55.155(c) (2014) (listing aggravating factors); *id.* § 12.55.155(d) (listing mitigating factors).

253. *Id.* § 12.55.155(d).

254. *Id.* § 12.55.155(d)(4).

255. *Id.* § 12.55.155(f)(1).

256. *See, e.g.*, Considerations in Imposing Sentence, IND. CODE § 35-38-1-7.1 (2015) (listing eleven mitigating circumstances the court may consider, none of which relate to youth); Imposition of

a mitigating factor of constitutional significance, states must consider youth at sentencing even in a presumptive sentencing context.

### 3. Juvenile Conditions of Confinement

In its recent juvenile sentencing decisions, the Supreme Court has focused on *what* sentence the states may impose rather than the conditions under which juveniles are required to serve those sentences. Yet, the Court has repeatedly expressed concern with the vulnerability of youth in its recent juvenile Eighth Amendment cases[257] as well as in other constitutional settings.[258] Juvenile justice advocates should leverage the Court's emphasis on the vulnerability and susceptibility of youth to seek improved conditions of confinement for youth in the years to come. Arguably, there are countless defects with American modes of incarceration, many of which are especially problematic for juveniles. However, this Article suggests two areas that are ripe for post-*Miller* reform: juvenile incarceration with adults and juvenile solitary confinement—both of which should be abolished.

Each year, approximately 250,000 youth are tried in the adult criminal justice system[259] and on any given day over 100,000 juveniles are incarcerated.[260] Since the 1980s, juveniles have increasingly been housed with adult inmates in prisons and jails.[261] Between 1983 and 1998, the number of juveniles in adult jails grew by more than 300%. In approximately the same time period, the number of juveniles admitted to state prisons more than doubled.[262] Today there are approximately 10,000 juveniles in adult prisons and jails on a daily basis.[263]

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Presumptive Sentence; Jury Requirements; Departure Sentencing; Substantial and Compelling Reasons for Departure; Mitigating and Aggravating Powers, KAN. STAT. ANN. 21-6815(c)(1) (2014 Supp.) (listing nonexhaustive mitigating factors, none of which include youth). *But see* ARIZ. REV. STAT. § 13-701(E)(1) (2015 Supp.) (listing age of defendant as a mitigating factor); N.C. GEN. STAT. ANN. § 15A-1340.16(e)(4) (2013) (listing youth as mitigating factor).

257. *See generally supra* Part III.

258. *See, e.g.*, J. D. B. v. North Carolina, 564 U.S. 261, 271–73 (2011) (holding that juvenile defendant's age informs Miranda analysis because children are less mature and responsible); Safford Unified Sch. Dist. v. Redding, 557 U.S. 364, 375, 377 (2009) (finding unconstitutional school strip search of child in part because of adolescent vulnerability); Planned Parenthood v. Casey, 505 U.S. 833, 970–71 (1992) (upholding parental consent provision in state abortion law, among others, on grounds of juvenile immaturity and lack of judgment).

259. Ashley Nellis, *Addressing the Collateral Consequences of Convictions for Young Offenders*, CHAMPION, July–Aug. 2011, at 20, 20; T.J. Parsell, *In Prison, Teenagers Become Prey*, N.Y. TIMES (June 5, 2012), http://www.nytimes.com/roomfordebate/2012/06/05/when-to-punish-a-young-offender-and-when-to-rehabilitate/in-prison-teenagers-become-prey.

260. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 4 (2000), https://www.ncjrs.gov/pdffiles1/bja/182503.pdf.

261. *Id.* at 5 (citing a 366% change in number of juveniles in adult jails).

262. *Id.* at 6 (citing growth in juvenile admissions to adult prisons from 3400 in 1985 to 7400 in 1997).

263. *Children in Prison*, EQUAL JUST. INITIATIVE, http://www.eji.org/childrenprison (last visited Apr. 22, 2016); *see also* CAMPAIGN FOR YOUTH JUSTICE, KEY FACTS: CHILDREN IN ADULT JAILS

Housing youth inmates with adults persists despite the well-documented, tragic realities of the practice. To begin, children housed in adult facilities lack the educational and rehabilitative services they need during a critical period of development.[264] Even more acute is the concern that juveniles in adult facilities are subject to physical and sexual victimization. When Congress passed the Prison Rape Elimination Act ("PREA") in 2003, it found that "more than any other group of incarcerated persons, youth incarcerated with adults are probably at the highest risk for sexual abuse."[265] Since then, the trend has only worsened. A recent Justice Department study found that juvenile inmates suffer higher rates of staff sexual assault than adult inmates do, and the reported numbers are thought to be low.[266]

Moreover, because of their physical and emotional immaturity, juveniles among adult inmates are most likely to be subject to physical assault and coercion.[267] Based on his own experience as a juvenile housed in an adult facility, T.J. Parsell, recounts that:

> At the time I was sent to prison, for robbing a Fotomat with a toy gun, I was still a boy—physically, cognitively, socially and emotionally—and ill equipped to respond to the sexualized coercion of older, more experienced convicts. On my first day, I was drugged, gang raped and turned into sexual chattel.[268]

He notes that his experience was not atypical and that "juveniles [are] five times as likely to be sexually assaulted in adult rather than in juvenile

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AND PRISONS, http://www.campaignforyouthjustice.org/documents/KeyFactsonYouthinAdultJailsandPrisons.pdf; HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2008: STATISTICAL TABLES 20, tbl.21 (2009), http://www.bjs.gov/content/pub/pdf/pim08st.pdf (reporting that in 2008 there were 3650 inmates under 18 housed in state prisons).

264. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 263, at 1.

265. *Id.* (quoting NAT'L PRISON RAPE ELIMINATION COMM'N, NAT'L PRISON RAPE COMM'N REPORT 18 (2009), http://www.ncjrs.gov/pdffiles1/226680.pdf).

266. Aviva Shen, *Teenagers in Adult Prisons More Likely to Be Sexually Abused by Staff, DOJ Finds*, THINKPROGRESS (May 16, 2013, 4:30 PM), http://thinkprogress.org/justice/2013/05/16/2023511/teenagers-in-adult-prisons-more-likely-to-be-sexually-abused-by-staff-doj-finds.

267. *See* Jim Lynch, *Juvenile Prisoners in Michigan Allege Rape, Abuse*, DETROIT NEWS (April 1, 2015, 11:32 PM), http://www.detroitnews.com/story/news/politics/2015/04/01/juvenile-prisoners-michigan-allege -rape-abuse/70813032 (discussing the recent lawsuit that was filed in Michigan where state law permits juveniles as young as 13 to be incarcerated alongside adults); Naomi Spencer, *Widespread Abuse of Juvenile Inmates in Michigan Prisons*, WORLD SOCIALIST WEB SITE (Dec. 14, 2013), http://www.wsws.org/en/articles/2013/12/14/mich-d14.html ("According to federal data, incarcerated youth are eight times more likely to be subjected to sexual violence in adult facilities."). The United States is also suing over the treatment of adolescents at Rikers, the nation's second-largest jail. Benjamin Weiser et al., *U.S. Plans to Sue New York over Rikers Island Conditions*, N.Y. TIMES (Dec. 18, 2014), http://www.nytimes.com/2014/12/19/nyregion/us-plans-to-sue-new-york-over-rikers-island-conditions.html.

268. Parsell, *supra* note 259.

facilities—often within their first 48 hours of incarceration."[269] In short, life for a juvenile within an adult correctional institutional is a daily quest for survival.

Ironically, some adult correctional institutions recognize that youth are unsafe among the general inmate population and place them in solitary confinement—a condition which can be equally, if not more harmful, to juveniles. Adults in solitary confinement can suffer psychological trauma.[270] For juveniles, who are at a critical stage of development, the outcomes can be devastating, including depression, anxiety, and psychosis.[271] Most juvenile suicides that happen within correctional facilities occur within solitary confinement.[272] For these reasons, the United Nations passed a resolution in 1990 prohibiting the use of solitary confinement for juveniles.[273] The American Academy of Child & Adolescent Psychiatry opposed the use of juvenile solitary confinement and stated that youth held in isolation for more than 24 hours should be evaluated by a mental health professional.[274] Most recently, President Obama adopted the Justice Department's recommendation to ban solitary confinement for juveniles in federal prisons.[275] Countless social scientists have joined the chorus of objection to juvenile solitary confinement. And yet the practice persists.

In the wake of *Miller*, juvenile justice advocates should seize upon the Supreme Court's moral leadership and argue that because children are constitutionally different, their conditions of confinement must reflect that difference.[276] Several organizations have called for the abolition of housing juveniles with adults in jail and prison,[277] and New York City officials recently agreed to prohibit the use of solitary confinement for inmates under the age

269. *Id.* (citing Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, § 2(4), 117 Stat. 972, 972).

270. *See generally* Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477 (1997); Shira E. Gordon, Note, *Solitary Confinement, Public Safety, and Recidivism*, 47 U. MICH. J.L. REFORM 495 (2014).

271. *Solitary Confinement of Juvenile Offenders*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY, http://www.aacap.org/AACAP/Policy_Statements/2012/Solitary_Confinement_of_Juvenile_Offenders.aspx.

272. *Id.*

273. G.A. Res. 45/113 (Dec. 14, 1990).

274. *Solitary Confinement of Juvenile Offenders*, *supra* note 271.

275. Barack Obama, Opinion, *Barack Obama: Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html.

276. *See, e.g.*, Wood, *supra* note 102 (applying *Miller* to question the confinement of juveniles with adults).

277. Liz Ryan, *Prison Rape Elimination Act Can Keep Children Out of Adult Jails*, HUFFINGTON POST (Mar. 18, 2013, 12:10 PM), http://www.huffingtonpost.com/2013/03/18/prison-rape-elimination-act_n_2901001.html (citing consensus among various stakeholders that juveniles should not be housed with adult inmates).

of 21.[278] Change is afoot on juvenile conditions of confinement post-*Miller*. The time is ripe for making that change a reality.

## V. CONCLUSION

*Miller* has revolutionized juvenile justice. This Article developed two corollaries that logically flow from the *Miller* trilogy: the creation of procedural safeguards for children facing LWOP comparable to those recommended for adults facing the death penalty and the elimination of mandatory minimums for children. It also identified three key areas for reform post-*Miller* that are farther away on the horizon, but are nevertheless attainable: transfer law reform, revised presumptive sentencing guidelines for youth, and improved juvenile conditions of confinement.

This Article concludes by recognizing two realities. First, it is important to note that there are many good reasons for state actors to pursue the juvenile justice practices proposed herein and many of these reasons have nothing to do with the *Miller* opinion. The fact is, our nation's juvenile justice practices have spun out of control. Even in the absence of the *Miller* decision, holistic rethinking is in order. The *Miller* decision, while significant, does not offer outlier insights. Rather, the decision confirms what advocates and academics have known for years: kids are different; they change by definition; and society has an obligation to foster improvement over entrenched criminal behavior.

Second, the *Miller* trilogy arguably represents the Court's efforts to bring the law into step with the direction of juvenile justice reform at the state level. As Professor Elizabeth Scott explains, in the early 21st century, there has been a marked dissipation of the "moral panic" of the 1990s: "Many lawmakers and politicians—from the Supreme Court to big city mayors—appear ready to rethink the punitive approach of the 1990s, and recent surveys indicate strong public support for a rehabilitative approach to teenage crime."[279] In the four years since *Miller* was decided, there are already some signs that state actors are reading *Miller* expansively and accepting the Court's invitation to rethink juvenile sentencing. Nine states have abolished the practice of juvenile LWOP in the wake of *Miller*, while other states have precluded the sentence for certain categories of juvenile offenders.[280] A majority of state courts that have considered whether *Miller* applies retroactively have concluded that it must, and the Supreme Court recently affirmed those rulings.[281] Prominent leaders

278. Michael Winerip & Michael Schwirtz, *Rikers to Ban Isolation for Inmates 21 and Younger*, N.Y. TIMES (Jan. 13, 2015), http://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html.

279. Scott, *supra* note 18, at 541.

280. *Two Years Since* Miller v. Alabama, *supra* note 187.

281. Jody Kent Lavy, Opinion, *Signs of Hope and Justice Two Years After* Miller v. Alabama, JUV. JUST. INFO. EXCHANGE (July 8, 2014), http://jjie.org/signs-of-hope-and-justice-two-years-after-miller-v-alabama/107244; *see also* discussion of *Montgomery v. Louisiana*, *supra* note 6.

have spoken publicly about the cruelty, inhumanity, and general senselessness of juvenile LWOP in the two years since the *Miller* decision. In many ways, the *Miller* revolution is underway.