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## Note

### Children *Are* Different: Bridging the Gap Between Rhetoric and Reality Post *Miller* *v. Alabama*

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*“For these are all our children. We will all profit by, or pay for, whatever they become.”*  
*James Baldwin*

#### INTRODUCTION

On June 25, 2012, the Supreme Court held in *Miller v. Alabama* that mandatory life sentences without the possibility of parole for juvenile offenders violate the Eighth Amendment of the U.S. Constitution.<sup>1</sup> This ruling is the latest of a series of decisions that acknowledge that three fundamental characteristics of youth—lack of maturity, vulnerability to negative influences, and capacity for change—make children<sup>2</sup> “constitutionally different” from

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1. *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

2. This Case Note follows the lead of Justice Kagan in *Miller* and uses the words “children” and “juvenile” interchangeably. *See, e.g., Miller*, 132 S. Ct. at 2464. This is not to obscure the fact that “juvenile” is a term of art that refers to “a person who has not reached the age (usually 18) at which one should be treated as an adult by the criminal justice system.” BLACK’S LAW DICTIONARY 945 (9th ed. 2009). At common law, children under the age of seven were presumed incapable of forming the requisite *mens rea* to commit criminal acts and thus could not be held criminally liable.

adults and “less deserving of the most severe punishments.”<sup>3</sup> Although the holding in *Miller* should be celebrated as a step toward individualized justice for juveniles, this Case Note posits that it does not go far enough. One obvious reason is that juveniles can still be sentenced to life without parole (LWOP) on a discretionary basis, which could allow courts to perpetuate the unequal treatment of youth of color.<sup>4</sup> Another is that states are free to fashion rules that seemingly conform to the decision in *Miller* while undermining its reasoning and end goals.<sup>5</sup> The third and main reason is that the prohibition of mandatory LWOP does not address the processes that allow juveniles to be sentenced to lengthy sentences to begin with.

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*Id.* at 792. With the development of the juvenile court, the term “juvenile” gained prominence as a way to mark the period between childhood and adulthood. See DAVID ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA, 205-25 (1980). Although generally thought of as signifying teenage years, the term “juvenile” represents a rather ambiguous category whose upper and lower threshold differ across states. Children as young as six and as old as nineteen have fallen within the jurisdiction of juvenile court. See AMNESTY INT’L, AI INDEX AMR 51/60/98, BETRAYING THE YOUNG: CHILDREN IN THE US JUSTICE SYSTEM, 15 (1998). Thus, because the term “juvenile” refers to both teenagers and younger children, it can safely be substituted with the colloquial term “children.” Further, the Model Juvenile Court Act defines a “child” as an individual who either is 1) under age 18; 2) under age 21 and committed an act of delinquency before turning 18; or 3) under age 21 and committed an act of delinquency after turning 18 and is transferred to juvenile court. MODEL JUVENILE COURT ACT § 2(1) (1968); see also 47 AM. JUR. 2D *Juvenile Courts* §§ 12, 25, 47 (1964).

3. *Miller*, 132 S. Ct. at 2464; see also *Roper v. Simmons*, 543 U.S. 551 (2005) (abolishing juvenile death penalty); *Graham v. Florida*, 130 S. Ct. 2011 (2010) (holding that life without parole sentences for juveniles in nonhomicide cases violate the Eight Amendment).

4. In a study of youth arrested for murder in twenty-five states, African American youth were found to be sentenced to LWOP at a rate that is 1.59 times higher than white youth. HUMAN RIGHTS WATCH, REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR YOUTH OFFENDERS IN THE UNITED STATES IN 2008, 6-7 (2008), available at [http://www.hrw.org/sites/default/files/reports/the\\_rest\\_of\\_their\\_lives\\_execsum\\_table.pdf](http://www.hrw.org/sites/default/files/reports/the_rest_of_their_lives_execsum_table.pdf); see also AMNESTY INT’L AND HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR YOUTH OFFENDERS IN THE UNITED STATES 39 (2005), available at <http://www.hrw.org/reports/2005/10/11/rest-their-lives> (presenting research finding that “minority youths receive harsher treatment than similarly situated white youths at every stage of the criminal justice system, from the point of arrest to sentencing”); SARAH RAMSEY ET AL., CHILDREN AND THE LAW IN A NUTSHELL 483 (2d ed. 2003).

5. Iowa Governor Terry Branstad commuted the LWOP sentences of thirty-eight juvenile offenders to mandatory sixty-year sentences, which are, of course, functionally life sentences. Citing public safety concerns, Branstad used his commutation power to ensure that youth offenders have a miniscule chance of coming out of prison alive. See *Branstad Commutes Life Sentences for 38 Iowa Juvenile Murders*, THE GAZETTE (July 16, 2012), <http://thegazette.com/2012/07/16/branstad-commutes-life-sentences-for-38-iowa-juvenile-murderers/>; see also *States Respond to Supreme Court JLWOP Decision*, JUVENILE JUSTICE BLOG (July 17, 2012), <http://juvenilejusticeblog.web.unc.edu/2012/07/17/states-respond-to-supreme-court-jlwop-decision/>. In California, Governor Jerry Brown signed into law Senate Bill 9. Under the bill, youth offenders cannot petition for a resentencing hearing until they have served at least fifteen years of the original LWOP sentence, and they cannot be released until they have served at least twenty-five years. To win legislative approval of the bill, State Senator Leland Yee stressed that it would cost California \$700 million to incarcerate the 300 juveniles sentenced to LWOP until death. See *Jerry Brown Signs Bill Allowing New Sentences for Young Murderers*, SACRAMENTO BEE (Sept. 30, 2012), <http://blogs.sacbee.com/capitolalertlatest/2012/09/jerry-brown-signs-bill-allowing-new-sentences-for-young-murderers.html>.

This Case Note contends that the Court's reasoning in *Miller*, in combination with *Roper v. Simmons* and *Graham v. Florida*, requires a thorough transformation of the way juveniles are treated in the criminal justice system. Currently, 200,000 children are prosecuted in adult court annually, where they are treated as adults and given sentences they can hardly comprehend.<sup>6</sup> There are three practices in particular that allow juveniles to be sentenced as adults: 1) statutory exclusion laws, which require that charges against juveniles be filed in adult court based solely on the nature of the offense,<sup>7</sup> 2) prosecutorial discretion laws, which give prosecutors discretion to file charges directly in adult court,<sup>8</sup> and 3) minimum sentencing provisions that apply to juveniles once transferred to adult court.<sup>9</sup> In *Miller*, the Court explained how these practices led to mandatory LWOP sentences; it proceeded to ban the result but not any of the practices that brought that result.<sup>10</sup>

This Case Note argues that in order to give full effect to its reasoning in *Miller*, the Supreme Court needs to abolish automatic transfers, prosecutorial discretion transfers, and mandatory sentencing schemes upon transfer. These practices ignore the "mitigating qualities of youth," which the Court in *Miller* stressed should be given due consideration.<sup>11</sup> Only if judges are required to take into account the age, maturity, educational, and socio-psychological circumstances of a child in all instances will they be able to award sentences that meet the demands of the Eighth Amendment.

This Case Note begins in Part I with an analysis of the Court's reasoning in *Miller*. Part II places *Miller* in context by providing a brief sketch of the legal reforms that led to juveniles being sentenced to mandatory LWOP in the first place. Part II.A illustrates how even though studies show children's diminished culpability and greater capacity for reform, children are being transferred to adult court and sentenced to adult-like sanctions in greater and

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6. Neelum Arya, *Using Graham v. Florida to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 108 (2010). In adult prison, juveniles face increased risk of assault, rape and abuse by staff, as well as few prospects of rehabilitation. See ASHLEY NELLIS, THE SENTENCING PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 19 (2012), available at [http://sentencingproject.org/doc/publications/publications/jj\\_The\\_Lives\\_of\\_Juvenile\\_Lifers.pdf](http://sentencingproject.org/doc/publications/publications/jj_The_Lives_of_Juvenile_Lifers.pdf).

7. See Arya, *supra* note 6, at 108-10 (defining types of transfer laws that allow youth to be prosecuted in the adult system). Statutory exclusion laws are sometimes referred to as "automatic transfer laws" because juveniles above a certain age accused of specific offenses are automatically transferred to adult court. These laws are currently in effect in twenty-nine states. See RICHARD REDDING, U.S. DEPT. OF JUSTICE, JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY (2010), available at <https://www.ncjrs.gov/pdffiles1/ojdp/220595.pdf>; see also *Miller*, 132 S. Ct. at 2474 (referring to automatic transfers as "mandatory transfer systems").

8. See Arya, *supra* note 6, at 109-10. Prosecutorial discretion laws are also known as prosecutorial direct-file laws and are currently in effect in fourteen states and the District of Columbia. See REDDING, *supra* note 7.

9. See *Miller*, 132 S. Ct. at 2473 (explaining that most states do not have separate penalty provisions for juvenile offenders tried as adults).

10. See *id.* at 2473-74.

11. *Id.* at 2467; see also *id.* at 2466 (requiring judges to take into account "how children are different").

greater numbers. Part II.B explains the nature of the transfer laws and sentencing schemes that are driving this development, discusses how they contradict the Court's reasoning in *Miller*, and finally Part II.C argues for their abolition.

## I.

### *MILLER V. ALABAMA IN REVIEW*

In the consolidated review of *Miller v. Alabama* and *Jackson v. Hobbs*, the Supreme Court heard the cases of two 14-year-old offenders who were convicted of murder and sentenced to LWOP.<sup>12</sup> Their individual stories are representative of the background, nature of offense, and level of culpability of other children sentenced to life behind bars.<sup>13</sup> By the time petitioner Evan Miller was fourteen years old, he had been in and out of foster care because of addiction and abuse in his family.<sup>14</sup> He had attempted suicide four times, the first when he was six years old. The night of the offense he was in his trailer home with a friend, when a neighbor by the name of Cannon came to do a drug deal with Miller's mother.<sup>15</sup> Miller and his friend followed Cannon to his trailer where all three consumed alcohol. When Cannon fell asleep, the boys tried to steal his wallet, but Cannon woke up and grabbed Miller by the throat. The boys beat Cannon with a bat and set his trailer on fire.<sup>16</sup> Miller was initially charged as a juvenile but the District Attorney exercised his discretion to seek removal of the case to adult court.<sup>17</sup> In adult proceedings, Miller was charged with murder in the course of arson, a crime that carried a mandatory minimum punishment of LWOP in Alabama.<sup>18</sup>

Petitioner Kuntrell Jackson accompanied two other boys to a video store to commit a robbery.<sup>19</sup> He initially chose to stay outside but as time passed, he went in the store only to find Shields, one of the other boys, pointing a gun at the store clerk. The parties disputed whether Jackson said "I thought you all was playing" or "we ain't playing" right before Shields shot the clerk.<sup>20</sup> The State did not argue that Jackson fired the bullet or that he intended the death. Still, the prosecutor charged him with capital felony murder under an aiding-

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12. *Miller*, 132 S. Ct. at 2457.

13. *Id.*; see also ACLU, PETITION ALLEGING VIOLATIONS OF THE HUMAN RIGHTS OF JUVENILES SENTENCED TO LIFE WITHOUT PAROLE IN THE UNITED STATES OF AMERICA 3-7 (2006), available at [http://www.aclu.org/files/images/asset\\_upload\\_file326\\_24232.pdf](http://www.aclu.org/files/images/asset_upload_file326_24232.pdf).

14. *Miller*, 132 S. Ct. at 2462.

15. *Id.*

16. *Id.*

17. *Id.*; see also ALA. CODE § 12-15-34 (1977).

18. *Miller*, 132 S. Ct. at 2463. As a point of comparison, the International Criminal Tribunal for the Former Yugoslavia (ICTY) sentenced Ranko Cestic to 18 years in prison for ten murders, constituting five crimes against humanity and five violations of the laws of war, and one sexual assault, constituting a crime against humanity. Prosecutor v. Ranko Cestic, Case No. IT-95-10/1-S, Sentencing Judgment, ¶ 107 (Mar. 11, 2007).

19. *Miller*, 132 S. Ct. at 2461.

20. *Id.*

and-abetting theory.<sup>21</sup> Following Arkansas law, which gives prosecutors authority to charge fourteen-year-olds as adults when they are alleged to have committed certain serious crimes, the prosecutor in this case charged Jackson as an adult.<sup>22</sup> When a jury convicted Jackson of both felony murder and aggravated robbery, the judge explained that “in view of the verdict, there [was] only one possible punishment”—life imprisonment without parole.<sup>23</sup> Jackson was fourteen years old at the time. Both his mother and grandmother had previously shot individuals, and Jackson himself grew up immersed in violence.<sup>24</sup>

Writing for the majority, Justice Kagan explained that state law in both cases “mandated that each juvenile die in prison even if a judge or jury thought that his youth and its attendant characteristics, along with nature of his crime” called for a lesser sentence.<sup>25</sup> She concluded that such mandatory schemes are unconstitutional when they lead to LWOP for juveniles based on two strands of precedent. The first strand was grounded on *Roper v. Simmons* and *Graham v. Florida*, which together barred capital punishment for minors and LWOP for juveniles convicted of non-homicide offenses.<sup>26</sup> These decisions imposed categorical bans on sentencing practices based on a mismatch between the culpability of a class of offenders and the severity of a sentence. The second strand was based on *Woodson v. North Carolina* and *Lockett v. Ohio*, which held that sentencing authorities must consider the characteristics of a defendant and the details of his offense before sentencing him to death.<sup>27</sup> Examining both of these strands in tandem, the Court held that juveniles are entitled to “individualized consideration” before being sentenced to LWOP.<sup>28</sup> The Court therefore concluded that the Eighth Amendment prevents a state from mandating that juveniles be sentenced to LWOP.<sup>29</sup>

When evaluating whether mandatory juvenile LWOP violated the prohibition against cruel and unusual punishment, the Court referenced “the

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21. *Id.*

22. *Id.*; see also ARK. CODE ANN. § 9 27 318(c)(2) (1998).

23. *Miller*, 132 S. Ct. at 2461; see also ARK. CODE ANN. § 5-4-104(b) (1997).

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

25. *Id.* at 2460.

26. *Id.* at 2463; see also *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 130 S. Ct. 2011, 2015 (2010).

27. *Miller*, 132 S. Ct. at 2463; see also *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion); *Lockett v. Ohio*, 438 U.S. 586 (1978).

28. *Miller*, 132 S. Ct. at 2470. Because the Court likens LWOP sentences to juveniles to the death penalty, it is arguable that *Miller* falls within the Court’s death-is-different jurisprudence. See *id.* at 2466. Juveniles have a right to individualized sentencing only when they face “the most serious penalties.” *Id.* at 2461. But given the focus on the developmental differences between juveniles and adults, this Note claims that individualized sentencing should be available to all juveniles, not just the ones charged with offenses that carry LWOP sentences.

29. See David R. Dow, *Don’t Believe the Hype: Supreme Court Decision on Juvenile Life Without Parole Is Weak*, THE DAILY BEAST (June 25, 2012), <http://www.thedailybeast.com/articles/2012/06/25/don-t-believe-the-hype-supreme-court-decision-on-juvenile-life-without-parole-is-weak.html>.

evolving standards of decency that mark the progress of a maturing society.”<sup>30</sup> To determine society’s standards of decency, the Court employed a two-part inquiry. First, the Court consulted “the objective indicia” of relevant legislative enactments and sentencing juries to determine whether a national consensus against a sentence existed.<sup>31</sup> Next, the Court analyzed the penological justifications for the sentence and applied its own independent judgment to decide whether the punishment was cruel and unusual.<sup>32</sup> The former inquiry caused a split in the Court. Justices Roberts, Scalia, Thomas and Alito in dissent agreed with Alabama and Arkansas that the fact that twenty-nine jurisdictions permit mandatory LWOP for juveniles suggested that no national consensus against the practice existed.<sup>33</sup> Justice Kagan, writing for the majority, maintained that no national consensus was needed because the Court was not banning LWOP, but merely requiring judges to follow a conscientious process in considering whether to impose it.<sup>34</sup>

Justice Kagan explained that states that authorize juvenile LWOP do so through “two independent statutory provisions”—one allowing the transfer of juveniles to adult court, the other setting penalties for everyone tried in adult court.<sup>35</sup> To the majority, this process did not indicate that “the penalty has been endorsed through deliberate . . . legislative consideration.”<sup>36</sup> To the dissenters, the majority appeared to be imposing its own values and displacing “the legislative role in proscribing appropriate punishment for crime.”<sup>37</sup> The Court, however, stopped short of a categorical ban on all juvenile LWOP sentences. Absent such a ban, judges are required to consider a juvenile’s age and attendant characteristics before irrevocably sentencing him or her to a lifetime in prison.<sup>38</sup> By mandating individualized sentencing for juveniles facing LWOP, the Court in *Miller* opened the door to a much more thorough challenge of the current system, namely the argument that *all* juveniles deserve individualized justice. In other words, no sentencing scheme that ignores age and its attendant circumstances should determine the outcome of a juvenile case.

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30. *Miller*, 132 S. Ct. at 2463 (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1957)).

31. *Id.* at 2470.

32. *Id.* at 2465.

33. *Id.* at 2477 (Roberts, C.J., dissenting) (arguing that if 2,500 juveniles are serving LWOP, the sentence is not unusual).

34. *Id.* at 2471.

35. *Id.* at 2472.

36. *Id.* at 2473 (citing *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010)).

37. *Id.* at 2481 (Roberts, C.J., dissenting); see *Dow*, *supra* note 29.

38. See David Tanenhaus, *The Roberts Court’s Liberal Turn on Juvenile Justice*, N. Y. TIMES (June 27, 2012), [http://www.nytimes.com/2012/06/27/opinion/the-roberts-courts-liberal-turn-on-juvenile-justice.html?\\_r=0](http://www.nytimes.com/2012/06/27/opinion/the-roberts-courts-liberal-turn-on-juvenile-justice.html?_r=0) (noting that individualized justice for children was one of the ideals of juvenile court).

## II.

## JUVENILES DESERVE INDIVIDUALIZED SENTENCING AND A CHANCE AT REHABILITATION

To date, the Supreme Court has barred the application of automatic transfers, prosecutorial transfers and mandatory minimum provisions that result in sentencing juveniles to the harshest terms of imprisonment: capital punishment in *Roper* and LWOP in *Graham* and *Miller*. But the Court has stopped short of abolishing these practices when they lead to other adult-length sentences, such twenty-five years to life, thirty-five years to life, or sixty years of imprisonment. This Case Note calls for an end to these practices because they mandate severe penalties for juveniles without consideration of age and attendant circumstances, thus violating the spirit of *Miller*. The first subsection of Part II analyzes how statutory exclusion and prosecutorial discretion laws came to be; the second shows how they contravene the widely accepted notion that juveniles are less culpable and more amenable to change than adults; the third part argues that these laws violate the Eighth Amendment because they subject juveniles to punishments that are not proportional to their diminished level of culpability.

A. *The Downfall of the Juvenile Justice System*

For much of the twentieth century, youthful offenders were subject to the jurisdiction of the juvenile court, a court that recognized that fundamental differences between children and adults called for lesser punishments.<sup>39</sup> The juvenile justice system was based on individualized rehabilitation and treatment, civil jurisdiction, informal procedure, and separate incapacitation.<sup>40</sup> A child could be transferred to adult court only if a judge held a hearing and determined that transfer served the best interests of the child and the public.<sup>41</sup> As a result, most youth offenders ended up serving sentences in juvenile hall where they had access to a range of programs.<sup>42</sup>

All of this changed significantly in the early 1990s, when public discourse was “consumed by [a] looming threat posed by America’s youth.”<sup>43</sup> As juvenile crime rates reached a temporary peak in the late 1980s, media outlets

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39. See Brief for NAACP as Amicus Curiae Supporting Petitioner at 5, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647) [hereinafter Brief for NAACP].

40. See RAMSEY, *supra* note 4, at 486.

41. See Sacha Coupet, *What to Do With the Sheep in Wolf’s Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System*, 148 U. PA. L. REV. 1303, 1309 (2000); see also *Kent v. United States*, 86 S. Ct. 1045 (1966) (holding that a waiver of juvenile court jurisdiction was invalid without a transfer hearing and an opportunity for the accused to challenge said waiver). Justice Fortas outlined specific criteria, including seriousness of the alleged offense, history and “likelihood of reasonable rehabilitation” that juvenile courts judges need to use when making the “critically important” decision to transfer a case to adult court or not. *Id.* at 1055, 1060; see also Tanenhaus, *supra* note 38.

42. See RAMSEY, *supra* note 4, at 486.

43. Brief for NAACP, *supra* note 39, at 8.

coalesced on a narrative of hyper-violent, morally-depraved and criminally-involved youth who were out to terrorize society.<sup>44</sup> According to then-Princeton University Professor and criminologist John J. DiIulio, “on the horizon [were] tens of thousands of severely morally impoverished juvenile super-predators . . . [who] do what comes ‘naturally’: murder, rape, rob, assault, burglarize, deal deadly drugs and get high.”<sup>45</sup> This super-predator myth remained salient even in the face of declining violent crime rates among juveniles.<sup>46</sup> Academics and politicians consistently spoke of teen crime in racially coded terms that mapped comfortably onto “historical representations of African Americans as violence-prone.”<sup>47</sup>

Fueled by such narratives that conflated race, youth and criminal behavior, states began to adopt harsher punishments for crimes committed by juveniles.<sup>48</sup> Punitive sanctions took the place of treatment and rehabilitation. Since youth offenders were thought of as deficient in personality traits, the only way to control them was through incarceration.<sup>49</sup> Many states accomplished a near complete overthrow of the juvenile justice system by 1) allowing for automatic transfers that withdraw juvenile jurisdiction for certain cases based on age and nature of offense, 2) granting discretion to prosecutors to file charges for specified crimes directly in adult court without judicial waiver proceedings, 3) lowering the age at which child offenders could be subject to adult prosecution.<sup>50</sup>

As a result of laws passed in the 1990s, children as young as thirteen were being sentenced to spend the rest of their lives in prison.<sup>51</sup> Of the 2,500 juveniles sentenced to LWOP when *Miller* was decided, an estimated 26 percent had not actually committed a murder but were convicted for their role in aiding and abetting a felony.<sup>52</sup> Disturbingly, black youth are serving LWOP

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44. *Id.* at 8; see also Robert Shepard, *How the Media Misrepresents Juvenile Policies*, 12 CRIM. JUST. 37, 38 (1998) (“[A] survey of local television news in Los Angeles revealed that where the race of crime perpetrators was identifiable, nearly 70 percent were nonwhite males.”); see also Perry Moriearty, *Framing Justice: Media, Bias and Legal Decisionmaking*, 69 MD. L. REV. 849, 871 (2011) (“[A] study of news broadcasts in six major cities found that 62 percent of the stories involving Latino youth were about murder or attempted murder [although] in 1998, minority youth accounted for only one quarter of all juvenile crime arrests and less than half of all violent juvenile crime arrests.”).

45. Brief for NAACP, *supra* note 39, at 16.

46. When juvenile crime rate dropped by more than half in the 1990s, Professor DiIulio explained that “he wished he had never become the . . . intellectual pillar for putting violent juveniles in prison.” *Id.* at 20.

47. *Id.* at 15. In a 1996 report to the U.S. Attorney General, Dean James Alan Fox of Northeastern University’s College of Criminal Justice warned of a “future wave of youth violence” due to a population increase in the number of African American males between the ages of fourteen and seventeen. JAMES ALAN FOX, IN JUVENILE JUSTICE: A REPORT TO THE UNITED STATES ATTORNEY GENERAL ON CURRENT AND FUTURE RATES OF JUVENILE OFFENDING (1996).

48. Brief for NAACP, *supra* note 39, at 9.

49. *Id.* at 10.

50. See ACLU, *supra* note 13, at 9-10; see also Arya, *supra* note 6, at 108-10.

51. See ACLU, *supra* note 13, at 3.

52. In California the number is as high as 45 percent. See Letter from the United States and International Human Rights Organizations to the Commission on the Elimination of Racial

sentences at a rate ten times that of white youth on a per capita basis.<sup>53</sup> This fact is consistent with the finding that youth of color “receive different and harsher treatment” throughout the criminal justice system.<sup>54</sup> Seen in that light, the Court’s conclusion that *some* youth can still be sentenced to LWOP is particularly problematic because it means that youth of color will likely be the ones considered “appropriate” for that sentence.<sup>55</sup> By not imposing a categorical ban on all juvenile LWOP sentences, the Court can inadvertently perpetuate pernicious racial disparities in sentencing.

### B. *Children Are Different but Are Not Treated as Such*

The Court’s decision in *Miller* confirms the generally recognized notion that children differ from adults in many legally salient ways. First, studies show that the prefrontal cortex of adolescent brains is structurally immature, which means that teenagers have less control over their emotions and actions.<sup>56</sup> With a diminished capacity for decision making, children are more susceptible to peer pressure and more likely to engage in risky behavior. Additionally, studies show that the majority of American youth will engage in “delinquent” activities during their teenage years and eventually “age out” of such conduct.<sup>57</sup> Thus, actions committed during this transient period are reflections of adolescent development, not indications of “bad character.”<sup>58</sup> Further, it is harder for children to extricate themselves from abusive environments.<sup>59</sup> In a survey by the Sentencing Project, 79 percent of juveniles sentenced to LWOP reported witnessing violence in their homes and 46 percent experienced

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Discrimination, 2 (June 4, 2009), available at [http://www.aclu.org/files/pdfs/humanrights/jlwop\\_cerd\\_cmte.pdf](http://www.aclu.org/files/pdfs/humanrights/jlwop_cerd_cmte.pdf). Still other children were given LWOP for lesser crimes: Antonio Nunez was sentenced to LWOP for a crime that resulted in no bodily injury. *Id.*

53. *Id.*; see also RAMSEY, *supra* note 4, at 483 (observing that “minority are more likely than white youth to become involved in the juvenile system with their overrepresentation increasing at each stage of the process”).

54. See Brief for NAACP, *supra* note 39, at 29; see also Barry Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & FAM. STUD. 11, 36 (2007) (“After researchers control for present offense and prior record, . . . studies consistently report additional racial disparities when judges sentence black youths.”).

55. *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012); see also Monya Bunch, *Juvenile Transfer Proceedings: A Place for Restorative Justice Values*, 47 HOW. L.J. 909, 910 (2004) (citing that over three-quarters of all youths confined in adult prisons are minority children although 71 percent of juveniles arrested are white youths).

56. See Michael Barbee, *Juveniles Are Different: Juvenile Life Without Parole After Graham v. Florida*, 81 MISS. L. J. 299, 314 (2011).

57. See Arya, *supra* note 6, at 106.

58. These differences are recognized in every arena of life with the exception of criminal justice. With civil and political matters, everyone agrees that children are less responsible than adults; for example, in the United States, persons under the age of eighteen cannot legally consume alcohol, serve on juries, vote, sign a contract, or be drafted. See ACLU, *supra* note 13, at 7.

59. See C.S. Widom, *Child Abuse, Neglect, and Violent Criminal Behavior*, 27 CRIMINOLOGY 251-71 (1989).

physical abuse.<sup>60</sup> Over 77 percent of the girls had been victims of sexual abuse.<sup>61</sup> Because their cases were waived to adult court, this type of information about their background was frequently considered inadmissible at trial.

Yet even though many children outgrow their impulsive behavior and are not to be blamed for the violence that surrounds them, the current system treats them as if they are as culpable as adults. During criminal investigations, teenage suspects are disadvantaged by their inability to deal with police officers and prosecutors, fully weigh long-term consequences, and trust defense counsel.<sup>62</sup> Statutory exclusion and prosecutorial discretion laws allow for their cases to be transferred to adult court regardless of their maturity levels.<sup>63</sup> Once in adult proceedings, juveniles are subject to mandatory sentencing laws and, in some states, are incarcerated with adults.<sup>64</sup> To illustrate, consider the case of a young boy called Johnny who was driving a car from which a gun was fired.<sup>65</sup> Although no one was hurt, Johnny received a sentence of thirty-five years to life. Even if Johnny's sentence were shorter, he would still carry the lifelong stigma of a criminal conviction, which in some states is accompanied by restrictions on voting, access to public housing, and educational loans.<sup>66</sup> But with thirty-five years in adult prison, Johnny will have to live with a lot more than the stigma. He faces a significantly higher chance of being physically and sexually assaulted in the adult facilities than in juvenile hall.<sup>67</sup> By some accounts, half of the children who end up in adult prison are assaulted or raped; they commit suicide eight times as often as adults.<sup>68</sup> Nonetheless, courts across America continue to allow children to be charged and sentenced as adults.<sup>69</sup>

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60. See NELLIS, *supra* note 6, at 2.

61. *Id.* at 3. Youth serving LWOP had experienced socioeconomic disadvantages, with a third being raised in public housing, less than half attending school during the time of the offense, and more than a quarter missing a parent due to incarceration. As the researchers explain, "violence is a learned behavior and when it is demonstrated by adults as a tool to address problems, children internalize this and, without intervention, are prone to repeat it." *Id.* at 10.

62. See Arya, *supra* note 6, at 133.

63. See *id.* at 107.

64. See CAMPAIGN FOR YOUTH JUSTICE, KEY FACTS: YOUTH IN THE JUSTICE SYSTEM (2012), available at <http://www.campaignforyouthjustice.org/documents/KeyYouthCrimeFacts.pdf>. [hereinafter YOUTH IN THE JUSTICE SYSTEM] ("On any given night, 10,000 children are held in adult jails and prisons."). Even though the Federal Juvenile Justice and Delinquency Prevention Act requires that juveniles are housed separately from adults, these protections do not apply to youth prosecuted in the adult criminal justice system. See also CAMPAIGN FOR YOUTH JUSTICE, JAILING JUVENILES (2007), available at [http://www.campaignforyouthjustice.org/documents/CFYJNR\\_JailingJuveniles.pdf](http://www.campaignforyouthjustice.org/documents/CFYJNR_JailingJuveniles.pdf) [hereinafter JAILING JUVENILES].

65. See JUVIES (Chance Films 2004).

66. See Arya, *supra* note 6, at 107.

67. See NELLIS, *supra* note 6, at 19.

68. See JUVIES, *supra* note 65.

69. See YOUTH IN THE JUSTICE SYSTEM, *supra* note 64.

### C. Bridging the Gap Between Rhetoric and Reality

The Court's admission that "children are constitutionally different from adults for purposes of sentencing" does not match the experience of juveniles in the criminal justice system.<sup>70</sup> To bridge the gap between rhetoric and reality, the Court needs to take the reasoning in *Miller* to its logical conclusion. It is not just mandatory LWOP for juveniles that "precludes consideration of . . . age and its hallmark features."<sup>71</sup> All automatic transfers, prosecutorial transfers and mandatory sentencing for juveniles in adult court have the same effect. Therefore, the Court needs to implement two significant changes.

First, automatic transfers and prosecutorial control of transfers must be abolished in all cases. The determination to sentence a child as an adult should always be made by a judge and on a case-by-case basis.<sup>72</sup> Statutory exclusion laws, which require that juveniles charged with certain offenses be tried in adult court, do not allow judges to examine individualized circumstances of juveniles and decide on appropriate penalties.<sup>73</sup> Some states set no minimum age for who can be transferred to adult court, thus applying adult-like sanctions to "children of any age, be it 17 or 14 or 10 or 6."<sup>74</sup> By transferring juveniles automatically to adult court, these laws ignore the mitigating circumstances of youth. Similarly, by placing the decision to transfer solely in the hands of prosecutors, prosecutorial discretion laws take away a judge's ability to determine whether transfer is in the interest of the child and of society.<sup>75</sup>

Second, if transferred to adult court, juveniles need to be given procedural protections and substantive exemptions from mandatory sentencing laws. As the Court in *Miller* explained, currently most states do not have separate penalty provisions for juveniles tried in adult court.<sup>76</sup> If found guilty, juveniles face steep mandatory minimum penalties that judges cannot change or

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70. *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012); see also Aaron Sussman, *The Paradox of Graham v. Florida and the Juvenile Justice System*, 37 VT. L. REV. 381(2012).

71. *Miller*, 132 S. Ct. at 2465.

72. This is already the case in states that use judicial waiver laws, which have historically been the primary vehicle to transfer youth to criminal courts. See Arya, *supra* note 6, at 109 (differentiating between a number of judicial waiver laws). Under those laws, the juvenile court judge has the authority to waive jurisdiction and transfer the case to adult court after proving that criteria established in *Kent v. United States* are met. See *Kent v. United States*, 86 S. Ct. 1045, 1060 (1966).

73. *Miller*, 132 S. Ct. at 2473. A specific subset of those laws called "age of jurisdiction laws" automatically place sixteen- and seventeen-year-olds in the adult criminal justice system regardless of the crime. See Arya, *supra* note 6, at 109.

74. *Miller*, 132 S. Ct. at 2473.

75. Prosecutors are not required to take age or maturity into account when making a decision to transfer. *Id.* at 2474. Further, they make unilateral decisions to file directly in adult court "without the benefit of a hearing where defense counsel and probation officials can provide important information about the juvenile in question." Coupet, *supra* note 41, at 1311. Lastly, they respond to political pressures and incentives to seek harsh punishment. See JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 33-75 (2007).

76. *Miller*, 132 S. Ct. at 2473.

mitigate.<sup>77</sup> As a result, the distinctive attributes of youth are once again ignored. Judges need to consider a child's age and circumstances and provide the kind of "meaningful opportunity for release based on demonstrated maturity and rehabilitation" that *Graham* established.<sup>78</sup> Only then will Eighth Amendment principles be fully honored.

At the core of Eighth Amendment jurisprudence is a concern with "the dignity of man."<sup>79</sup> A punishment is considered "cruel and unusual" if it is too severe for the crime or if it is not more effective than a less severe penalty.<sup>80</sup> Automatic transfers, prosecutorial transfers and mandatory sentencing provisions for juveniles violate the first principle because they prevent decision makers from taking into account the age and diminished level of culpability of the offender. As a result, the punishment allocated goes beyond the legitimate purpose of evincing moral disapproval of criminal conduct and becomes excessive.<sup>81</sup> These laws also violate the second principle since they are often less (not more) effective than alternative punishments. Studies show that transferred youth are more likely to recidivate upon release and their offenses are more likely to be violent than those of similar youth who were retained in the juvenile system.<sup>82</sup>

Further, the harsh sentences that juveniles receive as a result of these mandatory sentencing schemes do not serve legitimate penological goals. As the Court in *Graham* noted "the case for retribution is not as strong with a minor as with an adult" because children are categorically less morally blameworthy than adults.<sup>83</sup> While they can cause harm to others just as adults can, they do not bear the same responsibility.<sup>84</sup> Similarly, adult-length sentences do not further the goal of deterrence. Deterrence, by definition, relies on the assumption that the offender is a rational calculator of the risk in relation to the reward of the crime. Research shows that adolescents consistently overvalue the potential reward of risky behavior and are thus unlikely to make

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77. The judge in Jackson's case stated: "[I]n view of the verdict, there's only one possible punishment." *Id.* at 2461.

78. *Id.* at 2469 (citing *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010)).

79. See Robert Johnson & Chris Miller, *An Eighth Amendment Analysis of Juvenile Life Without Parole: Extending Graham to All Juvenile Offenders*, 12 U. MD. L. J. RACE RELIGION GENDER & CLASS 101, 110 (2012) (citing *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972), for the proposition that Eighth Amendment prohibitions are animated by "nothing less than the dignity of man"); see also *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) (explaining that "prisoners retain the essence of human dignity inherent in all persons [and] [r]espect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment").

80. See *Furman*, 408 U.S. at 273 (Brennan, J., concurring) (explaining that a punishment "may be degrading simply by reason of its enormity" and that "if there is less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary").

81. See Johnson & Miller, *supra* note 79, at 111.

82. See Arya, *supra* note 6, at 106.

83. *Graham*, 560 U.S. at 2028 (citing *Roper v. Simmons*, 543 U.S. 551, 571 (2005)).

84. See Barbee, *supra* note 56, at 322.

the kinds of rational decisions that society expects of adults.<sup>85</sup> They fail to anticipate the long-term consequences of their actions and are thus unlikely to be deterred by the threat of long prison terms. As expected, studies demonstrate a lack of noticeable deterrent effect of transfer laws in lowering juvenile crime.<sup>86</sup>

Even if retribution and deterrence do not justify sentencing juveniles to long prison terms, it may be argued that the crimes committed are so heinous that lengthy incapacitation is warranted. Indeed, the whole purpose of transfer is to ensure that juveniles will spend a lot longer in prison than they would have if sentenced in the juvenile system. Even though youth in adult facilities do serve longer sentences than their counterparts in juvenile detention facilities, the lack of crime during their lengthy incapacitation is outweighed by the increased recidivism of these youth upon release. The majority of juveniles sentenced to adult prisons do get out in mid-adulthood and when they re-enter society, they are 34 percent more likely to reoffend than those retained in the juvenile system.<sup>87</sup> Thus, even if incapacitation does temporarily forestall criminal activity, in the long run imprisonment is not an effective method of reducing recidivism and keeping communities safe.

Nor is the goal of rehabilitation served when juveniles are sentenced as adults. In adult correctional facilities, youth offenders are less likely to receive treatment than in juvenile hall.<sup>88</sup> They struggle to survive in a prison environment that “entails pain on a much deeper level than a loss of freedom.”<sup>89</sup> American prisons are plagued by overcrowding, inmate-on-inmate violence, guard abuse, and arbitrary strip-searches that in Europe have been considered “incompatible with human dignity.”<sup>90</sup> Prisons undermine the efforts of inmates to foster empathy, a key factor that determines whether they will thrive in society or reoffend. Moreover, the deprivations of prison life weigh most heavily on juveniles, who do not have the emotional maturity and faith in themselves needed to survive such profound adversity.<sup>91</sup> The world experienced by inmates with the kinds of long sentences that juveniles are given is “hellish” and in many ways un-survivable.<sup>92</sup> As a result, mandatory

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85. See Lawrence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 459, 469 (2009).

86. See NELLIS, *supra* note 6, at 29.

87. See Arya, *supra* note 6, at 141.

88. See Johnson & Miller, *supra* note 79, at 104.

89. *Id.* at 108.

90. *Id.* at 114. See, e.g., *Brown v. Plata*, 131 S. Ct. 1910, 1923 (2011) (holding that the “medical and mental health care provided by California’s prisons has fallen short of minimum constitutional requirements [resulting in] needless suffering and death”).

91. Because they come to prison young, juveniles have fewer memories of the outside world and less reasons to turn their lives around. *Id.* at 113.

92. See *id.* at 106 (clarifying that “prisons are not settings in which young persons can mature into responsible adults. Prisons are monuments to punishment and exclusion, and the code of life in prison embodies the exact sort of . . . impulsivity and aggression that the Court claims that juveniles may overcome if given suitable punishments”).

sentencing schemes produce youth offenders who are ill-equipped to become productive members of society.

By abolishing automatic transfers, prosecutorial transfers and mandatory sentencing, the Court can begin to address juvenile crime in a more humane and effective way. It can require that a number of factors be taken into account *before* a decision to transfer is made, including the role of implicit bias in findings of culpability.<sup>93</sup> It can allow for more adolescents to be retained in the juvenile system where they can have access to the rehabilitative programs they need.<sup>94</sup> Even if a judge deems that transfer is in the interest of the offender and society, juveniles should be exempt from mandatory sentencing schemes. To the extent that some youth will continue to be transferred to adult court, they should not be housed with older adult offenders. Finally, the money that will be saved from not warehousing lives should be directed at prevention and intervention programs that studies show reduce crime and repair communities.<sup>95</sup>

#### CONCLUSION

The Supreme Court's decision in *Miller* is a much-needed step in the right direction toward bringing individualized justice to juveniles sentenced to die in prison. Yet the decision in *Miller* fails to address the underlying practices that cause children to be sentenced to other exorbitantly long prison terms. An understanding that youth matters—that juveniles are immature, less culpable, more malleable, and more likely to be reformed—requires that they be given individualized punishments and a meaningful opportunity to prove reform. The current system, which automatically transfers a juvenile to adult court based purely on the alleged offense, allows prosecutors to charge adolescents as adults, and subjects juveniles to mandatory minimum sentencing provisions once they are transferred to adult court, does the exact opposite. It allows fourteen-year-olds to languish behind bars, with no opportunity to prove that their bad acts are not representative of their true characters. It violates the basic human rights of youth offenders and conflicts with the Court's stated respect

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93. See, e.g., Brief for NAACP, *supra* note 39, at 14 (citing studies that show how race undermines culpability determinations; researchers analyzed what probation officers deemed the cause of the youth's criminal behavior and found that "officers described black and white youths differently, referring to negative *personality traits* for black youths and more negative *environmental influences* for whites").

94. See Arya, *supra* note 6, at 153 (emphasizing that juvenile facilities need to assess their programs and ensure they reflect scientific evidence of methods that work to rehabilitate children).

95. See *id.* at 37 (listing effective interventions, such as preschool programs, parenting skills development, multi-systemic therapy, vocational training, substance abuse treatment, and others); see also Coupet, *supra* note 41, at 1322 (arguing for a balanced approach to juvenile crime that incorporates restorative justice principles "while preserving the original intent of those who devised a separate system for children—to safeguard the rights of children who merit treatment and rehabilitation over punishment and incarceration"); Bunch, *supra* note 55, at 954-91 (presenting a restorative justice framework for juvenile crime that adequately balances the needs of the victim, the offender and the community).

for human dignity under the Eighth Amendment. It is time for the Court to close the gap between rhetoric and reality by abolishing all automatic transfers, prosecutorial transfers, and mandatory sentencing schemes for juveniles charged as adults. Only then will we have a criminal justice system based on human rights and scientifically-proven methods for decreasing crime that reflects “the progress of a maturing society.”<sup>96</sup>

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96. *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012) (quoting *Estelle v. Gamble*, 429 S. Ct. 97, 102 (1976)).