MANDATING DISCRETION: JUVENILE SENTENCING SCHEMES
AFTER MILLER V. ALABAMA

Jennifer S. Breen and John R. Mills*

ABSTRACT

Miller v. Alabama established that “children are different” and it required profound changes in the way states adjudicate juveniles within the criminal justice system.1 This Article moves beyond standard interpretations of this significant decision and argues that Miller requires much more than abolition of mandatory juvenile life-without-parole sentences. In addition to that sentence-specific ban, Miller establishes a right for juveniles to have their young age taken into consideration during sentencing. This holding demands individualized consideration of a child’s age at sentencing, akin to sentencing procedures demanded by the Court in death penalty cases. At the very least, it is clear that states may no longer treat a juvenile defendant as an adult without any opportunity to consider the impact of youth upon the defendant. Yet this Article identifies eighteen states that continue to utilize these now unconstitutional sentencing schemes, contravening the most basic holding of the Court in Miller: “[C]hildren are constitutionally different from adults for purposes of sentencing.”2

After contextualizing both the Miller decision and the process of transferring juveniles to adult court, this Article identifies a subset of states that fail to allow for consideration of the unique qualities of youth at any stage of the juvenile adjudication process. These states are outliers and defy both the national consensus on juvenile adjudication and the Court’s mandate in Miller. This Article concludes by proposing reforms to aid states in accommodating the implications of Miller while increasing reliability in juvenile sentencing.

INTRODUCTION

In Miller v. Alabama, the United States Supreme Court held for the first time that “children are different” and, therefore, require “individualized consideration” of

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* Jennifer S. Breen, Ph.D, Political Science, University of Pennsylvania; J.D., Cornell Law School (expected, 2015). Dr. Breen studies policy history and the law. John R. Mills, J.D., Cornell Law School. Professor Mills is Adjunct Assistant Professor of Law at St. Louis University Law School and runs a non-profit that focuses on representing U.S. inmates sentenced to the severest penalties under law. The authors wish to thank the following scholars for their thoughtful input on this Article: Martin Guggenheim, Susan McGraugh, and Bidish Sarma, as well as the thorough research assistance of Anna Dorn. © 2014, Jennifer S. Breen and John R. Mills.

2. Id. at 2464.
their age before sentencing.\textsuperscript{3} The Court’s narrow holding was that the Eighth Amendment bars mandatory sentences of life without parole for persons under the age of eighteen at the time of their crimes.\textsuperscript{4}

Miller was one of four recent cases that demonstrate increased sensitivity to how the unique attributes of youth affect juveniles’ interaction with the criminal justice system and invoke either the Fifth or Eighth Amendments. In the cases addressing the Eighth Amendment, the Court held that states must take account of the fact that juveniles’ culpability and potential for rehabilitation is categorically different than adults. As a result, the Court held in each case that the standard penological justifications for punishment simply do not make sense when applied to juveniles. In the lone Fifth Amendment case, the Court acknowledged juveniles’ unique vulnerabilities to situations beyond their control and accordingly demanded greater procedural protections for juvenile defendants. In each of the cases, the Court broke new ground in providing more robust procedural and substantive protections for juveniles.

The Miller decision changes juvenile sentencing in ways that are different in kind from these earlier precedents. In Miller, the Court established a special right for children, namely, individualized consideration of their age in crafting a sentence. The Court embraced the principle that children are different, and therefore worthy of special treatment at sentencing. The Court’s reasoning relies on its “death is different” jurisprudence regarding the death penalty, yet even that line of cases has limited application to the holding of Miller because the vulnerabilities of childhood provide the only distinction between Miller and other relevant case law on sentencing. Put another way, Miller creates a set of rights for juveniles based on the young age of the offender, whereas the Court’s “death is different” jurisprudence establishes rights based on the offense. Neither the sentence imposed nor its relationship to the crime charged (the traditional components of a proportionality analysis) marked this case as deserving of special treatment.\textsuperscript{5} Yet the defendants in Miller did receive special treatment from the Court, for the simple yet profound reason that they are children, a distinction that now has new and broad significance for applications of the Eighth Amendment.

We believe that Miller establishes a new right for juvenile defendants; namely, that youth be taken into consideration as a factor in individualized sentencing. We argue further that a number of states currently employ sentencing schemes that are manifestly unconstitutional after Miller because they fail to take account of youth

\textsuperscript{3} Id. at 2469–70.
\textsuperscript{4} Id. at 2460.
\textsuperscript{5} We make this claim despite the Court’s half-hearted insistence that there is some correspondence between life-without-parole sentences for juveniles and the death penalty. Miller, 132 S. Ct. at 2466–67. We find this argument unpersuasive given the Court has flatly banned juvenile death sentences as violations of the Eighth Amendment, but refused to do the same regarding life-without-parole sentences. If the two were truly comparable, life-without-parole sentences should be banned. Instead, the Court required sentencers to consider the offender’s age in sentencing. The key category in Miller is age, not the crime or sentence.
at any stage in the juvenile’s adjudication. These state schemes, we argue, are unconstitutional under even a more narrow reading of the *Miller* holding than the one this Article offers.

This Article will proceed in several parts. Section I will establish the context of *Miller*, first by explaining how juvenile transfer into adult criminal court affects the children transferred, and then by providing an overview of recent Supreme Court case law addressing juveniles in the criminal justice system. Section II explains why, after *Miller*, children are entitled to their own special category of analysis under the Eighth Amendment. Section III explores the current and future impact of *Miller*. Part A applies the Court’s “objective indicia” approach to two types of sentencing schemes (including a comprehensive list of specific statutes) that are national outliers, contrary to the national consensus, and out of step with the Court’s holding in *Miller*. Part B discusses several approaches that could replace these constitutionally insufficient approaches to juvenile sentencing. Finally, Part C suggests several reforms that might increase reliability in the adjudication process and thereby diminish the risk of arbitrary sentences imposed upon juvenile offenders.

There has been much debate regarding the significance of *Miller* and some of that debate will be addressed below. *Miller* presents a robust challenge to current systems of juvenile justice, with significant implications for children across the nation.

**I. JUVENILE TRANSFER AND PRIOR SUPREME COURT DECISIONS ON JUVENILE OFFENDERS**

*Miller v. Alabama* is the product of the intersection of a criminal justice system that regularly treats children as adults and a series of Supreme Court decisions challenging that practice. Accordingly, we preface our discussion of the significance of *Miller* with background on both how juveniles end up in adult court facing adult sentences and the key cases that preceded *Miller*.

**A. The Nuts and Bolts of Juvenile Transfer and Sentencing**

As an initial matter, children charged with criminal conduct are generally treated differently than adults. They are tried in specialized courts and provided protections that recognize the vulnerabilities of youth. They are also sentenced with a different set of interests in mind: juvenile courts recognize youth’s greater capacity for rehabilitation and greater vulnerability to their circumstances. Thus, when

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6. With the exception of *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011), the cases highlighted are those that address the Eighth Amendment’s impact on juvenile sentences. *J.D.B.* is included both because it embraces the “children are different” language that drives the other cases and because it highlights the applicability of this principle to a procedural context. See id. at 2394 (holding that a child’s age should inform police custody analysis).
crafting remedial action, juvenile courts are generally afforded much greater discretion than adult courts.

1. The Recent History of Juvenile Sentencing

This approach to juvenile justice is a legacy of Progressive Era reforms that embraced the idea that the goal of juvenile justice is rehabilitation, not punishment.7 This Progressive Era version of the “children are different” approach to juvenile justice included an additional key difference between adult and juvenile justice: the procedural protections given to adults were not required for juvenile dispositions.8 In this era, the basic procedural protections of our adversarial criminal justice system played no role in a system focused on how best to treat the child in need of help and rehabilitation. Perversely, the lack of procedural protections given to juveniles was intended to promote the rehabilitative, rather than punitive, goals of juvenile justice.9

This approach to juvenile justice changed with the Supreme Court’s decision in In re Gault, which reshaped the contours of juvenile adjudication. The Court held that juveniles are entitled to the basic requirements of due process.10 Due process in a juvenile disposition required written notice of the basis of delinquency allegations, confrontation of witnesses against the juvenile, and advisement of the right to counsel and of their privilege against self-incrimination.11 These due process requirements provided important basic procedural protections for adjudicated youth. But as the formerly stark procedural distinctions between juvenile and adult adjudications began to fade, the Court largely left states unsupervised in their reform efforts, even as many states dramatically shifted the purpose of juvenile justice from rehabilitation to punishment and sentenced juveniles to ever-harsher punishments.12


8. Id. at 464–66.

9. See In re Gault, 387 U.S. 1, 15–17 (1967) (noting that the purportedly rehabilitative purpose of juvenile procedures, up to that point, served to avoid any “constitutional grief” associated with providing children with meaningful procedural protections).

10. Id. at 30–31; see also Guggenheim, supra note 7, at 467–69 (“It would be difficult to overstate In re Gault’s importance to the field of juvenile justice, specifically, and to children’s rights generally. In re Gault so thoroughly repudiated the idea that denying children procedural rights may be good for them that modern readers may miss just how strongly the contrary belief was held.”).


12. See Graham v. Florida, 560 U.S. 48, 109 (2010) (Thomas, J., dissenting) (noting increase in length of juvenile sentences between 1990 and 2010). The dramatic increase in incarceration has been linked to causes as disparate as racism and lead poisoning. See Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 178–220 (rev. ed. 2012) (discussing the phenomenon of mass incarceration resulting from systematic discrimination of people, primarily men, of color); Rick Nevin, How Lead Exposure Relates to Temporal Changes in IQ, Violent Crime, and Unwed Pregnancy, 83 ENVIRON. RES. 1, 17 (2000) (finding that increased exposure to lead within the population is consistent with increased violence and crime rates).
Since *In re Gault*, states have enacted laws specifying the circumstances and methods by which juveniles may—or in many cases, must—be moved into adult court for trial and sentencing.\(^{13}\) Once transferred to adult court, the juveniles are largely treated as adults. Many of these transfer provisions have been around for years, but the 1990s witnessed a boom in juvenile transfer as legislatures responded to an increase in juvenile crime with an expansion of the crimes and categories of juvenile offenders eligible for trial and sentencing in adult criminal court.\(^{14}\) Between 1992 and 1999, “forty-nine states and the District of Columbia enacted or expanded their transfer provisions, meaning that state legislatures increasingly moved juvenile offenders into criminal court based on age and/or the seriousness of the offense charged.”\(^{15}\) As a result, tens of thousands of children each year are processed in adult criminal courts.\(^{16}\) There have been further legislative changes to juvenile sentencing procedures in the wake of the Supreme Court decisions discussed below, but these revisions have not affected whether juveniles are transferred into adult court in the first place.\(^{17}\)

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16. A 2005 study by the Coalition for Juvenile Justice estimated that as many as 27,000 children are sent to adult court through a direct file procedure and 7,500 are waived into the criminal court by a judge (these procedures are discussed infra). Coal. For Juvenile Justice, *Childhood on Trial: The Failure of Trying and Sentencing Youth in Adult Criminal Court* 8 (2005), available at www.issuelab.org/resource/childhood_on_trial_the_failure_of_trying_and_sentencing_youth_in_adult_criminal_court. Thousands more youths are transferred in through statutory exclusion and direct file mechanisms (discussed infra), but “state data are hard to find and even more difficult to assess accurately;” as only thirteen states publicly report the total number of their transfers. Griffin et al., supra note 14, at 1, 12. A 2011 study estimates that 23.7% of transfers occur through a judicial waiver process, 34.7% occur through prosecutorial waivers, and 41.6% occur through statutory exclusions. Id. at 12. In addition to these transfer mechanisms, 218,000 children per year are tried and sentenced in adult court solely because they live in a state that prosecutes sixteen- and seventeen-year-olds as adults. Coal. For Juvenile Justice, supra, at 18. Two states send all sixteen- and seventeen-year-olds to adult court and an additional eleven states do the same for seventeen-year-olds, no matter how minor the offense. Statistical Briefing Book, U.S. Dep’t of Justice, Office of Juvenile Justice & Delinquency Prevention (2011), www.ojjdp.gov/ojstatbb/structure_process/qat04101.asp. We focus our attention on the transfer mechanisms discussed infra, but the logic of the argument of the article extends to the states that treat children under the age of eighteen as though they were adults. See Coal. For Juvenile Justice, supra, at 8, 17–21.

17. In the wake of *Graham* and *Miller*, some states adopted sentencing provisions specifically for juveniles tried in adult court for crimes that would otherwise result in a sentence that would violate the narrowest dictates of the Supreme Court’s recent decisions. See, e.g., N.C. Gen. Stat. § 15A-1340.19B–19D (2014) (giving trial court discretion to sentence juveniles convicted of premeditated and deliberated murder to either twenty-five years to life or life without parole); W. Va. Ann. Stat. § 6-2-101(b) (2014) (providing that a person convicted of murder in the
There are three general approaches jurisdictions use to transfer a juvenile offender to adult criminal court where the juvenile will be exposed to adult sentences: prosecutorial discretion, judicial waiver, and statutory exclusion. In most cases, the law combines a particular crime with a method of transfer and a minimum age of the juvenile offender.

Prosecutorial discretion allows the prosecutor to decide whether to file charges in juvenile or criminal court. In these regimes, prosecutors are generally given limitless discretion to determine whether a case should go forward in adult court—with adult outcomes—or whether it should go forward in juvenile court.

Judicial waiver permits juvenile courts to waive jurisdiction over a particular case, which results in its transfer to adult criminal court. The standards considered in a waiver hearing—if any are required at all—vary by state and produce waiver schemes that are either discretionary, presumptive, or mandatory. Discretionary judicial waiver generally permits or requires a judge to consider an enumerated set of factors, including the seriousness of the crime and the characteristics of the juvenile. Presumptive judicial waiver of juvenile jurisdiction creates a presumption that the juvenile court will waive jurisdiction for a prescribed set of offenses. Generally, the presumption can be overcome in a hearing, where the question is whether the severity of the crime and/or the characteristics of the juvenile warrant judicial waiver. Mandatory judicial waiver generally requires a juvenile court to waive jurisdiction if it finds probable cause to believe enumerated crimes have been committed. In this approach, there is no consideration of the individual characteristics of the juvenile.

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18. See infra Table 1; GRIFFIN ET AL., supra note 14, at 1–2.
20. Florida’s process, for example, grants prosecutor’s the option for certain offenses to charge sixteen- and seventeen-year-olds either as an adult or as a juvenile. FLA. STAT. § 985.557(1)(b) (2014).
21. See GRIFFIN ET AL., supra note 14, at 2; see also Note, Juvenile Delinquents: The Police, State Courts, and Individualized Justice, 79 HARV. L. REV. 775, 775 (1966) (describing judicial discretion jurisdictions). North Carolina’s process for most crimes illustrates the lack of standards in some jurisdictions: “After notice, hearing, and finding of probable cause the court may . . . transfer jurisdiction over a juvenile to superior court.” N.C. GEN. STAT. § 7B-2200 (2014) (emphasis added). The statute provides little guidance as to what it should consider when the court exercises its discretion (and no direction about how to weigh the few factors it enumerates). See N.C. GEN. STAT. § 7B-2203(b).
22. See GRIFFIN ET AL., supra note 14, at 2; see also Donna M. Bishop, Juvenile Offenders in the Adult Criminal Justice System, 27 CRIME & JUST. 81, 92 (2000) (describing presumptive judicial waiver jurisdictions).
23. Utah creates a presumption in favor of adjudication in adult court for certain offenses where the offender is at least sixteen years old. UTAH CODE ANN. § 78A-6-702 (2014).
24. See GRIFFIN ET AL., supra note 14, at 2; see also Hoeffel, supra note 13, at 50 (describing mandatory judicial waiver jurisdictions).
25. North Carolina’s process for Class A felonies (most often first degree murder) illustrates mandatory transfer: “If the alleged felony constitutes a Class A felony and the court finds probable cause, the court shall
Finally, statutory exclusion refers to criminal code definitions of certain offenses as exclusively within the jurisdiction of the criminal court, leaving no discretion to either the prosecutor or judge. Statutory exclusion and mandatory judicial waiver are functionally identical: if there is probable cause to believe certain crimes have been committed, jurisdiction lies exclusively in adult court.

Many states tweak one of these basic structures in ways that either mitigate the harshness of juvenile transfer or exacerbate it. These changes fall into one of three categories. First, “once an adult, always an adult” refers to statutes that dictate that once a juvenile has been convicted in a criminal court, any subsequent offense must be prosecuted in adult criminal court with adult sentencing, no matter how minor the subsequent infraction. Reverse waivers, by contrast, allow the adult criminal court to send a case back to juvenile court, following a hearing or other required considerations and procedures. This procedure allows the adult court to partially consider a juvenile’s age-related vulnerabilities. Finally, blended sentencing allows a variance from the required sentence. Blended adult criminal sentencing allows a criminal court to impose a juvenile disposition. Blended juvenile sentencing allows a juvenile court to impose a criminal punishment. Thus, blended sentencing can either ensure a juvenile is treated as a juvenile or allow the court to impose an adult sentence, depending on the type of blended sentencing regime.

In sum, depending on the specific provision, statutes that set up transfer schemes may either affect the scope of the juvenile court’s jurisdiction or a court’s ability to transfer the case to the superior court for trial as in the case of adults.” N.C. GEN. STAT. § 7B-2200 (2014). The existence of different processes in North Carolina for different crimes illustrates the complexity of juvenile justice more broadly.

26. See GRIFFIN ET AL., supra note 14, at 2; see also Hoeffel, supra note 13, at 50. In California, for example, offenders above the age of fourteen who are charged with murder will be tried and sentenced in adult criminal court through a statutory exclusion mechanism; an offender above the age of sixteen charged with any offense may be transferred to adult criminal court through a judicial waiver mechanism, upon motion of the prosecutor. CAL. WELF. & INST. CODE §§ 602(b)(1), 707.01(a)(5)(A) (West 2014).

27. These statutes limit the jurisdiction of the juvenile court. See GRIFFIN ET AL., supra note 14, at 2. North Carolina’s relevant statute, for example, excludes sixteen- and seventeen-year-olds from juvenile court jurisdiction (a separate serious issue for juvenile adjudication applicable to only two states in the nation, see supra note 16), as well as any juvenile with a prior criminal court conviction: “A juvenile who is transferred to and convicted in superior court shall be prosecuted as an adult for any criminal offense the juvenile commits after the superior court conviction.” N.C. GEN. STAT. § 7B-1604(b) (2014).

28. See GRIFFIN ET AL., supra note 14, at 2; see also State v. Martin, 530 N.W.2d 420, 422 (Wis. Ct. App. 1995) (describing Wisconsin as reverse waiver jurisdiction). Arizona, for example, offers the possibility of reverse waiver for some offenses. Its statute directs a judge to send the juvenile back to juvenile court “[i]f the court finds by clear and convincing evidence that public safety and the rehabilitation of the juvenile, if adjudicated delinquent, would be best served by transferring the prosecution to the juvenile court.” ARIZ. REV. STAT. ANN. § 13-504(C) (2014). The statute orders the court to consider ten enumerated factors, including “the seriousness of the offense” and “the record and previous history of the juvenile” in rendering its decision. § 13-504(D).

29. See GRIFFIN ET AL., supra note 14, at 2; In re J.V., 979 N.E.2d 1203, 1207–08 (Ohio 2012) (describing blended sentencing in Ohio). New Mexico gives courts the “discretion to invoke either an adult sentence or juvenile sanctions on a youthful offender.” N.M. STAT. ANN. § 32A-2-20(A) (2014).
tailor a remedy for a juvenile’s conduct. Transfer schemes thus vary widely as to how they impact our criminal justice system’s ability to take account of the age of a juvenile. Transfers effect on juvenile offenders cannot be overstated and follow directly from the rationale that differentiates juvenile court from criminal court. Juvenile court dispositions are focused on rehabilitation—indeed, courts have held that there is a “right to treatment” for juveniles in a delinquency adjudication.30 By contrast, criminal court sanctions are aimed at retribution and, in many cases, apply only to juveniles whom the court has found to be beyond the reach of rehabilitation.31 Further, a juvenile disposition does not subject the offender to the lifelong stigma of a criminal record, since juvenile records are usually closed and, therefore, do not follow the juvenile into adulthood.32 Finally, children who receive criminal sentences are more likely to reoffend, to reoffend quickly, or to reoffend violently than children who receive the supervision, treatment, and rehabilitative services exclusively available within the juvenile system.33 The consequences of the rise in juvenile transfers are thus significant. A corresponding rejection of that process—or at the very least an obligation to consider the individual juvenile before transferring out of juvenile court—could have profound lifelong consequences for adjudicated youth. Miller’s profound effect on these schemes is discussed below.

B. Juveniles in the Court Before Miller: “Children are not adults”34

In the seven years preceding Miller, the Supreme Court decided three cases recognizing that, in matters of criminal punishment and procedure, children are fundamentally different than adults.35 The first case, Roper v. Simmons, invalidated...
the death penalty for children who were sixteen or seventeen at the time of the offense.\textsuperscript{36} The Court applied the framework used for analyzing “categorical restrictions on the death penalty.”\textsuperscript{37} As the Court explained in a later case,

The Court’s cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.\textsuperscript{38}

\textit{Roper} involved the latter. These categorical challenges follow a two-pronged methodology. First, the Court examines “objective indicia of society’s standards, as expressed in legislative enactments and state practice to determine whether there is a national consensus against the sentencing practice at issue.”\textsuperscript{39} That is, in addition to legislative acts and the formal legality of a sentence, the Court reviews actual practice to determine the presence of a national consensus. The Court also considers public opinion,\textsuperscript{40} whether there is a trend in favor of abolishing a sentence,\textsuperscript{41} and the worldwide prevalence of a practice.\textsuperscript{42} Thus, the first part of the inquiry is a far-reaching, objective examination of a sentencing practice.

The second prong of the test in “categorical” cases is the Court’s use of its “independent judgment” to determine whether the punishment is disproportionate.\textsuperscript{43} The Court is guided by the “standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose.”\textsuperscript{44} This analysis examines the penological justifications for a given punishment: incapacitation, retribution, deterrence,

\begin{itemize}
\item \textsuperscript{36} 543 U.S. 551 (2005).
\item \textsuperscript{37} Graham v. Florida, 130 S. Ct. 2011, 2021 (2010).
\item \textsuperscript{38} Id. at 2021.
\item \textsuperscript{39} Id. at 2022 (citations omitted) (internal quotation marks omitted).
\item \textsuperscript{40} Atkins v. Virginia, 536 U.S. 304, 306, 315–16 (2002).
\item \textsuperscript{41} Id. at 316 (“The evidence [for a trend against executing the intellectually disabled] carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition.”); see also Kennedy v. Louisiana, 554 U.S. 407, 422–34 (2008) (considering whether a trend in favor of capital sentencing for child rape exists and concluding one does not).
\item \textsuperscript{42} See 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 sanction to the juvenile death penalty.”).
\item \textsuperscript{43} Id. at 564.
\item \textsuperscript{44} Kennedy, 554 U.S. at 421.
\end{itemize}
and rehabilitation.45 “A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense,” and proscribed by the Eighth Amendment.46 Accordingly, the Court in Atkins v. Virginia held that imposition of a death sentence on the intellectually disabled was unconstitutional because it lacked substantial support based on retribution and deterrence,47 given the impairments inherent to intellectual disability.48

The other challenge to the proportionality of a sentence generally applies to term-of-years sentences. The Eighth Amendment “‘does not require strict proportionality between the crime and the sentence,’ but rather ‘forbids only extreme sentences that are “grossly disproportionate” to the crime.’”49 Under this approach, the Court first compares the gravity of the offense with the severity of the sentence.50 If it concludes that the sentence is “grossly disproportionate,” then it compares the sentences for similar crimes in the jurisdiction of the sentencing court and in other courts’ jurisdictions to determine whether the sentencing court’s initial conclusion is correct.51

In Roper, the Court applied the two-pronged categorical approach and found that the Eighth Amendment prohibited death sentences for criminal acts of juveniles. The Court first found a national consensus against executing children.52 The Court then found three fundamental differences between youth and adults that required their different treatment in sentencing: less ability to engage in good decision-making, heightened susceptibility to peer pressure, and greater chance for reform.53 The Court found that “[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.”54

In 2010, Graham v. Florida expanded on Roper and held that the imposition of a life without parole sentence on a juvenile, non-homicide offender violated the Eighth Amendment.55 This decision again emphasized the ways in which juveniles are different from adults, particularly noting the “lessened culpability” of juvenile offenders.56 “[D]evelopments in psychology and brain science continue to show

46. Id.
47. In determining whether a death sentence in particular is constitutional, the only relevant justifications are retribution and deterrence. Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion). A punishment of death necessarily accomplishes incapacitation and eliminates hope for rehabilitation.
50. Id. at 2022.
51. Id.
53. Id. at 569–70.
54. Id. at 572–73.
55. Graham, 130 S. Ct. at 2034.
56. Id. at 2026.
fundamental differences between juvenile and adult minds,” which must implicate the ways in which courts assess the “penological justifications for the sentencing practice” at issue in the case.57 After explaining that those “fundamental differences” between juveniles and adults invalidated the sentencing practice at issue in this case, the Court noted, “An offender’s age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.”58

_Graham_ was remarkable because the Court for the first time applied the test reserved for the death penalty to the sentencing of children who had not been sentenced to death. Although the decision contained significant language suggesting that other aspects of criminal procedure might be “flawed,”59 the reach of the decision was limited to invalidating the imposition of a substantive sentence: life without parole for nonhomicide offenses committed by children.60

The following year, the Court held in _J.D.B. v. North Carolina_ that “a child’s age properly informs the _Miranda_ custody analysis.”61 This decision emphasized the “commonsense conclusions” reached by the Court in this and prior cases, most notably that “children cannot be viewed simply as miniature adults.”62

In short, officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child’s age. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult.63

In addition, the opinion emphasized “the settled understanding that the differentiating characteristics of youth are universal” and, therefore, “apply broadly to children as a class.”64 The Court was clear that while it might not be true that “a child’s age will be determinative, or even a significant, factor in every case. It is, however, a reality that courts cannot simply ignore.”65

In _Roper, Graham, and J.D.B._, the Court demonstrated a newfound willingness to regulate juvenile justice. These cases laid the groundwork for a case with much broader implications for juvenile justice in many states.

57. _Id._ at 2026, 2028.
58. _Id._ at 2026, 2031.
59. _Id._
60. _Id._ at 2034.
62. _Id._ at 2403–04.
63. _Id._ at 2407.
64. _Id._ at 2403–04.
65. _Id._ at 2406 (citations omitted).
C. Miller v. Alabama: “Children are Different”

These cases constitute the immediate backdrop for the Court’s decision in *Miller v. Alabama*, which explicitly held for the first time that individualized consideration of a juvenile’s age must be part of our criminal procedure when fashioning juvenile sentences. The opinion relied on the same key insights from the recent juvenile cases: (1) criminal procedure must take a juvenile’s age into account, (2) “children are constitutionally different from adults for purposes of sentencing,” and (3) these differences are apparent through “common sense[,]... science[,] and social science” in ways that complicate and often weaken traditional “penological justifications” for punishment.66 At the same time, the Court shifted its focus from the *penalty* imposed to legislative schemes requiring mandatory *means* of imposing it.67 The Court struck down mandatory life without parole sentencing schemes for juveniles and targeted the mandatory nature of the sentence as uniquely troublesome:

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.68

In short, if “death is different,” as the Court often notes,69 it must be true that “children are different too.”70 The Court then applied its death penalty jurisprudence to explain why the lack of individualized consideration inherent in mandatory sentences of life without possibility of parole violates the Eighth Amendment.71

The cases immediately preceding the decision in *Miller v. Alabama* set the stage for further expansion of the rights of juveniles within the criminal justice system. As one scholar has recently noted, the decision in *Graham* in particular was a seismic shift in Court philosophy, granting children “a right to be treated as children even when the state does not agree.”72 Having made that shift, it is in

67. *See id.* at 2462–65 (emphasizing that courts need to examine the individual characteristics of the offender).
68. *Id.* at 2466.
69. *See, e.g.*, *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (“This especial concern [with heightened reliability] is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.”); *see also* *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (collecting cases imposing protections in death penalty cases “that the Constitution nowhere else provides”).
72. *Guggenheim, supra* note 7, at 487.
some ways unsurprising that Miller similarly embraced that doctrine when it examined mandatory sentences of life without parole.

Responses to the decision indicate a widespread agreement that this holding was somehow different than the ones that preceded it, yet that consensus does not extend to the matter of exactly how it is different. The Court’s dissenters, for example, view it as a “way station” on the way to further judicially designated categorical bars for many types of juvenile sentencing, while one scholar argues it backed away from the rationale of the prior cases in refusing a categorical bar on this particular sentencing practice. Advocates of juvenile justice reform generally praise the decision for its recognition that “children are different,” but disagree exactly how it will affect juvenile sentencing.

Additionally, some critics of the opinion have argued that the mandate of the case for “individualized sentencing” opens the door to great confusion in lower courts, a concern that seems to have been validated in the Court’s post-Miller remand of Mauricio v. California. In Mauricio, the Supreme Court granted certiorari and then vacated the state court ruling before remanding it “for further consideration in light of Miller v. Alabama.” The confusion is generated by Mauricio’s life without parole sentence pursuant to a sentencing scheme where life without parole was the presumptive—not mandatory—punishment for his homicide. In light of the Court’s focus on the mandatory nature of the penalties at issue in Miller v. Alabama and the remedy, which provided only for individualized

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73. Miller, 132 S. Ct. at 2481–82 (Roberts, C.J., dissenting) (“The principle behind today’s decision seems to be only that because juveniles are different from adults, they must be sentenced differently. There is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive. Unless confined, the only stopping point for the Court’s analysis would be never permitting juvenile offenders to be tried as adults.” (citations omitted)).

74. Mary Berkheiser, Developmental Detour: How the Minimalism of Miller v. Alabama Led the Court’s “Kids are Different” Eighth Amendment Jurisprudence Down a Blind Alley, 46 AKRON L. REV. 489, 507 (2013) (“The rationale that had led the Court in both Roper and Graham to adopt categorical rules and to reject case-by-case sentencing of juveniles was plainly before the Miller Court. Yet instead of adopting it or explaining why it did not hold in the cases before it, the Court in Miller took a decided detour, adopting its reasoning about adolescent differences from adults but not the necessary results of that reasoning, as counseled in both Roper and Graham . . . . [T]hose who seek resentencing under Miller will face a head-on collision with everything those cases warned against.”).

75. See, e.g., Miller, 132 S. Ct. at 2470.


78. 133 S.Ct. at 524.

sentencing rather than a ban on the particular sentence, the remand suggests the Court might envision \textit{Miller} as embodying a more expansive rejection of this form of juvenile sentencing than the limited language of the decision superficially suggests.\textsuperscript{80}

\textit{Miller} marks a new approach to juvenile sentencing with profound implications. We believe that the Court’s holding—that the Eighth Amendment requires youth to be considered as a factor in sentencing—demands individualized consideration of juvenile defendants. But even the narrowest interpretation of the decision invalidates a number of currently existing sentencing schemes that treat juveniles as though they were adults at every stage of the process.

\section*{II. Children Must Receive Individualized Consideration}

\textit{Miller} holds that “mandatory life without parole for those under the age of eighteen at the time of their crimes violates the Eighth Amendment’s prohibition on ‘cruel and unusual punishments.’”\textsuperscript{81} This relatively narrow holding reflects a wide-reaching theory: “children are different.”\textsuperscript{82} But \textit{Miller} takes the theory in a new direction. Instead of creating another categorical bar of life without parole sentences for juveniles—a question the Court certified,\textsuperscript{83} but declined to reach—the Court held that juveniles have a right to have their age taken into account before being sentenced to life without parole.

\begin{itemize}
\item \textsuperscript{80} Note that the Court did not even mention California as a state with the kind of sentencing scheme invalidated by \textit{Miller}. California has since changed its sentencing procedures, allowing for sentencing review for juveniles sentenced to life without parole at several regular intervals. See \textsc{Campaign for the Fair Sentencing of Youth, State Legislative Roundup One Year After Miller v. Alabama} 2 (2013), available at www.fairsentencingofyouth.org/wp-content/uploads/2013/06/Final-Legislative-Roundup.pdf.
\item \textsuperscript{81} Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012). The decision’s reliance on eighteen as the end of childhood is controversial, most notably within scientific circles. One recent article relies upon recent research, including a large MacArthur Foundation study of adolescents, to argue that juveniles are constitutionally incompetent to stand trial. Elizabeth S. Scott & Thomas Grisso, Developmental Incompetence, Due Process, and Juvenile Justice Policy, 83 N.C. L. Rev. 793, 816 (2005) (“Although policymakers draw age boundaries between childhood and adulthood, it is not possible to point to a particular age at which youths attain adult-like psychological capabilities.”). More broadly, others have argued that \textit{Miller} and \textit{Graham} have opened the door to a more robust proportionality analysis in Eighth Amendment jurisprudence, one that must “include a comprehensive and clear analysis of the individual defendant’s culpability,” including an assessment of “the defendant’s personal background, and the defendant’s emotional and mental states.” Sara Taylor, \textit{Unlocking the Gates of Desolation Row}, 59 UCLA L. Rev. 1810, 1817 (2012). On the other hand, others have argued that the Court’s cut off at age eighteen is not inherently irrational because of its basis in legal categories, but has been insufficiently explained by the Court. See Beth A. Colgan, \textit{Constitutional Line Drawing at the Intersection of Childhood and Crime}, 9 Stan. J. C.R. & C.L. 79, 92–93 (2013) (arguing that the Court in \textit{Graham}, J.D.B., and \textit{Miller} “missed an opportunity . . . to link the concept of forced environmental and influential circumstances to their decision to draw the line at eighteen,” which would have made these decisions more intellectually coherent). The dissenters in \textit{Miller} complain that the cutoff is arbitrary, but with a focus on the culpability of older teenagers. See, e.g., \textit{Miller}, 132 S. Ct. at 2487 (Alito, J., dissenting) (arguing that the \textit{Miller} decision means that “[e]ven a 17 ½-year-old who sets off a bomb in a crowded mall or guns down a dozen students and teachers is a ‘child’ and must be given a chance to persuade a judge to permit his release into society”).
\item \textsuperscript{82} \textit{Miller}, 132 S. Ct. at 2470.
\item \textsuperscript{83} Miller v. Alabama, 132 S. Ct. 548 (2011) (mem.).
\end{itemize}
The *Miller* holding expands on the same ideas reiterated throughout the Court’s recent juvenile cases—namely, that children have different capabilities than adults, that the law has long recognized that juveniles are different, that this insight relies upon the “common sense [that]... ‘any parent knows,’” and finally that new research on the brain definitively demonstrates that children are simply not as capable as adults when it comes to reasoned decision-making. These assessments apply to all children and relate to matters that strike at the heart of our understanding of culpability in such a way as to make it nonsensical to treat children as “miniature adults” for purposes of sentencing. *Miller* repeats the strongly worded admonition from *Graham*: “An offender’s age... is relevant to the Eighth Amendment... [and] criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.”

For the purposes of *Miller*, these factors led the Court to hold that a sentencing court is required to “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”

In short, the Court banned the imposition of the sentence without considering the unique characteristics of the juvenile. In simultaneously adding this key requirement while refraining from banning the sentence outright, the Court reoriented sentencing procedures for juveniles toward mandating individualized consideration of the unique vulnerabilities of youth. This shift in focus, away from the sentence imposed and the type of crime committed and towards the procedure used by courts to sentence children, marks a fundamental change in the Court’s juvenile jurisprudence. It marked a change from a focus on a particular sentence—life without parole—to the person being sentenced. It represents a shift from “life without parole for children is different” to “children are different.” In *Miller*, the Court tells us:

- “[Y]outh matters for purposes of meting out the law’s most serious punishments.”

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84. *Miller*, 132 S. Ct. at 2464 (quoting *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005)) (explaining that there are three significant areas of gaps between the capabilities of children and adults relevant to these analyses: first, children lack a fully developed sense of responsibility that leads to reckless behavior; second, children are more susceptible to peer pressure and have less control over toxic relationships and environments than adults; and finally, children have a greater prospect for rehabilitation since their characters are “less fixed” than those of adults).
85. *Id.* at 2470.
86. *Id.* at 2464.
87. *Id.* at 2464–65.
88. *Id.* at 2463.
89. *Id.* at 2470 (quoting *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2404 (2011)).
91. *Id.* at 2469.
92. *Id.* at 2471.
“[C]hildren are constitutionally different from adults for purposes of sentencing.”93

There are “fundamental differences between juvenile and adult minds.”94

“[T]he distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.”95

“[N]one of what [Graham] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific.”96

“Youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole.”97

“In imposing a State’s harshest penalties, a sentencer misses too much if he treats every child as an adult.”98

“By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.”100

“We require [a sentencing court] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”101

“So if . . . ‘death is different,’ children are different too.”102 Thus, in Miller the Court for the first time fully embraced the need for special procedures governing juvenile sentencing, carving out a special category of protections akin to protections provided in the death penalty context. The Court made that point dramatically when it distinguished Miller from Harmelin v. Michigan, the 1991 case that upheld a mandatory life without parole sentence for cocaine possession.103 Harmelin, and the first two Supreme Court cases to apply the test announced in Harmelin,104 reflect the peak of the Court’s deference to legislatures in matters of sentencing.105 Until Graham and Miller, the one area of exception to that deferential posture has been the death penalty, which has always received a more

93. Id. at 2464.
94. Id. (quoting Graham, 130 S. Ct. at 2026).
95. Id. at 2465.
96. Id.
97. Id.
98. Id. at 2466.
99. Id. at 2468.
100. Id. at 2469.
101. Id.
102. Id. at 2470.
103. Id. (citing Harmelin v. United States, 501 U.S. 957 (1991)).
searching review by the Court because “death is different.” We now know that “children are different too” and that juvenile sentences ought to be imposed and assessed under different standards from adults. As the Court clarifies:

Harmelin had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders. We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children . . . . Our ruling thus neither overrules nor undermines nor conflicts with Harmelin.106

Miller thus requires individualized consideration for juveniles within the criminal justice system because children are different from adults and must be treated so by the judicial system. Recent cases make clear that this requirement stems from neither the crime nor the punishment, but rather from the unique characteristics of youth.

III. THE CURRENT AND FUTURE IMPACT OF MILLER

The Court’s willingness to apply the Eighth Amendment to regulate the administration of juvenile justice demonstrated in Miller has significant implications for juveniles in the criminal justice system. First, the holding suggests that sentencing schemes that mandatorily treat juveniles as adults throughout the entire process—in other words, schemes that sentence juveniles without any consideration of the fact that they are children—are unconstitutional. Although many states have schemes that are potentially problematic in light of Miller, we identify as most problematic those that totally eliminate consideration of a juvenile’s age. Although the Miller decision leaves the status of the objective indicia analysis somewhat uncertain in the realm of this categorical ban on a sentencing procedure,107 we proceed with that strand of the analysis in demonstrating that only a minority of states offer their juvenile offenders no treatment as juveniles at all, at

106. Miller, 132 S. Ct. at 2470.
107. There is a good deal of criticism regarding the Court’s employment of the “objective indicia” analysis, specifically arguing that the Court uses no clear methodology and does not make clear what kind of “objective” data is sufficient to constitute a “national consensus.” The dissenters in Miller offered this critique, with Justice Alito making the most forceful case for the irrelevance of the “objective indicia” analysis: “What today’s decision shows is that our Eighth Amendment cases are no longer tied to any objective indicia of society’s standards. Our Eighth Amendment case law is now entirely inward looking.” 132 S. Ct. at 2490 (Alito, J., dissenting); see also Colgan, supra note 81, at 99 n.103 (arguing that “[d]espite the moniker, the use of these statistics is not objective” and “[t]he Justices make subjective determinations regarding which of the two types of statistics really matter in a given case”); Guggenheim, supra note 7, at 460–61 (arguing the objective indicia presented in Graham were “to say the least, underwhelming” and not actually the source of the Court’s decision); see generally Ian P. Farrell, Abandoning Objective Indicia, 122 YALE L.J. ONLINE 303 (2013) (arguing that Miller signals the Court’s abandonment of the “objective indicia” approach to Eighth Amendment analysis); Robert J. Smith, Bidish J. Sarma & Sophie Cull, The Way the Court Gauges Consensus (And How to Do It Better), 35 CARDozo L. REV. 2397 (2014) (offering a “systematic analysis of consensus analysis” and proposing a new framework for the court to better judge national consensus).
any stage of the process. A small minority of that group exacerbates this constitutional difficulty with an additional “once an adult, always an adult” rule that is particularly problematic in light of *Miller*.

Second, *Miller* signals the Court’s willingness to demand more: specifically, that juveniles are entitled to procedures that would increase the reliability of juvenile adjudication by ending practices that arbitrarily and unreasonably treat juveniles as though they were adults. Regardless of how the juvenile is transferred into adult court—through a discretionary, presumptive, or mandatory process—*Miller* suggests that the criminal sentencing of a child must include procedures to ensure that the child’s age is a significant factor in that determination. We build on the Court’s use of its death penalty precedents to call for more demanding standards for juvenile representation and for the consideration of a broader set of individualized information about juveniles in tailoring sentences.

### A. Problematic Statutory Schemes

As discussed in Section I.B, in *Roper*, *Graham*, and *Miller* the Court’s Eighth Amendment analysis includes an examination of the “objective indicia of society’s standards, as expressed in legislative enactments and state practice” in search of a “national consensus” against a particular sentencing regime. In some cases, the Court has found that the “evolving standards of decency that mark the progress of a maturing society” bar the sentence through application of the Eighth Amendment. This practice usually involves, *inter alia*, examining state legislative enactments and to some extent simply counting how many states have such a practice on the books and, if possible, determining how many states actually enact the given punishment. If only a minority of states engages in a practice, the Court may decide to hold that “objective indicia” suggest a “national consensus” against a particular practice.

Thus, we have identified the jurisdictions that are outliers because they expose their children to mandatory adult sentences without any consideration of a child’s age. We have also indicated whether those jurisdictions expose juveniles to mandatory sentences for more than one offense, since several states in our chart only impose these sentences for a single crime. These jurisdictions with discretionless, mandatory sentencing are particularly problematic in light of *Miller*’s “children are different” rationale.

#### 1. Mandatory Transfer and Sentencing

A minority of states have constructed schemes that shuttle juveniles charged with particular crimes directly into adult criminal court, after which courts have no opportunity to consider their age either as a reason to keep them in juvenile court

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109. *Id.* at 2463 (quoting *Estelle* v. *Gamble*, 429 U.S. 97, 102 (1976)).
or as a factor in sentencing.\footnote{110} In other words, these schemes do not allow for discretion in the transfer of the juvenile to criminal court; once in criminal court, the juvenile is sentenced exclusively using adult criminal guidelines. The crime with which the child is charged is entirely and exclusively dispositive of how the child will be sentenced and processed in the criminal justice system.

Moreover, these are states in which mechanisms like juvenile blended sentencing and reverse waiver are \textit{unavailable} for adjudicated youth charged with particular crimes.\footnote{111} Instead, after a finding of probable cause, these youths are sent to the adult criminal justice system and treated as though they were adults for the purposes of their trials and sentencing. There are eighteen states that impose these mandatory schemes\footnote{112} in contradiction of the admonition in \textit{Graham} restated forcefully in \textit{Miller}: “An offender’s age... is relevant to the \textit{Eighth Amendment}... and criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.”\footnote{113}

\section*{2. Once an Adult, Always an Adult}

A smaller minority within that group also include a provision referred to as “once an adult, always an adult,” under which juveniles who have previously been adjudicated and convicted as adults are immediately processed in criminal court for all future charges, regardless of what those charges may be.\footnote{114} When mandatory adult prosecution occurs as a result of a prior conviction under one of the mandatory sentencing schemes highlighted, the juvenile has not been afforded any discretion at any stage of her \textit{two} criminal sentences and the second criminal proceeding flows inexorably from the mandatory nature of the first.\footnote{115} If a juvenile were mandatorily transferred into the adult system for an offense, any subsequent offense—no matter how small—would result in an adult criminal prosecution. Juvenile offenses that in and of themselves are not contemplated as being properly within the purview of criminal court will nevertheless produce criminal convictions for juveniles under this mandatory scheme.

\footnote{110. See infra Table 1 (listing eighteen states with mandatory transfer statutes).}
\footnote{111. See, e.g., 705 ILL. COMP. STAT. § 405/5-810(4) (2014) (providing for an adult sentence only where the juvenile was prosecuted in adult court and the juvenile did not comply with the terms of the juvenile sentence).}
\footnote{112. See infra Table 1.}
\footnote{113. \textit{Miller}, 132 S. Ct. at 2466 (quoting Graham, 130 S. Ct. at 2031) (internal quotation marks omitted). The eighteen states we identify are Alabama, Alaska, Arizona, Connecticut, Delaware, District of Columbia, Kentucky, Louisiana, Maryland, Minnesota, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, and Utah. See infra Table 1.}
\footnote{114. See infra Table 1.}
\footnote{115. This law can be even harsher than it first appears, since in many states a child is only returned to juvenile court jurisdiction if she is acquitted of \textit{all} crimes in her criminal trial. In other words, because these statutes move \textit{all} charges into criminal court, if she is convicted of a lesser offense that by itself would not have subjected her to transfer, but acquitted of the charge that sent her to criminal court, in subsequent proceedings she would still be excluded from juvenile court under these harsh versions of “once an adult, always an adult.” See, e.g., \textit{AL. CODE} § 12-15-203(i) (2014).}
When combined with a lack of reverse waiver options, a lack of sentencing discretion, and the other mandatory features discussed above, this small group of sentencing schemes is both at odds with *Miller* and with the practice in the overwhelming majority of jurisdictions nationwide. These schemes present the most extreme versions of the Court’s concern that transfer makes it “impossible” to determine “the judgment these States have made regarding the appropriate punishment for such youthful offenders.”\(^{116}\) Only twelve states subscribe to this extreme version of mandatory transfers.\(^{117}\)

These states are outliers and indicative of a national consensus against a sentencing scheme that relentlessly prevents a court from considering the age of a juvenile offender at any point in the process.

**Table 1: States that Do Not Consider Age when Sentencing Juveniles**

<table>
<thead>
<tr>
<th>State</th>
<th>Minimum Age</th>
<th>Method(^{118})</th>
<th>Relevant Transfer Statute</th>
<th>Multiple Offenses</th>
<th>Once an Adult, Always an Adult(^{119})</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>16</td>
<td>Statutory Exclusion</td>
<td>ALA. CODE § 12-15-204 (2014)</td>
<td>*</td>
<td>*</td>
</tr>
<tr>
<td>Alaska</td>
<td>16</td>
<td>Statutory Exclusion</td>
<td>ALASKA STAT. § 47.12.030 (2014)</td>
<td>*</td>
<td></td>
</tr>
<tr>
<td>Arizona</td>
<td>15</td>
<td>Statutory Exclusion</td>
<td>ARIZ. REV. STAT. ANN. § 13-501(A) (2014)</td>
<td>*</td>
<td>*</td>
</tr>
<tr>
<td>Connecticut</td>
<td>14</td>
<td>Mandatory Transfer</td>
<td>CONN. GEN. STAT. § 46b-127 (2014)</td>
<td>*</td>
<td></td>
</tr>
<tr>
<td>Delaware</td>
<td>15</td>
<td>Statutory Exclusion</td>
<td>DEL. CODE ANN. tit. 11, § 1447A(f) (2014)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>District of Columbia</td>
<td>16</td>
<td>Statutory Exclusion</td>
<td>D.C. CODE § 16-2301(3) (2014)</td>
<td>*</td>
<td>*</td>
</tr>
<tr>
<td>Kentucky</td>
<td>14</td>
<td>Mandatory Transfer</td>
<td>KY. REV. STAT. ANN. § 635.020(4) (West 2014)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Louisiana</td>
<td>15</td>
<td>Mandatory Transfer</td>
<td>LA. CHILD. CODE ANN. art. 305 (2014)</td>
<td></td>
<td>*</td>
</tr>
</tbody>
</table>


\(^{117}\) See infra Table 1.

\(^{118}\) For discussion of the different methods, see supra Section I.A.2.

\(^{119}\) For explanation of the concept of “once an adult, always an adult,” see supra note 27 and accompanying text.
### Statutory Exclusions

<table>
<thead>
<tr>
<th>State</th>
<th>Minimum Age</th>
<th>Method</th>
<th>Relevant Transfer Statute</th>
<th>Multiple Offenses</th>
<th>Once an Adult, Always an Adult</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maryland</td>
<td>14</td>
<td>Statutory Exclusion</td>
<td>MD. CODE ANN., CTS. &amp; JUD. PROC. § 3-8A-03 (West 2014)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>New Jersey</td>
<td>16</td>
<td>Mandatory Transfer</td>
<td>N.J. STAT. ANN. § 2A:4A-26(e) (West 2014)</td>
<td>*</td>
<td></td>
</tr>
<tr>
<td>North Carolina</td>
<td>13</td>
<td>Mandatory Transfer</td>
<td>N.C. GEN. STAT. § 7B-2200 (2014)</td>
<td></td>
<td>*</td>
</tr>
<tr>
<td>North Dakota</td>
<td>14 (or 16, if transferred via request from juvenile)</td>
<td>Mandatory Transfer</td>
<td>N.D. CENT. CODE § 27-20-34(1)(b) (2014)</td>
<td>*</td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>14</td>
<td>Mandatory Transfer</td>
<td>OHIO REC. CODE ANN. § 2152.10(A) (West 2014)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Oklahoma</td>
<td>15</td>
<td>Statutory Exclusion</td>
<td>OKLA. STAT. tit. 10A, § 2-5-205(B) (2014)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Oregon</td>
<td>15</td>
<td>Statutory Exclusion</td>
<td>OR. REV. STAT. § 137.707(1)(a) (2014)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rhode Island</td>
<td>17</td>
<td>Mandatory Transfer</td>
<td>R.I. GEN. LAWS § 14-1-3(1) (2014)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Utah</td>
<td>16</td>
<td>Statutory Exclusion</td>
<td>UTAH CODE ANN. § 78A-6-701(West 2014)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### B. Sentencing Children as Children

1. **Constitutionally Insufficient Schemes in Light of Miller**

*Miller* makes clear that a court may not impose a sentence upon a juvenile offender without taking into account the fact that the offender is a child. Citing
Roper and Graham, the Miller Court reiterated, “children are constitutionally different from adults for purposes of sentencing.”

The Court attacked the claims made by Alabama and Arkansas that the presence of discretion at the moment of transfer ensured the children received individualized consideration. In this Eighth Amendment sentencing context, the Court reiterated the concerns it raised in Graham that the process of transfer convolutes the entire picture of juvenile sentencing. When a legislature decides that a juvenile should be transferred to adult court for a particular crime, it certainly makes the judgment that children of a certain age who commit a particular crime are either old enough to be in criminal court or have committed such a serious crime that juvenile court is insufficiently retributive for them. But in making that decision, has the legislature also endorsed the adult sentencing scheme as specifically appropriate for the children who are transferred? The Court did not think so: transfer statutes tell “us nothing about the judgment these States have made regarding the appropriate punishment for such youthful offenders.”

Deciding to send a child to adult criminal court is not, according to the Court, equivalent to deciding that adult criminal punishment is appropriate for that particular child.

In addition to the problems of unintended consequences and insufficient information at transfer hearings, the Court raised a further concern with the unbroken link between the decision to transfer a juvenile to adult court and the decision to sentence him as an adult:

[T]he question at transfer hearings may differ dramatically from the issue at a post-trial sentencing. . . . [T]ransfer decisions often present a choice between extremes: light punishment as a child or standard sentencing as an adult . . . . Discretionary sentencing in adult court would provide different options: There, a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term with the possibility of parole or a lengthy term of years. It is easy to imagine a judge deciding that a minor deserves a (much) harsher sentence than he would receive in juvenile court, while still not thinking life-without-parole appropriate. For that reason, the discretion available to a judge at the transfer stage cannot substitute for discretion at post-trial sentencing in adult court—and so cannot satisfy the Eighth Amendment.

After rejecting mandatory transfer, prosecutorial discretion, and schemes that do not allow for reverse waiver as insufficient for the protection of the juvenile’s Eighth Amendment rights, the Court even noted the limitations of discretionary

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120. 132 S. Ct. at 2464.
121. Id. at 2474–75.
122. Id.; see also Graham v. Florida, 130 S. Ct. 2011, 2025–26 (2010) (“But the fact that transfer and direct charging laws make life without parole possible for some juvenile nonhomicide offenders does not justify a judgment that many States intended to subject such offenders to life without parole sentences.”).
124. Id. at 2474–75.
judicial waivers, the transfer process that allows for the most discretion and individualized decision-making:

Even when States give transfer-stage discretion to judges, it has limited utility. First, the decisionmaker typically will have only partial information at this early, pretrial stage about either the child or the circumstances of his offense. . . . The key moment for the exercise of discretion is the transfer—and as Miller’s case shows, the judge often does not know then what she will learn, about the offender or the offense, over the course of the proceedings.\textsuperscript{125}

Transfer is thus both a “key moment for the exercise of discretion” and a moment where such discretion is insufficient to protect the rights of the juvenile. What then, does Miller portend for juvenile transfer as a whole?

First, as explained above, Miller holds that mandatory transfer schemes that allow no opportunity for consideration of the fact that the offender is a juvenile at any stage of the process—from transfer to sentencing—are unconstitutional.\textsuperscript{126} Second, in light of the Court’s critiques of discretionary juvenile transfer procedures, any attempt to rid a child’s age from the equation at sentencing is unconstitutional. Miller requires profound changes in the ways states adjudicate and sentence juveniles; the responses from states thus far have been dramatically inadequate.\textsuperscript{127}

\textbf{2. Possible Solutions to Comply with Miller}

Miller raises many issues regarding juvenile transfer and sentencing, but the solutions are less clear. The Court appears to endorse the provision referred to as juvenile blended sentencing—under which an adult criminal court may impose a juvenile disposition on a child prosecuted there—when it approvingly discusses the possibility of “[d]iscretionary sentencing in adult court.”\textsuperscript{128} Another alternative

\begin{itemize}
\item \textsuperscript{125} Id. at 2474.
\item \textsuperscript{126} While commentators are sure to note that much (but not all) of the Court language focuses on the life-without-parole sentence in particular; “none of what it said about children . . . is crime-specific.” Miller, 132 S. Ct. at 2465. Indeed, the Chief Justice’s dissent quotes that sentence and then explains: “The principle behind today’s decision seems to be only that because juveniles are different from adults, they must be sentenced differently. There is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive. Unless confined, the only stopping point for the Court’s analysis would be never permitting juvenile offenders to be tried as adults.” Id. at 2482 (Roberts, C.J., dissenting). Additionally, as discussed supra, the key conceptual categories in this decision are children and adults; the sentence and crime are irrelevant for the purposes of the holding.
\item \textsuperscript{127} See Cara H. Drinan, Misconstruing Graham & Miller, 91 WASH. U. L. REV. 785 (2014). Drinan argues that the state-level response to Miller has been inadequate and suggests several less conventional paths for state-level change, including executive action on the part of prosecutors, who should reconsider their charging and sentencing policies for juveniles, and governors, who should consider the appointment of “Miller Commissions” to address the retroactive application of the decision. Id. at 793–95.
\item \textsuperscript{128} Miller, 132 S. Ct. at 2474.
\end{itemize}
would be a separate sentencing scheme for juveniles within the criminal system.  

Such a scheme must be designed explicitly for juveniles transferred into adult criminal court and take account of the factors the Court has found significant in juvenile sentencing, most significantly diminished culpability and greater capacity for rehabilitation. A separate sentencing scheme would resolve the Court’s concern that the legislature was unaware—or at the very least, not mindful of—the specific punishments that would result from juvenile transfer. Furthermore, its very existence would satisfy the Miller insistence that a sentencing court cannot “remov[e] youth from the balance” in sentencing a child and remain within constitutional limits, but must instead assess proportionality in relation to the offender’s status as a juvenile.

One final possibility would be the most direct possible approach to sentencing children as children: simply keeping them in juvenile court throughout their adjudication. While entirely mandatory transfer schemes are the outliers in the world of juvenile transfer and certainly outside the bounds of juvenile sentencing endorsed by the Miller Court, the defendants in Miller were both juveniles who had been transferred through discretionary schemes. In other words, the Miller Court held their sentences unconstitutional even though there had been some treatment of the offenders as juveniles at some point in the process. That moment of discretion was not enough to satisfy the Court’s understanding of Eighth Amendment proportionality as applied to juveniles. Yet beyond that somewhat limited topic, the Court’s discussion of discretion in transfer raises the possibility that it might simply be impossible to transfer children to adult criminal court in a way that is consistent with the “children are different” approach of the case.

Even if a prosecutor used her discretion to decide where to prosecute a case, juvenile court or adult court, such a choice would place in the prosecutor in an untenable situation. Juvenile sentences often expire at the age of majority, forcing a prosecutor to make an impossible choice between a very short “juvenile” sentence and a lengthy adult sentence.

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129. One scholar has suggested a “Youth Discount” in sentencing, such that “state legislators should use age as a conclusive proxy for reduced culpability and provide substantial reductions in sentence lengths.” Barry C. Feld, Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount, 31 LAW & INEQ. 263, 264–65 (2013). This proposal would account for the factor of youth, but in other respects a blanket statutory “discount” on adult sentences may be in tension with Miller’s mandate for individualized consideration.

130. Oregon imposes separate presumptive sentences for crimes that send juveniles to adult court and mandates that courts impose at least that minimum, but the statute does not specifically require courts to consider the factors raised in Miller when imposing the sentence. OR. REV. STAT. § 137.707 (2014).

131. Miller, 132 S. Ct. at 2466.

132. Id. at 2461–62.

C. Improving Reliability in Juvenile Adjudication

Miller relied on the Court’s death penalty jurisprudence to conclude that “children are different”\(^{134}\) and worthy of special consideration at sentencing. Criminal sentences that fail to consider the mitigating factors of youth may violate the Eighth Amendment and result in arbitrary sentences for adjudicated youth. The Miller decision was limited to whether a child’s age is relevant at sentencing. Drawing on the same jurisprudence, we highlight several ways to prevent that unconstitutional outcome and improve reliability in juvenile adjudication.

Permitting juveniles to present “any aspect of a [juvenile’s] character or record and any of the circumstances of the offense”\(^ {135}\) will improve the reliability of juvenile adjudication. Jurisdictions with the death penalty apply this principle by providing aggravating and mitigating factors for sentencing courts to consider before imposing a sentence.\(^ {136}\) These factors ensure that the sentencing court is “suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”\(^ {137}\)

Juveniles, like individuals potentially eligible for a death sentence, ought to be entitled to present any information that may help the sentencing court reach a reliable result. Juvenile justice includes rehabilitation—even when adult justice might not. Meeting this important goal requires consideration of the juvenile, her family, and her community. Death penalty jurisdictions often include these factors in their sentencing guidelines.\(^ {138}\) Gathering and presenting this information would require a much larger role for social workers and mental health professionals than currently contemplated by most juvenile justice systems. The investment will be well worth it, as sentencing courts will be able to more carefully tailor the punishment to the offense and offender.

Increased standards and resources for counsel who represent juveniles will likely improve reliability in juvenile adjudications. Juvenile cases are often handled by the junior-most attorneys and standards and pay for appointed counsel—assuming there are standards—are the lowest in our criminal justice

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134. Id. at 2470.
137. Gregg, 428 U.S. at 189.
system.\textsuperscript{139} We owe our children more. Improving the quality of counsel in death penalty litigation has improved the reliability of the administration of the death penalty. The same would surely be true for juveniles.

**CONCLUSION**

*Miller v. Alabama* was a watershed decision for juvenile justice. In addition to the hundreds of individuals whose sentences should be reconsidered in light of this holding,\textsuperscript{140} the decision’s holding that “children are different” and require “individualized consideration” at sentencing invalidates a number of current sentencing schemes. It also demands additional procedural protections that should better account for the vulnerabilities of youth within the justice system.

Most notably, state sentencing schemes that fail to take account of age at any stage of the process should be held unconstitutional in light of *Miller*. A minority of states subscribe to such schemes—and an even smaller group embraces the harshest version through use of “once an adult, always an adult” statutes—suggesting a national consensus against criminal sentencing that puts on blindfolds when a child is standing in the courtroom.

Yet the Court requires even more. Between *Miller*’s demand for individualized consideration of a child’s age at sentencing, the additional procedural protections afforded juveniles in *J.D.B.*, and the robust language differentiating children and adults in several recent cases, the Court is poised to demand more of the criminal justice system when children are involved. Drawing on our system’s experience with the death penalty, we have offered several suggestions for stronger protections for the adjudication of vulnerable youth.


\textsuperscript{140} The retroactive application of *Miller* has proven to be a difficult and divisive question. Compare People v. Carp, 852 N.W.2d 801, 832 (Mich. 2014) (holding *Miller* does not apply retroactively), and Chambers v. State, 831 N.W.2d 311, 331 (Minn. 2013) (same), with Evans-Garcia v. United States, 744 F.3d 235, 238, 241 (1st Cir. 2014) (accepting government concession of retroactivity), Johnson v. United States, 720 F.3d 720, 720 (8th Cir. 2013) (holding Minnesota juvenile sentenced to life without parole entitled to file a successive habeas petition because he made out a *prima facie* case of *Miller* relief), Hill v. Snyder, No. 10-14568, 2013 U.S. Dist. LEXIS 112981, at *3 (E.D. Mich. Aug. 12, 2013) (“[E]very person convicted of first-degree murder in the State of Michigan as a juvenile and who was sentenced to life in prison shall be eligible for parole.”), and Marsha L. Levick & Robert G. Schwartz, *Practical Implications of Miller v. Jackson: Obtaining Relief in Court and Before the Parole Board*, 31 LAW & INEQ. 369, 374–88 (2013) (concluding that *Miller* must be retroactive). Ultimately the Supreme Court will likely have to settle the issue. Whatever the federal result, states are free to apply *Miller* retroactively. See Danforth v. Minnesota, 552 U.S. 264, 266 (2008) (holding that states are free to apply rules of retroactivity more broadly than federal law requires).
The *Miller* Court insists, “imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.”\(^{141}\) In light of the Court’s recognition that “none of what . . . [is] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific,”\(^{142}\) courts must always take into account a child’s age through the individualized consideration dictated by *Miller* and should ensure that the sentences imposed upon juvenile offenders are reliable and just.

\(^{141}\) *Miller*, 132 S. Ct. at 2466.
\(^{142}\) *Id.* at 2465.