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Jurisprudence vs. Judicial Practice: Diminishing Miller in the Struggle over Juvenile Sentencing

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JURISPRUDENCE VS. JUDICIAL PRACTICE: DIMINISHING *MILLER* IN THE STRUGGLE OVER JUVENILE SENTENCING

ABSTRACT

Using a case from the Kansas Supreme Court, *State v. Brown,* as an illustrative case, this Comment discusses the incremental dilution of the Supreme Court's holding in *Miller v. Alabama* and explores the constitutional consequences of this dilution. Juvenile sentencing jurisprudence reflects a long-standing tradition of treating juveniles differently than adults, the rationale for which is based on principles of reduced juvenile culpability. While previous courts imposed categorical bans on particular sentences as applied to juveniles, *Miller v. Alabama* combined two lines of precedent to strike down mandatory life without parole, affecting the process by which courts may sentence young offenders. Using the existing Eighth Amendment principle of diminished juvenile culpability and infusing the analysis with death penalty jurisprudence, the *Miller* Court required individualized consideration of a juvenile offender's mitigating circumstances before imposition of life without parole. Though *Miller*'s narrow holding is limited to mandatory life without parole, the broader *Miller* rationale is applicable to all juvenile sentencing proceedings. Juveniles are categorically less mature, less able to assess risk, and more capable of reform than adults, warranting individualized consideration of the mitigating circumstances of youthfulness prior to sentencing. However, subsequent courts have incrementally diminished *Miller*'s prospective strength using transfer decisions and declining to extend *Miller*'s narrow holding to its rational end. *State v. Brown* illustrates this incremental attack. Affirming the transfer of thirteen-year-old Brown to adult court and upholding Brown's hard twenty life sentence for felony murder, the *Brown* court diluted *Miller*. Representative of post-*Miller* court decisions, *Brown* exemplifies the ways in which subsequent courts limit *Miller*'s broader rationale and diminish the constitutional line between juveniles and adults.

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INTRODUCTION

Juveniles are different than adults. They are less capable of assessing risk and consequence, more irrational, more malleable, and there-

fore less culpable.[1] Our nation's justice system recognizes this diminished responsibility and reflects a well-established practice of treating juveniles differently.[2] Based on categorical differences between youth and adults, the Eighth Amendment's prohibition on "cruel and unusual punishment,"[3] invokes a separate and lower threshold with regard to the treatment of juvenile offenders and proportionality in juvenile sentencing practice.[4] But how low should the threshold go?

Despite conflicting legislation at the state level,[5] modern juvenile sentencing jurisprudence has not waivered when answering this question; juveniles, being less culpable than adults, must be sentenced differently.[6] While legal treatment of juvenile offenders has evolved to reflect increased scientific insight into the development and maturation of the human brain,[7] these advances only confirm the lessened culpability of youthful offenders and encourage a system that mitigates, rather than punishes, the criminal behavior of youth.[8] Based on this rationale—that

1. Miller v. Alabama, 132 S. Ct. 2455, 2464–65 (2012) ("We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" (quoting Graham v. Florida, 560 U.S. 48, 68–69 (2010))); *see also* Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 118–21 (2013); Nick Straley, Miller*'s Promise: Re-Evaluating Extreme Criminal Sentences for Children*, 89 WASH. L. REV. 963, 970–76 (2014).

2. Elizabeth S. Scott, *"Children Are Different": Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 72 (2013) ("The Eighth Amendment opinions offer two consistent messages—that juveniles who commit offenses are less culpable than their adult counterparts and that they are more likely to reform."); *see also* Straley, *supra* note 1, at 965 ("[P]hysiological differences between teenagers and adults carry constitutional significance and require that children be sentenced differently—a principle firmly rooted in recent science and longstanding legal distinctions between children and adults."); Andrea Wood, Comment, *Cruel and Unusual Punishment: Confining Juveniles with Adults After* Graham *and* Miller, 61 EMORY L.J. 1445, 1469 (2012) ("The United States has long recognized that the differences between juveniles and adults require separate processing and treatment for juvenile offenders.").

3. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

4. Scott, *supra* note 2, at 72 ("These conclusions are based on a proportionality analysis that draws on behavioral and neurobiological research to delineate the attributes of adolescence that distinguish teenage offending from adult criminal activity: these traits include adolescents' propensity for taking risks without considering future consequences; their vulnerability to external influences, particularly of peers; and their unformed characters.").

5. *Id.* at 92–94 ("The hostility and fear that characterized attitudes toward young offenders in the 1990s resulted in policies and decisions driven primarily by immediate public safety concerns and the goal of punishing young criminals.").

6. Sean Craig, Note, *Juvenile Life Without Parole Post-*Miller*: The Long, Treacherous Road Towards A Categorical Rule*, 91 WASH. U. L. REV. 379, 386–91 (2013) ("Since the Court decided *Thompson* twenty-five years ago, its notions of what it means to be a juvenile have expanded, but the fundamental message has gone unchanged. Juveniles, by definition, are not adults, and the reality of their lives and growth make it unfair to treat them exactly as if they were."); *see also* Straley, *supra* note 1, at 966 ("In a trilogy of recent cases, the Supreme Court has recognized that juveniles differ from adults in their psychosocial and neurological makeups and therefore must be sentenced differently—even when those children have committed heinous crimes.").

7. Scott, *supra* note 2, at 81–82.

8. Christopher Slobogin, *Treating Juveniles Like Juveniles: Getting Rid of Transfer and Expanded Adult Court Jurisdiction*, 46 TEX. TECH L. REV. 103, 106 (2013); *see also* Straley, *supra* note 1, at 965–69, 976 ("The Court in *Roper*, *Graham*, and *Miller* relied upon a wealth of relatively recent neurological and psychosocial research in finding that children must be sentenced differently

youthfulness translates into lesser culpability—the United States Supreme Court has championed the creation of tangible differences between juveniles and adults in our legal system.[9] Accordingly, juvenile sentencing jurisprudence has led to a shrinking pallet of sentencing options from which courts may choose in punishing young offenders.[10]

As part of this long-standing tradition, *Miller v. Alabama*[11] widened the margin between juveniles and adults with regard to sentencing schemes by invalidating mandatory life without parole as applied to juveniles.[12] The *Miller* holding, however, did more than pick up where the previous jurisprudence left off. Rather than imposing a flat prohibition on a particular sentence as applied to juveniles, the Court announced a new way in which juveniles must be considered in the process of imposing a sentence.[13] In fact, *Miller* combined and simultaneously extended two lines of precedent:[14] on one hand, *Miller* relied on existing rationale that juveniles are constitutionally different from adults; on the other hand, the Court used adult death penalty jurisprudence as a comparative springboard to mandate individualized consideration of youthfulness when imposing the harshest sentences, such as life without the possibility of parole.[15]

While *Miller*'s narrow holding only invalidated mandatory life without parole as applied to juveniles, the Court's broader rationale is applicable in most juvenile sentencing hearings.[16] If juveniles are cate-

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than adults. . . . And finally, barring a child from ever living outside a prison's walls 'forswears altogether the rehabilitative ideal.' It reflects 'an irrevocable judgment about [an offender's] value and place in society, at odds with a child's capacity for change.'" (second alteration in original) (quoting *Miller*, 132 S Ct. at 2465)).

9. Scott, *supra* note 2, at 72–73 ("The Court has created a special status for juveniles through doctrinal moves that had little precedent in its earlier Eighth Amendment cases. In its willingness to find severe adult sentences to be excessive for juveniles, the Court elevated the prominence of proportionality, setting aside the deference to legislatures that is a strong theme in modern Eighth Amendment law and molding constitutional doctrine in a new direction.").

10. *See* Andrew Tunnard, Note, *Not-So-Sweet Sixteen: When Minor Convictions Have Major Consequences Under Career Offender Guidelines*, 66 VAND. L. REV. 1309, 1327 (2013).

11. 132 S. Ct. 2455 (2012).

12. *See* Scott, *supra* note 2, at 76.

13. Recent Case, 127 HARV. L. REV. 1252, 1254 (2014).

14. *Id.* at 1254 n.22 ("Although the Court in *Miller* relied on two strains of precedent, . . . neither dictated the outcome: The first line of precedent—adopting categorical bans on sentencing practices that were excessively severe for a certain class of offenders—had never before been extended to include juveniles convicted of murder. The second line of precedent—requiring individualized sentencing in the capital context—had never before been applied beyond the imposition of the death penalty.").

15. Scott, *supra* note 2, at 75–76 (discussing the holding that "harsh sentence[s] could only be imposed on a juvenile after the youth had the opportunity to produce evidence of mitigation," because of the "constitutional principle announced in *Miller*—'children are different.'" (quoting *Miller*, 132 S Ct. at 2470)).

16. Alex Dutton, Comment, *The Next Frontier of Juvenile Sentencing Reform: Enforcing* Miller*'s Individualized Sentencing Requirement Beyond the JLWOP Context*, 23 TEMP. POL. & CIV. RTS. L. REV. 173, 197 (2013) ("The notion that juveniles are developmentally different from adults has no limit. . . . [T]he Court has relied on this doctrine to require that youth be treated differently than adults by the justice system. The doctrine applied with equal weight to the juvenile death penal-

gorically less culpable than adults, sentencing structures must reflect this principle; an offender's youthful status should be used to mitigate on behalf of the juvenile sentence.[17]

Despite *Miller*'s broad applicability, courts have found numerous ways to limit the application of *Miller*'s rationale. In any given case, state and circuit courts will make multiple, incremental decisions that appear reasonable in-and-of-themselves, but which produce unreasonable, even absurd results in light of *Miller*'s broad rationale. The effect of this incremental decision making is a slow dilution of *Miller*'s profound contribution to juvenile sentencing jurisprudence. And the practical outcome of diminishing *Miller* is that post-*Miller* courts will continue to make juvenile sentencing indistinguishable from that of adults.[18]

The tendency of courts to limit *Miller*'s broad rationale is illustrated, in part, by *State v. Brown*,[19] a recent Kansas Supreme Court case that ultimately declined to extend *Miller*'s narrow holding.[20] Using charging decisions (which involve a determination of whether to charge a juvenile as an adult) and a straight-line reading of *Miller*'s comparison of juvenile sentences to the harshest adult sentences, the *Brown* court held a hard twenty life sentence—an indeterminate life sentence without the possibility of parole for twenty years—did not violate the Constitution when imposed on a juvenile offender.[21] The court reasoned that a hard twenty life sentence was not the harshest punishment available for a juvenile and, therefore, not within *Miller*'s reach.[22] *Miller* used a comparison between imposing life without parole on juveniles and imposing the death penalty on adults as a springboard for requiring individualized sentencing before imposing life without parole on a juvenile. Ironically, the *Brown* court employed this same comparison to justify its conclusion that a hard twenty life sentence was not unduly harsh for a juvenile; this is, however, in direct opposition to the broader *Miller* rationale.[23]

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ty as it did to JLWOP and juvenile *Miranda* rights. The imposition of mandatory sentences on juvenile offenders must comply with these entrenched constitutional findings." (footnotes omitted)).

17. Scott, *supra* note 2, at 74 ("Implicit in this generalization is a broader principle that the same attributes of adolescence that mitigate the culpability of the youths whose crimes the Court has reviewed reduce the blameworthiness of juveniles' criminal choices generally.").

18. *See* Ioana Tchoukleva, Note, *Children Are Different: Bridging the Gap Between Rhetoric and Reality Post* Miller v. Alabama, 4 CAL. L. REV. CIRCUIT 92, 101–02 (2013) (arguing that through transfer laws and harsh, mandatory sentences "the current system treats [children] as if they are as culpable as adults. . . .To bridge the gap between rhetoric and reality, the Court needs to take the reasoning in *Miller* to its logical conclusion."). *But see* Scott, *supra* note 2, at 95 (stating that there "is a growing tendency among lawmakers and the public to accept (once again) that young offenders are different from adults").

19. 331 P.3d 781 (Kan. 2014).

20. *Id.* at 797.

21. *Id.*

22. *Id.*

23. *See id.* ("The parallels between life-without-parole sentences and the death penalty that made *Woodson* applicable in *Miller* are not present in this case. A hard 20 life sentence does not irrevocably adjudge a juvenile offender unfit for society.").

This Comment examines the ineffectiveness of *Miller* in light of a national tendency to avoid or contain its rationale in juvenile sentencing. Using the Kansas Supreme Court holding in *State v. Brown* as an illustrative case, this Comment explores the ways in which courts have diluted *Miller*'s strength to the detriment of our constitutionally enshrined principle that juveniles are different from adults. Part II of this Comment explores the background of juvenile sentencing that contributed to the evolution of modern juvenile sentencing jurisprudence. Part III provides an analysis of the *Miller v. Alabama* holding and explores the Court's broader rationale, as applied to all juvenile sentencing. Part IV then reviews the narrow holding in *State v. Brown*, installing the case as a springboard for discussion of juvenile sentencing. Referencing *State v. Brown*, Part V analyzes the ways in which the *Miller* rationale has been incrementally diluted by transfer mechanisms and subsequent rulings, which decline to extend *Miller*. Part VI then discusses the implications of ignoring *Miller*, as it diminishes the constitutional line between juveniles and adults. Ultimately, this Comment explores the ways in which subsequent court decisions undermine the *Miller* rationale and offend the long-standing tradition of treating juveniles differently.

I. BACKGROUND

A. Juvenile Sentencing and the Eighth Amendment

Since 1899, when the first juvenile court was established in Illinois, the United States has recognized juveniles as constitutionally different from adults.[24] Before then, "juvenile offenders generally were treated by the law in the same manner as adults."[25] Yet, with rising concerns regarding the imposition of adult punishments on juveniles, states invoked a "parens patriae" role that allowed the state to be a "protector [of juveniles] rather than punisher."[26] Under this rationale, "a separate court system . . . replaced traditional notions of punishment with a 'clinical' approach emphasizing rehabilitation and treatment."[27] That is, although exclusion from criminal laws did not render juveniles exempt from all consequences, juvenile proceedings were "civil in nature, rather than criminal or adversarial."[28] This system of separation, in "reject[ing] con-

24. *See* Sara E. Fiorillo, Note, *Mitigating After* Miller*: Legislative Considerations and Remedies for the Future of Juvenile Sentencing*, 93 B.U. L. REV. 2095, 2098–99 (2013).

25. Laoise King, *Colorado Juvenile Court History: The First Hundred Years*, 32 COLO. LAW. 63, 63 (2003).

26. Kristina H. Chung, Note, *Kids Behind Bars: The Legality of Incarcerating Juveniles in Adult Jails*, 66 IND. L.J. 999, 1011 (1991) (quoting Santosky v. Kramer, 455 U.S. 745, 766 (1982)).

27. *Id.* at 1009.

28. *Id.* at 1010.

cepts of criminal responsibility and punishment,"[29] codified differences between juveniles and adults with regard to culpability.[30]

1. Juveniles in the Law: Delinquency vs. Criminal Charges

This approach implicated modern day notions of charging and sentencing where the axis of both concepts turned not on the crime, but rather on the juvenile.[31] This is evidenced by the fact that juvenile cases, no matter what offense a juvenile committed, were delinquency proceedings—involving determination as to whether a minor required "supervision of the court"—as opposed to the criminal proceedings imposed on adult offenders.[32] Here, "the purpose of the juvenile court was to focus on the offender" within the scope of delinquency.[33] As a result, criminal courts imposed punitive sentences based on the committed crime while juvenile courts instituted corrective measures based on the juvenile's needs.[34] This became a powerful distinction, because it saved juveniles from adult sentences by deliberately placing youth on a rehabilitative, rather than retributive track.[35]

Though forty-six states, as well as the District of Columbia, instituted juvenile courts by 1925,[36] this principle of separation enjoyed little practical effect as a result of charging decisions and sentencing schemes, which are inextricably linked. With regard to charging decisions, the law began recognizing some juveniles were "unfit for such programs, [and] thus . . . require[ed] adjudication in adult courts."[37] As such, juvenile courts were allowed to transfer juvenile offenders to face charges in

29. Wood, *supra* note 2, at 1468.

30. Alison Powers, Note, *Cruel and Unusual Punishment: Mandatory Sentencing of Juveniles Tried as Adults Without the Possibility of Youth as a Mitigating Factor*, 62 RUTGERS L. REV. 241, 246–47 (2009) (exploring rationale for separate juvenile courts, as juveniles had "less than fully developed moral and cognitive capacities" (quoting HOWARD N. SNYDER & MELISSA SICKMUND, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT, at 94 (2006), http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf) (internal quotation mark omitted)).

31. *See* Jennifer Taylor, Note, *California's Proposition 21: A Case of Juvenile Injustice*, 75 S. CAL. L. REV. 983, 986 (2002); *see also* Candace Zierdt, *The Little Engine That Arrived at the Wrong Station: How to Get Juvenile Justice Back on the Right Track*, 33 U.S.F. L. REV. 401, 420 (1999) ("A hallmark of the juvenile court, however, has always been indeterminate sentencing, which allows a judge to focus on the juvenile instead of the crime." (footnote omitted)).

32. Taylor, *supra* note 31, at 986.

33. *Id.* (quoting Sara Raymond, Comment, *From Playpens to Prisons: What the Gang Violence and Juvenile Crime Prevention Act of 1998 Does to California's Juvenile Justice System and Reasons to Repeal It*, 30 GOLDEN GATE U. L. REV. 233, 239 (2000)) (internal quotation mark omitted).

34. *Id.*

35. *See* Zierdt, *supra* note 31, at 407 ("[I]t is evident that over the years the juvenile court came to be seen as a benevolent institution, designed to help and rehabilitate children instead of to simply punish them.").

36. Wood, *supra* note 2, at 1468.

37. Brice Hamack, *Go Directly to Jail, Do Not Pass Juvenile Court, Do Not Collect Due Process: Why Waiving Juveniles into Adult Court Without a Fitness Hearing Is a Denial of Their Basic Due Process Rights*, 14 WYO. L. REV. 775, 785 (2014).

criminal court.[38] Although this waiver of juvenile jurisdiction over the young offender was to be used "only in exceptional cases,"[39] the exception has become the ever-expanding rule as more juveniles are tried as adults in the widening net of state transfer mechanisms.[40]

First, states expanded the options available for transferring a juvenile to adult criminal court, providing mechanisms for transfer by "either judicial waiver, legislative waiver, mandatory judicial waiver, or prosecutorial waiver."[41] This left juvenile offenders more exposed to prosecution as an adult.[42] What is more, most states have "once an adult, always an adult" provisions that "automatically exclude[] minors from juvenile court adjudication once they have been tried and convicted in criminal court."[43] The most common waiver, a judicial waiver, often requires the juvenile judge to consider particular factors with regard to the transfer determination, though juvenile judges have considerable discretion in deciding whether to transfer the juvenile.[44] However, in the aftermath of a violence scare during the 1980s and 90s, a new "'get tough' mentality . . . spilled over into the juvenile court system,"[45] resulting in even more statutorily prescribed transfers to limit this discretion.[46] It is clear now that "[c]urrent state law favors mandatory transfers over discretionary transfers of serious juvenile offenders to adult criminal court."[47]

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38. Brian J. Fuller, Case Note, *Criminal Law—A Small Step Forward in Juvenile Sentencing, but Is It Enough? The United States Supreme Court Ends Mandatory Juvenile Life Without Parole Sentences;* Miller v. Alabama, *132 S. Ct. 2455 (2012)*, 13 WYO. L. REV. 377, 379–81 (2013).

39. Lisa A. Cintron, Comment, *Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court*, 90 NW. U. L. REV. 1254, 1261 (1996) (quoting Jeffrey S. Schwartz, Note, *The Youth Offender: Transfer to the Adult Court and Subsequent Sentencing*, 6 CRIM. JUST. J. 281, 290 (1983)) (internal quotation marks omitted).

40. David Pimentel, *The Widening Maturity Gap: Trying and Punishing Juveniles as Adults in an Era of Extended Adolescence*, 46 TEX. TECH L. REV. 71, 86–89 (2013); *see also* Slobogin, *supra* note 8, at 103 ("Numerous states increased the types of crimes that trigger transfer and most also lowered the age at which it could occur . . . .").

41. Hamack, *supra* note 37, at 778; *see* Christine Chamberlin, Note, *Not Kids Anymore: A Need for Punishment and Deterrence in the Juvenile Justice System*, 42 B.C. L. REV. 391, 399 (2001) ("Between 1992 and 1997, forty-four states and the District of Columbia enacted legislation expanding the transfer of jurisdiction over juveniles.").

42. *See* Zierdt, *supra* note 31, at 414–22 ("Today, however, we are moving away from the rehabilitative ideal in juvenile court by making the juvenile court resemble an adult criminal court or by certifying juveniles to stand trial in adult court.").

43. Andrea Knox, Note, Blakely *and Blended Sentencing: A Constitutional Challenge to Sentencing Child "Criminals,"* 70 OHIO ST. L.J. 1261, 1274 (2009) (internal quotation marks omitted) ("Thirty-four states currently have 'once an adult, always an adult' provisions on their books.").

44. Zierdt, *supra* note 31, at 418.

45. Hamack, *supra* note 37, at 787–88.

46. *Id.* at 788; *see also* Slobogin, *supra* note 8, at 103 ("A third of the states also enacted statutes authorizing prosecutorial waiver or 'direct file,' while the number of jurisdictions that adopted 'automatic' transfer regimes for designated crimes (rather than leaving that decision to the discretion of the juvenile court or the prosecutor) more than doubled to thirty-one."); Zierdt, *supra* note 31, at 418 ("[B]ecause the public often views these judges as too lenient, a popular method of increasing transfers is to limit the judge's discretion in the transfer decision.").

47. Cintron, *supra* note 39, at 1254; *see also* Slobogin, *supra* note 8, at 104 ("While in the past several years some states have reduced the scope of transfer or have raised the age for criminal court jurisdiction, the latter number has stayed fairly constant since 2000." (footnote omitted)).

Second, while most statutes limit transfers "to juveniles of a minimum age who have been charged with specific offenses,"[48] states have consistently lowered this minimum age at which a juvenile may be charged as an adult, instituting a "trend of *lowering* rather than raising the age of juvenile criminal liability."[49] For example, in the late 1990's, Missouri lowered its minimum transfer age to twelve from fourteen; Indiana lowered its minimum age to ten from sixteen; and twenty-two states "no longer impose[d] any minimum age requirement for at least one method of transferring jurisdiction to adult court."[50] Many of these legislative changes were proffered in the wake of a perceived increase in violence, rising from the sensationalism of press, not from consideration of long-enduring tenets of the juvenile court or from consideration of the juveniles themselves.[51] As states widened their nets with regard to transfers, increasing numbers of juveniles became ensnared in the adult criminal system.[52]

In effect, "[t]he liberalization of transfer laws . . . seems to reflect this logic; the fact that someone is a juvenile is not itself a sufficient basis for granting the leniency afforded by the juvenile criminal justice system."[53] As a result, "many of the transfer statutes are keyed not to the maturity level of the offender, but to the seriousness of the offense,"[54] which not only offends the rehabilitative rationale underlying juvenile courts, but results in harsher sentences without achieving the hoped-for deterrence.[55]

2. Juvenile Sentencing and the Eighth Amendment

With state transfer laws funneling more juveniles into adult court,[56] which changed the sentencing schemes applied to those juveniles,[57] the

48. Chamberlin, *supra* note 41, at 400.

49. Thompson v. Oklahoma, 487 U.S. 815, 867 & n.3 (1988) (Scalia, J., dissenting) (citing multiple state laws lowering the applicable waiver age).

50. Chamberlin, *supra* note 41, at 399.

51. Zierdt, *supra* note 31, at 419.

52. Slobogin, *supra* note 8, at 104 ("In New York State alone, this move led to the adult prosecution of over 45,000 youths aged sixteen and seventeen in 2010. . . . [A]nd the number of juveniles under eighteen prosecuted as adults skyrocketed from somewhere between 10,000 and 15,000 a year to 250,000 a year." (footnotes omitted)).

53. Pimentel, *supra* note 40, at 89.

54. *Id.* at 91.

55. *See id.* at 86; *see also* Robert Anthonsen, Note, *Furthering the Goal of Juvenile Rehabilitation*, 13 J. GENDER RACE & JUST. 729, 741 (2010) (discussing numerous studies that show "adult criminal sentencing and the threat of adult criminal sentencing have proven ineffective in deterring juvenile crime and recidivism"); Cynthia R. Noon, Comment, *"Waiving" Goodbye to Juvenile Defendants, Getting Smart vs. Getting Tough*, 49 U. MIAMI L. REV. 431, 453–54 (1994) (discussing how legislative waivers are inconsistent with the rehabilitative goals of juvenile courts because "they focus on the offense rather than the individual juvenile's characteristics").

56. *See* Wendy N. Hess, *Kids Can Change: Reforming South Dakota's Juvenile Transfer Law to Rehabilitate Children and Protect Public Safety*, 59 S.D. L. REV. 312, 313 (2014) (stating there are about "250,000 children under age eighteen who are sent to the U.S. adult criminal system every year").

Supreme Court began to consider whether applying certain harsh adult sentences to juveniles was constitutional.[58] Specifically, the Court invoked the same rationale used to establish juvenile courts, insisting that youth were different from adults because "their irresponsible conduct is not as morally reprehensible as that of an adult" due to their lack of experience, education, and lesser intelligence,[59] and that such differences carried Eighth Amendment implications with regard to sentencing.[60] As a result of this rationale, the Court proffered a series of decisions, which incrementally explored the question: to what extent is criminal sentencing required to treat juveniles differently?

The Court began chipping away at harsh juvenile sentencing in *Thompson v. Oklahoma*,[61] a case in which a fifteen-year-old was convicted of homicide and sentenced to death.[62] Holding the death penalty for a juvenile offender under the age of sixteen is unconstitutional, the Court reasoned that "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage."[63] Accordingly, the Court weighed the need for "punishment [to] be directly related to . . . personal culpability,"[64] and assessed the "differences which must be accommodated in determining the rights and duties of children as compared with those of adults."[65] The Court found the death penalty, as applied to a fifteen-year-old, antithetical to the purpose of the penalty: "the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children" made principles of retribution "inapplicable" and notions of deterrence unfounded.[66] Here, the *Thompson* Court returned to the bedrock principles of juvenile courts, recognizing that "the Court ha[d] already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult."[67]

Following *Thompson*, the Court invoked this notion of reduced juvenile culpability to further limit juvenile sentencing options. In *Roper v.*

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57. Chamberlin, *supra* note 41, at 403 ("Naturally, if jurisdiction over a juvenile is transferred to adult court and the juvenile is found guilty of the offense, the court may impose upon the juvenile the adult sanction appropriate for the offense.").

58. *See* Thompson v. Oklahoma, 487 U.S. 815, 824–35 (1988) (plurality opinion); *see also id.* at 867–69, 872 (Scalia, J., dissenting) (discussing the trend in lowering the age at which juveniles may be sentenced as adults, while considering whether the death sentence was unconstitutional as applied to a fifteen year-old).

59. *Id.* at 835 (plurality opinion).

60. *Id.* at 833–35.

61. 487 U.S. 815 (1988) (plurality opinion).

62. *Id.* at 818–19.

63. *Id.* at 834, 838 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

64. *Id.* (quoting California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

65. *Id.* at 823 (quoting Goss v. Lopez, 419 U.S. 565, 591 (1975) (Powell, J., dissenting)).

66. *Id.* at 836–37.

67. *Id.* at 835.

Simmons,[68] a seventeen-year-old was convicted of murder and sentenced to death.[69] The *Roper* Court held the death penalty, as applied to all persons under the age of eighteen, is unconstitutional.[70] Here, the *Roper* Court extended *Thompson*'s rationale by elaborating on the chasmic differences between juveniles and adults. First, the Court noted "[a] lack of maturity and an underdeveloped sense of responsibility . . . in youth more often than in adults . . . . result[ing] in . . . ill-considered actions and decisions."[71] Second, the Court reiterated the fact that juveniles are more "vulnerable or susceptible to negative influences and outside pressures."[72] Finally, the Court noted the malleability of juvenile character, explaining that the "personality traits of juveniles are more transitory, less fixed," and therefore more capable of reform.[73] For these reasons, the Court concluded, "juvenile offenders cannot . . . be classified among the worst offenders," as to warrant the "most severe punishment."[74]

In 2010, the Court again leveraged notions of diminished juvenile culpability to insulate youth from harsh sentences. In *Graham v. Florida*,[75] the Court reviewed a seventeen-year-old juvenile's sentence of life without the possibility of parole. The seventeen-year-old had been charged with robbery, "possessing a firearm, and . . . associating with persons engaged in criminal activity"—all violations of his 3-year probation for prior commissions.[76] The *Graham* Court held that life without the possibility of parole is unconstitutional when imposed on juveniles for nonhomicidal offenses.[77] In analyzing this "categorical challenge to a term-of-years sentence"[78] as applied to juvenile offenders, the Court continued the *Thompson* and *Roper* rationale that because juveniles possess "lessened culpability they are less deserving of the most severe punishments."[79]

However, the Court applied this rationale with specific reference to and concern for the severity of life without parole sentences as applied to juveniles convicted of nonhomicidal crimes.[80] Finding "[t]he age of the offender and the nature of the crime each bear on the analysis,"[81] the Court reasoned that life without parole was particularly ill-applied to

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68. 543 U.S. 551 (2005).
69. *Id.* at 556.
70. *Id.* at 578.
71. *Id.* at 569 (first alteration in original) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)) (internal quotation marks omitted).
72. *Id.*
73. *Id.* at 570.
74. *Id.* at 568–69.
75. 560 U.S. 48 (2010).
76. *Id.* at 55, 57.
77. *Id.* at 74–75.
78. *Id.* at 61.
79. *Id.* at 68.
80. *Id.* at 68–75.
81. *Id.* at 69.

juveniles, when considering the "penological justifications for the sentencing practice" in light of a juvenile's diminished culpability and the nonhomicidal nature of the offense.[82] Specifically, the Court noted: "Life without parole is an especially harsh punishment for a juvenile," given the percentage of life a juvenile would spend incarcerated.[83] Because life without parole was the harshest sentence a juvenile offender could receive at that time, the Court likened this sentence to the most severe punishment available for adults—the death penalty.[84] Recognizing both sentences facilitated the same grave result,[85] and failed to satisfy penological goals of the criminal system, the Court found "the limited culpability of juvenile nonhomicide offenders" was "not adequate to justify life without parole for juvenile nonhomicide offenders."[86] In continuation of this rationale, the Court also concluded that while a state does not have to assure the ultimate release of juveniles convicted of nonhomicide crimes, it must provide those juveniles "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[87]

II. *MILLER V. ALABAMA* INTRODUCES INDIVIDUALIZED SENTENCING

The most recent, and perhaps most controversial juvenile sentencing decision came on the heels of *Graham* in 2012. In *Miller v. Alabama*, the Supreme Court considered two cases on collateral review: two fourteen-year-olds were "convicted of murder and sentenced to life imprisonment without the possibility of parole."[88] The Court held that mandatory life without parole for juveniles was unconstitutional.[89] In making this determination, the Court relied on "the confluence of . . . two lines of precedent" expressed in *Roper* and *Graham*.[90] First, the Court reasoned, as it did in *Roper* and *Graham*, that "the distinctive attributes of youth" make children "constitutionally different from adults for purposes of sentencing."[91] The operation of this principle therefore "diminish[ed] the penological justifications for imposing the harshest sentences on juvenile offenders."[92] Second, the Court relied on *Graham*'s reasoning—drawing a parallel between life-without-parole sentences imposed on juveniles to the death penalty imposed on adults—to extend the rationale for individualized consideration of a juvenile before imposing life-without-parole."[93] Thus, and in light of this precedent, the Court concluded indi-

82. *Id.* at 63, 71–73.
83. *Id.* at 70–71.
84. *Id.* at 69–70.
85. *Id.* at 69 ("[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences.").
86. *Id.* at 71–75.
87. *Id.* at 75.
88. Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012).
89. *Id.*
90. *Id.* at 2464.
91. *Id.* at 2458, 2465.
92. *Id.*
93. *Id.* at 2466.

vidualized consideration of mitigating factors of youth is required when a juvenile faces life without possibility of parole.[94]

In combining the *Roper* and *Graham* precedents, the *Miller* Court concluded the difference between juveniles and adults is constitutionally pertinent because youth (1) lack mental maturity and responsibility; (2) are more susceptible to outside influences; and (3) are more capable of change, such that they may be rehabilitated.[95]

The Court held that because "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole,"[96] a "judge or jury must have the opportunity to consider certain mitigating circumstances before imposing the harshest possible penalty for juveniles."[97] These mitigating circumstances, laid down by the Court, included:

> "[C]hronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences," his "family and home environment," "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him," and the prospects for rehabilitation while incarcerated.[98]

A. Miller*'s Broad Rationale for Individualized Consideration is Applicable to All Juvenile Sentencing Proceedings*

Miller's broader rationale, despite its narrow holding, sparked a tug-of-war between the principles expressed in juvenile sentencing jurisprudence, and the actual, subsequent treatment of juvenile offenders in state and federal courts.[99] The *Miller* Court used a comparison between the death penalty, imposed on adult criminals, and life-without-parole as applied to juveniles to arrive at an individualization requirement.[100] This was a legal springboard catapulting juvenile sentencing jurisprudence forward into an individualization requirement. However, by making this comparison, *Miller* allowed subsequent courts to afford juveniles individualized protection only where a similarly situated adult criminal would receive such. To say, as this Comment does, that *Miller*'s broader rationale is being incrementally diminished, is to imply that such diminution is not warranted. It is therefore necessary to establish this founda-

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94. *Id.* at 2467–68 ("*Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult.").

95. *Id.* at 2464; *see also* Straley, *supra* note 1, at 968 (footnotes omitted).

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

97. *Id.* at 2475.

98. *Id.* at 2468.

99. *See* Tchoukleva, *supra* note 18, at 102 ("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." (quoting *Miller*, 132 S. Ct. at 2464)).

100. *Miller*, 132 S. Ct. at 2467.

tional premise—that the broader *Miller* rationale, rather than the narrow *Miller* holding, is an appropriately applicable standard in juvenile sentencing schemes—before exposing the lack of its proper treatment in subsequent judicial decisions.

1. Individualized Consideration at the Core of Sentencing Juvenile Offenders

The rationale expressed in *Miller*, though a continuation of the rationale used in *Thompson*, *Roper*, and *Graham*, introduced a new principle for juvenile sentencing: individualized consideration of a juvenile offender when imposing the harshest sentences.[101] Where the *Thompson* and *Roper* Courts focused on a particular sentence as applied to a category of offenders (juveniles),[102] and the *Graham* Court focused on a particular crime as disproportionate to a singular sentence with respect to that category of offenders,[103] the *Miller* Court broke new ground by focusing on the individual mitigating circumstances of the particular juvenile offender to prohibit mandatory imposition of life without parole.[104] While each Court imposed a categorical ban on particular sentences with regard to juvenile offenders, only the *Miller* Court combined this precedent with its individualization requirement to strike down the mandatory application of a particularly harsh sentence.[105] The focus on the harshest sentences is indicative of *Miller*'s intent to shape juvenile sentencing jurisprudence in a way that focuses on the individual and youthful status of a juvenile offender, rather than the crime committed or sentence applied.[106]

Though the *Miller* Court only required individualized consideration in cases where juveniles face life without parole,[107] the rationale, which justified and mandated the process of individualized sentencing, extends to all sentences imposed on juvenile offenders for two primary reasons. First, the *Miller* Court focused more on the individual circumstances of the juvenile offender than on the sentence itself, promoting a resurrection of juvenile-centered juvenile sentencing.[108] Second, the Court's rationale in requiring individualization can remain intact upon application to other mandatory juvenile sentencing schemes.

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101. Scott, *supra* note 2, at 88.

102. Michael Barbee, Comment, *Juveniles Are Different: Juvenile Life Without Parole After* Graham v. Florida, 81 MISS. L.J. 299, 303–05, 307 (2011).

103. *Id.* at 310.

104. *See* Sonia Mardarewich, *Certainty in a World of Uncertainty: Proposing Statutory Guidelines in Sentencing Juveniles to Life Without Parole*, 16 SCHOLAR 123, 125 (2013) (implying the revolutionary nature of *Miller*'s holding).

105. Miller v. Alabama, 132 S. Ct. 2455, 2463–64 (2014).

106. Tchoukleva, *supra* note 18, at 97 (arguing that "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").

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

108. *See id.* (discussing the rationale behind individualized sentencing for juveniles by saying "mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it").

i. *Miller*'s Focus on the Individual Juvenile Offender

Turning to *Miller*'s universally applicable rationale for individualized consideration, the Court's general focus on an offender's juvenile status is instructive in all juvenile sentencing proceedings. Rather than categorically banning life without the possibility of parole for all juveniles, the *Miller* Court held that the juvenile status of an offender triggers individualized consideration of that particular youth's mitigating circumstances in the imposition of such a sentence.[109] In a lengthy discussion of the offending juveniles, Miller and Jackson, the Court focused primarily on the mitigating circumstances attending their crimes rather than focusing on the crime.[110] Discussing Miller, the Court noted, "if ever a pathological background might have contributed to a 14-year-old's commission of a crime, it is here."[111] While acknowledging that there is no doubt he "committed a vicious murder," the Court quickly moved on to discuss how "Miller's stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times."[112]

In reference to Jackson, the Court points out that "his age could well have affected his calculation of the risk that posed, as well as his willingness to walk away" when he learned that his friend had a gun.[113] Noting that "[b]oth his mother and his grandmother had previously shot other individuals," the Court pays special attention to the individual "circumstances [that went] to Jackson's culpability for the offense."[114] Ultimately, the Court applies a great deal of weight to the individual circumstances of each offender in determining the sentence is too harsh.[115]

In turning judicial attention away from the crime and corresponding sentence towards the juvenile offender himself, the Court discusses the need for individualized consideration, saying, "At the least, a sentencer should look at such facts before depriving a 14-year-old of any prospect of release from prison."[116] Regardless of whether the Court was actually exercising "judicial minimalism"[117] in making this determination instead

109. *Id.* at 2469 (saying "[b]ecause that holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles," while asserting its expectation that such sentences would be "uncommon.").

110. *Id.* at 2468–69.

111. *Id.* at 2469.

112. *Id.*

113. *Id.* at 2468.

114. *Id.*

115. *Id.* (discussing how "[b]oth cases before [the Court] illustrate the problem" that arises when "imposing a State's harshest penalties [because] a sentencer misses too much if he treats every child as an adult").

116. *Id.* at 2469.

117. *See* 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, 491 (2013).

of imposing a categorical ban, the door to this particular rationale was nonetheless opened and left deliberately wide open.[118]

This is especially true where a categorical ban on life without parole seems more minimalistic in effect than a lengthy combination of two precedential lines that so curiously and obviously baits the extension of individualization requirements in all juvenile sentencing. For example, had the Court imposed a categorical ban on life without parole as applied to juveniles, it could have simply extended Eighth Amendment jurisprudence in light of "the evolving standards of decency that mark the progress of a maturing society."[119] While foreclosing all opportunity to impose life without parole on juveniles, which is arguably more immediately effective,[120] a categorical ban would have left untouched a nationwide practice of treating juveniles like adults, aside from the small subset of categorically forbidden sentences. It would not have infused the sentencing inquiry with an individualization requirement, and courts would not be obliged to meaningfully consider youthfulness as a mitigating factor.[121] As a result, the door to meaningful consideration of a juvenile offender's youthfulness before the imposition of other sentences would remain closed.[122]

However, because the Court chose to build on the jurisprudence requiring individualized sentencing, lower courts should take note and begin following suit—considering juveniles as juveniles.[123] This opened the door to forward thinking that could—and arguably does—require individual consideration of juveniles before imposing any sentence.

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118. *See* Piper Waldron, Case Comment, *Youth Matters:* Miller v. Alabama*'s Implications for Individualized Review in Juvenile Sentencing*, 46 LOY. L.A. L. Rev. 775, 776 (2013) ("*Miller* expands the Eighth Amendment as it is applied to juveniles, since its reasoning may challenge other mandatory laws that negate individualized sentencing.").

119. *Miller*, 132 S. Ct. at 2463 (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)) (internal quotation marks omitted).

120. Fuller, *supra* note 38, at 392–93 ("The Court, however, should have engaged fully in the Eighth Amendment proportionality analysis and adopted a categorical rule prohibiting life without parole sentences for all juveniles. A categorical rule would still give sentencing judges ample discretion to impose a severe punishment that fulfills the penological goals of retribution, deterrence, and incapacitation while properly focusing on the juvenile offender's rehabilitation and taking youth into account as a mitigating factor." (footnotes omitted)).

121. *Id.* at 394 (noting that, while *Miller* did not provide proper guidance for subsequent courts, "courts are now required to consider youth as a mitigating factor").

122. *See id.* at 393 ("The State could best comply with *Miller* in one of two ways. First, the state can require judges to consider mitigating factors at the sentencing hearing. Second, the state can simply eliminate life without parole for juveniles." (footnotes omitted)).

123. *See id.* at 403–04 (discussing that, although, "the Court did not address whether a lengthy term of years sentence for juvenile offenders would violate the Eighth Amendment as cruel and unusual," subsequent courts have interpreted *Miller* to implicate sentences other than mandatory life without parole).

ii. *Miller*'s Rationale Applies to Other Mandatory Sentencing Schemes

In addition to focusing on the individual circumstances of an offender because of his or her juvenile status, the Court's assertion that youthfulness is a justification for diminished juvenile culpability operates as a universally mitigating factor in juvenile sentencing.[124] This opens the door to individualized sentencing of all juvenile offenders. While the Court does state that rendering youth "irrelevant . . . poses too great a risk of disproportionate punishment," when imposing only the "harshest prison sentence,"[125] the Court's rationale is applicable to all mandatory sentencing schemes, as the mitigating factors of youth are inherently present in all sentencing considerations with regard to juvenile offenders.[126] For example, the Court's discussion of the "flaws [in] imposing mandatory life-without-parole" on juveniles reveals a transferrable justification with regard to the disproportionate effects of such sentences on less culpable, youthful individuals.[127] In saying that "[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it,"[128] the Court identifies common reality inherent in all mandatory sentences applied to juveniles. The Court further expresses dissatisfaction that

> [u]nder these schemes, every juvenile [would] receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. . . . [E]ach juvenile (including these two 14-year-olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses . . . .[129]

The rationale for mitigating all juvenile sentencing with consideration of an individual offender also has an important degree of logical transferability with regard to the Court's analysis of both punitive goals and youthfulness. The punitive goals of criminal sentencing and the principles of lessened culpability due to an offender's youthfulness are equally implicated in other mandatory sentencing schemes.[130] The Court rec-

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124. *See Miller*, 132 S. Ct. at 2464.

125. *Id.* at 2469.

126. *Id.* at 2467 (discussing the application of the mitigating qualities of youth throughout juvenile sentencing jurisprudence and recognizing that "we insisted in these rulings that a sentencer have the ability to consider the 'mitigating qualities of youth.' Everything we said in *Roper* and *Graham* about that stage of life also appears in these [prior] decisions." (citation omitted) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993))); *id.* at 2466 (discussing how the "mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations").

127. *See id.*

128. *Id.*

129. *Id.* at 2467–68.

130. *See* Waldron, *supra* note 118, at 786–90; *see also* Powers, *supra* note 30, at 254 ("[M]andatory minimums clearly disserve the best interests of juveniles tried as adults in failing to

ognized that where "'[t]he heart of the retribution rationale' relates to an offender's blameworthiness," a mandatory imposition of life without parole is scarcely useful in sentencing a less culpable offender.[131] This same rationale applies to all mandatory sentencing schemes because such schemes not only preclude consideration of a juvenile's categorically lessened culpability, but preclude individualized consideration of that juvenile as well.[132] In addition, the punitive goal of deterrence is not likely achieved by any mandatory sentencing scheme, where the *Miller* Court itself asserted, "'the same characteristics that render juveniles less culpable than adults'—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment."[133] This rationale is applicable to any mandatory sentences, where any potential punishment is likely to have little effect on juvenile actions.[134]

The second piece of *Miller*'s rationale that applies to all mandatory juvenile sentencing is the juvenile's youthful characteristics. The *Miller* Court's rationale is transferable to other mandatory sentencing schemes as the same characteristics of youth are inherent in all juveniles. For example, the *Miller* Court leans heavily on the principles expressed in *Thompson*, *Roper*, and *Graham*: "youth is more than a chronological fact";[135] it is a time when people are "most susceptible to influence and to psychological damage";[136] "it is a time of immaturity, irresponsibility, 'impetuousness[,] and recklessness'";[137] "[a]nd its 'signature qualities' are all 'transient.'"[138] The Court's own rationale for requiring individualized consideration of juveniles when imposing the "[s]tate's harshest penalties," demands extension, as "a sentencer misses too much if he treats every child as an adult" in any sentencing scheme.[139] This is especially true where "[t]he features that distinguish juveniles from adults . . . put them at a significant disadvantage in criminal proceedings."[140] Juveniles tend not to trust adults and are unable to comprehend the processes and players associated with the justice system, such that juveniles do not cooperate in their own defense—this leads to diminished quality of advocacy on a juvenile's behalf.[141]

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consider the distinct needs and developmental level of each child offender, while providing questionable benefits, if any, to the country as a whole." (footnote omitted)).

131. *Miller*, 132 S. Ct. at 2465 (alteration in original) (quoting Graham v. Florida, 560 U.S. 48, 71 (2010)).

132. Feld, *supra* note 1, at 129.

133. *Miller*, 132 S. Ct. at 2465 (quoting *Graham*, 560 U.S. at 72).

134. Dutton, *supra* note 16, at 200.

135. *Miller*, 132 S. Ct. at 2467 (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)) (internal quotation marks omitted).

136. *Id.* (quoting *Eddings*, 455 U.S. at 115) (internal quotation mark omitted).

137. *Id.* (alteration in original) (quoting Johnson v. Texas, 509 U.S. 350, 368 (1993)).

138. *Id.* (quoting *Johnson*, 509 U.S. at 368).

139. *Id.* at 2468.

140. *Id.* (quoting Graham v. Florida, 560 U.S. 48, 78 (2010)) (internal quotation marks omitted).

141. *Graham*, 560 U.S. at 78.

The Court's rationale, focusing on the juvenile offender, is transferable to mandatory sentences other than a life without parole. In fact, the *Miller* Court recognized the inherent transferability of its own rationale, stating, "[N]one of what is said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific."[142] The transferability of *Miller*'s rationale to all juvenile sentencing schemes is critical because the same dangers underlying the Court's insistence upon individualized sentencing when considering the imposition of life without parole on a juvenile are present in all other mandatory juvenile sentencing schemes, including the imposition of undeserved and disproportionate sentences.[143] Public policy would generally necessitate an extension of the Court's rationale.[144]

The Court employs one crime-specific inquiry in *Miller*. In cases of mandatory life-without-parole sentences will juveniles serve "a *greater* sentence than those adults [convicted of homicide] will serve."[145] Though this consideration turns on the particular sentence rather than the juvenile's individual circumstances, this factor alone is not dispositive in light of the Court's broader rationale.

Therefore, when determining whether to contain *Miller*'s holding, it remains critical to focus on the broader rationale to which the Court devoted its attention. This requires understanding the difference between the legal argument the *Miller* Court used to extend individualized sentencing to juveniles and the overarching rationale the Court employs as the broader justification for such an extension. The Court first focused on the harsh nature of mandatory life without parole to bridge two lines of precedent and legitimize the extension of an individualized sentencing requirement under death penalty jurisprudence; the Court's subsequent discussion and stated reasons for extending the individualized sentencing requirement, however, focused on the lesser culpability and youthful status of the juveniles themselves. This is wholly transferable to all mandatory juvenile sentencing schemes and is not foreclosed just because the *Miller* Court was not asked to decide the constitutionality of such all mandatory schemes.[146] Subsequent courts must therefore be careful not to lose sight of the rationale the *Miller* Court employed in reaching its narrow outcome. To do so, would be to mistake the means—comparing

142. Marsha L. Levick & Robert G. Schwartz, *Practical Implications of* Miller *and* Jackson*: Obtaining Relief in Court and Before the Parole Board*, 31 LAW & INEQ. 369, 372 (2013) (quoting *Miller*, 132 S. Ct. at 2465) (internal quotation marks omitted).

143. *See Miller*, 132 S. Ct. at 2467–68 ("Under these [mandatory] schemes, every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one."); *see also* Dutton, *supra* note 16, at 199–200.

144. Waldron, *supra* note 118, at 783–90 (recognizing that children are different).

145. *Miller*, 132 S. Ct. at 2467–68.

146. *See* Slobogin, *supra* note 8, at 110 ("[T]he majority opinion in *Miller* focused on the inability of mandatory penalties to reflect individualized desert determinations, not on the absolute length of the sentence.").

life without parole and the death penalty to extend individualized sentencing—for the end, which is simply not the case.

2. Standards for Individualized Consideration: Youthfulness as a Mitigating Factor

Of course, such individualized consideration is not synonymous with loose or unbridled discretion; rather, it must be guided by the enumerated factors and overall spirit expressed in *Miller*.[147] These factors buttress, and cannot be divorced from, the Court's holding, and for that reason, should guide subsequent courts in consideration of juvenile offenders.[148] There may be some concern—arguably well-founded concern, given lower courts' application of *Miller*—that the *Miller* decision has opened the door to unbridled discretion when courts conduct individual considerations in sentencing juveniles to life without parole.[149] However, correct application of individualized sentencing under *Miller* limits this possibility and requires, at least, that the factors of youth mitigate the severity of the crime on behalf of a juvenile, not provide a basis to aggravate a sentence.[150]

The *Miller* Court, echoing jurisprudence, outlines four mitigating factors: (1) "chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences";[151] (2) background, including family and home environment; (3) mental and emotional development; and (4) circumstances of the crime, "including the extent of his participation in the conduct and the way familial and peer pressures may have affected him."[152] It is important to note, the *Miller* Court assesses these factors with a careful eye towards how they advocate on behalf of a juvenile,[153] after noting the objective, scientific fact that youth have a "diminished culpability and heightened capacity for change."[154] Thus, while the Court engages a subjective analysis of the juvenile offenders' family background and environment and the particularities of the offenders' crimes, the Court focuses only on the

147. *Miller*, 132 S. Ct. at 2467; *see* Janet C. Hoeffel, *The Jurisprudence of Death and Youth: Now the Twain Should Meet*, 46 TEX. TECH L. REV. 29, 50 (2013) ("[I]ndividual assessments made without any guidance can lead to arbitrary and capricious decision-making, an issue that has plagued transfer decisions.").

148. *See* Waldron, *supra* note 118, at 775 (noting, in its discussion of *Miller* that "[i]ndividualized review is a comprehensive approach to juvenile sentencing, under which a court must consider mitigating factors such as susceptibility to peer pressure, underdeveloped brains, and traumatic life stories").

149. Berkheiser, *supra* note 117, at 510 ("*Miller*, with its mandate of individualized consideration at sentencing, reopens the door to all of the malignity of subjective decision-making and its fruits.").

150. *See Miller*, 132 S. Ct. at 2469 (requiring courts, before imposing sentences of life without parole, to "take into account how children are different").

151. Straley, *supra* note 1, at 995 n.181 (quoting *Miller*, 132 S. Ct. at 2468).

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

153. *Id.* at 2468–69.

154. *See id.*

mitigating aspects of those factors. For example, the Court observed one of the offenders, Jackson, had a background of family "immersion in violence," after noting that a juvenile cannot remove himself from certain family situations, "no matter how brutal or dysfunctional."[155] This provides guidance as to how these factors should be weighed by subsequent courts, as the *Miller* Court appears to affirm the *Roper* Court's mandate that a juvenile offender's youthfulness not be "counted against him,"[156] but instead work on his behalf. There is no reason subsequent courts should fail to do otherwise,[157] and these factors, and their mitigating purpose, must be strictly employed by courts to mitigate harsh sentences, not exacerbate them.

III. *STATE V. BROWN*

While *Miller*'s rationale for individualized consideration of youthful offenders is applicable to all juvenile sentencing proceedings, a wave of subsequent decisions reveal the tendency to limit *Miller*'s reach. Illustrating this trend is *State v. Brown*.[158] Interpreting *Miller*, the Kansas Supreme Court held that a mandatory hard twenty life sentence was not unconstitutional under Eighth Amendment principles.[159] In *Brown*, a juvenile offender appealed her conviction for "felony murder and attempted aggravated robbery."[160] The juvenile appealed on multiple grounds, including: (1) improper "juvenile jurisdiction waiver";[161] and (2) an unconstitutional sentence in light of the *Miller v. Alabama* ruling.[162]

A. Facts

Keaira Brown was thirteen years old when she allegedly shot sixteen-year-old Scott Sappintgon, Jr. at point-blank range in an attempted robbery.[163] In light of fingerprints, DNA evidence, and eyewitness accounts connecting her to bloody clothing and to the scene of the crime, Brown was charged with felony murder based on the offense of attempted aggravated robbery.[164] The state sought "authorization to prosecute Brown as an adult,"[165] under a statute that presumed a juvenile to be a juvenile "unless good cause [was] shown to prosecute the juvenile as an

155. *Id.* at 2468.
156. Berkheiser, *supra* note 117, at 508 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)) (internal quotation mark omitted).
157. *See Miller*, 132 S. Ct. at 2468–69.
158. 331 P.3d 781 (Kan. 2014).
159. *Id.* at 797.
160. *Id.* at 785.
161. *Id.* at 785–86.
162. *Id.* at 786.
163. *Id.* at 785–86.
164. *Id.* at 786.
165. *Id.*

adult."[166] The district court waived juvenile jurisdiction using an eight-factor test that considered the following:

> "(1) The seriousness of the alleged offense and whether the protection of the community requires prosecution as an adult . . . ;
>
> "(2) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
>
> "(3) whether the offense was against a person or against property[,] [with] [g]reater weight . . . given to offenses against persons . . . ;
>
> "(4) the number of alleged offenses unadjudicated and pending against the juvenile;
>
> "(5) the previous history of the juvenile, including . . . whether [prior] offenses were against persons or property . . . ;
>
> "(6) the sophistication or maturity of the juvenile as determined by consideration of the juvenile's home, environment, emotional attitude, pattern of living or desire to be treated as an adult;
>
> "(7) whether there are facilities or programs available to the court which are likely to rehabilitate the juvenile prior to the expiration of the court's jurisdiction . . . ; and
>
> "(8) whether the interests of the juvenile or of the community would be better served by criminal prosecution or extended jurisdiction juvenile prosecution.[167]

In consideration of these factors the court placed emphasis on the serious nature of the crime, as it was committed against another person and was particularly violent.[168] These conclusions were weighed against a finding that the evidence "fell short of establishing a likelihood Brown could be rehabilitated before juvenile jurisdiction expired."[169] The court found Brown could not be rehabilitated after testimony from a psychologist that Brown's numerous behavioral disorders could be rehabilitated in the seven years the system had left to "work with her,"[170] but that because she had "become[] aggressive at 13, [she had] a statistically greater risk of reoffending than one who becomes aggressive at 17."[171] With specific regard to the maturity factor, however, the court made oral findings that the evidence supported a "wash"; there were "aspects of Miss Brown that [were] 13 years of age, and there [were] aspects of her that

166. *Id.* at 789 (quoting KAN. STAT. ANN. § 38-2347(a)(1) (2014) (internal quotation mark omitted).
167. *Id.* (quoting KAN. STAT. ANN. § 38-2347(e) (2014)).
168. *Id.* at 788.
169. *Id.*
170. *Id.*
171. *Id.*

[were] an adult age."[172] Here "the court did not find the evidence of Brown's maturity level was enough to consider that factor in the analysis."[173] Brown's history also supported waiver of jurisdiction, where she had fired a gun and thrown rocks at a car in an altercation, hit her aunt with an iron, and sustained "57 disciplinary infractions" while housed in the juvenile detention center.[174] The court then made a more matter-of-fact finding that the community would be better protected through waiver of such jurisdiction.[175]

B. The Kansas Supreme Court's Analysis

On appeal, Brown challenged three basic conclusions proffered by the lower court with regard to the waiver of juvenile jurisdiction. Brown argued: (1) the court improperly gave her the burden of proof with regard to showing the ability of rehabilitation; (2) the court erred in considering the seriousness, violence nature, and against-a-person factors separately, though their facts substantially overlapped; and (3) the court impermissibly relied on the nature of the crime and her "grooming habits" in determining that her maturity went "beyond that of juvenile."[176]

While the Kansas Supreme Court did not use *Miller* in reviewing the trial court's decision to transfer Brown, this Comment argues the court's deference to the trial court's runaway discretion, when viewed in light of the effects of juvenile transfer to adult court, nevertheless warrant the use of *Miller*'s individual consideration requirement in all juvenile sentencing. First, the Kansas Supreme Court found the district court did not improperly give Brown the burden of proof by considering statements made by Brown's psychologist on cross-examination; reliance on the psychologist's statements indicating various programs "could help rehabilitate Brown," but that she would be a "challenging case," did not fall outside the scope of permissible considerations in deciding the rehabilitation factor.[177] Notably, however, the court took no issue with the fact that Brown's age worked against her in that analysis.

Second, the court dismissed Brown's argument that separate consideration of the first three factors was "duplicitous," resulting in an unreasonable weight in favor of transfer.[178] The court framed each factor as an inquiry that "concern[ed] different subject matter," where the seriousness of the crime related to the gravity, and the violence of the crime

172. *Id.* at 790 (quoting the oral ruling of the district court).
173. *Id.* at 788.
174. *Id.* at 787.
175. *Id.* at 788.
176. *Id.* (emphasis omitted) (quoting State v. Stevens, 975 P.2d 801, 805 (Kan. 1999)) (internal quotation mark omitted).
177. *Id.* (quoting trial testimony from Brown's psychologist) (internal quotation marks omitted).
178. *Id.*

related to the manner in which a grave crime may be committed.[179] Here, the court found no error in focusing a substantial amount of the analysis on the crime, as long as each factor considered a theoretically different facet of that crime.

Finally, with regard to Brown's arguments that the lower court improperly considered her crime and dress habits in concluding that her maturity favored transfer, the court found both without merit.[180] First, the court permitted consideration of Brown's crime in relation to her maturity, because that factor was not given dispositive treatment by the lower court. However, four of the eight factors considered in the transfer decision already involved assessing the nature of Brown's crime. Thus, it is arguable that allowing one more factor to focus on the crime itself, which often tipped a particular factor in favor of transfer, was dispositive in effect, as it then pushed five of the eight factors towards transfer.[181] Second, the court found no abuse in the lower court's memorandum because the district court had specified that its oral findings, not the memorandum, were to control.[182] Here, while the memorandum indicated "that Brown's 'choice at her young age to adopt the grooming habits and clothing of a boy are . . . indications of a [more] mature attitude,'" the Kansas Supreme Court focused its review on the oral findings as directed by the lower court and found no abuse of discretion in those findings, however sparse the lower court's oral analysis had proved.[183] The court therefore affirmed the waiver of juvenile jurisdiction.[184]

At trial, Brown was convicted and sentenced to a mandatory "hard 20 life sentence for [felony] murder and a concurrent 32-month sentence for attempted aggravated robbery."[185] After affirming the waiver of juvenile jurisdiction, the court considered the constitutionality of Brown's mandatory hard twenty life sentence in light of *Miller*.

Brown argued that because she was a minor and the mandatory sentencing scheme failed to consider her age, the imposition of her hard twenty life sentence was unconstitutional under *Miller*.[186] Nonetheless, the Kansas Supreme Court held that such a sentence did not fall within the *Miller* holding.[187] To find "mandatory life-with-parole sentences [as applied to juveniles] are unconstitutional," it asserted, required an unwarranted extension of the *Miller* decision.[188] Specifically, the court rea-

179. *Id.*
180. *Id.* at 790–91.
181. *See id.* at 789, 791.
182. *Id.* at 788.
183. *Id.* at 791 (second alteration in original) (quoting memorandum opinion of the district court).
184. *Id.*
185. *Id.* at 786.
186. *Id.* at 796–97.
187. *Id.* at 797.
188. *Id.*

soned that *Miller* was premised on notions of lessened juvenile culpability and the analogous nature of "juvenile life without parole sentences to capital punishment."[189] Specifically, the court noted that a mandatory hard twenty life did not meet the same threshold of severity as to justify elevating the sentence to life-without-parole status and trigger *Miller*'s applicability; the "parallels between life-without-parole sentences and the death penalty" were not present in a life with parole sentence.[190] Therefore, the Kansas Supreme Court recognized the opportunity to extend *Miller*'s decision, yet found *Miller*'s rationale "inapplicable," where "[a] hard 20 life sentence [did] not irrevocably adjudge a juvenile offender unfit for society."[191]

IV. STATES ARE SLOWLY DISMANTLING *MILLER*

In the aftermath of *Miller*, twenty-nine state sentencing statutes, imposing mandatory life without parole, were invalidated as applied to juveniles.[192] This requisite response, however, was not the end-all-be-all with regard to *Miller*'s reach in juvenile sentencing jurisprudence. Many courts and state legislatures have grappled, and will continue to grapple, with other pertinent issues implicated in *Miller*'s broad rationale.[193] As predicted, subsequent decisions by federal circuits, state supreme courts, and legislatures have created a tug-of-war over both the retroactivity of *Miller*,[194] the extent to which *Miller*'s principles extend, if at all, to pun-

189. *Id.* at 796–97.

190. *Id.* at 797.

191. *Id.*

192. Levick & Schwartz, *supra* note 142, at 396.

193. *See* Craig S. Lerner, *Sentenced to Confusion:* Miller v. Alabama *and the Coming Wave of Eighth Amendment Cases*, 20 GEO. MASON L. REV. 25, 38 (2012) ("At some point the Supreme Court may condescend to clarify whether long prison sentences should be deemed LWOP for purposes of *Graham* and *Miller*.").

194. While retroactivity is a separate, complex legal doctrine, it has been considered among the ways in which subsequent courts limit *Miller*'s reach by foreclosing all meaningful opportunity for release for juveniles sentenced to life without parole before *Miller*. Recent Case, *supra* note 13, at 1256 (noting the effects of not applying *Miller* retroactively: "[M]any defendants who were sentenced as juveniles—with all the mitigating propensities of youth—will not be afforded individualized sentencing hearings simply because of the timing of their decisions, rather than because they are not constitutionally entitled to such protection."); *see also* Mardarewich, *supra* note 104, at 125–26 (recognizing that *Miller* left courts "without guidance when considering whether this ruling should be applied retroactively").

The Supreme Court granted certiorari in *Montgomery v. Louisiana* in March 2015 to resolve the split amongst the states on this issue. State v. Montgomery, 141 So. 3d 264 (La. 2014) (mem.), *cert. granted, sub nom.* Montgomery v. Louisiana, 135 S. Ct. 1546 (2015). Some courts have declared that *Miller* applies retroactively. *See, e.g.*, Evans-Garcia v. United States, 744 F.3d 235, 240 (1st Cir. 2014) (finding, in light of the government's concession, a prima facie showing that *Miller* applies retroactively); In re Pendleton, 732 F.3d 280, 282 (3d Cir. 2013) (finding a "prima facie showing that *Miller* is retroactive"); Johnson v. United States, 720 F.3d 720, 721 (8th Cir. 2013) (finding, after the government conceded retroactivity, a *prima facie* showing that *Miller* applies retroactively); Casiano v. Comm'r of Corr., 115 A.3d 1031, 1037 (Conn. 2015) ("We conclude that the rule announced in *Miller* is a watershed rule of criminal procedure that must be applied retroactively."); Falcon v. State, 162 So. 3d 954, 962 (Fla. 2015) (finding *Miller* applies retroactively); State v. Ragland, 836 N.W.2d 107, 117 (Iowa 2013) (holding *Miller* applies retroactively); State v. Mantich, 842 N.W.2d 716, 731 (Neb. 2014) ("Because the rule announced in *Miller* is more substantive than procedural and because the Court has already applied that rule to a case on collateral review, we

ishments other than mandatory life without parole,[195] and even juvenile transfer decisions.[196]

As a result, the *Miller* decision has become the pinnacle of controversy and uncertainty regarding juvenile sentencing, not as much by reason of its holding, but rather, by reason of its potentially applicable rationale to further limit juvenile sentencing options.[197] Because "the Supreme Court failed to specify what sentencing guidelines should dictate . . . states and courts [are] without guidance when determining the appropriate sentence for juveniles convicted of violent crimes."[198] Now, three years after *Miller*, the instruction of hindsight reveals a wave of state and federal decisions reluctantly addressing *Miller* and limiting its reach by applying only its narrowest holding.

A. Incrementally Avoiding Miller

State courts and legislatures have scrambled to find constitutionally viable sentencing schemes for juveniles convicted of murder "in place of mandatory life without parole."[199] Most states, indicative of both uncer-

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conclude that the rule announced in *Miller* applies retroactively . . . ."); State v. Mares, 335 P.3d 487 (Wyo. 2014) (stating that *Miller* is, "despite its procedural aspects, a substantive rule"). Other courts have held that *Miller* does not apply retroactively. *See, e.g.*, Johnson v. Ponton, 780 F.3d 219, 226 (4th Cir. 2015) ("We therefore hold that the Supreme Court has not held the *Miller* rule retroactively applicable, and that the Court's holdings do not dictate retroactivity because the rule is neither substantive nor a watershed rule of criminal procedure."); In re Morgan, 713 F.3d 1365, 1368 (11th Cir. 2013) (finding *Miller* did not apply retroactively); People v. Tate, 352 P.3d 959, 972 (Colo. 2015) ("Because *Miller* is procedural in nature, and is not a "watershed" rule of procedure, it does not apply retroactively to cases on collateral review of a final judgment."); State v. Tate, 130 So. 3d 829, 831 (La. 2013) ("[W]e find *Miller* does not apply retroactively in cases on collateral review as it merely sets forth a new rule of criminal constitutional procedure . . . ."); Martin v. State, 865 N.W.2d 282, 292 (Minn. 2015) (holding "*Miller* does not apply retroactively to a juvenile whose LWOR sentence became final before the *Miller* rule was announced"); Chambers v. State, 831 N.W.2d 311, 331 (Minn. 2013) (concluding the defendant was "not entitled to the retroactive benefit of the *Miller* rule in a postconviction proceeding); Beach v. State, 348 P.3d 629, 642 (Mont. 2015) (holding *Miller* did not apply retroactively).

195. Kelly Scavone, Note, *How Long Is Too Long?: Conflicting State Responses to De Facto Life Without Parole Sentences After* Graham v. Florida *and* Miller v. Alabama, 82 FORDHAM L. REV. 3439, 3457–77 (2014); *see also* Elisabeth A. Archer, Note, *Establishing Principled Interpretation Standards in Iowa's Cruel and Unusual Punishment Jurisprudence*, 100 IOWA L. REV. 323, 325, 338 (2014) (arguing the Iowa Supreme Court failed when it agreed with "[d]efendant Denem Anthony Null [who] alleged that his 75-year sentence, with parole eligibility after 52.5 years, constituted cruel and unusual punishment in light of the United States Supreme Court's decision in *Miller v. Alabama*").

196. Laura Cohen, *Freedom's Road: Youth, Parole, and the Promise of* Miller v. Alabama *and* Graham v. Florida, 35 CARDOZO L. REV. 1031, 1060 (2014).

197. Scavone, *supra* note 197, at 3441–42 ("The narrow holding of *Miller* has left several residual questions regarding the future of juvenile sentencing and how states should incorporate both the *Miller* and *Graham* decisions into their sentencing structure. . . . Responses in state courts to the issue of virtual LWOP sentences after *Miller* and *Graham* have varied significantly." (footnote omitted)); *see also* Nancy Gertner, Miller v. Alabama*: What It Is, What It May Be, and What It Is Not*, 78 MO. L. REV. 1041, 1052 (2013) ("Some courts have refused to apply *Miller* at all, concluding that it is not retroactive. Other courts have ignored the decision's broad themes, focusing instead on its narrow holding and going so far as to reaffirm lengthy sentences for juveniles after an ostensibly 'individualized' determination." (footnote omitted)).

198. *See* Mardarewich, *supra* note 104, at 125–26.

199. Levick & Schwartz, *supra* note 142, at 389.

tainty and a refusal to see juvenile offenders as categorically different than adult criminals, have simply imposed the "next most severe statutory sentence available for that offense."[200] Under the guise of judicial minimalism, courts express an unwillingness to consider the *Miller* rationale in juvenile sentencing, making incrementally nominal decisions to avoid its application. This avoidance is most evident in transfer decisions and sentencing mechanisms, which have contained *Miller* to its narrow holding. This Comment first considers transfer mechanisms.

1. Transfer Mechanisms—Out of *Miller*'s Reach: When Mandatory Juvenile Sentencing Depends on Charging Juveniles as Adults

"A transfer order is described as the harshest sanction that may be imposed on a juvenile offender . . . ."[201] At first glance, this may appear to be an interesting assertion considering the notion that an actual term-of-years sentence is the traditional notion of a "sanction" imposed on criminal offenders.[202] However, this is only a surprising argument if charging and sentencing are viewed as two separate decisions, each existing in a vacuum.[203] But this is not the case. Charges dictate sentencing in the adult criminal system; they focus on the crime of an offender and trigger certain permissible or mandatory sentences corresponding to that crime once guilt is determined. Therefore, when a juvenile is transferred to adult jurisdiction, the effect is this: the focus shifts from the individual juvenile and their mitigating circumstances to the crime committed.[204] And as a result, charging a juvenile as an adult causes "significant adult sentences" to automatically attach to that youth upon conviction for the charged offense, regardless of individual circumstances.[205] For these rea-

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200. *Id.*

201. Cintron, *supra* note 39, at 1261; *see also* Hess, *supra* note 56, at 317 ("The Court [has] recognized that the question of whether to transfer a child to adult court is 'critically important' because it involves 'tremendous consequences,' including that the 'child will be deprived of the special protections and provisions' of the juvenile court." (quoting Kent v. United States, 383 U.S. 541, 553–54 (1966))).

202. *See* Samuel Marion Davis, *The Criminalization of Juvenile Justice: Legislative Responses to "The Phantom Menace,"* 70 MISS. L.J. 1, 18 (2000) ("Punitive options are available to criminal courts . . . .").

203. *See* Tchoukleva, *supra* note 18, at 93–94, 101–04 (asserting that transfer mechanisms are the "processes that allow juveniles to be sentenced to lengthy sentences to begin with," and that "mandatory sentencing schemes [are invoked] upon transfer"); *see also* Joseph E. Kennedy, *Juries for Juveniles*, 46 TEX. TECH L. REV. 291, 292–94 (2013) (recognizing the inherent connection between juvenile transfer or charging decisions and subsequent adult sentences imposed on juveniles).

204. Hamack, *supra* note 37, at 791 ("Because these waiver schemes trigger transfer based on the charged offense and the juvenile's age, they fail to focus on the individualized needs of the juvenile over the offense allegedly committed, thus failing to value rehabilitation over punishment."); *see* Tunnard, *supra* note 10, at 1332 ("Transfer decisions often leave the judge a choice between the light punishment of the juvenile system and the standardized sentencing for adults. Since a judge making the transfer decision will likely determine that a minor deserves a harsher sentence than he would receive in juvenile court, the importance of a sentencing judge's consideration of juvenile mitigation becomes paramount." (footnotes omitted)).

205. Eric K. Klein, Note, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 AM. CRIM. L. REV. 371, 391 (1998); *see also*

sons, transfer mechanisms are determinative of juvenile sentencing.[206] Transfer mechanisms not only implicate *Miller*'s rationale, but also serve to dismantle it by removing juveniles to a system that will not account for their individual, youthful circumstances.[207]

Though "challenges brought against mandatory transfer laws have largely failed on the notion that treatment in juvenile court is not a right," this does not foreclose application of *Miller*'s Eighth Amendment rationale where the logic and necessity to do so exist.[208] The *Miller* rationale should be applied to transfer mechanisms because juvenile transfers are determinative of sentencing:[209] The *Miller* rationale applies to harsh, mandatory sentencing schemes imposed on youth, and nothing triggers the harsh mandatory sentencing of a youth like transfer mechanisms.[210] Such mechanisms therefore fall within the contemplation of the *Miller* rationale, because where the "concerns [associated] with mandatory juvenile life without parole are the same as those with transfer," the need to focus on the youth's age as a mitigating factor in such decisions is just as critical.[211] And *Miller* is the polestar case, providing guidance for how courts must treat juveniles differently in transfer decisions.[212]

However, the *Miller* rationale is categorically undermined by state transfer mechanisms. Mandatory transfer schemes are the most obvious in their operation as instruments that are offensive to the *Miller* rationale since the lack of meaningful consideration with regard to a juvenile's status as a juvenile is prescribed in these transfers.[213] Of course, as the

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Hoeffel, *supra* note 148, at 52 (referring to *Miller* in stating that "Miller had been transferred from juvenile court, found guilty, and automatically sentenced to life without parole")

206. *But see* State v. Mays, 18 N.E.3d 850, 861 (Ohio Ct. App. 2014) ("[M]andatory bindover does not equate to punishment any more than the mere prosecution of an adult in the common pleas court constitutes punishment." (quoting State v. Quarterman, No. 26400, 2013 WL 4506970 at *4 (Ohio Ct. App. Aug. 21, 2013) (Carr, J., concurring)) (internal quotation marks omitted)).

207. *See* Mariko K. Shitama, Note, *Bringing Our Children Back from the Land of Nod: Why the Eighth Amendment Forbids Condemning Juveniles to Die in Prison for Accessorial Felony Murder*, 65 FLA. L. REV. 813, 831 (2013).

208. *See* Hoeffel, *supra* note 148, at 51, 54 (asserting that the individualization rationale used in *Graham* and *Miller* is applicable to mandatory transfer of juveniles to adult court). *But see* Knox, *supra* note 43, at 1269 ("[S]tatutes in every state create a statutory entitlement to adjudication in courts specialized to deal with delinquency.").

209. *See* Hoeffel, *supra* note 148, at 51.

210. Tchoukleva, *supra* note 18, at 101 (discussing the effects of transfer mechanisms, saying that "[o]nce in adult proceedings, juveniles are subject to mandatory sentencing laws and, in some states, are incarcerated with adults").

211. Hoeffel, *supra* note 148, at 53 (noting that although the *Miller* Court was discussing mandatory sentencing, the same language would apply to juvenile transfer, where the Court finds "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed." (quoting Miller v. Alabama, 132 S. Ct. 2455, 2462 (2012)) (internal quotation marks omitted)).

212. *Id.* at 30; *see* Hoeffel, *supra* note 148, at 32 (arguing for the application of death penalty jurisprudence to juvenile transfer to provide guidance to judges, where "the evidence is clear that both judges and prosecutors make arbitrary and capricious decisions").

213. *Id.* at 50 ("Both methods of mandatory transfer result in a juvenile's case being filed in adult court without a hearing and without individualized consideration of the juvenile's circumstances."); *see also* Shitama, *supra* note 209, at 830 ("The Supreme Court in *Miller* noted that of the

Brown case illustrates, regardless of whether automatic or permissible at the discretion of a judge or the prosecution,[214] all transfer mechanisms dictate the nature of available sentences to a juvenile offender, as the *Brown* court's transfer of Brown to adult court jurisdiction triggered her hard twenty sentence. Juvenile transfer should therefore trigger the same meaningful consideration of the mitigating factors of youthfulness referenced in *Miller*,[215] because meaningful individualized consideration is not guaranteed at the transfer stage, the adult sentencing process is not itself individualized, and the *Miller* rationale is equally undermined by the consequences of the transfer.[216] The offensive operation of mandatory transfers has already been addressed by academics in relation to the *Miller* decision.[217] Therefore, this Comment's discussion of state transfer mechanisms and their diluting effect on the *Miller* rationale is limited to discretion-based judicial waivers. These waivers effectively label juveniles as adults and preclude individualized consideration in sentencing. Even the *Miller* Court questions whether discretionary transfer laws "adequately address the unique characteristics of juvenile offenders,"[218] noting that discretionary transfer "has limited utility, because the decisionmaker typically will have only partial information about the child or the circumstances of his offense."[219]

Once juvenile jurisdiction has been waived, the already-attached "adult" label precludes more guided and informed consideration of the juvenile when it comes to sentencing, because "once [a juvenile is] convicted in adult court, mandatory sentencing laws proscribe age and other mitigating factors from weighing in the determination of a child offender's punishment."[220] This occurs even when the transfer decision involves the balancing of various individual-related factors, because the broad discretion of the court or prosecution is not effectively policed by clear legislative mandates, creating the risk that courts may make arbi-

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twenty-nine jurisdictions that impose mandatory life without parole on juveniles, 'about half' have mandatory transfer laws that 'place at least some juvenile homicide offenders in adult court automatically, with no apparent opportunity to seek transfer [back] to juvenile court.'" (alteration in original) (quoting *Miller*, 132 S. Ct. at 2474)).

214. Davis, *supra* note 204, at 6–8 (discussing the circumstances under which "[t]he vast majority of states . . . provide for waiver by the juvenile court"); *see also* Tamara L. Reno, Comment, *The Rebuttable Presumption for Serious Juvenile Crimes: An Alternative to Determinate Sentencing in Texas*, 26 TEX. TECH L. REV. 1421, 1435 (1995) ("The increase in serious juvenile crime prompted at least twenty states in 1994 to attempt to reform their juvenile codes to prosecute more serious juvenile offenders as adults.").

215. *See Miller*, 132 S. Ct. at 2467.

216. Tchoukleva, *supra* note 18, at 94 ("[I]n order to give full effect to its reasoning in *Miller*, the Supreme Court needs to abolish . . . [even] discretion[ary] transfers, and mandatory sentencing schemes upon transfer."); *see also id.* at 105 ("Even if a judge deems that transfer is in the interest of the offender and society, juveniles should be exempt from mandatory sentencing schemes.").

217. *See, e.g.*, Shitama, *supra* note 209, at 830.

218. Tunnard, *supra* note 10, at 1332.

219. *Miller*, 132 S. Ct. at 2460.

220. Shitama, *supra* note 209, at 831.

trary and capricious decisions about who to send to adult court.[221] And, as demonstrated in *Brown*, review of transfer decisions usually involves deference to the lower court's analysis of the evidence.[222] Even if transfer decisions were more effectively guided by state law, it is often true that the "transfer hearing [itself is] an inadequate place for [a] judge to learn much about the juvenile before him in terms of his ultimate disposition in the adult system."[223] As a result, judges do not effectively consider mitigating circumstances and are not required, by statute, to do so.[224]

Despite the risks of wrongful transfer even when individualized consideration is given, a juvenile offender is irreversibly labeled an adult once transfer determinations are made. This forecloses any chance the youth may have at considerations of mitigating factors in the sentencing process, where sentences automatically attach upon conviction for particular crimes.[225] Other than the categorical bans on the death penalty and life without parole for nonhomicidal offenses, juveniles are adults in every sense of the word after the transfer order is issued.[226] In a system that ties the charged crime to a sentence and is dedicated to the motto, "[c]ommit an adult crime, do adult time,"[227] juvenile transfers have become a means of sentencing youth to the adult fate before they ever receive a term-of-years at a formal sentencing hearing. *Miller*'s rationale makes it clear that the harsh consequences of juvenile transfer must be mitigated by a more guided consideration of the offender's youthful status.

i. Transfer Mechanism in *State v. Brown*

State v. Brown illustrates the need for strict guidance in juvenile transfer. In *Brown*, the Kansas Supreme Court undermined *Miller*'s rationale by affirming the transfer of juvenile jurisdiction despite the arguably misguided use of discretion by the lower court and regardless of the decision's harsh consequence. The trial court ignored the presumption in favor of continued juvenile jurisdiction and failed to consider all statutorily prescribed factors in that light.[228] The Kansas Supreme Court, upon review for such abuse,[229] approved this unbridled judgment. As a result

221. *See* Hoeffel, *supra* note 148, at 47.

222. State v. Brown, 331 P.3d 781, 791 (Kan. 2014).

223. Hoeffel, *supra* note 148, at 60.

224. *See id.* at 56 ("[T]he courts and the states have put almost no work into guiding discretion in judicial transfer decisions.").

225. Shitama, *supra* note 209, at 831.

226. *See* Robert Visca, Comment, *An Evolving Society: The Juvenile's Constitutional Right Against a Mandatory Sentence of Life (and Death) in Prison*, 9 FLA. INT'L U. L. REV. 159, 167 (2013).

227. Klein, *supra* note 207, at 372.

228. *See* State v. Brown, 331 P.3d 781, 789 (Kan. 2014) ("The juvenile shall be presumed to be a juvenile unless good cause is shown to prosecute the juvenile as an adult." (quoting KAN. STAT. ANN. § 38-2347(a)(1) (2014))).

229. *Id.* at 787 ("On appeal, that decision is subject to a dual standard of review. The district court's factual findings are reviewed for substantial competent evidence. But the district court's

of these incremental decisions, Brown was charged as an adult for her crimes and received the corresponding mandatory sentence for those crimes, with no individual consideration of her youthfulness.[230]

a. The Lower Court

The *Brown* trial court did not give proper consideration to the juvenile-related statutory factors required in transfer decisions for juveniles.[231] Starting with a presumption of juvenile jurisdiction, the factors were designed to discourage transfer unless the circumstances, after considering each factor meaningfully, demanded otherwise.[232] However, the trial court considered each factor in relation to the crime thirteen-year-old Brown committed and not in light of her youthfulness,[233] thus failing to give the factors proper weight in terms of their mitigating effect and their presumption.[234]

Turning to the statutory factors, only four of the eight factors required consideration of the individual juvenile offender: the unadjudicated offenses pending against the youth; the history of the juvenile with regard to that juvenile's particular crimes; the maturity of the offender (which still allowed consideration of the committed crime, per the Kansas Supreme Court's ruling in *Brown*); and the possible rehabilitation of the offender.[235] These factors will be referred to as the "juvenile-related" factors. For the sake of leniency, one might suggest the final factor considered the individual juvenile, instructing the court to analyze whether the "interests of the juvenile or of the community would be better served by criminal prosecution."[236] However, as seen in *Brown*, this factor receives only lip service where the court limits its consideration to the interests of the community, not the best interests of Brown.[237] The remain-

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assessment of the eight statutory factors, which is based upon proved facts, should be reviewed for an abuse of discretion." (citations omitted)).

230. *See id.* at 796.

231. *See* Hoeffel, *supra* note 148, at 56–60 (discussing the need for increased guidance within statutory factors, where such factors have become increasingly empty in light of unbridled judicial discretion).

232. KAN. STAT. ANN. § 38-2347(a)(1) (2014).

233. *See Brown*, 331 P.3d at 788 ("Ruling from the bench, the district court waived juvenile jurisdiction. It cited the seriousness of the offense; that the offense was committed in an aggressive, violent, and willful manner; that it was a person offense; that the evidence fell short of establishing a likelihood Brown could be rehabilitated before juvenile jurisdiction expired; and that the interest of the community, *i.e.*, community protection, would be better served waiving juvenile jurisdiction.").

234. This is arguably a statutory failure and a flawed manner in which to make transfer determinations. *See* Hoeffel, *supra* note 148, at 58–59 (discussing how statutory frameworks and criteria for determining transfer provide judges with "standardless discretion" (quoting Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, *in* CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFERS OF ADOLESCENTS TO THE CRIMINAL COURT 90, 90 (Jeffrey Fagan & Franklin E. Zimring eds., 2000)) (internal quotation mark omitted)).

235. *Brown*, 331 P.3d at 789.

236. KAN. STAT. ANN. § 38-2347(e)(8) (2014).

237. *See Brown*, 331 P.3d at 788.

ing statutory factors considered the crime committed and the criminal tendencies of the juvenile offender.

Using the four juvenile-related factors, the trial court dismissed substantial evidence of Brown's mitigating circumstances with regard to Brown's history, maturity, and potential for rehabilitation, while clinging to evidence regarding the crime itself.[238] Where the *Miller* Court discussed the history of abuse, family environment, and youthful inability to spot consequence as mitigating factors,[239] the trial court's analysis of the prior offenses factor was a one-dimensional consideration of Brown's prior behavioral problems. The analysis ignored possible age-related and background circumstances that perhaps informed Brown's offenses; her mother's incarceration and Brown's own "conduct disorder," accompanied by depression and multiple suicide attempts were left completely out of the analysis, and the court found that Brown's criminal history weighed in favor of transfer.[240] This is, at best, a superficial consideration of Brown's individual, mitigating circumstances,[241] and illuminates the need for strict guidance in juvenile transfer decisions.

The court also failed to give proper mitigating weight to evidence concerning Brown's maturity by focusing on her crime. Evidence of Brown's maturity from Brown's father and a psychologist supported juvenile jurisdiction, where at least some of Brown's behavior—and most of the evidence the trial court assessed, other than her crimes—was consistent with a girl her age and "inconsistent with someone trying to present themselves as equal to adults."[242] The court ruled the maturity factor a "wash."[243] In doing so, the court denied that it considered the nature of Brown's crime dispositive. However, the court primarily relied on the circumstances of the crime to determine Brown should be adjudicated as an adult.[244] This not only offends the *Miller* rationale, which recognizes the general lack of maturity of juvenile offenders,[245] but re-

238. *See id.*

239. Miller v. Alabama, 132 S. Ct. 2455, 2468–69 (2012).

240. *Brown*, 331 P.3d at 788.

241. *See* Shitama, *supra* note 209, at 850 (explaining, that in light of *Miller*, "trial courts should conduct these sentencing hearings with the understanding that 'full consideration' of evidence that mitigates against life without parole should be considered by the sentencing body so that it may 'give a reasoned moral response to the defendant's background, character, and crime'" (quoting Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Responses in Capital Sentencing*, 11 U. PA. J.L. & SOC. CHANGE 237, 243 (2007))).

242. *Brown*, 331 P.3d at 788.

243. *Id.* at 790 (quoting oral ruling of the district court).

244. *Id.* at 791 (discussing the maturity factor the *Brown* court asserts that "[t]he Court is careful not to rely too heavily on the adult-like nature of the crime charged. While the Court does believe that it is relevant to the factor, it is clear in a large majority of waiver cases the crime will fit, by level of violence or planning or some other measure, into adult-type behavior. In this case, it certainly did. For a person to arm themselves, calmly approach a scene, slay a young man and then calmly leave the scene and dispose of incriminating evidence all are very adult activities" (quoting memorandum opinion of the district court) (internal quotation mark omitted)).

245. *See* Hoeffel, *supra* note 148, at 53.

veals the lack of substantial evidence in favor of transfer when considering Brown apart from her crime.[246]

In addition, the court ignored evidence concerning Brown's potential for rehabilitation. Finding an "absence of evidence" with regard to the possibility of rehabilitation, the court ruled this factor weighed in favor of transfer.[247] This ruling, however, was contrary to testimony by a psychologist that "it was possible to change Brown's behavior because she was still in her formative years and the juvenile system still had almost 7 years to work with her."[248] While additional evidence indicated Brown would be a "challenging case,"[249] this did not substantiate a finding that the rehabilitation factor supported transfer, especially in light of a presumption in favor of juvenile jurisdiction. Therefore, the court's improper consideration of the juvenile-related factors not only offended the statutory presumption in Brown's favor, but directly undermined *Miller*'s mandate that individualized consideration mitigate on behalf of a juvenile offender.[250] While transfer orders—discretion-based transfers by judicial waiver—have the appearance of legitimacy in their individualized determination that a juvenile should not be a youth in the eyes of the law, such an order hardly embodies the meaningful consideration contemplated by *Miller* if it fails to appropriate proper weight to mitigating circumstances of the juvenile, as was the case in *Brown*.[251]

Also, the court committed an abuse of discretion by applying Brown's age when convenient to support a waiver.[252] Both the Kansas statute and common sense mandate that the presumption of youthfulness and lack of maturity exists with regard to a thirteen-year-old unless the evidence clearly indicates otherwise; the court, however, appeared to forego this presumption in favor of an unwarranted evidentiary stalemate with regard to Brown's maturity.[253] Brown was thirteen; she clearly "looked to her mother for responses during . . . evaluation[,] . . . something [her psychologist said] a girl her age would do and [something] inconsistent with someone trying to present themselves as equal to

246. *See Brown*, 331 P.3d at 791 (using a subsequent written report, to make its only finding as to Brown's maturity weighing in favor of transfer, where Brown's "choice at her young age to adopt the grooming habits and clothing of a boy [were] indications of a [more] mature attitude" (alteration in original) (quoting memorandum opinion of the district court) (internal quotation marks omitted)).

247. *Id.* at 790.

248. *Id.* at 788.

249. *Id.* at 790 (quoting trial testimony of Brown's psychologist) (internal quotation marks omitted) ("[C]onsidering that this factor weighed in favor of adult prosecution, the district court relied on Cappo's cross-examination concessions that Brown would be a 'challenging case' . . . ." (quoting trial testimony of Brown's psychologist)).

250. *See* Feld, *supra* note 1, at 135–36.

251. *See* Hoeffel, *supra* note 148, at 60 ("Given the stakes, the transfer hearing should, in fact, allow the judge to learn as much as possible about the juvenile and his potential exposure in the adult system before making the decision to transfer him.").

252. *See Brown*, 331 P.3d at 788.

253. *See id.* at 790.

adults."[254] However, instead of allowing Brown's young age to mitigate in favor of her lack of maturity, the court struck that factor from its analysis.[255] Should the evidence have actually been a "wash," the presumption in favor of juvenile jurisdiction should have tipped the scales in favor of that presumed jurisdiction.[256]

The trial court had no problem reinstituting Brown's age into its consideration of rehabilitation, however, when Brown's age conveniently served to aggravate the possibility of rehabilitation. It is logical to conclude that the statutory presumption in favor of juvenile jurisdiction is based on the rationale that younger children are more likely to undergo successful rehabilitation, due to the young age at which they enter the system.[257] Thus, where a seventeen-year-old would not have been entitled to the presumption of juvenile jurisdiction because the system had less time to rehabilitate that juvenile.[258] However, the court ignored this rationale, and instead, afforded a hypothetical seventeen-year-old more benefit of the doubt with regard to rehabilitation than thirteen-year-old Brown, concluding that the early age at which Brown began her criminal activity rendered her incapable of rehabilitation no matter how long the system had to pursue such efforts.[259] Regardless of the statutory presumption juvenile status afforded Brown as a thirteen-year-old offender, the court leveraged her youthfulness against her, saying such aggressiveness at her young age made the road to rehabilitation harder than if she would have been seventeen at the time of her crimes.[260] Here, the court inverted the presumption in favor of rehabilitating juveniles under the age of fourteen. This is indicative of runaway discretion, as the lower court gave only lip service to the text of the statute and completely ignored its spirit.[261] The presumption in favor of juvenile jurisdiction was not sufficiently rebutted as to support transfer by the preponderance of the evidence.

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254. *Id.* at 788.

255. *See id.* at 790–91 ("I find—frankly that that [sophistication and maturity] factor is a wash. I think there are reasons to believe that there are—are aspects of Miss Brown that are 13 years of age, and there are aspects of her that are of an adult age. So I don't believe that is particularly helpful in this case." (quoting oral ruling of the district court) (internal quotation marks omitted)).

256. *See* Hoeffel, *supra* note 148, at 66.

257. *See id.* at 788, 790; *see also* Lisa S. Beresford, Comment, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment*, 37 SAN DIEGO L. REV. 783, 799 (2000).

258. *See* Beresford, *supra* note 261, at 799–800.

259. *See Brown*, 331 P.3d at 788.

260. *See id.*

261. *See* Hoeffel, *supra* note 148, at 58 ("'[A]pplication of the [statutory] factors that are considered relevant to the amenability determination is often pretextual'; the judges are much more interested in culpability and dangerousness." (quoting Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299, 330 (1999))).

b. The Kansas Supreme Court

In reviewing the lower court's decision, the Kansas Supreme Court affirmed the lower court's decision, although the record did not support transfer by a preponderance of the evidence in light of a statutory presumption favoring juvenile jurisdiction. First, in reviewing the factual findings with regard to the statutory factors, the Kansas Supreme Court ignored "substantial competent evidence [that did] not support a finding of fact on which the [lower court's] exercise of discretion [was] based."[262] While the lower court's factual findings regarding the crime-related factors supported transfer, the lower court did not meaningfully consider material evidence as to the juvenile-related factors, which should have mitigated transfer.[263] Though the Kansas Supreme Court was not permitted to "reweigh the evidence," it is arguable the lower court did not weigh the evidence at all, but rather ignored, misinterpreted, or simply lacked evidence when making factual determinations with regard to Brown's maturity and ability to be rehabilitated. These failures are tantamount to substantial competent evidence not supporting the lower court's use of discretion.[264]

And without knowing how the lower court weighed certain factors in its analysis or by how much the evidence overcame the presumption in favor of juvenile jurisdiction by the preponderance of the evidence,[265] the Kansas Supreme Court could not be sure whether an error in as to any one factor would undermine the entire transfer determination. Nevertheless, the court quickly, and without discussion, disregards any error in the lower court's findings regarding Brown's maturity as not warranting reversal.[266]

Second, the Kansas Supreme Court affirmed the lower court's assessment of the statutory factors, despite the lower court's abuse of discretion. Abuse of discretion is a deferential standard,[267] and while this Comment does not dispute the standard of review,[268] failing to give full force to statutory factors and evaluating these factors incorrectly is an abuse no matter how broad the court's discretion. Although the lower court was "not constrained by the insufficiency of evidence to support one or more of the factors,"[269] the Kansas Supreme Court was silent as to the lower court's misapplication of factors, overreliance on the nature of

262. *Brown*, 331 P.3d at 791. ("Substantial competent evidence 'is evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved.'" (quoting *In re* D.D.M., 249 P.3d 5, 11 (Kan. 2011))).

263. *See id.* at 787.

264. *See id.* at 787, 789–90.

265. *Id.* at 789.

266. *Id.* at 791.

267. *Id.* at 787.

268. This does, however, raise questions as to whether juvenile transfer decisions should be afforded a different standard of review, given their sentencing-like consequences.

269. *Brown*, 331 P.3d at 787.

the crime for five of the eight factors, and failure to consider the presumption in favor of juvenile jurisdiction.

For example, the Kansas Supreme Court took scant notice of the lower court's inversion of logic when considering the rehabilitation factor, which should have favored juvenile jurisdiction based on the statutory presumption associated with Brown's age. The court also affirmed the lower court's heavy reliance on Brown's crime to draw conclusions about her ability to be rehabilitated and to conclude her maturity was a "wash." When three of the eight factors involve assessing a juvenile's crime, the statute's failure to address the nature of the crime in the remaining factors appears deliberate, meaning courts must consider, at least, the rehabilitation and maturity factors apart from the crime. Otherwise, the factors would become so conflated as to render nearly all juvenile offenders deserving of transfer to adult court. The Kansas Supreme Court dismissed the lower court's overreliance on the nature of the crime, however, by reasoning that any consideration of the crime by the lower court was not dispositive.[270] This is incorrect, where the only evidence in favor of transfer with regard to this factor, was the nature of Brown's crime. Because this evidence contradicted evidence in Brown's favor, thus rendering the factor a wash, the nature of Brown's crime was arguably dispositive.

In addition, the Kansas Supreme Court affirmed an abuse of discretion where the lower court improperly concluded Brown's maturity was a "wash" in the analysis. The lower court found contradictory evidence of Brown's maturity level, and the factor was effectively stricken from the balancing process, despite suspicious contradictions between the lower court's oral findings and after-the-fact written report.[271] This should not have been the case. The statute mandates consideration of each factor as the Kansas Supreme Court itself pointed out in rebutting Brown's argument that the first three factors were repetitive.[272] While calling the maturity factor a wash is consideration in the most rudimentary sense, it is arguable that no factor is a wash in light of the statutory presumption favoring of juvenile jurisdiction. However, the lower court ultimately ignored the presumption in favor of juvenile jurisdiction to strike the factor from the analysis. This was a clear abuse of discretion.

As a result of transferring Brown without meaningful regard to her mitigating circumstances or the statutory presumption in her favor, the court effectively imposed a mandatory sentence based on the less-than-individual consideration she was given at the transfer stage. Where *Mil-*

270. *Id.* at 91.

271. *Brown*, 331 P.3d at 790–91.

272. *Id.* at 790 (quoting KAN. STAT. ANN. § 38-2347(e) (2014)). Arguably, this logic would lead to the conclusion that certain evidence pertaining to Brown's maturity—looking to her mom for responses—could also be used to show Brown was capable of being rehabilitated, but neither court went as far as to draw this conclusion.

ler insisted on using juvenile status to warrant consideration of individual, mitigating circumstances,[273] *Brown* used only the crime committed to warrant feigned consideration of juvenile status. Where transfer decisions are nearly tantamount to sentencing, the *Brown* Court undermined *Miller*.

ii. Transfer Mechanisms in Other States

Per *Brown*'s example, the situation repeats itself from state-to-state: the district court exercises unbridled discretion in weighing factors;[274] the reviewing court rewards this use of discretion by loosely reviewing the district court analysis for abuse; and the juvenile is transferred to adult court and receives a mandatory sentence associated with that crime, as long as it is not life without parole. Post-*Miller* courts and legislatures have simply failed to make changes to mandatory or discretionary waiver mechanisms and processes despite their harsh effect on juvenile sentences.

Pulling one example out of the many that exist, the Minnesota Court of Appeals upheld a lower court's extensive focus on the juvenile's crime and past crimes in deciding to transfer the youth to adult court.[275] First, the statutory factors themselves, though requisite safeguards to such discretionary transfers, made little room for the actual mitigating circumstances of youth to factor into the analysis.[276] Second, the court of appeals aggravated this imbalanced consideration where it upheld an analysis of each factor, especially culpability, based on the facts of the crime rather than the mitigating principle of diminished juvenile culpability laid out in *Miller* and juvenile sentencing jurisprudence.[277] Here, as in *State v. Brown*, the circumstances of youth actually worked against the juvenile offender.

Post-*Miller* courts have taken little interest in exercising more scrutiny upon review of lower court transfer decisions, allowing lower courts to disregard, as inapplicable, factors that are statutorily required for con-

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

274. *See* Shitama, *supra* note 209, at 826 ("This [judicial waiver] gave judges wide authority to intervene in the lives of juvenile offenders' in inconsistent and often intrusive ways.").

275. *In re* Welfare of C.K.R., No. A14-0514, 2014 WL 5507050, at *2–4 (Minn. Ct. App. Nov. 3, 2014).

276. *See id.* at *2 ("(1) [T]he seriousness of the alleged offense in terms of community protection, including the existence of any aggravating factors recognized by the Sentencing Guidelines, the use of a firearm, and the impact on any victim; (2) the culpability of the child in committing the alleged offense, including the level of the child's participation in planning and carrying out the offense and the existence of any mitigating factors recognized by the Sentencing Guidelines; (3) the child's prior record of delinquency; (4) the child's programming history, including the child's past willingness to participate meaningfully in available programming; (5) the adequacy of the punishment or programming available in the juvenile justice system; and (6) the dispositional options available for the child." (quoting MINN. STAT. § 260B.125, subdiv. 4 (2012))).

277. *See id.* at *3–4 (ignoring testimony about the mitigating factors of lessened brain development in youth by concluding the particular juvenile offender "was not impaired and was not coerced").

sideration.[278] For example, prior to *State v. Brown*, the Kansas Supreme Court recognized the sufficiency of a statement by the trial court acknowledging the requisite factors a judge must consider before transferring a juvenile to adult court. Stating that a judge need not make a formal finding regarding each factor, the Kansas Supreme Court abdicated all meaningful review in allowing the following statement to satisfy the statutory requirements: "I am aware and did consider all of the statutory factors in making the decision to waive juvenile court jurisdiction and find the ones I put on the record outweigh the other factors if they're even applicable."[279] In that case, the only factors put on the record were conclusory statements that the "juvenile [was] not amenable to being treated further as a juvenile," and a quick reference to "[t]he seriousness of these offenses, the fact that this offense occurred ten days to less than two weeks after he was released from Larned Correctional Facility, [and] his long history with the court system."[280] In a lackadaisical review, the Kansas Supreme Court found this to be sufficient consideration of the evidence to show "he need[ed] to be treated as an adult."[281]

Moreover, post-*Miller* legislation has not changed as a result of a codified rationale in favor of more structured individualized consideration. "Currently, every state has at least one form of juvenile transfer, and most states have multiple ways of imposing adult sanctions on juvenile offenders."[282] Even worse, "forty-four states impose some form of mandatory waiver,"[283] where discretion is not even afforded a lower court, regardless of the strength of a particular juvenile offender's mitigating circumstances. As a result, *Miller* has had little effect on transfer decisions, even though transfer of juveniles to adult court is the necessary precursor to sentencing.[284]

2. Refusing to Extend *Miller*: The Narrow Holding Versus the Broad Rationale

As this Comment has argued, "[b]y mandating individualized sentencing for juveniles facing [life without parole], 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 jus-

278. *See, e.g.*, State v. Washington, No. C–130213, 2014 WL 4724684, at *5 (Ohio Ct. App. Sept. 14, 2014) ("Where there is no statutory requirement that the juvenile court separately identify factors that are not applicable, it does not err if it fails to do so, as long as it has indicated, in the record, the factors that it weighed in favor of or against transfer.").

279. Makthepharak v. State, 314 P.3d 876, 882 (Kan. 2013) (emphasis omitted) (quoting oral ruling of the district court) (internal quotation mark omitted).

280. *Id.* (quoting oral ruling of the district court).

281. *See id.*

282. Shitama, *supra* note 209, at 830.

283. *Id.*

284. Dutton, *supra* note 16, at 204 ("In *Miller*, the Court rejected the argument that transfer determinations—by judge, prosecutor, or legislature—are sufficient to cool the mandatory nature of the JLWOP sentences that were before the Court.").

tice."[285] The broader rationale of *Miller* is, "[i]n other words, [that] no sentencing scheme that ignores age and its attendant circumstances should determine the outcome of a juvenile case."[286] Yet, this is not the reach of *Miller*'s narrow holding, which struck down mandatory life-without-parole sentences for juveniles.[287] As a result, courts and legislatures have struggled with the vital correlation between *Miller*'s broader rationale and its narrow holding.[288] Of course, in an attempt to avoid the wide range of ramifications that ensue from the broader *Miller* rationale, subsequent decisions have effectively served to contain *Miller* to its most narrow application, however constitutionally questionable such containment may prove to be.[289]

Having already discussed the argument for extending *Miller*'s rationale to some of the more severe juvenile sentences, much of that argument rooted in the original rehabilitative cry of juvenile courts themselves,[290] it is necessary to discuss the well-crafted box courts and legislatures have used to enjoin *Miller* from expansion—focusing on courts and subsequent litigation of issues related to *Miller*.[291] The four sides of this box are representative of the primary ways courts decline to extend and undermine the *Miller* rationale: Side one will be discussed as the "one-step-down but still mandatory" approach; side two will be addressed as the "non-mandatory out" approach; side three will cover the "aggregated sentence" approach; and side four will discuss the other creative ways courts have withheld the *Miller* rationale from even its most narrow application. However, it is important to note that even while the narrow application of *Miller* undermines the *Miller* rationale in its own right, many "new" sentencing schemes go a step further: many ensure a functional equivalent of life without parole, revealing an insistence not only upon containing *Miller*, but demolishing it as well.[292]

In the wake of *Miller*, there was no doubt mandatory life without parole was barred, and more than twenty state laws imposing such a sen-

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285. Tchoukleva, *supra* note 18, at 97.

286. *Id.*; *see also* Courtney Amelung, Endnote, *Responding to the Ambiguity of* Miller v. Alabama*: The Time Has Come for States to Legislate for a Juvenile Restorative Justice Sentencing Regime*, 72 MD. L. REV. ENDNOTES 21, 50 (2013) ("The Court's decision in *Miller* has given states the opportunity to legislate for restorative justice within the juvenile justice system.").

287. Lauren Kinell, Note and Comment, *Answering the Unanswered Questions: How States Can Comport with* Miller v. Alabama, 13 CONN. PUB. INT. L.J. 143, 145, 148–49 (2013).

288. *See* Mardarewich, *supra* note 104, at 125–26.

289. *See* Alexander L. Nostro, Comment, *The Importance of an Expansive Deference to* Miller v. Alabama, 22 AM. U. J. GENDER SOC. POL'Y & L. 167, 179–83 (2013).

290. *See* Fuller, *supra* note 38, at 379–81; *see also supra* Part I.

291. *See* David Siegel, *What Hath* Miller *Wrought: Effective Representation of Juveniles in Capital-Equivalent Proceedings*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 363, 368–69 (2013) (discussing how "the scope of the procedural protections—such as whether they are retroactive, whether they extend to sentences for which there is a theoretical but not meaningful possibility of parole, and whether they can apply to discretionary LWOP sentences—are currently being litigated" (footnotes omitted)).

292. *Id.*

tence were subsequently invalidated as applied to juveniles.[293] In response, and without the immediate enactment of new legislation, many courts are left to "remand . . . case[s] for further sentencing proceedings to permit the factfinder to assess [an] applicant's sentence at (1) life with the possibility of parole . . . or (2) life without parole after consideration of applicant's individual conduct, circumstances, and character."[294] While this posed minimal problems of interpretation within *Miller*'s narrow scope, questions arise as to the reach of *Miller*'s broad rationale when various mandatory and non-mandatory life-with-parole sentences are functionally equivalent to life without parole.[295]

B. One-Step-Down-But-Still-Mandatory Schemes

In light of such questions, courts and legislatures have nevertheless contained *Miller* by allowing the imposition of other, albeit lesser, mandatory sentences—the "one-step-down" approach. For example, in the absence of legislation that is compliant with *Miller*'s holding, courts have allowed prosecutors to simply "sever the unconstitutional language in [the sentencing codes] as applied to juveniles convicted of [a particular crime]" that originally called for mandatory life without parole.[296] Courts may simply "remand the case for [a juvenile offender] to be resentenced on his conviction under the sentencing range provided for [the same class felony], in accordance with the remaining language in [the] subsection,"[297] or sentence the juvenile in accordance with some other mandatory scheme supplied by the legislature after *Miller*.[298]

Depending on the statute, this approach may lead to the imposition of a mandatory term of years sentence or a sentence with a mandatory

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293. Amelung, *supra* note 290, at 32; *see also* Fuller, *supra* note 38, at 401.

294. *Ex parte* Maxwell, 424 S.W.3d 66, 76 (Tex. Crim. App. 2014).

295. *See, e.g.*, State v. Riley, 110 A.3d 1205, 1213 (2015) (discussing that an aggregate sentence, imposed in the court's discretion and which was the functional equivalent of a sentence of life without the possibility of release,was unconstitutional under *Miller*, after reading *Miller* "as impacting two aspects of sentencing: (1) that a lesser sentence than life without parole must be available for a juvenile offender; and (2) that the sentencer must consider age related evidence as mitigation when deciding whether to irrevocably sentence juvenile offenders to a lifetime in prison"); *see also* Amelung, *supra* note 290, at 34.

296. Whiteside v. State, 426 S.W.3d 917, 920 (Ark. 2013); Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 286 (Mass. 2013).

297. *Whiteside*, 426 S.W.3d at 920; *see also* Commonwealth v. Brown, 1 N.E.3d 259, 268 (Mass. 2013) (excising the portion of the sentencing statute prohibiting parole eligibility when applied to a juvenile). *But see* People v. Tate, 352 P.3d 959, 965 (Colo. 2015) ("[W]e hold that the proper remedy after *Miller* is to vacate a defendant's LWOP and to remand the case to the trial court to determine whether LWOP is an appropriate sentence given the defendant's 'youth and attendant circumstances.'" (quoting Miller v. Alabama, 132 S. Ct. 2455, 2471 (2012)).

298. St. Val v. State, 174 So. 3d 447, 449 (Fla. Dist. Ct. App. 2015) (finding a mandatory minimum sentence of twenty-five years did not violate *Miller*); People v. Banks, 36 N.E.3d 432, 437 (Ill. App. Ct. 2015) (finding a mandatory minimum of forty-five years did not violate *Miller*); Commonwealth v. Lawrence, 99 A.3d 116, 121 (Pa. Super. Ct. 2014), *appeal denied*, 114 A.3d 416 (Pa. 2015) (holding a mandatory minimum of thirty-five years did not violate *Miller*, where an "argument against a mandatory minimum of 35 years presents the same concerns as would a mandatory minimum of 35 days' imprisonment," such that it would prohibit any mandatory scheme).

minimum and a discretionary range. For example, the Arkansas Supreme Court held the applicable sentencing range, after severing the unconstitutional language and remanding the case, was ten to forty years or life.[299] Even in cases where courts remand the case for consideration of an individual defendant's youthfulness to determine the appropriateness of life without parole, these courts may still apply a one-step-down approach if, on remand, it is determined that life without parole is inappropriate.[300]

This raises questions as to whether one-step-down mandatory sentencing schemes are unconstitutional under *Miller*, since all mandatory sentencing processes are implicated by the same rationale *Miller* employed to strike down mandatory life without parole.[301] However, many courts, like the *Brown* court, were not inclined to extend *Miller*'s holding to mandatory sentences other than mandatory life without parole. The Colorado Supreme Court held that life with the possibility of parole is an appropriate and constitutional sentence under *Miller* once a court determines, after individual consideration, that life without the possibility of parole is inappropriate.[302] Noting that *Miller* did not expressly address life with the possibility of parole, the Colorado Supreme Court declined to read *Miller* so broadly as to render the mandatory imposition of life with the possibility of parole unconstitutional.[303]

In making this determination, however, the court did not impose or suggest a constitutional limit on the mandatory term of years a juvenile offender may be required to serve before parole eligibility in a life without parole sentence.[304] In the absence of guidance, state courts may impose a sentence that teeters, arguably, on the side of the functional equivalent of life without parole.[305]

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299. *Whiteside*, 426 S.W.3d at 921 (holding that "this discretionary sentencing range is acceptable under *Miller*, as long as on remand the jury is given the opportunity to take into account the offender's 'age, age-related characteristics, and the nature of his crime'").

300. Tate, 352 P.3d at 965 (holding that "if the trial court determines LWOP is not warranted after considering the defendant's 'youth and attendant characteristics,' the proper sentence is LWPP"); *see also* State v. Nathan, 404 S.W.3d 253, 271 (Mo. 2013) ("In that event, the trial court must set aside the jury's verdict finding Nathan guilty of first-degree murder and enter a finding that Nathan is guilty of second-degree murder. Nathan then should be sentenced for second-degree murder within the statutorily authorized range of punishments for that crime."); Lewis v. State, 448 S.W.3d 138, 146 (Tex. App. 2014), *cert. denied*, 136 S. Ct. 52 (2015) (holding that a mandatory life sentence for with the possibility of parole after forty years did not violate *Miller*).

301. *See* Straley, *supra* note 1, at 994 & n.180 (explaining how, in response to *Miller*, Washington's legislation, "requir[es] court[s] to consider *Miller* factors when setting minimum term for sixteen and seventeen-year-olds").

302. *Tate*, 352 P.3d at 970.

303. *Id.*; *see also* Bear Cloud v. State, 2014 WY 113, ¶ 40, 334 P.3d 132, 145 (Wyo. 2014) (recognizing "there is merit in the proposition that a mandatory life sentence for a juvenile is contrary to the rationale underlying the *Roper/Graham/Miller* trilogy, we will not find a phantom constitutional restriction that the United States Supreme Court has declined the opportunity to recognize").

304. *Tate*, 352 P.3d at 970.

305. *But see* Springer v. Dooley, No. 3:15-CV-03008-RAL, 2015 WL 6550876, at *5 (D.S.D. Oct. 28, 2015) (holding a 261-year sentence with the possibility of parole after thirty-three years was not a de facto life without parole sentence and did not violate *Miller*).

This imposition of a life sentence with a mandatory term-of-years before parole eligibility,[306] appears to be a comfortable place for post-*Miller* sentencing schemes:[307]

> *Miller* [only] stands for the proposition that a sentence of life imprisonment without the possibility of parole may not be mandatorily imposed upon a defendant who was a juvenile at the time of the crime without individual consideration of the mitigating circumstances. That did not occur in [a] case. . . . [where] the defendant received a sentence of life with the possibility of parole, albeit with consideration coming after fifty-one years.[308]

As such, states split *Miller* many different and unpredictable ways in determining the constitutional limits on mandatory life with parole sentences or mandatory term-of-year sentences.

C. *Non-Mandatory Out: Unbridled Discretion Fails* Miller *and Amounts to De Facto Life Sentences Without Parole*

Some courts and legislatures have employed semantics to contain *Miller*, extracting the word "mandatory" to impose sentencing schemes that are the functional equivalent to mandatory life without parole.[309] This allows courts to comply[310] with *Miller* in a literal sense, while undermining the *Miller* rationale. First, by simply "[s]evering the mandatory nature of a life-without-parole sentence for a juvenile to provide for the ameliorative possibility of parole because of characteristics attendant to youth,"[311] courts have nonetheless kept their sentencing statutes in place, by simply infusing discretion into the sentencing process or prescribing enumerated factors courts may use to guide the sentencing, yet allowing unfettered discretion that often amounts to the same sentences.

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306. *See* Banks v. People, No. 12SC1022, 2013 WL 3168752, at *1 (Colo. June 24, 2013).

307. *See, e.g.*, Ellmaker v. State, No. 108,728, 2014 WL 3843076, at *10 (Kan. Ct. App. Aug. 1, 2014) ("Considering the explicit way in which the United States Supreme Court has distinguished life without parole sentences and the death penalty and set them apart from all other sentences, we decline Ellmaker's invitation to extend this category to include a hard 50 sentence when imposed on juveniles. Thus, we reject Ellmaker's assertion that a hard 50 sentence on a juvenile offender is the functional equivalent of a life sentence without parole."); *see also* Ouk v. State, 847 N.W.2d 698, 701–02 (Minn. 2014) ("[T]he mandatory sentencing scheme at issue in Ouk's case does not violate the rule announced in *Miller* because it does not require the imposition of the harshest term of imprisonment: life imprisonment without the possibility of release."); People v. Aponte, 981 N.Y.S.2d 902, 905 (N.Y. Sup. Ct. 2013) ("Although both *Miller* and *Graham* held it was unconstitutional to impose life without parole on a person under the age of eighteen, the defendant received no such sentence. In fact, he is parole eligible. No doubt he is unhappy over the prospect that the aggregate mandatory minimum periods of imprisonment may preclude him from ever being paroled, he nevertheless remains eligible for it.").

308. Perry v. State, No. W2013-00901-CCA-R3-PC, 2014 WL 1377579, at *5 (Tenn. Crim. App. Apr. 7, 2014), *appeal denied,* Sept. 18, 2014.

309. *But see* Scavone, *supra* note 197, at 3477 (noting that the post-*Miller* "bill was aimed at comprehensive sentencing reform that takes virtual LWOP into account").

310. Amelung, *supra* note 290, at 34–35.

311. *Ex parte* Henderson, 144 So. 3d 1262, 1281 (Ala. 2013).

This is noticeable in *Ex parte Henderson*,[312] where the Alabama Supreme Court allowed juveniles to be charged for capital offenses under a statutory scheme calling for either death or life without parole.[313] The court upheld the statutory scheme by replacing its mandatory nature with a consideration of certain enumerated factors to put juveniles on "actual notice that, if convicted, they face a sentence of life without the possibility of parole as a 'ceiling.'"[314] The court goes on to say that "juveniles [then] have [additional] notice of the 'floor' as well, because *Miller* requires that a juvenile convicted of capital murder is entitled to have his life sentence reviewed for the possibility of parole."[315]

The California Supreme Court followed suit by validating its own statute that allowed a "juvenile convicted of special circumstance murder" to receive "life without parole or [twenty-five] years to life."[316] The California Supreme Court overruled the lower courts' interpretation of the statute, which originally "creat[ed] a presumption in favor of life without parole," holding that it satisfied *Miller*'s ban on mandatory life without parole.[317] Here, the court made its statute *Miller*-compliant by shifting semantics, insisting that it be "understood to not impose a presumption in favor of life without parole."[318] This, while technically complying with *Miller*, does not provide any meaningful consideration of youthfulness per the *Miller* Court's rationale.

In a similar effort to avoid *Miller*'s broad rationale, many state legislatures have simply added an option that allows a non-mandatory range of equally harsh sentences to be imposed on juveniles without instituting *Miller*'s particularized individual consideration test.[319] Here, courts and legislatures have taken advantage of the "uncertainty of what [was] meant by 'individualized sentencing,'" in *Miller*, though *Miller*'s rationale alone provides guidance.[320] For example, Pennsylvania, one of the first states to respond to *Miller* with legislation, infused its statutory scheme with allowable ranges, of course still including life without parole as an option.[321] As such, a juvenile may still receive a sentence of life without parole, but the judge or jury may choose an alternative sen-

312. *Id.*
313. *Id.*
314. *Id.* at 1281, 1284.
315. *Id.* at 1281.
316. People v. Gutierrez, 324 P.3d 245, 249 (Cal. 2014).
317. *Id.*
318. *Id.*
319. *See, e.g.*, State v. Griffin, 145 So. 3d 545, 548 (La. App. 2014) (appearing satisfied by Louisiana's post-*Miller* laws, which state that "a hearing shall be conducted prior to sentencing to determine whether the sentence shall be imposed with or without parole eligibility," though this sentence scheme simply allows the prosecution and defense to present mitigating and aggravating factors to support requested sentences; there is no requirement that the judge consider the enumerated factors in *Miller*).
320. *See* Lerner, *supra* note 195, at 27.
321. Amelung, *supra* note 290, at 33.

tence of either thirty-five years to life for juveniles at least fifteen years old, or a twenty-five years to life for juveniles under age fifteen.[322] There is, however, no requirement that youthfulness mitigate on behalf of the juvenile during the discretionary sentencing, which reeks of the possibility of discretionary abuses.

Applying this approach, courts avoid triggering the narrow *Miller* holding by asserting, "*Miller* is distinguishable because [a juvenile's] sentence of life without parole [is] *discretionary,* not mandatory."[323] Yet this approach fails to provide meaningful limits on sentencing discretion, as it lacks mandatory consideration of the mitigating factors of youth set out in *Miller.* Because judges have broad discretion when imposing a sentence and such decisions only are reviewed *de novo* for abuse of discretion[324] it cannot be guaranteed that *Miller*'s underlying principles—lessened culpability of juveniles requiring consideration of the mitigating circumstances of a juvenile offender—will be advanced.[325] As noted in *State v. Riley*, where the Connecticut Supreme Court held the trial court did not consider the mitigating factors in *Miller*:

> [T]he dictates set forth in *Miller* may be violated even when the sentencing authority has discretion to impose a lesser sentence than life without parole if it fails to give due weight to evidence that *Miller* deemed constitutionally significant before determining that such a severe punishment is appropriate.[326]

Where courts do consider mitigating factors, in imposing either life without parole or other functional equivalents, they are not required to contemplate any particular combination of mitigating circumstances enumerated by *Miller*, or afford such circumstances any specific weight.[327] As a result, courts may find that any individual consideration of a juvenile satisfies *Miller*'s mandate."[328] Here, a juvenile may receive

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322. *Id.*

323. State v. Lane, No. 2013-G-3144, 2014 WL 1900459 at *12 (Ohio Ct. App. May 12, 2014).

324. Commonwealth v. Batts, 125 A.3d 33, 43, 50 (Penn. 2015) (refusing to "impose a heightened burden of proof, and a corresponding more stringent appellate review, in juvenile life without parole cases").

325. Berkheiser, *supra* note 117, at 508–10 (discussing how *Miller*, "with its mandate of individualized consideration at sentencing, reopens the door to all of the malignity of subjective decision-making and its fruits"); *see also* Fuller, *supra* note 38, at 402 (discussing how even when requiring consideration of mitigating circumstances, "state courts did not elaborate as to what must be included in this consideration").

326. State v. Riley, 110 A.3d 1205, 1213 (2015) (overruling appellate court's affirmation of an effective one hundred year sentence, where the appellate court affirmed the trial court's decision to not consider the *Miller* factors).

327. *But see* State v. Seats, 865 N.W.2d 545, 555–57 (Iowa 2015) (starting from a presumption that the imposition of life without parole should be uncommon and mandating the consideration of specific factors rooted in *Miller*'s rationale before imposing a sentence of life without parole).

328. Jones v. State, 769 S.E.2d 901, 905 (Ga. 2015) (affirming, on alternative grounds, the trial court's imposition of "two consecutive terms of life imprisonment plus [eighty-five] years," because "the trial court explicitly considered Appellant's relatively young age"); *see also* State v. Williams, 862 N.W.2d 701, 703–04 (Minn. 2015) (affirming the district court's discretionary imposition of

a sentence that is functionally equivalent to a sentence of life without the possibility of release, without any assurance that their sentence embodies the mitigating purpose of *Miller*.[329]

D. Aggregated Sentences

Although not an issue in *Brown*, courts have also dismantled *Miller*'s rationale by allowing mandatory sentences to accumulate and effectively amount to life without parole.[330] While at least two state supreme courts have ruled an aggregate sentence that constitutes a *de facto* life sentence violates the Constitution under *Miller*,[331] other courts have found such aggregate sentences fall outside the scope of *Miller*.[332] These courts have declared that egregious term-of-years sentences do not qualify for *Miller* protection, despite the relatively same effect of mandatory sentences when applied in the aggregate.[333] While this scenario is not offensive to the literal *Miller* holding, it is certainly offensive to the broader rationale that should "trigger the protections afforded under *Miller*—namely, an individualized sentence hearing to determine the issue of parole eligibility" when imposing a "lengthy term-of-years sentence."[334] At least one state supreme court, Iowa, has concluded, albeit under Iowa's constitution, "all mandatory minimum sentences of imprisonment for youthful offenders are unconstitutional."[335] In any case, the

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consecutive sentences, after the district court considered the aggravating circumstances of the juveniles' crimes in addition to the mitigation circumstances).

329. *See* Molly F. Martinson, Comment, *Negotiating* Miller *Madness: Why North Carolina Gets Juvenile Resentencing Right While Other States Drop the Ball*, 91 N.C. L. REV. 2179, 2198 (2013).

330. *E.g.*, State v. Williams, 862 N.W.2d 701, 702 (Minn. 2015) (affirming imposition of an "aggregate sentence of at least 74 years in prison").

331. Bear Cloud v. State, 334 P.3d 132, 144 (Wyo. 2014) (holding that the process of individualized consideration in *Miller* "must be applied to the entire sentencing package, when the sentence is life without parole, or when aggregate sentences result in the functional equivalent of life without parole"); *see also* Fuller v. State, 9 N.E.3d 653, 654 (Ind. 2014) ("[W]e exercised our constitutional authority and revised the 150-year sentence received by sixteen-year-old Martez Brown for two counts of murder and one count of robbery.").

332. *See, e.g.*, Nostro, *supra* note 293, at 176 ("In the immediate aftermath of the *Miller* decision, the Sixth Circuit held that an eighty-nine-year sentence created from multiple convictions was not the same as a life sentence for purposes of requiring consideration of a juvenile offender's age and mitigating factors of youth. In reaching its decision, the Circuit prioritized the *Miller* Court's focus on single-conviction sentencing practices to conclude that the Court did not intend for the punishment to apply to all forms of LWOP sentences." (footnote omitted)); *see also* Walle v. State, 99 So. 3d 967, 968 (Fla. Dist. Ct. App. 2012) (holding that sentences imposed by two different courts creating a ninety-two-year aggregate sentence was not the functional equivalent of a life sentence without the possibility of release); State v. Zuber, 442 N.J. Super. 611, 611 (N.J. Super. Ct. App. Div. 2015) (rejecting the argument that an aggregate sentence of fifty-five years without parole eligibility was the functional equivalent of life without parole).

333. People v. Reyes, 2015 Ill. App. 2d 120471, ¶ 25 (Ill. App. Ct. 2015) (finding juvenile offender's ninety-seven-year aggregate sentence did not offend *Miller*); Scavone, *supra* note 197, at 3463; *see also* People v. Lucero, 11CA2030, 2013 WL 1459477, at *2–4 (Colo. App. 2013) (citing *Miller* and *Graham* in finding aggregate sentence of eighty-four years did not violate the Constitution), *cert. granted*, 13SC624, 2014 WL 7331018 (Colo. Dec. 22, 2014).

334. State v. Null, 836 N.W.2d 41, 70–71 (Iowa 2013).

335. State v. Lyle, 854 N.W.2d 378, 400 (Iowa 2014).

next question always becomes "how [the] court should proceed in correcting [a defendant's] sentence[?]"[336] Without guidance, courts are free to work within vague perimeters.

E. Other Ways: Felony Murder

The last common approach that undermines the *Miller* rationale is the quiet operation of unfortunate doctrines such as felony murder. As an initial matter, there is little reason for this doctrine in the context of juvenile sentencing.[337] While those in favor of the felony-murder doctrine claim it deters the commission of the underlying crime, it is hard to justify as applied to juveniles, who are less able to foresee the consequences of their actions.[338] *Miller* recognized lower juvenile culpability based on factors that include "'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking."[339] This rational creates the possibility that the Court may later prohibit sentencing juveniles to life without parole based on felony murder principles of transferred intent.[340]

Miller recognizes that "defendants who do not kill, intend to kill, or foresee that life will be taken are *categorically* less deserving of the most serious forms of punishment than are murderers."[341] The *State v. Brown* ruling offends this rationale in its imposition of a hard twenty life sentence for thirteen-year-old Brown's felony murder conviction. The *Miller* Court recognized that "the criminal responsibility of juveniles who did not murder was doubly diminished,"[342] and "the rationale underlying felony murder is [therefore] utterly incompatible with our modern understanding of juveniles" especially when imposing such harsh sentences.[343]

This Comment does not take immediate issue with the concept of felony murder, though, by principle of transferred intent, it stands on shaky ground.[344] However, it must be argued that sentencing juveniles on the basis of felony murder convictions is contrary to the *Miller* rationale, where the application of this doctrine to youth reveals the most offensive ignorance of the critical differences between juvenile and adult ability to assess the spectrum of consequences associated with their actions.[345]

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336. Whiteside v. State, 426 S.W.3d 917, 920 (Ark. 2013).

337. Erin H. Flynn, Comment, *Dismantling the Felony-Murder Rule: Juvenile Deterrence and Retribution Post-*Roper v. Simmons, 156 U. PA. L. REV. 1049, 1071 (2008).

338. *Id.*

339. Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)).

340. Mardarewich, *supra* note 104, at 130.

341. *Miller*, 132 S. Ct. at 2481 (quoting Graham v. Florida, 560 U.S. 43, 50 (2010)) (internal quotation marks omitted).

342. Feld, *supra* note 1, at 125–26.

343. Shitama, *supra* note 209, at 845.

344. *See id.* at 842–48.

345. *See id.* at 846.

In *Brown*, the court took no issue with the application of the felony murder charge to thirteen-year-old Keaira Brown. The court simply noted that "[a]t the time of Brown's crimes, first-degree murder was defined as the killing of a human being committed, '(b) in the commission of, attempt to commit, or flight from an inherently dangerous felony' . . . ." and that "[a]ggravated robbery is an 'inherently dangerous felony.'"[346] While simplistic definition may be appropriate as applied to an adult criminal who is less impulsive and better able to understand the consequences of his or her actions, it is wholly inappropriate when considering both the goals of felony murder doctrine and the reduced culpability of juveniles.

The goals of the felony murder doctrine are deterrence and retribution.[347] Where "unforeseen acts . . . cannot logically be deterred," and "culpability should be based on an individual defendant's criminal intent . . . and not simply on harm caused in the commission of a crime," the justifications for the doctrine are unsubstantiated.[348] Consequently, the doctrine is even less warranted as applied to juveniles. It assumes, wrongfully so, that juvenile felons, who are less culpable because they inherently possess a "proclivity for risk, and inability to assess consequences,"[349] can "reasonably anticipate any resulting injury and should therefore be held liable when such injury in fact occurs."[350]

Miller stands for the proposition "that a juvenile is much less likely than an adult to recognize that his participation in a robbery or other felony could potentially result in death or injury," and is therefore "less likely to be deterred by the specter of even the most severe punishment."[351] Keaira Brown's felony murder conviction is therefore unwarranted based on this rationale. Here, while it is clear that "[t]he serious theoretical shortcomings of felony murder liability apply with exponentially greater force to juveniles,"[352] it must be noted, "almost every state prosecutes both children and adults for felony murder,"[353] contrary to *Miller*'s rationale.

V. THE CONSEQUENCES OF IGNORING *MILLER*

Extending the *Miller* rationale to forbid mandatory sentencing in all juvenile cases, or at least in cases that implicate the most severe sentencing schemes, would create a splash in the modern adult criminal system, even as it could be extended to warrant the resurrection of a more "re-

346. State v. Brown, 331 P.3d 781, 792 (Kan. 2014) (quoting KAN. STAT. ANN. §§ 21-3401, 21-3436(4) (repealed 2010)).
347. Shitama, *supra* note 209, at 843.
348. *Id.* at 844.
349. Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012).
350. Shitama, *supra* note 209, at 843.
351. *Id.* at 845–46.
352. *Id.* at 845.
353. *Id.* at 844.

storative justice" scheme for juveniles.[354] Perhaps this is why state courts have taken to containing the *Miller* decision in the numerous ways previously discussed. The inherent effects of each decision to contain *Miller* are clear; however, it is necessary to take a step back to see the cumulative and detrimental effect of these decisions; "the practical result is at odds with the Supreme Court's clear trajectory toward [affording juveniles] greater [constitutional] protection and greater leniency . . . in the criminal context."[355] Operating together, every juvenile waiver, and every declination to extend *Miller* form the context in which the constitutional line between juveniles and adults slowly evaporates.

The first incremental step is transfer mechanisms. Of course, juvenile transfer decisions, at first glance, do not appear to implicate *Miller*, because the *Miller* holding addresses a mandatory sentence. However, mandatory and discretionary transfers operate in such a way that they precede imposition of the harshest adult sentences on youth; "a decision to send a juvenile to adult court is a decision to end his childhood."[356] Transfers effectuate a juvenile's transition, in the eyes of the law, from child to adult, and carry with them the "profound consequences" of doing "adult time," among other catastrophic effects.[357]

Tantamount to sentencing, juvenile transfer undercuts *Miller*'s contemplation of juveniles as different, where a youth may be transferred without ever "hav[ing] the opportunity to tell the juvenile court judge about his background, his mental health, or any other fact that might make him worthy of an opportunity to take advantage of what the juvenile court may have to offer."[358] Here, it is necessary to apply *Miller*'s broader rationale to transfer proceedings to properly defend the legal notion that juveniles are different than adults.[359]

The second incremental step in the dilution of *Miller*'s rationale often involves juvenile sentencing decisions, which are often nuanced and chip away at *Miller* in piecemeal fashion, making it difficult to identify any single sentencing scheme as the culprit. Despite *Miller*'s broader rationale with regard to reduced juvenile culpability, a literal interpretation of *Miller*'s narrow holding is not irrational per se.[360] Such decisions are sound from a purely legal standpoint: a non-mandatory life without

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354. *See* Amelung, *supra* note 290, at 35 (stating, in response to *Miller*, "[t]he appropriate response for these—and all—states is to incorporate restorative justice sentences into the juvenile sentencing structure").

355. Recent Case, *supra* note 13, at 1252.

356. *Id.* at 30.

357. *Id.* at 34 (internal quotation marks omitted).

358. *Id.* at 54.

359. *See id.* (arguing for the application of *Miller* to transfer decisions because "[w]hile the Eighth Amendment itself might not apply directly to transfer proceedings, *Graham* and *Miller* indicate that juveniles are different and deserve a heightened due process akin to the kind of process that death penalty litigants have been given through the Eighth Amendment" (footnote omitted)).

360. *See* Nostro, *supra* note 293, at 181.

parole sentence without proper individualized consideration, "an eighty-nine-year prison sentence without parole," and a mandatory consecutive fixed-term sentence that is functionally equivalent to life without parole are all beyond the literal *Miller* holding.[361] It is only when recognizing *Miller*'s broader notion—that a juvenile's youthfulness warrants individualized consideration of that youth's mitigating circumstances—does "the reckless danger of a strict interpretation of *Miller*" reveal itself.[362]

Simply put, "[a] sentencing scheme that fails to consider a juvenile offender's potential for rehabilitation is at odds with the Supreme Court's stance on juvenile culpability."[363] And while *Miller* may or may not have ushered in the revitalization of restorative juvenile justice[364] by infusing our current process of juvenile sentencing with the individualization requirement, "the narrow application of *Miller*'s holding could . . . result in sentences that run afoul of the concerns over proportionality that are central to . . . *Miller*."[365] In the incremental dilution of *Miller*, our constitutional concept of juvenile is growing, where post-*Miller* courts make sentencing decisions in a legal vacuum, rather than considering the broader constitutional meaning and effect of *Miller*.[366] The ultimate effect is a dissipated line between juveniles and adults, where juveniles are transferred to adult court and sentenced as adults based on their crime without the court ever needing to assess their juvenile status.[367] The result? Juveniles *are* adults in the eyes of the law.

These effects and their attendant results are demonstrated by example. *State v. Brown* illustrates the unbridled discretion of judges in transferring a thirteen-year-old offender to adult court despite the presumption of juvenile jurisdiction. Per typical state transfer mechanisms, juvenile jurisdiction over Brown was waived "with little or no consideration of [her] child status or the mitigating circumstances surrounding [her] offense."[368] The broad discretion of the district court at the transfer stage, as it impeded a meaningful consideration of Brown's youth, is incremental step number one. The Supreme Court of Kansas affirmed this unguided and potentially hostile consideration, reviewing the decision with the deferential lens of abuse of discretion, while ignoring the presumption triggered by Brown's youthfulness.[369]

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361. *Id.* at 180–83.
362. *Id.* at 181–82.
363. *Id.* at 189–90.
364. *See* Amelung, *supra* note 290, at 31–32 ("[T]he appropriate response for all states, including those not affected by the *Miller* decision, is to incorporate a restorative justice sentencing regime into the juvenile justice system.").
365. Nostro, *supra* note 293, at 180.
366. *See id.* at 179–86.
367. *See* Hoeffel, *supra* note 148, at 53–54.
368. *See* Shitama, *supra* note 209, at 830–31.
369. *See supra* Part I.

After being transferred to adult court, Brown was then charged with particular crimes (felony murder and robbery), which were attached to a specific, mandatory sentence—a sentence the court held did not violate *Miller*'s narrow holding, although it foreclosed any meaningful consideration of Brown's youthfulness.[370] Thus, immediately upon conviction "in adult court, [the] mandatory sentencing laws proscribe[d] age and other mitigating factors from weighing in the determination of [her] punishment . . . ."[371] Here, Brown's juvenile status not only failed to mitigate on her behalf during transfer, it could not even mitigate on her behalf after transfer.

In light of these incremental steps, it is now imperative to take a step back. The Court's reasoning, in the *Roper*, *Graham*, and *Miller* trilogy is this: juvenile offenders are less culpable and therefore less deserving of harsh adult sentences.[372] Allowing juveniles to undergo little or no consideration of mitigating factors at the transfer level, only then to be subjected to mandatory prison terms at the sentencing level is an expressway to "adulthood" the Supreme Court has slowly tried to foreclose.[373] *Miller* sought to distance juveniles from adult treatment by mandating individualized consideration when imposing the harshest sentences. The means chosen, however—the individual consideration mandate—indicate a return to the principles of the juvenile court.[374] That is, the Court recognizes that focusing on the crime in making a juvenile do adult time does not comport with the known scientific fact that juveniles are less able to asses risk, comprehend consequence, and resist peer pressure.[375] As such, where it is apparent that "[a]n offender's age has no bearing on the amount of harm caused—children and adults can inflict the same injuries. But youths' inability fully to appreciate wrongfulness or to control their behavior may reduce culpability and lessen blameworthiness for the harms they cause."[376]

CONCLUSION

Juveniles are not adults, and "[t]he Court has explicitly stated that the Constitution may apply differently to juveniles and adults."[377] However, there is tension where juvenile sentencing jurisprudence recognizes the "culpability differences between juveniles and adults, and [courts]

370. Shitama, *supra* note 209, at 796.
371. *Id.* at 831.
372. *See* Bear Cloud v. State, 334 P.3d 132, 142 (Wyo. 2014); *see also* Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012).
373. *See Miller*, 132 S. Ct. at 2458–60, 2463–69.
374. *See* Amelung, *supra* note 290, at 24 ("While the Court's decision does not provide guidance for its implementation, it does provide a significant impetus to change the manner in which the legal system holds juvenile criminals accountable for their crimes.").
375. *See* Feld, *supra* note 1, at 113–21.
376. *Id.* at 113 (footnote omitted).
377. Wood, *supra* note 2, at 1467.

nonetheless subject[] them to the same sentencing schemes."[378] *Thompson*, *Roper*, *Graham*, and *Miller* established a tradition of treating juveniles differently using a common thread of reduced juvenile culpability to limit the availability of particular sentences as applied juvenile offenders.[379] *Miller*, in particular, introduced individualized consideration of an offender's youthful status before imposing life without parole, and the broader *Miller* rationale supports an individualization requirement in all juvenile sentencing proceedings.[380]

Post-*Miller* courts have effectively undermined this broad rationale, using loosely considered transfer decisions to trigger a myriad of mandatory sentences and severely limiting the application of *Miller*.[381] The *Miller* Court sought to re-establish the line between young offenders and adult criminals, barring sentencing schemes that impose mandatory life-without-parole on juveniles.[382] In announcing this new rule, the Court contemplated, or perhaps hoped, that "appropriate occasions for sentencing juveniles to this harshest possible penalty w[ould] be uncommon."[383] However, this has not been the case; where juveniles are continuously subjected to a sentence of functional equivalence, life without parole, as subsequent courts incrementally dismantle *Miller*'s rationale. This phenomenon is demonstrated effectively by the Kansas Supreme Court's decision in *State v. Brown*.

In *Brown*, an ill-considered transfer mechanism equalized a thirteen-year-old offender and adult criminals, undermining *Miller*'s contemplation of juveniles as less culpable than adults and warranting individualized consideration. With extreme deference afforded to lower courts, reviewing courts rarely reverse transfer decisions, even when an abuse is present. This is in spite of a constitutional principle of lessened culpability, the harsh consequences of transfer, and even a statutory presumption against transfer. As *Brown* also demonstrates, the most pronounced manner in which courts foreclose the operation of *Miller*'s rationale in juvenile sentencing jurisprudence is denying extension of *Miller* through a myriad of creative sentencing schemes that avoid *Miller*'s holding but offend its rationale. Courts may refuse to apply *Miller* in contexts other than mandatory life without parole. In minimally complying with *Miller*'s narrow holding, courts and legislatures employ a variety of creative strategies: some legislatures sever the mandatory nature of

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378. Flynn, *supra* note 342, at 1073.

379. *See* Kelli E. Antes, Case Comment, *Taking a Life Without Taking a Life:* State v. Ninham *Violates the Eighth Amendment by Sentencing a Fourteen-Year-Old Juvenile to Life in Prison Without Parole*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 215, 241 (2013).

380. Hoeffel, *supra* note 148, at 53.

381. *See e.g.*, Nostro, *supra* note 293, at 176.

382. *See* Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.").

383. *Id.*

life without parole while giving little effect to individual consideration before imposing life without parole; other courts impose the next most severe punishment that may operate as the equivalent to life without parole.

Our current legal system therefore suffers a bifurcation of juvenile sentencing philosophies. Juvenile jurisprudence insists youthfulness is a unique status with regard to legal treatment of criminal offenders, as seen most potently in *Miller*. A variety of states, however, dismantle *Miller*'s broad rationale; they "lump" juveniles into the adult criminal system and charge accordingly, with little or no regard for youthfulness as a categorically distinct status.[384] As a result of diminishing *Miller*'s reach, the constitutional line between juveniles and adults originating in the juvenile courts and advanced by *Miller* is inevitably and incrementally erased.

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384. Flynn, *supra* note 342, at 1072.

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