THE JURISPRUDENCE OF DEATH AND YOUTH: NOW THE TWAIN SHOULD MEET

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"[I]f . . . 'death is different,' children are different too."
– Justice Kagan[1]

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1. Miller v. Alabama, 132 S. Ct. 2455, 2470 (2012) (quoting Harmelin v. Michigan, 501 U.S. 957, 994 (1991)).

I. INTRODUCTION

Death is different. In its severity and irrevocability, it is unique as a form of punishment. The United States Supreme Court has underscored this point in forty-one years of jurisprudence, since its 1972 decision in *Furman v. Georgia*.[2] As a result of death's difference, the Court has required procedural protections against its arbitrary imposition.

Youth is different. In its transience and malleability, it is unique as a stage of life. The Supreme Court has underscored this sentiment in its Eighth Amendment jurisprudence, beginning with *Thompson v. Oklahoma* in 1988.[3] As a result of youth's difference, the Court has prohibited sentences of death and mandatory life without parole for juveniles.[4]

The Court's recent insistence that "if . . . 'death is different,' children are different too"[5] gives weight to the application of Eighth Amendment death penalty jurisprudence to juvenile sentences other than death in *Graham v. Florida*[6] and *Miller v. Alabama*.[7] This Article argues that the jurisprudence of juvenile transfer should go a step further down the comparative road paved by the Court and insist that juvenile transfer proceedings be subject to the same scrutiny exercised over capital punishment proceedings. While Eighth Amendment jurisprudence need not be literally incorporated into juvenile transfer proceedings, it should be adopted through the Due Process Clause.

The parallels between the death penalty and juvenile transfer are striking. Both involve a decision to expose a person to the most severe set of penalties available to the relevant justice system: a death sentence for adults in adult court; a transfer to adult court for youth in juvenile court. The decision to send an adult to his death is a decision to end his life; the decision to send a juvenile to adult court is a decision to end his childhood. Both decisions signify a life not worth saving, and therefore, both decisions are to apply to the "worst of the worst."[8] As a result of the finality and seriousness of their consequences, both processes should require the strictest of procedures for reliable imposition of those consequences.

Nonetheless, the procedures for imposition of both a death sentence and juvenile transfer are deeply flawed. Each suffers from the dueling quest for

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2. Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

3. Thompson v. Oklahoma, 487 U.S. 815, 834, 838 (1988) (holding that because of youth's differences, execution of a person under sixteen violated the Eighth Amendment). The Court began this course to a lesser extent a few years earlier in *Eddings v. Oklahoma*, in which it held that a decision-maker in the penalty phase of a capital case must consider the mitigating effects of "the background and mental and emotional development of a youthful defendant." Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982).

4. The word "juvenile" in this Article will generally refer to a child under eighteen years old, consistent with the Supreme Court's use of the term in the majority of its cases.

5. *Miller*, 132 S. Ct. at 2470 (quoting *Harmelin*, 501 U.S. at 994).

6. Graham v. Florida, 130 S. Ct. 2011 (2010).

7. *Miller*, 132 S. Ct. 2455.

8. *See, e.g.*, Kansas v. Marsh, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) (internal quotation marks omitted) ("[T]he death penalty must be reserved for 'the worst of the worst.'").

guided discretion (or consistency), on the one hand, and individualization on the other. The recognition of that seemingly irreconcilable tension has caused a few Supreme Court Justices to reject the quest altogether in the death penalty context.[9] While the Court's jurisprudence on procedures for imposing death is not a model, the Court has, at least, recognized the tension and worked both to narrow who is subject to the death penalty and to reduce the potential for arbitrary and capricious imposition of death through procedures for guided discretion.

In the juvenile transfer context, however, the Court has weighed in on the procedures only once, almost fifty years ago, in *Kent v. United States*, and suggested the sparest form of due process.[10] As a result, juvenile transfer is a "jurisprudential wasteland."[11] Since *Kent*, juvenile transfer laws have proliferated to become incoherent and expansive mechanisms for arbitrary and capricious imposition of transfer to adult court. Whereas death penalty jurisprudence recognizes that the twin goals of guided discretion and individualization are in tension and tries to resolve that tension, in juvenile transfer, those goals, if pursued at all, are pursued at cross purposes and in direct conflict with each other. When transfer laws allow transfer of a child based on the unfettered discretion of a judge or a prosecutor, the decision is individualized, but juveniles are then subject to the kind of arbitrary and capricious imposition outlawed in the death penalty context in 1972. Furthermore, when transfer laws allow automatic transfer of a child based solely on the alleged offense, there is consistency, but at the expense of individualization. *Graham* and *Miller* teach that individualization is necessary because adolescents are developmentally different from adults and should not be automatically subject to a harsh penalty without consideration of those differences.[12]

This Article argues that the punitive and unbalanced procedures of juvenile transfer can benefit from the more developed and principled jurisprudence of death. Part II provides a brief background on the history and development of juvenile transfer. It highlights the hodgepodge response of state legislatures to a perceived crisis in juvenile crime. Little coordination among stakeholders, a punitive attitude toward youth, and a lack of faith in the juvenile justice system have led to thoughtless and draconian transfer provisions.

Part III addresses the importance of narrowing the eligibility for who is subject to juvenile transfer. It first describes the very broad eligibility criteria

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9. *See infra* note 182 and accompanying text.

10. Kent v. United States, 383 U.S. 541, 561–63 (1966).

11. Franklin E. Zimring, *The Power Politics of Juvenile Court Transfer: A Mildly Revisionist History of the 1990s*, 71 LA. L. REV. 1, 1 (2010); *see* Robin Walker Sterling, *Fundamental Unfairness:* In re *Gault and the Road Not Taken*, 72 MD. L. REV. 607, 613 (2013) (describing the Court's approach to juvenile rights as an "anemic due process analysis").

12. *See infra* notes 120–23, 165–68 and accompanying text.

that currently exist in the states. The breadth of eligibility for children as young as ten defies scientific research as to the competency, culpability, and capability of adolescents. This Part then looks to death penalty jurisprudence to study how the Court has narrowed the eligibility criteria for the death penalty for adults and has eliminated juveniles from its purview. This narrowing comes from the Court's belief that the classes of offenders or offenses subject to the death penalty should be limited to classes about which the Court feels with certainty that death is deserved. Applying the lessons of death to juvenile transfer, this Part argues that the same kind of narrowing must occur in juvenile transfer proceedings, lest undeserving youth face the very real risk they will be transferred to adult court, despite their transient incompetence and immaturity.

Part IV addresses the goal of individualization and applies the lessons of death penalty jurisprudence to mandatory juvenile transfer provisions. The Supreme Court outlawed the mandatory death penalty in 1976 and constitutionalized the requirement of individualized consideration of the defendant's circumstances to inform the decision of whether to impose the death penalty.[13] Recently, because just as "death is different," "children are different too,"[14] the Supreme Court in *Miller* extended the individualization requirement to juveniles facing sentences of life without parole. On the other hand, the legislative response to juvenile crime has been to enact legislation automatically excluding juveniles of a certain age and offenses of a certain kind from the jurisdiction of the juvenile court. Mandatory transfer schemes violate a child's due process right to individualized treatment.

Finally, Part V discusses the dilemma of guiding discretion in both death and juvenile transfer proceedings so as to avoid arbitrary and capricious decision-making. In juvenile transfer proceedings, most jurisdictions give a judge the discretion to decide whether to waive jurisdiction after a hearing, but a growing number of jurisdictions give prosecutors complete and unfettered discretion about whether to file the case in juvenile or adult court. Both procedures suffer from a lack of guidelines and accountability, and the evidence is clear that both judges and prosecutors make arbitrary and capricious decisions. In the death penalty context, the Court has worked for forty years to guide the discretion of the decision-maker, albeit with limited success, but with more success than in the juvenile transfer proceeding context. Furthermore, the life or death decision-maker is *never* the prosecutor. This section recommends abolishing prosecutorial discretion in juvenile transfer decisions and recommends borrowing procedures from capital cases to begin to rein in the discretion of judges.

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13. Woodson v. North Carolina, 428 U.S. 280, 291–92 (1976).

14. Miller v. Alabama, 132 S. Ct. 2455, 2470 (2012) (quoting Harmelin v. Michigan, 501 U.S. 957, 994 (1991)) (internal quotation marks omitted).

State legislatures are not poised to eliminate either juvenile courts or juvenile transfer any time soon.[15] Hence, it is worth spending far more time and effort delivering a coherent and defensible theory for the transfer of juveniles to adult court. The lessons of death provide some guidance in that exercise.

II. A BRIEF BACKGROUND ON JUVENILE TRANSFER

A juvenile's transfer to adult court has profound consequences.[16] The result is not only quantitative in that a child will more likely be incarcerated after processing in adult court than in juvenile court[17] and for longer periods,[18] but it is also qualitative. The child is no longer a child, but an adult, for the purposes of our justice system. Although the juvenile system does punish, it

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15. *See* PATRICK GRIFFIN, SEAN ADDIE, BENJAMIN ADAMS & KATHY FIRESTINE, U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, JUVENILE OFFENDERS AND VICTIMS: NATIONAL REPORT SERIES—TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 9 (2011) [hereinafter OJJDP, TRYING JUVENILES AS ADULTS], *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf ("Despite the steady decline in juvenile crime and violence rates since 1994, there has as yet been no discernible pendulum swing away from transfer."); *see also* Franklin E. Zimring, *The Punitive Necessity of Waiver*, *in* CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFERS OF ADOLESCENTS TO THE CRIMINAL COURT 216–17 (Jeffrey Fagan & Franklin E. Zimring eds., 2000) [hereinafter CHANGING BORDERS] (arguing that the best outcome to the balance between society's preference to process youth in the juvenile system and the "hard cases" is to allow transfer for the very serious crime committed by a sixteen or seventeen-year-old whom the juvenile court cannot easily accommodate).

16. *See* Robert O. Dawson, *Judicial Waiver in Theory and Practice*, *in* CHANGING BORDERS, *supra* note 15, at 55 ("Because of the magnitude of the stakes at issue in a waiver proceeding, the judicial hearing can be lengthy and hard-fought. Under those circumstances, such hearings are the 'capital cases' of the juvenile justice system in the sense that they are the proceeding with the most serious consequences in the system."); Richard E. Redding, *Juveniles Transferred to Criminal Court: Legal Reform Proposals Based on Social Science Research*, 1997 UTAH L. REV. 709, 716 (1997) (quoting the New Jersey Supreme Court that "waiver to the adult court is the single most serious act the juvenile court can perform . . . because once waiver of jurisdiction occurs, the child loses all protective and rehabilitative possibilities available." (quoting State v. R.G.D., 527 A.2d 834, 835 (N.J. 1987) (internal quotation marks omitted)).

17. *See* OJJDP, TRYING JUVENILES AS ADULTS, *supra* note 15, at 24 (comparing data from 1990, 1992, and 1994 revealing that 68% of the transferred youth received incarceration, while only 40% of the nontransferred youth received placements in juvenile correctional facilities); Barry C. Feld, *Abolish the Juvenile Court: Youthfulness, Criminal Responsibility, and Sentencing Policy*, 88 J. CRIM. L. & CRIMINOLOGY 68, 79 n.21 (1997) [hereinafter Feld, *Abolish the Juvenile Court*] (citing studies and statistics showing that transferred violent youth received greater sentences than their juvenile counterparts).

18. *See* Donna Bishop & Charles Frazier, *Consequences of Transfer*, *in* CHANGING BORDERS, *supra* note 15, at 233–37 (demonstrating that transferred youths receive longer sentences than not only their juvenile court counterparts, but also their older adult counterparts). There is some indication, however, of a "punishment gap" with lesser offenses, such as property offenses, in which the juvenile who is transferred may receive a more lenient sentence. *See* Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 705 (1991) (positing that some transferred youth who are young or with lower-level offenses get less punishment); Eric L. Jensen, *The Waiver of Juveniles to Criminal Court: Policy Goals, Empirical Realities, and Suggestions for Change*, 31 IDAHO L. REV. 173, 197–98 (1994) (also positing that some transferred youth who are young or with lower-level offenses get less punishment); *see also* Redding, *supra* note 16, at 738 n.177 (citing studies showing differential conclusions on the length of sentences for like offenders in juvenile and adult court).

also gives children the opportunity to clear their records and grow out of their behavior.[19]

The adult system reverses these assumptions. The child is an adult, subject to "adult time," often housed with adult prisoners,[20] faced with abusive conditions far worse than in juvenile facilities,[21] and saddled with an adult record to follow him throughout his life.[22] Furthermore, in thirty-four states, this is now the child's status for all future cases: these states have "once adult/always adult" laws, meaning that the child is subject to the punitive adult system of justice forevermore.[23] A child who is transferred to the adult system has a far greater chance of recidivism than a child in the juvenile system; not only does transfer not deter future criminal behavior, but it also encourages it.[24]

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19. *See* Kent v. United States, 383 U.S. 541, 556–57 (1966) ("It is clear beyond dispute that the waiver of jurisdiction is a 'critically important' action . . . . The Juvenile Court is vested with 'original and exclusive jurisdiction' of the child. This jurisdiction confers special rights and immunities. He is, as specified by the statute, shielded from publicity. He may be confined, but with rare exceptions he may not be jailed along with adults. He may be detained, but only until he is 21 years of age. The court is admonished by the statute to give preference to retaining the child in the custody of his parents 'unless his welfare and the safety and protection of the public can not be adequately safeguarded without * * * removal.' The child is protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and disqualification for public employment." (alterations in original)); Zimring, *The Punitive Necessity of Waiver*, *supra* note 15, at 210 ("The policy of the juvenile court is to punish offenders without sacrificing the long-term life chances and developmental opportunities of the targets of punitive sanctions. The key distinction here is between punishments that hurt and those that permanently disfigure. . . . [P]ermanent stigma is to be avoided at great cost . . . ." (citation omitted)).

20. *See* OJJDP, TRYING JUVENILES AS ADULTS, *supra* note 15, at 22–23 (giving examples). "According to Amnesty International, in 1998 nearly 200,000 children under eighteen were tried as adults; 18,000 children were housed in adult prisons, 3500 of whom shared living spaces with adults." David S. Tanenhaus & Steven A. Drizin, *"Owing to the Extreme Youth of the Accused": The Changing Legal Response to Juvenile Homicide*, 92 J. CRIM. L. & CRIMINOLOGY 641, 643 (2002) (citing AMNESTY INT'L, BETRAYING THE YOUNG: HUMAN RIGHTS VIOLATIONS AGAINST CHILDREN IN THE U.S. JUSTICE SYSTEM (1998)). A more recent paper reports that 7,000 youth under eighteen are "in adult jails on any given day and one in 10 youth incarcerated in the United States are admitted to an adult prison or jail." Carol A. Schubert et al., *Predicting Outcomes for Youth Transferred to Adult Court*, 34 LAW & HUM. BEHAV. 460, 461 (2010) (citations omitted).

21. *See* Bishop & Frazier, *Consequences of Transfer*, *supra* note 18, at 254 (stating that, among other issues presented in prisons, there are problematic relationships between inmates and staff, unstructured interaction with inmates, and inadequate educational, mental health, and occupational services); Redding, *supra* note 16, at 758 n.280 (reciting a 1997 summary of "research showing that juveniles in adult correctional facilities are eight times more likely to commit suicide, five hundred times more likely to be sexually assaulted, and two hundred times more likely to be beaten by staff than are juveniles in juvenile facilities").

22. *See* T. Marcus Funk, *The Dangers of Hiding Criminal Pasts*, 66 TENN. L. REV. 287, 290–92 (1998) (explaining juvenile expungement schemes).

23. OJJDP, TRYING JUVENILES AS ADULTS, *supra* note 15, at 2, 3. "'Once adult/always adult' laws are a special form of exclusion requiring criminal prosecution of any juvenile who has been criminally prosecuted in the past—usually without regard to the seriousness of the current offense." *Id.* at 2.

24. *See* Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 141 (2010) (citing a 2007 Center for Disease Control report that examined all available studies on transfers, finding higher recidivism rates for children prosecuted as adults compared to similarly situated children in juvenile court and that juveniles transferred to the adult system were approximately 34% more likely to be arrested than children in the juvenile system); Donna M. Bishop et al., *The Transfer of Juveniles to Criminal Court: Does It Make a Difference?*, 42 CRIME & DELINQ. 171, 175–83 (1996) (studying recidivism rates of transferred compared to nontransferred juveniles and finding recidivism rates higher among transferred); Jeffrey Fagan, *The Comparative Advantage of Juvenile Versus Criminal Court Sanctions*

Hence, the decision to treat a child as an adult in our penal system is a qualitative one, unique to the juvenile justice system in its severity.

This Part discusses how and why transfer to adult court became a part of the Progressives' juvenile justice system of rehabilitation and describes the evolution of the various expansive transfer mechanisms operating today. This history exposes a lack of coherence between the competing, but equally important, goals of consistency and individualization.

A "youth is different" theory is not new in the field of criminal justice. The Progressives built a separate juvenile justice system in America on the idea that children were different from adults and should be treated differently.[25] Over a century ago, Progressive Era reformers experimented with and developed a separate system of justice for juvenile criminal offenders.[26] Prior to that time, children fourteen and older had been treated as adults, tried in adult courts, and given adult sentences.[27]

Progressives believed that wayward children should be treated and rehabilitated, not punished, and they urged special non-criminal courts for juveniles.[28] The State was to act as parent, or *parens patriae* (literally "father of the country"[29]), and not as prosecutor or judge.[30] In 1909, Judge Julian Mack, a leading proponent of the separate court system, identified the purpose of the court:

> The problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.[31]

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on Recidivism Among Adolescent Felony Offenders, 18 LAW & POL'Y 77, 96–98 (1996) (matching juvenile offenders in juvenile and adult court and finding higher recidivism rates for those in adult court, controlling for other factors); Richard E. Redding & James C. Howell, *Blended Sentencing in American Juvenile Courts*, *in* CHANGING BORDERS, *supra* note 15, at 150 (citing multiple studies showing recidivism rates higher among juveniles transferred to adult court than those retained in the juvenile system; transferred juveniles are more likely to reoffend more quickly and more frequently than juveniles in juvenile system, even simply from being processed in criminal court without conviction and incarceration).

25. Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821, 823–25 (1988) [hereinafter Feld, *Juvenile Court Meets the Principle of Offense*]; David S. Tanenhaus, *The Evolution of Transfer Out of the Juvenile Court*, *in* CHANGING BORDERS, *supra* note 15, at 13, 17.

26. Feld, *Juvenile Court Meets the Principle of Offense*, *supra* note 25, at 824–25.

27. Tanenhaus, *supra* note 25, at 14.

28. David R. Barrett, William J.T. Brown & John M. Cramer, Note, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 775 (1966). These children were generally poor white and European immigrants and not African-American children, who were generally left out of the child-saving business. *See* Sterling, *supra* note 11, at 623–33 (describing disparate treatment).

29. BLACK'S LAW DICTIONARY 1221 (9th ed. 2009).

30. Kent v. United States, 383 U.S. 541, 554–55 (1966).

31. Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119–20 (1909). Julian Mack noted that the effective judge would be "[s]eated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him." *Id.* at 120.

Given the informal, non-adversarial nature of the proceedings, the child was not given the basic constitutional rights of adult criminal procedure, such as bail, confrontation, counsel, or a jury trial.[32]

However, from the very beginning, not all juveniles were thought fit subjects for this special treatment. Judges transferred to adult court (or declined jurisdiction over) older children charged with serious crimes.[33] In the 1920s, about one percent of juvenile cases were transferred, consisting almost entirely of sixteen and seventeen-year-olds charged with serious offenses.[34] The stated concern was that these children would be a danger to the nonviolent children housed in the juvenile system,[35] but societal fear was also growing with infamous cases like those of "boy murderers" Richard Loeb and Nathan Leopold.[36] As law historian David Tanenhaus explains, "[t]he option of transferring cases to the criminal justice system served as a built-in safety valve, which a judge could use to relieve political pressure on his court by expelling a controversial case."[37]

The care and rehabilitation ideal of juvenile court was never to be fully realized, in any event.[38] By the 1960s, the paucity of services and the punitive nature of the placements caught the attention of the United States Supreme Court. As Justice Fortas memorably stated for the majority in *Kent v. United States* in 1966, "There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[39] Hence, in the 1960s, the Court began to hand to juveniles some, but not all, basic constitutional procedural rights in juvenile court.[40]

Then transpired what Barry Feld calls the "[t]ransformation of the [j]uvenile [c]ourt."[41] At the same time that the Court gave juveniles procedural rights commensurate with adults, juvenile court sentences became more

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32. *Kent*, 383 U.S. at 555.

33. Tanenhaus, *supra* note 25, at 14.

34. *Id.* at 23.

35. *Id.*

36. *Id.* at 27.

37. *Id.* at 21 (citation omitted). For example, in 1935, the Illinois Supreme Court held that the juvenile court did not have jurisdiction over the case of fifteen-year-old alleged murderess Susie Lattimore because "[i]t was not intended by the Legislature that the juvenile court should be made a haven of refuge where a delinquent child of the age recognized by law as capable of committing a crime should be immune from punishment for violation of the criminal laws of the state[.]" People v. Lattimore, 199 N.E. 275, 276 (Ill. 1935).

38. Tanenhaus, *supra* note 25, at 18.

39. Kent v. United States, 383 U.S. 541, 556 (1966); *see In re* Gault, 387 U.S. 1, 18 (1967) ("[U]nbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.").

40. *See Gault*, 387 U.S. at 31–57 (granting juveniles the rights to notice of charges, a fair and impartial hearing, assistance of counsel, confrontation, and the privilege against self-incrimination).

41. Feld, *The Transformation of the Juvenile Court*, *supra* note 18, at 691.

punitive.[42] Many states rewrote their statutory purposes for juvenile jurisdiction to emphasize punishment of the juvenile and protection of the public, eliminating rehabilitation and best interests of the child.[43] States passed mandatory minimum sentences and sentencing guidelines.[44] In the 1990s, these new laws caused scholars such as Barry Feld and Janet Ainsworth to recommend the abolition of juvenile court because it was a punitive venue whose only distinction from adult court was its fewer procedural protections.[45] A separate juvenile court persists today, however, in part because society still believes children are different—that they have a capacity for change and deserve an opportunity for it. The advantages of treatment in juvenile court are still salient.[46] Juvenile court is still far less punitive than adult court under most circumstances, juvenile court still emphasizes treatment rather than incarceration, and a child can still emerge without an adult record.

When juvenile court transformed into to a more punitive venue, juvenile transfer also transformed. The reach of juvenile transfers expanded exponentially.[47] As juvenile crime grew and state legislatures bowed to the

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42. *See* Elizabeth S. Scott, Miller v. Alabama *and the (Past and) Future of Juvenile Crime Regulation*, 31 LAW & INEQ. 535, 537 (2013) (noting that, within less than a generation, "dispositions got harsher and the use of incarceration increased substantially" in juvenile court).

43. Tanenhaus & Drizin, *supra* note 20, at 642 & n.7 (citing MELISSA SICKMUND ET AL., U.S. DEP'T OF JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 1997 UPDATE ON VIOLENCE 30 (1997)).

44. *See* Feld, *Juvenile Court Meets the Principle of Offense*, *supra* note 25 at 852–79 (describing the punitive sentence reforms made in several states, including sentencing guidelines and mandatory minimums). *But see id.* at 910 (explaining that juveniles were still receiving shorter sentences on the whole).

45. Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1118–21 (1991) (recommending abolition because of the availability of greater procedural safeguards and greater opportunity for effective assistance of counsel); Katherine Hunt Federle, *The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights*, 16 J. CONTEMP. L. 23, 38–39 (1990) (questioning whether any distinct role for juvenile court remained); Feld, *Abolish the Juvenile Court*, *supra* note 17, at 68–69 (arguing that the substantive and procedural convergence between juvenile and adult court eliminates differences in strategies of social control of adults and juveniles, so there is no reason to maintain a separate system whose only distinction is persisting procedural deficiencies); Feld, *The Transformation of the Juvenile Court*, *supra* note 18, at 692–93. *But see* Irene Merker Rosenberg, *Leaving Bad Enough Alone: A Response to the Juvenile Court Abolitionists*, 1993 WIS. L. REV. 163, 166–85 (arguing that the juvenile system is better than the adult system at handling juveniles); Zimring, *The Punitive Necessity of Waiver*, *supra* note 15, at 212 (stating that the call for abolishment has no constituency and that "nothing speaks as powerfully to the continuing legitimacy of some ideal of juvenile justice than the absence of credible campaigns to disestablish the juvenile court"). Even with a recommendation of abolition, both Feld and Ainsworth recommended some sort of standardized "youth discount" for juveniles receiving sentences in adult court and that juveniles not be housed with adults. *See, e.g.*, Ainsworth, *supra*, at 1131; Feld, *Abolish the Juvenile Court*, *supra* note 17, at 118–21; *see also* Tanenhaus & Drizin, *supra* note 20, at 697–98 (supporting "youth discounts" for any adult sentences).

46. *See, e.g.*, Zimring, *The Punitive Necessity of Waiver*, *supra* note 15, at 210 ("The policy of the juvenile court is to punish offenders without sacrificing the long-term life chances and developmental opportunities of the targets of punitive sanctions. The key distinction here is between punishments that hurt and those that permanently disfigure. Discomfort and restriction are elements of juvenile sanctions but permanent stigma is to be avoided at great cost, and a juvenile residential facility that did not offer schooling and life preparation to its subjects would be in irredeemable conflict with the purposes of the modern juvenile court." (citation omitted)).

47. Much of this expansion disproportionately affected minority youth. *See* HOWARD N. SNYDER & MELISSA SICKMUND, U.S. DEP'T OF JUSTICE OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION,

political pressures of the time, mechanisms for waiver proliferated without much coherence or thought. As scholars in this area bemoan, waiver is a practice in search of a theory.[48]

The spike in juvenile crime in the 1980s and 1990s and the rise of the alleged juvenile "super-predator" is an oft-told story.[49] State legislatures reacted to this fear by making it easier to transfer children out of the juvenile system.[50] Until the 1970s, the almost exclusive method for transferring cases was a discretionary judicial waiver process.[51] However, with the increase in juvenile crime and the pressure of crowded dockets, states increasingly adopted two other forms of transfer that were far more expeditious and required minimal process: mandatory transfer and prosecutorial discretion transfer.[52] Most states have a blend of all three forms of transfer today.[53] Despite the fact that juvenile crime peaked in 1994 and has been on a steady descent,[54] legislatures have largely retained these rigid transfer provisions.[55]

JUVENILE OFFENDERS AND VICTIMS: 1999 NATIONAL REPORT 150 (1999) (showing that in 1996, African-American juveniles were referred to juvenile court at a rate more than twice that of white juveniles). While African-American children were ignored by the child savers, with the rise in juvenile crime and the transfer of the system into a punitive one, African-American children quickly became overrepresented in the system. *See id.*; Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383 (2013) (contending that narratives portraying minority youth as dangerous lead prosecutors to disproportionately reject the mitigating effect of youth in delinquency proceedings); Tanenhaus & Drizin, *supra* note 20, at 666 ("Minority youth bore the brunt of this new crackdown on juvenile offenders."); *see generally* Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative "Backlash"*, 87 MINN. L. REV. 1447 (2003) (analyzing racial considerations in the changing jurisprudence of juvenile justice).

48. *See*, *e.g.*, Jeffrey Fagan & Franklin E. Zimring, *Editors' Introduction*, *in* CHANGING BORDERS, *supra* note 15, at 2–3 (discussing the need to develop a theory of transfer).

49. *See*, *e.g.*, Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 681 n.1 (citing Peter Annin, '*Superpredators*' *Arrive: Should We Cage the New Breed of Vicious Kids?*, NEWSWEEK, Jan. 22, 1996, at 57); Scott, *supra* note 42, at 536 (stating that in the 1990s, "young criminals were seen as vicious 'superpredators' and a series of moral panics swept the country").

50. Between 1990 and 1996, forty states passed laws to make it easier to prosecute children in adult court. Fagan & Zimring, *supra* note 48, at 4.

51. OJJDP, TRYING JUVENILES AS ADULTS, *supra* note 15, at 8.

52. *Id.* By the mid-1980s, nearly all states had judicial waiver, twenty had automatic, and seven had prosecutorial. *Id.* During the surge in youth violence that began in 1987 and peaked in 1994, "legislatures in nearly every state revised or rewrote their laws to lower thresholds and broaden eligibility for transfer, shift transfer decisionmaking authority from judges to prosecutors, and replace individualized discretion with automatic and categorical mechanisms." *Id.* at 9. Between 1986 and the end of the 1990s, the number of states with automatic transfer mechanisms increased from twenty to thirty-eight, and prosecutorial discretion laws increased from seven to fifteen. *Id.* While more states have judicial discretion transfer provisions than prosecutorial discretion or mandatory provisions, the majority of juveniles are transferred to adult court through the latter two methods. *See id.* at 12 (citing a study of the seventy-five largest counties, showing only 23.7% of the cases reached criminal court through judicial discretion waiver).

53. *Id.* at 2.

54. *Id.* at 9; *see also* COORDINATING COUNCIL ON JUVENILE JUSTICE & DELINQUENCY PREVENTION, COMBATING VIOLENCE AND DELINQUENCY: THE NATIONAL JUVENILE JUSTICE ACTION PLAN 1 (1996) (reporting that one-half of one percent of youth were arrested for violent crimes).

55. OJJDP, TRYING JUVENILES AS ADULTS, *supra* note 15, at 9; Scott, *supra* note 42, at 540. Despite falling rates of juvenile crime, the public, fueled by the media and a few high-profile stories, continued to believe most violent crime was committed by juveniles. Scott, *supra* note 42, at 540. On the other hand, a

There is some hope that times have changed again, however. The Supreme Court's recent "children are different" jurisprudence focuses on developmental research that reiterates the frailty and transience of children and a corresponding need for less harsh punishment. Recent surveys show public support for a rehabilitative focus.[56] The time may be ripe to make changes in juvenile transfer, consistent with a current description of juvenile offenders "as youths whose crimes are a product of developmental immaturity and whose maturity into non-criminal adulthood is a reasonable policy goal."[57] The Supreme Court's recent marriage between death penalty jurisprudence and juveniles should help pave the way.

III. NARROWING THE ELIGIBILITY CRITERIA: LESSONS FROM DEATH FOR JUVENILE TRANSFER

A. The Current Status of Juvenile Transfer Eligibility

One of the first and most sweeping changes from the 1980s and 1990s panic was that legislatures lowered the age at which a juvenile could be transferred to juvenile court, and also lowered the level of eligible offenses for transfer. Traditionally, the cases judges transferred were largely those of sixteen and seventeen-year-old juveniles who had committed serious crimes.[58] Some examples should suffice to demonstrate the large-scale expansion since then. In four states, there is *no* age restriction whatsoever for transfer for *any* criminal offense.[59] In Kansas, a child as young as ten years old is eligible for transfer for *any* offense.[60] In two other states, ten-year-olds are eligible for transfer for specified offenses.[61] In two states, children as young as twelve are eligible for transfer for certain felonies.[62] In Illinois, Wyoming, and Mississippi, a thirteen-year-old child is eligible for transfer for *any* offense.[63] In three more states, thirteen-year-olds can be transferred for specified offenses.[64] Finally, six states allow transfer of fourteen-year-old children for *any* criminal offense,[65] and thirteen others allow transfer of fourteen-year-olds for specified

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few states reacted to the decreased concern by repealing various harsh transfer provisions. *See id.* at 548 & n.82 (giving examples from Washington and Illinois).

56. *See* Scott, *supra* note 42, at 541 (noting that lawmakers, politicians, and the public appear in favor or a more rehabilitative and less punitive approach to juvenile crime).

57. *Id.* at 543.

58. *See* Tanenhaus, *supra* note 25, at 23.

59. OJJDP, TRYING JUVENILES AS ADULTS, *supra* note 15, at 4 (including Alaska, Delaware, Rhode Island, and Washington).

60. *Id.*

61. *Id.* (Vermont: murder, person and certain property offenses; Indiana: murder).

62. *Id.* (Colorado and Missouri).

63. *Id.*

64. *Id.* (Georgia: capital crimes and certain person offenses; New Hampshire: murder and certain person offenses; North Carolina: certain felonies).

65. *Id.* (including Alabama, Florida, Idaho, Iowa, Nevada, and New Jersey).

offenses.[66] As far as the range of nonviolent felonies eligible for transfer, besides those states that allow transfer for *any* offense, four more states allow transfer of certain property offenses,[67] and three others allow transfer for certain drug offenses.[68]

Allowing transfer at such young ages and for such minor offenses means it is practically certain that transfer is not being authorized for the worst of the worst. Copious, peer-reviewed scientific research, some of which has recently been emphasized and relied upon by the Supreme Court,[69] has established developmental differences in adolescents that greatly impact their culpability, their susceptibility for deterrence, and their capacity for competent participation in criminal proceedings.[70] In 2005, expert researchers Elizabeth Scott and Thomas Grisso surveyed current research and concluded "that youths below age sixteen are significantly more likely than are adults to have deficiencies in capacities necessary for competent participation in criminal proceedings, and that, below age fourteen, the risk is substantial."[71]

Besides competency to stand trial, neurological and psychological development indicates that youths in early- to mid-adolescence lack cognitive understanding of consequences, are hard-wired to engage in risky behavior, and are more influenced by peers than by any other environmental factor. While Scott and Grisso found that "it is not possible to point to a particular age at which youths attain adult-like psychological capacities,"[72] they concluded that a "significant body of developmental research indicates that, on average, youths under the age of fourteen differ significantly from adolescents sixteen to eighteen years of age in their level of psychological development, with youths in the middle years showing similarities to and differences from both groups."[73] In addition, psychosocial research showed that "most youth age out of antisocial activities as they move into adulthood."[74]

How, then, is it defensible policy to have provisions that allow transfer to adult court of children between ten and fourteen years of age? Even a pure just deserts theory of retribution does not support punishment for a child who is not in a position to understand the consequences and to freely choose to do wrong.

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66. *Id.* (Arkansas: certain felonies, capital crimes, murder, certain person offenses, and certain weapons offenses; Kentucky: certain felonies and capital crimes; Louisiana: murder and certain person offenses; Indiana, Michigan, Minnesota, Ohio, Pennsylvania, South Carolina, Texas, Utah, Virginia, and Wisconsin: certain felonies).

67. *Id.* (giving various states' transfer data, including Oregon at fifteen; Vermont at ten; West Virginia at any age; and Wisconsin at fourteen).

68. *Id.* (Indiana at sixteen; Texas at fourteen; and West Virginia at any age).

69. *See infra* notes 96–106, 119–21 and accompanying text.

70. *See* Redding, *supra* note 16, at 724–33 (summarizing and collecting this research).

71. Elizabeth S. Scott & Thomas Grisso, *Developmental Incompetence, Due Process, and Juvenile Justice Policy*, 83 N.C. L. REV. 793, 811 (2005).

72. *Id.* at 816.

73. *Id.* at 817.

74. Beth A. Colgan, *Constitutional Line Drawing at the Intersection of Childhood and Crime*, 9 STAN. J. C.R. & C.L. 79, 84 & n.21 (2013) (citing studies).

However, even if the act itself was sufficiently reprehensible as to require incapacitation or victim vindication, it does not explain the transfer of cases where the offense is non-violent and not against the person. Statistics of transfer to adult court demonstrate that, in 2007, half the cases transferred were not offenses against the person.[75]

Given the seriousness of the decision to transfer a child, the dire consequences that follow, and the difficulty of making accurate decisions about who is deserving of transfer,[76] legislatures should seek to reduce exposure in categorical ways, in accordance with the care the Court has taken in narrowing eligibility for a death sentence.

B. The Lessons of Death Penalty Narrowing for Juvenile Transfer

The death penalty was a standard and mandatory punishment for any felony in early America.[77] Of course, felonies were limited to a few serious offenses, unlike today.[78] The Supreme Court ruled mandatory death penalties unconstitutional in 1976, in recognition of the harshness of a mandatory penalty that provides no opportunity for individualized consideration of the defendant's characteristics and circumstances.[79]

The Court has continued to use bright lines to narrow categories of death-eligible offenders and offenses. As the Court expressed in *Roper v. Simmons*, "[c]apital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"[80] The Court has drawn upon a distinct Eighth Amendment jurisprudence of proportionality for infliction of the death penalty.[81] Because death is different in kind from other sentences, the proportionality analysis is more robust than in non-death cases.[82] As famously put in *Woodson v. North Carolina*:

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75. OJJDP, TRYING JUVENILES AS ADULTS, *supra* note 15, at 10.

76. *See infra* notes 103, 202–09 and accompanying text.

77. *See* Woodson v. North Carolina, 428 U.S. 280, 289 (1976) (describing the range of offenses subject to the death penalty).

78. *Id.*

79. *Id.* at 304–05. The last vestige of a mandatory death penalty was later ruled unconstitutional. *See* Sumner v. Shuman, 483 U.S. 66 (1987) (outlawing a mandatory death penalty for murders committed by prisoners who are serving life sentences without possibility of parole).

80. Roper v. Simmons, 543 U.S. 551, 568 (2005) (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).

81. The Eighth Amendment states "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

82. *But see Atkins*, 536 U.S. at 337–44 (Scalia, J., dissenting) (arguing that the "death is different" jurisprudence has no support in history or in current social attitudes). For non-death sentences, the Court has held that a punishment violates the Eighth Amendment only if it is "grossly disproportionate" to the crime. Harmelin v. Michigan, 501 U.S. 957, 998 (1991) (internal quotation marks omitted). Because the Court gives deference to legislative determinations, some particularly harsh sentences passed muster under this test. *Id.* For example, in *Harmelin*, the Court held that a sentence of life without parole for possession of cocaine was not "grossly disproportionate." *Id.*; *see also* Ewing v. California, 538 U.S. 11, 11 (2003) (stating that a

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[83]

Whether death is a proportionate penalty for a particular crime or for a particular class of offenders is a two-step analysis. First, the Court determines whether a sentence of death for the offense or offender meets "evolving standards of decency that mark the progress of a maturing society."[84] "Evolving standards" have been measured by "objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question."[85] The Court has looked here for a "national consensus," or a majority of the states, on the acceptance or rejection of the punishment.[86]

For the second step of the proportionality analysis for capital punishment, the Court then uses its own subjective judgment to decide if the death penalty is proportionate.[87] Through this two-step analysis, the Court has held the death penalty unconstitutional for certain classes of offenders, such as the mentally retarded,[88] and for certain offenses, such as the rape of an adult woman[89] or the rape of a child,[90] and felony murder where the defendant did not kill or intend to kill.[91] These bright lines narrowed the death penalty so that it applied only to those who killed another human being or aided in a felony that led to the killing of a human being as long as the perpetrator of the felony had the intent to kill.

Most relevantly here, the Court has also drawn a bright line at the age of the offender as to who may be eligible for the death penalty. The Court found the death penalty unconstitutional for children under sixteen years old in *Thompson v. Oklahoma* in 1988.[92] Then, in 2005, the Court found the death

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sentence of twenty-five years to life for the theft of a few golf clubs under California's "three strikes" law was constitutional).

83. *Woodson*, 428 U.S. at 305.

84. Trop v. Dulles, 356 U.S. 86, 100–01 (1958).

85. *Roper*, 543 U.S. at 564.

86. *Id.* Traditionally, the Court did not count the states that had eliminated the death penalty entirely in determining the majority view. *See id.* at 610 (Scalia, J., dissenting) (making this point and stating that the reason is because the states prohibiting the death penalty have not weighed and considered the specific issue of proportionality of death for that certain crime or certain class of offenders). After looking for a national consensus, the Court has also looked to whether there has been a significant trend in legislation against the death penalty for the offense or offenders, and finally, to frequency of imposition as an additional factor. *Id.* at 566–67 (majority opinion).

87. *See* Coker v. Georgia, 433 U.S. 584, 597 (1977) ("[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.").

88. Atkins v. Virginia, 536 U.S. 304, 321 (2002).

89. *Coker*, 433 U.S. at 597.

90. Kennedy v. Louisiana, 554 U.S. 407, 446 (2008).

91. Enmund v. Florida, 458 U.S. 782, 797 (1982).

92. Thompson v. Oklahoma, 487 U.S. 815, 838 (1988).

penalty unconstitutional for all children under eighteen in *Roper v. Simmons*.[93] While the objective indicia of national consensus was not particularly strong in either case,[94] the Court's subjective analysis was grounded in developmental science, and it clearly drove the results in the two cases. In *Thompson*, Justice Stevens, for the plurality, remarked on the fact that some states authorized capital punishment with no minimum age for imposition and simply stated:

> One might argue on the basis of this body of legislation that there is no chronological age at which the imposition of death is unconstitutional and that our current standards of decency would still tolerate the execution of 10-year-old children. We think it self-evident that such an argument is unacceptable.[95]

Justice Stevens then relied upon several scientific reports to demonstrate the differences between adolescents and adults[96] and concluded that "[g]iven the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children," the expression of moral outrage shown by infliction of the death penalty was inapplicable for a fifteen-year-old offender.[97]

Depending even more upon the scientific research on the development of adolescents, a majority of the *Roper* Court held the death penalty unconstitutional for all juveniles under eighteen.[98] Based on this research, the Court noted three general differences between juveniles under eighteen and adults that "demonstrate that juvenile offenders cannot with reliability be

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93. Roper v. Simmons, 543 U.S. 551, 578–79 (2005). When confronted with the same issue in *Stanford v. Kentucky* years earlier, the Court did not find a national consensus against execution of kids over fifteen and under eighteen where twenty-two of the thirty-seven death penalty states permitted execution of sixteen-year-olds, and twenty-five of the thirty-seven permitted execution of seventeen-year-olds. Stanford v. Kentucky, 492 U.S. 361 (1989), *abrogated by Roper*, 543 U.S. 551.

94. *Compare Thompson*, 487 U.S. 815, *with Roper*, 543 U.S. 551. In both cases, there was conflicting evidence of a national consensus against the death penalty. *Roper*, 543 U.S. at 564–65; *Thompson*, 487 U.S. at 849. The national consensus against executing children under sixteen found by the four-member plurality in *Thompson* was inconclusive according to the fifth concurring judge. *Thompson*, 487 U.S. at 849 (O'Connor, J., concurring). Whereas four justices found that thirty-two states did not permit execution of children under sixteen, fourteen of those were states without the death penalty, leaving eighteen that considered and rejected juvenile execution, while nineteen jurisdictions and the federal government that allowed the death penalty, did not specify an age limit. *Id.* In *Roper*, the five-member majority proclaimed a national consensus against executing children less than eighteen years of age. *Roper*, 543 U.S. at 564–65. However, if the majority had counted only the death penalty states, as was traditional, there would have been no national consensus against executing children between sixteen and eighteen. Although thirty states prohibited such executions, that included twelve states that prohibited the death penalty altogether. Of the thirty-eight states permitting the death penalty, twenty allowed such executions and eighteen did not. *Id.* at 564 (majority opinion); *see id.* at 609 (Scalia, J., dissenting) ("Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus.").

95. *Thompson*, 487 U.S. at 827–28 (majority opinion).

96. *Id.* at 835 nn.42–43.

97. *Id.* at 836–37. Justice Stevens drew the line at fifteen, because the defendant was fifteen and the Court must only "decide the case before us." *Id.* at 838.

98. *Roper*, 543 U.S. at 570 (majority opinion).

classified among the worst offenders."[99] First, juveniles have "[a] lack of maturity and an underdeveloped sense of responsibility," that "often result[s] in impetuous and ill-considered actions and decisions."[100] Second, juveniles are subject to peer pressure and have less experience controlling their environment.[101] Finally, "[t]he personality traits of juveniles are more transitory, less fixed."[102]

The transience of these qualities was the key to differential treatment. As the *Roper* majority noted, "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime represents irreparable corruption."[103] Hence, juveniles have a diminished culpability for their actions, a greater claim for forgiveness, and a greater likelihood for reform.[104] Penological justifications of retribution and deterrence did not support the ultimate penalty of death.[105] Recognizing that line-drawing has its own arbitrariness, the Court drew the line at eighteen years old, consistent with other societal norms about when childhood ends and adulthood begins.[106]

In both cases, the Court made a categorical exception to the death penalty for youth of a certain age, and eschewed the case-by-case approach urged by the dissenters.[107] While the Court in *Roper* postulated that "a rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a sentence of death,"[108] it mandated a categorical rule because of several risks. First, there

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99. *Id.* at 569.

100. *Id.*

101. *Id.*

102. *Id.* at 570; *see also* Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982) ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. . . . Even the normal 16-year-old customarily lacks the maturity of an adult." (footnote omitted)).

103. *Roper*, 543 U.S. at 573.

104. *Id.* at 570.

105. *Id*. at 571 ("Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."). "[T]he likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." *Id.* at 572 (quoting Thompson v. Oklahoma, 487 U.S. 815, 837 (1988) (internal quotation marks omitted)).

106. *Id.* at 574. *But see* Colgan, *supra* note 74, at 92–93 (making the point that, while the Court was not very thoughtful about drawing the line at eighteen, the line is justified because the societal limitations on those under eighteen—the right to move, establish a residence, and maintain employment—exacerbate the developmental limitations of children who cannot extricate themselves from risky situations).

107. *See Roper*, 543 U.S. at 606 (O'Connor, J., dissenting) ("[T]he mitigating characteristics associated with youth do not justify an absolute age limit."), 618 (Scalia, J., dissenting) ("[T]he studies cited by the Court offer scant support for a categorical prohibition of the death penalty for murderers under 18."); *Thompson*, 487 U.S. at 870 (Scalia, J., dissenting) ("There is no rational basis for discerning in [the rarity of executions of 15-year-olds] a societal judgment that no one so much as a day under 16 can *ever* be mature and morally responsible enough to deserve that penalty . . . ."); *see also* Joseph L. Hoffmann, *On the Perils of Line-Drawing: Juveniles and the Death Penalty*, 40 HASTINGS L.J. 229 (1989) (arguing that bright-line age bans violate principles of retributivism).

108. *Roper*, 543 U.S. at 572 (majority opinion).

exists "[a]n unacceptable likelihood" that "the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course."[109] Second, as stated earlier, because it is difficult even for expert psychologists to know who will become a chronic offender,[110] jurors should not be entrusted with that difficult determination when a child's life is at stake.[111]

Perhaps most significantly for this Article, the Court took its death penalty jurisprudence on the road for juveniles facing sentences of life without parole. Until this point, the Court reviewed non-death sentences under a very narrow proportionality analysis on a case-by-case basis, and few sentences were even held to be "grossly disproportionate." In *Graham*, a majority of the Court used jurisprudence reserved for the death penalty to strike down a penalty of life without parole for juveniles convicted of non-homicide offenses,[112] and in *Miller*, it did the same for a mandatory penalty of life without parole for juveniles convicted of homicide offenses.[113] *Graham*'s implications for the narrowing of eligibility will be discussed here.

In *Graham*, the Court imported a death penalty proportionality analysis because "life without parole sentences share some characteristics with death sentences that are shared by no other sentences. . . . [T]he sentence alters the offender's life by a forfeiture that is irrevocable."[114] Such a sentence "means denial of hope"[115] and "forswears altogether the rehabilitative ideal."[116] A state must give the juvenile "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[117] Just as death is not a proportionate punishment for a juvenile, neither is the "second most severe penalty."[118]

As with *Thompson* and *Roper*, the majority's own subjective judgment in the second step of the proportionality analysis determined the result.[119] Taking

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109. *Id.* at 573.

110. *Id.* (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty By Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014–16 (2003)).

111. *Id.*

112. Graham v. Florida, 130 S. Ct. 2011, 2034 (2010). The *Graham* majority reasoned that because the petitioner's challenge was to the sentencing practice itself and not to the particular sentence imposed in his individual case, this was not a *Harmelin* claim, but a "categorical" claim. *Id.* at 2022–23; *see* Robert Smith & G. Ben Cohen, *Redemption Song:* Graham v. Florida *and the Evolving Eighth Amendment Jurisprudence*, 108 MICH. L. REV. FIRST IMPRESSIONS 86, 87 (2010) (noting the unique application of categorical exclusions to juvenile non-homicide offenses).

113. Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012).

114. *Graham*, 130 S. Ct. at 2027.

115. *Id.* (quoting Naorarath v. State, 779 P.2d 944, 944 (Nev. 1989)) (internal quotation marks omitted).

116. *Id.* at 2030.

117. *Id.*

118. *Id.* at 2027 (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991)) (internal quotation marks omitted).

119. The first step was not in the majority's favor. The *Graham* majority, in line with *Thompson* and *Roper* before it, did not use the traditional "national consensus" approach in the first step of its analysis. *Graham*, 130 S. Ct. at 2023. Indeed, thirty-seven states *allowed* sentences of life without parole for juveniles

the findings of children's differences in *Roper*—that juveniles have "transient rashness, proclivity for risk, and inability to assess consequences," which reduce moral culpability and "enhance[] the prospect that . . . his 'deficiencies will be reformed,'"[120]—the majority found life without the possibility of parole a disproportionate punishment for children.[121]

Graham's holding was cabined to non-homicide offenders and to sentences of life without parole, but in his dissent, Justice Thomas saw the dominos falling. Because "'[d]eath is different' no longer," he said, "[n]o reliable limiting principle remains to prevent the Court from immunizing any class of offenders from the law's third, fourth, fifth or fiftieth most severe penalties as well."[122] Yet, the majority refused a case-by-case approach, believing firmly in the difference of children as a category.[123]

In sum, then, death penalty proportionality jurisprudence teaches that in order for the penalty of death to be reserved for "the worst of the worst," its application should be narrowly and categorically drawn in terms of both offenders and offenses. Further, in cases involving youth, a bright line must be drawn consistent with developmental research, excepting all youth from the extreme sanction of death regardless of whether one of them may be deserving of the ultimate punishment. There is simply no certainty about a child's developmental status, and, drawing on the lessons from death jurisprudence, our legal system should be absolutely sure that a child is deserving of transfer before proceeding with the process. Next, in *Graham*, the Court opened the door to application of death penalty jurisprudence to non-death penalties for youth, again drawing bright eligibility lines to ensure that the transiency of youth and its impetuousness has a chance to run its course.

Taking a page from the Court's Eighth Amendment jurisprudence—that the application of harsh penalties of death and life without parole should be

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convicted of non-homicides. *Id.* "This is nothing short of stunning. . . . [T]he Court has never banished into constitutional exile a sentencing practice that the laws of a majority, let alone a supermajority, of States expressly permit." *See id.* at 2049 (Thomas, J., dissenting). The majority did not discuss any trend in legislation against the sentence. *See id.* at 2049–50. In general, the "trends" have been in the other direction—most states reacted to concerns of the child predator in the 1990s with harsher legislation toward juveniles. *See id.* at 2050 (citing a 1999 Department of Justice National Report, stating that during that period "legislatures in 47 States and the District of Columbia enacted laws that made their juvenile justice systems more punitive" (internal quotation marks omitted)). Instead, the majority relied on the infrequency of the imposition of life without parole as the key factor in the first step. *Id.* at 2023 (majority opinion).

120. Miller v. Alabama, 132 S. Ct. 2455, 2464–65 (quoting *Graham*, 130 S. Ct. at 2027).

121. *Graham*, 130 S. Ct. at 2034.

122. *Id.* at 2046 (Thomas, J., dissenting); *see* Mary Berkheiser, *Death Is Not So Different After All:* Graham v. Florida *and the Court's "Kids Are Different" Eighth Amendment Jurisprudence*, 36 VT. L. REV. 1, 1 (2011) ("[T]he Court's analytical approach unceremoniously demolished the Hadrian's Wall that has separated its 'death is different' jurisprudence from non-capital sentencing review since 1972.").

123. *Graham*, 130 S. Ct. at 2031–32 (majority opinion). In fact, Graham could have gotten relief without a categorical solution: Chief Justice Roberts concurred using a *Harmelin* analysis to find that Terrance Graham's penalty was grossly disproportionate. *Id.* at 2036 (Roberts, C.J., concurring). He further argued that Graham's "lack of prior criminal convictions, his youth and immaturity, and the difficult circumstances of his upbringing" and that "Graham's sentence far exceeded the punishment proposed by the Florida Department of Corrections . . . and the state prosecutors" made the punishment excessive. *Id.* at 2040.

narrowed to a class of people and offenses society is certain are appropriate targets for condemnation—there is little reason why the same jurisprudence of narrowing should not be applied to eligibility for juvenile transfer.[124] There is no more serious or harsh consequence in juvenile court than to be transferred to adult court. Only when the capacity for adult-like culpability and understanding is demonstratively available in a child of a certain age, and where the level and pattern of offenses committed by a child of that age demonstrate that he cannot benefit from juvenile court, should a child be eligible for transfer.

C. Narrowing Juvenile Transfer Eligibility

Applying the lessons of death to juvenile transfer, it is clear that over-inclusiveness to the point of absurdity rules the day. Just as Justice Stevens did not have to pause to think about whether a ten-year-old should ever be put to death, no prosecutor or court should have to pause to think about whether a ten-year-old should ever be eligible for transfer to adult court. As discussed, transfer to adult court is transfer to a system that can bring nothing but pain to a child: the pain of awaiting trial with adults, incarceration with adults, abuse by adults, likelihood of recidivism, the knowledge that, in many states, a return to juvenile court is no longer possible, and, in most cases, harsher and longer periods of incarceration. We should categorically exclude those children who cannot meet the developmental requirements for adult court or are not deserving of the harsh punishment.

Roper discussed the risk of leaving to the discretion of the jury an estimation of the dangerousness of a juvenile that even experts cannot make. Yet, in the transfer context, state laws routinely leave that decision to the discretion of a judge or prosecutor, who, as will be discussed, has no guidelines and is at great risk of making arbitrary and capricious decisions about who to send to adult court. As for transfers subject to the prosecutor's discretion, the prosecutor transfers cases without any guidance whatsoever. Children who commit only one crime and may never commit another may be doomed to a life of recidivism as a result.

A few bright-line rules to reduce the risk of wrongful transfer seem obvious. First, there is the matter of an age limit. Only children fifteen and over should be eligible for transfer. According to most studies, there is an inordinately high risk that children fourteen and under not only will not be competent to stand trial in adult court, but that their brains have not developed

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124. This Article does not argue that *Graham* commands the abolition of transfer altogether. *See* Terry A. Maroney, *Adolescent Brain Science After* Graham v. Florida, 86 NOTRE DAME L. REV. 765, 786–87 (2011) ("Under a categorical approach, *Graham*'s developmental logic thus could be understood to foreclose transfer altogether. But such an outcome appears highly unlikely in light of the Court's evident comfort level with transfer, even of the very young. It is also a political non-starter: some form of transfer has been contemplated since the invention of juvenile justice itself." (footnotes omitted)).

to the point at which they are able to control their behavior or understand the culpability or impact of their actions.[125] Because there is currently no mechanism for reliably measuring this in a child younger than fifteen, there should be no possibility of transfer.[126]

Second, first-time offenders of any kind should not be eligible for transfer. While the juvenile court has become increasingly punitive, there is evidence that activists, nonprofits, and stakeholders continue efforts to keep treatment and rehabilitation goals alive in juvenile court. A first-time offender, even a murderer, must have the opportunity to grow and to change out of that behavior.[127] Most children, even those who commit a single serious crime, do not recidivate.[128] Sending them to adult court will very likely breed criminals.

The one dilemma a first-time serious offender presents is when the juvenile is sixteen or seventeen years old. The juvenile court only has jurisdiction for a few more years and it may not appear to be a sufficient period of time to punish or treat the child.[129] Typically, then, the child is simply transferred to adult court. There are two less draconian options for children who may not deserve adult time. One is to extend the juvenile court jurisdiction to twenty-one or later, which many jurisdictions have already done.[130] The other option for children who may "age out" of the juvenile system is blended sentencing, an option that some states do have.[131] Here, because the youth may face an adult conviction, he receives all of the

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125. *See* Colgan, *supra* note 74, at 85 n.26 (citing research); Redding, *supra* note 16, at 732 (summarizing that current research suggests that children under fifteen may not have adult-like capabilities).

126. *See* Scott, *supra* note 42, at 554 (arguing that limiting transfer eligibility to older juveniles charged with serious violent felonies would help ensure "criminal court prosecution only when fairness and social welfare goals support it"); Tanenhaus & Drizin, *supra* note 20, at 690 (recommending a minimum age for transfer of at least fifteen, based on the ongoing developmental research).

127. *See* ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 96 (2008) (recommending that only fifteen-year-old youths previously convicted of a serious violent crime and currently charged with such a violent crime should be eligible for transfer).

128. *See* Redding, *supra* note 16, at 733–35 (summarizing research that shows the number of contacts with the juvenile justice system is a far better predictor of future criminality than the seriousness of the offense, and that those who commit property offenses are more likely to be recidivists, whereas many acts of violence by juveniles are one-time occurrences).

129. For example, in Texas, prosecutors were twice as likely to file transfer motions for juveniles sixteen and over—those nearing the age at which juvenile court jurisdiction would end. *Id.* at 737 n.173. Yet, "older, first time offenders are less likely to recidivate . . . than are somewhat younger juveniles who are repeat offenders. . . . because few whose first offense occurs in late adolescence become chronic offenders." *Id*. at 739.

130. According to a 2012 Office of Juvenile Justice and Delinquency Prevention report, thirty-two states have extended jurisdiction until age twenty, two until age twenty-one, one until age twenty-two and four until age twenty-four. U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE & DELINQUENCY PREVENTION, STATISTICAL BRIEFING BOOK (2012), *available at* http://www.ojjdp.gov/ojstatbb/structure_process/qa04106.asp?qaDate=2012. In accord with this extension, brain research has shown that the frontal cortex of the brain (responsible for the executive function) is not fully formed until a person reaches his mid-twenties. Colgan, *supra* note 74, at 85 & n.26 (citing research).

131. OJJDP, TRYING JUVENILES AS ADULTS, *supra* note 15, at 7. Thirty-four states have some form of blended sentencing; fourteen have juvenile blended sentencing (originating in juvenile court) and eighteen have criminal blended sentencing (originating in adult court). *Id.*

procedures and rights of an adult (including a jury trial), and, if found guilty, spends time in the juvenile system until its jurisdiction expires, then is evaluated again, and often sent to complete the remainder of his time in an adult prison.[132]

Third, transferring a child to adult court means resigning a child to adult punishment forever—likely incarceration with adults and a life of increased recidivism; as a result, only the worst of the worst child offenders should face transfer proceedings. Transfer-eligible offenses should be limited to offenses that are violent crimes against the person (other than first offenses). There is little justification for transferring to adult court drug or property crimes, with one exception. If by the age of fifteen, a child has had numerous contacts with the juvenile justice system, has had treatment and rehabilitation options, and yet returns for a third or fourth offense, research supports the idea that this is a child who is not going to be influenced, deterred, or rehabilitated in juvenile court.[133]

Bright-line rules are essential for determining eligibility for a death sentence or for a juvenile transfer. Given the seriousness of the imposition of either and the fact that both are fundamentally different from all other sanctions, the eligibility criteria should be narrowed to categories of offenses and offenders who offer the traits and hallmarks of the unsalvageable.

IV. INDIVIDUALIZING THE DECISION: LESSONS OF DEATH FOR JUVENILE TRANSFER

A. The Current Status of Individualization in Juvenile Transfer

Historically, the decision whether to transfer a child to adult court has been highly individualized.[134] The entire premise of juvenile court was not consistency, but unbounded discretion and individualized treatment as the child stood before the judge who would show him the way.[135] As will be discussed

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132. *Id.* Blended sentencing is not ideal. First, because juvenile blended sentencing thresholds are lower than transfer thresholds in most states, "there is a possibility that such laws, instead of providing a mitigating alternative to transfer, are instead being used for an 'in-between' category of cases that would not otherwise have been transferred at all." *Id.* Second, as Tanenhaus and Drizin explain, as long as the State has other methods to transfer the older juvenile to adult court, the temptation is strong to bypass the complex blended sentencing procedures and send the child directly to adult court. Tanenhaus & Drizin, *supra* note 20, at 696. Also, some blended sentencing schemes require that adult sanctions be imposed for any violation of a juvenile sentence, no matter how petty the violation, which in one instance sent a juvenile to adult prison for five years for shoplifting. *Id.* For a die-hard juvenile justice proponent like Franklin Zimring, blended sentencing is a bad idea, as it essentially allows juvenile court to "become[] the instrument of open-ended incapacitation, the damage is to its core commitment; the court has not shot itself in the foot, it has shot itself in the heart." Zimring, *The Punitive Necessity of Waiver*, *supra* note 15, at 216.

133. *See* Redding, *supra* note 16, at 757 (noting that chronic offenders tend to be children who start younger and offend repeatedly).

134. *See* Barrett et al., *supra* note 28, at 775–76, 790–91 (describing the individualized approach).

135. *Id.*

later in Part V, individual assessments made without any guidance can lead to arbitrary and capricious decision-making, an issue that has plagued transfer decisions. However, with the rising concern over juvenile crime in the 1980s and 1990s, numerous state legislatures began adopting mandatory transfer schemes as a more expeditious way to transfer cases.[136]

These mandatory transfer schemes come in two basic forms: mandatory judicial transfers and legislative exclusion laws. Under mandatory judicial waiver, a judge merely makes the requisite findings of age and offense level for transfer and then she *must* order the transfer.[137] Under legislative exclusion laws (which are not really transfers), the result is identical: states simply legislatively exclude certain ages and offenses from juvenile jurisdiction.[138] Today, twenty-nine states have very broad legislative exclusion laws, giving adult courts exclusive jurisdiction over a wide variety of offenses and a wide range of ages of offenders.[139] As an example, New York excludes from juvenile jurisdiction children at least thirteen years old charged with murder and certain person offenses, and children at least fourteen years old charged with certain property offenses and certain weapons offenses.[140] Fifteen states have mandatory judicial waiver provisions of equal breadth.[141]

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.[142] While some states, perhaps concerned about wrongful transfers in these mandatory situations, have allowed for reverse waiver or transfer back procedures through which the adult court judge can choose to transfer the case back to juvenile court,[143] there are several problems with this as a solution. First, the mere existence of such provisions should be an indication that participants know mistakes are made. Second, adult courts are too overburdened, underequipped, and undereducated in the matter of juveniles and adolescent development to make a knowledgeable determination.[144]

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136. OJJDP, TRYING JUVENILES AS ADULTS, *supra* note 15, at 9.

137. *Id.* at 4.

138. *Id.* at 6.

139. *Id.*

140. *Id.* For some examples of the breadth of legislative exclusion laws, adult court has exclusive jurisdiction under the following circumstances in the following states: in California, children at least fourteen who have committed certain person offenses or murder; in Florida, age sixteen for murder, certain property and certain drug offenses, and any age for certain person offenses; in Mississippi, age seventeen for all felonies, and age thirteen for all armed felonies; in Arizona, age fifteen for all felonies when the child has had two prior felony dispositions in juvenile court; in Utah, age sixteen for all felonies when the child has already been securely confined once. *Id.*

141. *Id.* at 4, 5.

142. *Id.* at 4, 6.

143. *See id.* at 7 (noting that twenty-four states have reverse waiver provisions for some offenses).

144. *See* Bishop & Frazier, *Consequences of Transfer*, *supra* note 18, at 242 (placing the burden of correction on adult courts "makes little sense," as they are overworked and lack expertise in issues involving youth); Tanenhaus & Drizin, *supra* note 20, at 693–94 (stating that while they support reverse waiver

Legal challenges brought against mandatory transfer laws have largely failed on the notion that treatment in juvenile court is not a right; just as the legislature granted juvenile court jurisdiction, it can take it away.[145] Studies have found that automatic transfer laws have "no deterrent effect whatsoever on juvenile crime."[146] Without a hearing, without individualized consideration, and without a determination of appropriate placement, mandatory transfer provisions and legislative exclusions can claim expediency and consistency as their only benefits. Death penalty jurisprudence as to mandatory sentences offers direct insights into the propriety of mandatory juvenile transfer.

B. Death Penalty Lessons and Miller*'s Lessons on Individualization for Juveniles*

In *Furman v. Georgia*, the Court declared that the death penalty as practiced in most states was unconstitutional.[147] The essence of the Court's concern was that the juries and judges making the decision to impose death had unfettered discretion with no guiding principles, leaving an unacceptable risk that death was being imposed in an arbitrary and capricious manner.[148] Some states responded creatively to *Furman* by eliminating discretion altogether and making death a mandatory punishment for certain crimes.[149]

While this solution eliminated discretion, the Court struck down these mandatory laws as violative of the Eighth Amendment.[150] In the 1976 case of *Woodson v. North Carolina*, the Court ruled unconstitutional the North Carolina statute that made the death penalty mandatory for everyone convicted of first-degree murder or felony murder.[151] The *Woodson* Court held that a mandatory scheme did not allow for "particularized consideration of relevant aspects of the character and record of each convicted defendant."[152] The Court declared that, because death is qualitatively different from any other sentence, "fundamental respect for humanity underlying the Eighth Amendment requires"[153] individual consideration, and that this consideration is a

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provisions, adult court judges are ill-equipped for the task and "[j]uvenile court judges are better situated to make decisions about transferring youth" due to experience and resources).

145. *See* Lynda E. Frost Clausel & Richard J. Bonnie, *Juvenile Justice on Appeal*, *in* CHANGING BORDERS, *supra* note 15, at 188–89 (citing cases upholding legislative exclusion against challenges); Arya, *supra* note 24, at 152 n.277 (citing cases holding treatment in juvenile court is a legislative gift, not a constitutional right).

146. Redding, *supra* note 16, at 744 n.202 (citing two "well designed" studies supporting this conclusion).

147. *See* Furman v. Georgia, 408 U.S. 238, 239 (1972) (per curiam) (reviewing cases from Georgia and Texas).

148. *See infra* note 239 and accompanying text.

149. *See*, *e.g.*, Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion).

150. *Id.*

151. *Id.* at 305.

152. *Id.* at 303.

153. *Id.* at 304.

"constitutionally indispensable part of the process of inflicting the penalty of death".[154]

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.[155]

The Court solidified this individualization requirement in 1978 in *Lockett v. Ohio* by declaring that "a death penalty statute must not preclude consideration of relevant mitigating factors."[156]

Individualization of sentencing determinations is not constitutionally required for adults facing *non*-death sentences.[157] Criminal laws are replete with mandatory punishments.[158] Consistency reigns over individualization. However, individualization is constitutionally required before imposing death because "death is different," as *Woodson* declared; its imposition demands a process through which individuals get a chance to influence the sentencer with mitigating facts and circumstances from his life.

With the *Miller* decision, the requirement of individualization before sentencing is not only for death cases.[159] In *Miller*, the Court decided that juveniles are in that special class of persons who require individualized consideration.[160] Alabama required a sentence of mandatory life without parole for a person found guilty of murder.[161] Miller had been transferred from juvenile court, found guilty, and automatically sentenced to life without parole.[162] In *Miller*, Justice Kagan, for the majority, extended the death penalty jurisprudence requirement of individualization to rule that mandatory life without parole for juvenile homicide offenders violated the Eighth Amendment.[163] To prohibit the mandatory aspect of the sentence, the majority

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154. *Id.*

155. *Id.*

156. Lockett v. Ohio, 438 U.S. 586, 608 (1978).

157. Harmelin v. Michigan, 501 U.S. 957, 995–96 (1991). Of course, as will be discussed imminently, *Miller v. Alabama*, 132 S. Ct. 2455 (2012), created the first exception.

158. *See* Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 425 (2008) (noting proliferation of mandatory sentences).

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

160. *Id.* at 2475.

161. *Id.* at 2460.

162. *Id.* at 2461.

163. *Id.* at 2460. The majority in *Miller* did not apply a proportionality approach at all. *Id.* Because the only issue was whether life without parole can be *mandatory*, not whether in some circumstances it could still be imposed on juvenile homicide offenders, it was not a categorical claim and the traditional proportionality two-step process was not applicable. *Id.* at 2471. Indeed, if it were, the numbers were not in the majority's favor: twenty-eight states and the federal government made life without parole mandatory for some juvenile homicides. *Id.*

imported the principles of *Woodson*.[164] Why? For all of the reasons *Thompson*, *Roper*, and *Graham* had held that children are different:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional.[165]

When confronted with prior Court decisions that upheld life without parole sentences as not "cruel and unusual," Justice Kagan simply wrote that those decisions did not apply to children: "So if . . . 'death is different,' children are different too."[166]

While Justice Kagan was writing only about a mandatory sentence of life without parole for juveniles convicted of homicide,[167] the *Miller* opinion is replete with references that indicate that in the criminal justice system, children should be treated with the kind of individualized human dignity reserved for those facing the death penalty. In fairly broad language, Justice Kagan emphasized that "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."[168] *Miller*'s language has some clear implications for juvenile transfer.[169]

C. Abolishing Mandatory Transfer Laws

When a juvenile faces the prospect of the harsh penalties and experiences of adult court, he ought to have the opportunity for an individualized determination as to whether he is a fit subject. The concerns with mandatory juvenile life without parole are the same as those with transfer: fairness, dignity, and accuracy. In New York, a fourteen-year-old child who commits his first property offense will never see the inside of juvenile court, but will appear first

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164. *Id.* at 2458.

165. *Id.* at 2468.

166. *Id.* at 2470 (quoting Harmelin v. Michigan, 501 U.S. 957, 994 (1991)).

167. For a criticism of this limitation to mandatory life without parole, 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, 500–01 (2013) (arguing that the decision in *Miller* was "unprincipled and unsound" by sidestepping a choice to categorically outlaw life without parole for all juvenile offenders).

168. *Miller*, 132 S. Ct. at 2466 (quoting Graham v. Florida, 130 S. Ct. 2011, 2031 (2010) (internal quotation marks omitted).

169. *Miller* would seem to indicate the elimination of all mandatory sentences for juveniles. As Chief Justice Roberts rightfully worried, there is "no clear reason that [*Miller*'s] principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive." *Id.* at 2482 (Roberts, C.J., dissenting).

in adult court.[170] He may never have 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.

While the Eighth Amendment itself might not apply directly to transfer proceedings,[171] *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.[172] It is unclear that the Eighth Amendment's cruel and unusual punishments clause was ever necessary to dictate procedure in death cases. The death penalty's heightened due process could just as easily have been achieved through the Due Process Clause.[173] In any case, there is little question now that both juveniles and people facing the death sentence are different from all other criminal defendants and that heightened due process is required in both classes. Mandatory transfer runs roughshod over the Court's warning that "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."[174]

Just as *Lockett* held that a defendant facing the death penalty should not be limited in his presentation of mitigating circumstances to spare him the ultimate punishment, a juvenile facing transfer should be able to present mitigating evidence to spare him a permanent disbarment from the benefits of childhood.[175] Individualization has been a cornerstone of the juvenile justice system.

As the next section will amplify, mandatory transfers, whether in the form of mandatory judicial transfers or legislative exclusion statutes, deprive a child of the minimal process the Court assumed was due in *Kent v. United States*.[176]

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170. *See* OJJDP, TRYING JUVENILES AS ADULTS, *supra* note 15, at 6 (table showing exclusion from juvenile court for certain property offenses committed by children fourteen or older).

171. Technically, transfer is not a "punishment" under the Eighth Amendment, but Neelum Arya has made the first arguments that transfer should be considered a punishment and that *Graham* can transform transfer laws. Arya, *supra* note 24, at 138.

172. Robin Walker Sterling has argued that the Court has disserved juvenile rights by relying on the watered down Due Process clause rather than the more powerful and absolutist enumerated Bill of Rights. Sterling, *supra* note 11, at 638–41.

173. The very same legal issue of unbounded discretion in imposing death came before the Court one year earlier in McGautha v. California, 402 U.S. 183, 185 (1971), *vacated*, Crampton v. Ohio, 408 U.S. 941 (1972). The only distinction between *McGautha* and *Furman* was that the claim was brought under the Due Process Clause in *McGautha*; otherwise, the claims were identical. *See* Furman v. Georgia, 408 U.S. 238, 239 (1972) (per curiam); *McGautha*, 402 U.S. at 196.

174. Miller v. Alabama, 132 S. Ct. 2455, 2462 (2012) (quoting Graham v. Florida, 130 S. Ct. 2011, 2031 (2010)) (internal quotation marks omitted).

175. Not everyone agrees. *See* Feld, *The Transformation of the Juvenile Court*, *supra* note 18, at 702 ("Proponents of just deserts reject individualization because treatment programs are ineffective, individualization vests broad discretion in presumed experts who cannot justify treating similarly-situated offenders differently[.]" (footnote omitted)).

176. *See* Kent v. United States, 383 U.S. 541, 542 (1966) (describing process due). In *United States v. Bland*, an early example of a due process challenge to a statutory exclusion statute that lost, dissenting Judge Skelly Wright argued that the majority's decision upholding the mandatory exclusion violated *Kent*'s call for a hearing before stripping a juvenile of his status: "This blatant attempt to evade the force of the *Kent* decision

Because of the lack of individualized determinations, wrongful transfers will absolutely occur. For example, assume two fourteen-year-olds are charged with burglary in New York. They will both be charged in adult court, despite the fact that it is the first offense for one and the fifteenth offense for the other. Maybe for the first child, he was persuaded by peers and feels guilty and would never do such an impulsive thing again. This child potentially faces years of imprisonment in an adult jail, permanent loss of his childhood status, and a likely return to crime. As the Court proclaimed in *Kent*, there should never be "result[s] of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons."[177] Automatic transfer provisions must be abolished.[178]

V. GUIDED DISCRETION IN DECIDING DEATH AND JUVENILE TRANSFER

By far the most challenging and least successful effort in both the death penalty jurisprudence and in the juvenile transfer jurisprudence (which is practically non-existent) is the effort to meaningfully guide the decision-maker's discretion in whether to impose death or transfer, and to lower the risks of arbitrary and capricious decision-making. In the death penalty world, many have found the enterprise doomed.[179] For forty years, the Court has issued opinions on guiding the discretion of juries in imposing death, and yet the prospect that decisions are nonetheless based upon arbitrary or discriminatory reasons seems very real.[180]

Furthermore, the purpose of guiding discretion is meant to provide a rational basis for finding the worst of the worst. Critics have felt that one cannot both seek common factors to guide the decision and simultaneously seek to individualize every defendant.[181] Those two goals may appear to be in direct

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should not be permitted to succeed. The result in *Kent* did not turn on the particular wording of the statute involved or on the particular waiver mechanism there employed. Rather, as the Court itself made clear, the rights expounded in *Kent* are fundamental and immutable." United States v. Bland, 472 F.2d 1329, 1341–42 (D.C. Cir. 1972) (Wright, J., dissenting).

177. *Kent*, 383 U.S. at 554.

178. *See* Redding, *supra* note 16, at 744 (also recommending abolition of automatic transfer laws).

179. *See, e.g.*, Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 306 ("[T]he Court has reduced the law of the penalty trial to almost a bare aesthetic exhortation that the states just do something—anything—to give the penalty trial a legal appearance.").

180. *See, e.g.*, McClesky v. Kemp, 481 U.S. 279, 286 (1987) (demonstrating strong evidence that jurors decide the death penalty based on race).

181. *See* Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. L. REV. 67, 103 (1992) ("The Court's two objectives are not, as Justice Scalia argues, irreconcilable with each other. Rather, they are irreconcilable with the death penalty."); Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1155 (1980) ("[I]f death as a punishment requires both maximum flexibility and nonarbitrariness, and these requirements cannot both be met, . . . then death cannot be a permissible punishment."). This claim has been echoed in the juvenile transfer context. *See* Maroney, *supra* note 124, at 787–88 ("*Graham*'s logic simultaneously suggests that mandatory transfer rests on a faulty assumption as to the nature of youth, and that individualized transfer requires judges to make predictions no human is capable of making. This tension may be eased at the margins, but likely will be

conflict.[182] Nonetheless, both goals are crucial to the fairness of the procedure of imposing death or transfer.[183] To the extent that our criminal justice system permits capital punishment and juvenile transfer, our system must try to fulfill both goals.

The Court's jurisprudence on guiding discretion in the decision of whether to impose death can inform the discretionary judicial transfer process. While the Court's success in this effort has been uneven,[184] the Court and the states have nonetheless put forty-one years of work into guiding discretion in the death penalty. On the other hand, the courts and the states have put almost no work into guiding discretion in judicial transfer decisions. There is something courts can learn here in guarding against the risk of arbitrary and capricious decisions.[185]

A. Discretionary Juvenile Transfers: Judicial

Discretionary judicial transfer is the oldest method for transferring juvenile cases from juvenile court to adult court.[186] Today, forty-five states

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tolerated and the parameters of transfer will continue to be shaped less by developmental concerns than by pragmatic and political ones." (footnotes omitted))

182. *See* Callins v. Collins, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting) ("Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death . . . can never be achieved without compromising an equally essential component of fundamental fairness—individualized sentencing." (citation omitted)); Walton v. Arizona, 497 U.S. 639, 665–66 (1990) (Scalia, J., concurring) (stating that he will no longer enforce the *Woodson*-*Lockett* individualization principle because it is rationally irreconcilable with *Furman*), *overruled by* Ring v. Arizona, 536 U.S. 584 (2002). *But see* Janet C. Hoeffel, *Risking the Eighth Amendment: Arbitrariness, Juries, and Discretion in Capital Cases*, 46 B.C. L. REV. 771, 786–87 (2005) (arguing that individuality enhances the goal of non-arbitrary decision-making and accuracy in an *individual* case, and that non-arbitrariness was never meant to encapsulate standardization between cases).

183. *But see* Feld, *Abolish the Juvenile Court*, *supra* note 17, at 91 (recommending the abandonment of discretionary judicial determinations and stating that "the individualized justice of a rehabilitative juvenile court fosters lawlessness and thus detracts from its utility as a court of law"). Despite this reference and many other references in this Article to Barry Feld's criticism of judicial waiver, by the year 2000 he admitted that after "two decades of struggling with many aspects of juvenile court waiver," juvenile judge transfers are "the least bad solution" to the intractable problem of serious young offenders. Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, *in* CHANGING BORDERS, *supra* note 15, at 127–28 [hereinafter Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction*]. Juvenile justice heavyweight Franklin Zimring also agreed that standard judicial waiver is "the least bad method of dealing with extremely severe cases." Zimring, *The Punitive Necessity of Waiver*, *supra* note 15, at 220.

184. To be sure, there is still much wrong with the implementation of the death penalty and this Article is in no way intended to minimize those issues. *See, e.g.*, *Callins*, 510 U.S. at 1144–45 (Blackmun, J., dissenting) ("[T]he death penalty remains fraught with arbitrariness, discrimination, caprice and mistake. . . . I no longer shall tinker with the machinery of death.").

185. Lynda Frost Clausel and Richard Bonnie suggested this same link: Because "transfer decisions are 'qualitatively different' from other prosecutorial decisions in criminal justice administration in the way that the death penalty is 'qualitatively different' from imprisonment, however severe, and . . . this difference triggers a 'heightened need for reliability' in the decision to invoke criminal court jurisdiction." Clausel & Bonnie, *supra* note 145, at 196–97.

186. *See* Tanenhaus, *supra* note 25, at 20–25 (describing the early practices of passive and active discretionary judicial transfer).

have judicial discretion transfer provisions.[187] The prosecution initiates a waiver hearing in juvenile court, and after the hearing, the juvenile judge decides whether to transfer the case to adult court.

Unfortunately, there is little to guide the juvenile judge's discretion in deciding whether to transfer a child to adult court. The Supreme Court set a floor for the proceedings in *Kent* in 1966.[188] The juvenile judge in *Kent* transferred Morris Kent to adult court without a hearing.[189] The Supreme Court said, in promising and grand terms, "[T]here is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons."[190] The Court held that, because Morris Kent had a statutory right to treatment in juvenile court, he must have "the essentials of due process and fair treatment," namely, a hearing, access by counsel to social reports and probation or similar reports, and a statement of reasons from the judge.[191] Due process was imperative because the "decision as to waiver of jurisdiction and transfer of the matter to the District Court was potentially as important to petitioner as the difference between five years' confinement and a death sentence."[192]

In an appendix, the *Kent* Court listed factors that judges should consider in making their decision.[193] As a result, most states passed legislation listing the same or similar factors for a judge to consider in making her decision.[194] However, critics have derided the suggested factors as nonbinding, malleable, conflicting, and subjective. The factors are not guiding judges' discretion, and the opportunity for arbitrary and capricious decision-making remains at large; the factors provide a cover for any decision the judge wishes to make.[195]

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187. OJJDP, TRYING JUVENILES AS ADULTS, *supra* note 15, at 3. Fifteen states also make judicial waiver presumptive in certain classes of cases; the juvenile has the burden of rebutting the presumption. *Id.* at 4.

188. Kent v. United States, 383 U.S. 541, 552 (1966).

189. *Id.* at 552–54.

190. *Id.* at 554.

191. *Id.* at 557, 562. While *Kent* was decided in the context of a federal statute, Barry Feld argued that "its language suggested an underlying constitutional basis claim for requiring procedural due process in any judicial waiver decision." Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction*, *supra* note 183, at 87.

192. *Kent*, 383 U.S. at 557.

193. *Id.* at 566–67 (listing factors such as the seriousness of the alleged offense and the need for protection of the community; whether the crime was committed in "an aggressive, violent, premeditated or willful manner"; whether it was against person or property, with greater weight if against persons; prosecutorial merit of the complaint; desirability of trial in one court if there are adult co-defendants; "sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living"; record and previous history of juvenile; prospects for protection of public and likelihood of reasonable rehabilitation by use of juvenile system services).

194. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction*, *supra* note 183, at 89.

195. *See id.* at 90 ("Lists of substantive factors such as those appended in *Kent* do not provide adequate guidance. Rather, catalogues of contradictory factors reinforce judges' discretion and allow them selectively to emphasize one variable or another to justify any decision.").

Studies have shown that the decisions of judges are, in fact, arbitrary and capricious.[196]

One of the *Kent* factors found in most statutory provisions and relied upon heavily by judges is the juvenile's "amenability to treatment."[197] It is unclear that judges or clinicians have the expertise to make such a determination.[198] As Barry Feld stated, "[j]udicial waiver criteria framed in terms of amenability to treatment or dangerousness give judges broad, standardless discretion."[199] What studies and experience have shown is that judges have felt mounting pressure to transfer older children who commit serious crimes, and "nonamenability" has just become a buzzword without meaning, used to describe those cases.[200] Christopher Slobogin found that judges' "application of the factors that are considered relevant to the amenability determination is often pretextual"; the judges are much more interested in culpability and dangerousness.[201]

Another *Kent* factor relied upon by judges is "danger to society."[202] Future dangerousness is one of the most unreliable aggravating factors upheld in death penalty jurisprudence.[203] Predictions of future dangerousness are even

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196. A study by Jeffrey Fagan and Elizabeth Deschenes of waiver decisions in four jurisdictions showed "a rash of inconsistent judicial waiver decisions" and no consistent or reliable determinant for the decisions. Jeffrey Fagan & Elizabeth P. Deschenes, *Determinants of Judicial Waiver Decisions for Violent Juvenile Offenders*, 81 J. CRIM. L. & CRIMINOLOGY 314, 345–47 (1990); *see also* Feld, *The Transformation of the Juvenile Court*, *supra* note 18, at 704 (arguing that national evaluations of judicial waiver show that a youth's race, geographic locale, and other idiosyncratic issues can be more significant in transfer decisions than the nature of the offense); Marcy Rasmussen Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. CRIM. L. & CRIMINOLOGY 449, 492 (1996) (conducting an analysis of 330 transfer motions in the same urban county, and finding that various judges decided cases of similarly-situated offenders differently).

197. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction*, *supra* note 183, at 89.

198. *See id.* ("Evaluation research . . . disputes whether judges or clinicians accurately can identify and classify those who will or will not respond to treatment.").

199. *Id.* at 90.

200. *See* Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281, 301 (1991) [hereinafter Bishop & Frazier, *Transfer of Juveniles to Criminal Court*] ("[C]riteria such as 'dangerous' and 'non-amenable to treatment' involve very subjective assessments that gives judges broad discretion in making transfer decisions."); Fagan & Zimring, *supra* note 48, at 3 ("The way in which contextual pressures of waiver decisions distort the term 'amenability' is a cautionary tale for those who wish to promote a theoretical dimension to discussion of transfer outcomes."). A survey of juvenile court judges conducted to show how much judges relied on the *Kent* criteria found that while judges claimed youth's amenability to treatment was most important, in reality, the judges relied most heavily on dangerousness and sophistication or maturity. *See* Arya, *supra* note 24, at 147 (citing Dia N. Brannen, *A National Study of How Juvenile Court Judges Weight Pertinent* Kent *Criteria*, 12 PSYCHOL. PUB. POL'Y & L. 332, 346–48 (2006)).

201. Christopher Slobogin, *Treating Kids Right: Deconstructing and Reconstructing the Amenability to Treatment Concept*, 10 J. CONTEMP. LEGAL ISSUES 299, 330 (1999) [hereinafter Slobogin, *Treating Kids Right*]; *see also* Feld, *Abolish the Juvenile Court*, *supra* note 17, at 84 n.31 (citing studies that show that juvenile judges "focus primarily on the seriousness of the present offense and prior record when they sentence delinquents").

202. Slobogin, *Treating Kids Right*, *supra* note 201, at 305–06.

203. *See* Barefoot v. Estelle, 463 U.S. 880, 920 (1983) (Blackmun, J., dissenting) (objecting to upholding prediction of future dangerousness as an aggravating circumstance when the American Psychiatric

less reliable with juveniles, who are different from adults precisely because they can and do change and grow out of impulsive behavior the majority of the time. As pointed out by the Court in *Roper*, after reviewing the social science, "It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[204] While some who work and write in the field of prediction science claim it has improved over the years, they also agree it is still flawed and predictions can only be very limited.[205]

A final *Kent* factor , and perhaps the most confounding, is "sophistication and maturity."[206] First, as one reads it, which way does it cut? If a juvenile is mature and sophisticated, does this make him a better or worse candidate for treatment? As Franklin Zimring has postulated, "the most serious cases are not the most mature offenders. The empirical pattern is, if anything, to the contrary."[207] Further, he argued, "[t]he traditional language about maturity and sophistication was always largely a cover for pushing the worst-case juvenile offenders into criminal courts. The recent emphasis on serious violence has simply removed the cover."[208] There is little scientific literature or protocol to ensure that clinicians and juvenile courts have the tools to evaluate any of these factors.[209]

While *Kent* granted limited due process, fifty years have passed and it is time to revisit what process is due—the stakes are now so much higher for juveniles facing transfer. In *Miller v. Alabama*, the majority briefly alluded to the less-than-satisfactory juvenile transfer hearing in fourteen-year-old Evan

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Association's "best estimate is that *two out of three* predictions of long-term future violence made by psychiatrists are wrong"), *superseded by statute as stated in* Slack v. McDaniel, 529 U.S. 473 (2000).

204. Roper v. Simmons, 543 U.S. 551, 573 (2005); *see also* Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction*, *supra* note 183, at 89–90 ("[C]linicians and jurists lack the technical capacity validly and reliably to predict low-base-rate serious criminal behavior."); Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 1008 n.185 (1995) (citing sources indicating that clinicians cannot reliably predict a youth's future criminal behavior).

205. *See* Thomas Grisso, *Forensic Clinical Evaluations Related to Waiver of Jurisdiction*, *in* CHANGING BORDERS, *supra* note 15, at 332–37 (describing the limits of danger assessments); Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97, 126 (1984) ("Current depictions of the research on dangerousness predictions exaggerate their inaccuracy, . . . [t]he number of professionals who can produce clinical predictions significantly better than chance appears to be limited."); *see also* Redding, *supra* note 16, at 745–46 (finding that because clinical predictions of recidivism risk are not reliable, courts should refer to the more reliable actuarial predictions).

206. Kent v. United States, 383 U.S. 541, 567 (1966).

207. Franklin E. Zimring, *Toward a Jurisprudence of Youth Violence*, 24 CRIME & JUST. 477, 484 (1998).

208. *Id.* at 485; *see also* Katherine Hunt Federle, *Emancipation and Execution: Transferring Children to Criminal Court in Capital Cases*, 1996 WIS. L. REV. 447, 488–89 (arguing that the *Kent* criteria do not assure that the most culpable minors are transferred, and it appears that juvenile court judges substitute the seriousness of the offense for "maturity").

209. *See* Thomas Grisso, *Clinicians' Transfer Evaluations: How Well Can They Assist Judicial Discretion?*, 71 LA. L. REV. 157, 185–86 (2010) (discussing the paucity of literature on the subject and the lack of validated, reliable techniques).

Miller's case.[210] The majority wrote that, "[c]iting the nature of the crime, Miller's 'mental maturity,' and his prior juvenile offenses (truancy and 'criminal mischief')" the appellate court affirmed the transfer.[211] Besides the seriousness of the crime, this seems a paltry record. The Court likely put "mental maturity" in quotes because it was indicated that fourteen-year-old Miller, who "had attempted suicide four times, the first [time] when he was six years old,"[212] said during the offense, "I am God, I've come to take your life."[213] Mental maturity under these conditions seems unlikely.

The *Miller* Court also described the transfer hearing as an inadequate place for the judge to learn much about the juvenile before him in terms of his ultimate disposition in the adult system.[214] In particular, in Miller's case, the juvenile judge denied Miller funds for an expert on the grounds that he was not entitled to the same protections he would get at trial.[215] While the *Miller* Court was not addressing the propriety of the transfer proceedings, the Court depicted the proceedings as inadequate.[216] 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.

B. Discretionary Juvenile Transfers: Prosecutorial

Another discretionary method of transfer, used in fifteen states,[217] is known alternatively as "prosecutorial direct file[]," "concurrent jurisdiction," or simply "prosecutorial discretion."[218] Within a broad range of ages and offenses, a prosecutor has complete discretion over whether to file the case directly in adult court.[219] In most states, there is no oversight or accountability in that exercise of discretion. As noted by the Office of Juvenile Justice and Delinquency Prevention:

> [P]rosecutorial discretion laws are usually silent regarding standards, protocols, or appropriate considerations for decision-making. Even in those few states where statutes provide some general guidance to prosecutors, or at least require them to develop their own decision-making guidelines, there is no hearing, no evidentiary record, and no opportunity for defendants to test

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210. Miller v. Alabama, 132 S. Ct. 2455, 2474 (2012).
211. *Id.* at 2462.
212. *Id.*
213. *Id.* (quoting Miller v. State, 63 So. 3d 676, 689 (Ala. Crim. App. 2010) (internal quotation marks omitted), *rev'd and remanded by Miller*, 132 S. Ct. 2455).
214. *Id.*
215. *Id.*
216. *Id.*
217. OJJDP, TRYING JUVENILES AS ADULTS, *supra* note 15, at 5.
218. *Id.* at 2, 12.
219. *Id.* at 5.

> (or even to know) the basis for a prosecutor's decision to proceed in criminal court.[220]

Some states' prosecutorial discretion laws have very broad coverage, giving the prosecutor the power to send to adult court many of the juvenile cases in the system. For example, in Nebraska and Vermont, any youth who is sixteen or seventeen may be prosecuted as an adult, regardless of the offense.[221] In Wyoming, a prosecutor can even file misdemeanors in adult court as long as the child is thirteen.[222] If judicial discretion transfer suffers from a lack of sufficiently binding guidelines, prosecutorial discretion transfer suffers from having none.

Studies on prosecutorial direct file in Florida, a state that uses this mechanism for transfer almost exclusively,[223] showed that prosecutors exercised their discretion in an arbitrary and capricious manner. Florida allows prosecutorial direct file in adult court for sixteen and seventeen-year-old children accused of felonies.[224] Florida's per capita transfer rates far outpace those of other states.[225] Data reported in 2008 showed that only 44% of the transfers were person offenses, while 31% were property offenses, and 11% were drug offenses.[226] The sheer breadth of offenses should demonstrate that those being transferred were not the worst of the worst.[227] In addition, in 23% of the cases, the transferred youths were first offenders who had not had any opportunity to benefit from juvenile programming.[228] Further, a study of the cases prosecutors transferred, compared against those not transferred, showed that "although thousands of juveniles are transferred each year, thousands of equally serious or even more serious offenders are not transferred."[229] In addition, the study showed that the juveniles transferred had greater rates of recidivism than their equivalent counterparts in the juvenile justice system.[230] Based on Florida alone, which transfers more juveniles than any other state,

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220. *Id.*

221. *Id.* at 20.

222. *Id.*

223. *Id.* at 18; Bishop & Frazier, *Consequences of Transfer*, *supra* note 18, at 247.

224. OJJDP, TRYING JUVENILES AS ADULTS, *supra* note 15, at 18.

225. *Id.* (stating that, between 2003 and 2008, Florida transferred youth at twice the rate of Arizona and eight times the rate of California).

226. *Id.* at 19; *see also* Bishop & Frazier, *Consequences of Transfer*, *supra* note 18, at 232 (stating that most youths transferred through prosecutorial direct-file are property offenders, nearly 20% are non-felons, and only a third have prior commitments to juvenile facilities).

227. *See* Bishop & Frazier, *Transfer of Juveniles to Criminal Court*, *supra* note 200, at 297 ("Our analyses indicate that youths transferred via prosecutorial waiver are seldom the serious and chronic offenders for whom prosecution and punishment in criminal court are arguably justified.").

228. *Id.* at 296.

229. Bishop & Frazier, *Consequences of Transfer*, *supra* note 18, at 247 (citing Florida study).

230. *Id.* at 248 (showing more repeated arrests more quickly and for more serious offenses).

prosecutorial discretion transfers are not only arbitrary and capricious, but are harmful to children and society.[231]

Thus far, most courts have rejected legal claims made against prosecutorial discretion statutes.[232] Those courts find that transfer decisions are nothing more than charging decisions, and prosecutors have wide discretion in the criminal justice system to make charging decisions.[233] Nonetheless, the supreme courts of Delaware and Utah have invalidated the practice.[234] The Delaware Supreme Court described the problem as one of separation of powers: "In essence, the statutory amendment has stripped the judiciary of its independent jurisdictional role in the adjudication of children by granting the charging authority the unbridled discretion to unilaterally determine which forum has jurisdiction[.]"[235] Unlike other areas of prosecutorial discretion, where there is no assumption of an adversarial hearing to protect rights, here the prosecutorial direct file system undermines the assumption in *Kent* that a child will not face the draconian consequences of transfer without due process and a fair hearing.

While death penalty procedures are not a perfect model, the Court's long experience in attempting to guide the discretion of the decision-maker in capital cases led to a few concrete improvements over unbounded discretion. Those improvements are explored in the next section.

C. Guided Discretion in Capital Cases

In 1972, the imposition of the death penalty had reached a point of such rarity, arbitrariness, and racism that it caught the attention of the United States Supreme Court.[236] State statutes gave juries (or judges) unfettered and unchecked discretion to decide who, among those convicted of murder or rape, would live and who would die. Hence, there was little coherent reasoning behind who was chosen.[237]

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231. *But see* Francis Barry McCarthy, *The Serious Offender and Juvenile Court Reform: The Case for Prosecutorial Waiver of Juvenile Court Jurisdiction*, 38 ST. LOUIS U. L.J. 629, 662–70 (1994) (arguing prosecutors are capable of exercising reasoned discretion).

232. *See, e.g.*, Manduley v. Superior Court, 41 P.3d 3, 16 (Cal. 2002) (upholding prosecutorial discretion against constitutional challenges); Flakes v. People, 153 P.3d 427, 438 (Colo. 2007) (upholding prosecutorial discretion against constitutional challenges); *see also* Berkheiser, *supra* note 122, at 47 n.281 (collecting cases); *cf.* State v. Robert K. McL., 496 S.E.2d 887 (W. Va. 1997) (expressing misgivings about prosecutorial discretion, but upholding because of reverse waiver provision).

233. *See* Berkheiser, *supra* note 122, at 47 (summarizing holdings).

234. Hughes v. State, 653 A.2d 241, 247 (Del. 1994); State v. Mohi, 901 P.2d 991, 1004 (Utah 1995) (striking down prosecutorial direct file because it denied juveniles the state right to uniform operation of the laws).

235. *Hughes*, 653 A.2d at 249.

236. *See* Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

237. *See id.* at 309–10 (Stewart, J., concurring) ("For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." (footnotes omitted)).

In *Furman v. Georgia*, the Court effectively placed a moratorium on the death penalty when it held two state statutes that gave total unguided discretion to a judge or jury to determine life or death violated the Eighth Amendment's prohibition on cruel and unusual punishment.[238] The agreed-upon mandate from *Furman* was that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[239] These were the marching orders for the state legislatures.

Several statutory requirements have emerged as constitutionally sufficient and reasonably suited to guide the jury's discretion. First, the Court has approved sentencing schemes under which state statutes provide the jury with a limited list of objective and clear aggravating circumstances.[240] These aggravating circumstances serve to narrow the class of murders eligible for the death penalty. The jury must find that the government proved at least one of these statutory circumstances before finding the defendant eligible for the death penalty.[241] Statutory aggravating circumstances cannot be vague; they must properly serve a narrowing function. Hence, the Court held unconstitutionally vague aggravating circumstances such as that the murder was "especially heinous, atrocious, or cruel,"[242] or that it was "outrageously and wantonly vile"[243] because such circumstances could apply to any murder. The statutory lists are not ideal, however, because many still include factors that could apply to any murder.[244]

Next, as previously noted, *Woodson* required consideration of individualized circumstances, and hence *Lockett v. Ohio* required that statutes allow the decision-maker consideration of any and all relevant mitigating circumstances on behalf of the defendant.[245] The mitigating circumstances do not have to be listed.[246] The difficulty here, as was noted in *Roper*, is that circumstances that are supposed to be mitigating—such as youth, an abusive background, or mental illness—are often taken instead as aggravating factors.[247] Jurors and litigants need more explicit judicial guidance.

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238. *Id.* at 239 (per curiam).

239. Gregg v. Georgia, 428 U.S. 153, 188–89 (1976) (reciting the *Furman* mandate).

240. *See, e.g.*, *id.* at 154 (approving this scheme in Georgia).

241. *See, e.g.*, Proffitt v. Florida, 428 U.S. 242, 251 (1976) (describing Florida's scheme); *Gregg*, 428 U.S. at 196–98 (describing Georgia's scheme).

242. Maynard v. Cartwright, 486 U.S. 356, 359 (1988).

243. Godfrey v. Georgia, 446 U.S. 420, 422 (1980) (quoting GA. CODE ANN. § 27-2534.1(b)(7) (1978)) (internal quotation marks omitted).

244. *See, e.g.*, Arave v. Creech, 507 U.S. 463, 465 (1993) (upholding as a valid aggravating circumstance that defendant exhibited "utter disregard for human life," as construed by Idaho Supreme Court's reference to the "cold-blooded, pitiless slayer" (internal quotation marks omitted)).

245. Lockett v. Ohio, 438 U.S. 586, 608 (1978).

246. *Id.* at 630.

247. In *Roper*, the prosecutor argued to the jury in the penalty phase that Roper's youth was aggravating: "Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating?

The Court has approved different schemes for how juries decide whether to impose death after consideration of aggravating and mitigating circumstances. The only one that withstands the scrutiny of critics is the scheme that is practiced by the "weighing" states. In weighing states, the jury must find one aggravating factor before moving on, but once found, the jury must weigh the aggravating circumstances against the mitigating circumstances.[248] Only if the aggravating circumstances outweigh the mitigating circumstances may the jury impose death.[249]

The Court has also approved of a mandatory appellate process. In *Gregg v. Georgia*, the Court noted with approval that Georgia had a specialized mandatory appellate process for any verdict of death.[250] The process included the trial judge filling out a questionnaire and the Georgia Supreme Court engaging in a proportionality review, checking the circumstances of the case appealed with other cases in which the death penalty was imposed and upheld on appeal.[251] Of course, as with all of these procedures, the appellate review could be greatly improved to provide a more robust analysis.

The Court has also affirmatively refused to look very deep into the decision-making process. For example, when faced with a comprehensive statistical study that the death penalty was being applied in a racist manner, the Court sidestepped the issue.[252] It is a system that is flawed in many ways, but nonetheless, can offer some guidance to juvenile transfer.

D. Applying Lessons of Death to Judicial and Prosecutorial Discretion Transfers

1. Prosecutorial Discretion Statutes

Prosecutorial juvenile transfers are shocking in the broad relinquishment of judicial power to the executive. Not surprisingly, they have no equivalent in the capital process. The prosecutor in death cases does not interfere with the

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Quite the contrary I submit. Quite the contrary." Roper v. Simmons, 543 U.S. 551, 558 (2005) (internal quotation marks omitted). The *Roper* Court commented, "In some cases a defendant's youth may even be counted against him. In this very case . . . the prosecutor argued Simmons' youth was aggravating rather than mitigating." *Id.* at 573.

248. *See, e.g.*, Proffitt v. Florida, 428 U.S. 242, 250–52 (1976) (approving a weighing scheme).

249. *Id.* To be avoided are schemes like those approved in *Jurek v. Texas*, 428 U.S. 262 (1976), in which the penalty phase consisted of asking the jurors three problematic questions; *Kansas v. Marsh*, 548 U.S. 163 (2006), in which the jury was allowed to find for death if the aggravators and mitigating factors were in equipoise; and *Gregg v. Georgia*, 428 U.S. 153 (1976), which approved a scheme that required no more than that the jury find one aggravating circumstance before it proceeded to make a decision. As derided by Justices Marshall and Brennan, the *Gregg* scheme provided no guided discretion in the jury decision whatsoever after the selection of one aggravating circumstance. Zant v. Stephens, 462 U.S. 862, 910–11 (1983) (Marshall & Brennan, JJ., dissenting).

250. *Proffitt*, 428 U.S. at 198.

251. *Id.*

252. *See* McCleskey v. Kemp, 481 U.S. 279 (1987) (rejecting as legally irrelevant a statistical study showing racial disparity in application of the death penalty).

judicial function. Once the prosecutor determines eligibility criteria are met and charges will be filed, she does not then decide whether the defendant should get life or death.

In contrast, a unilateral juvenile transfer power gives the prosecutor a quasi-judicial power to decide eligibility based on statutory criteria and then to decide whether to proceed with a transfer hearing. This is a direct usurpation of a judicial function and a side step around a juvenile's due process rights.

The consequences of ending the childhood status of a juvenile offender are dire. The decision to do so is not a charging decision—the charge remains the same in both jurisdictions—but a qualitative decision. Adult court and adult sentences are qualitatively different from juvenile court and juvenile dispositions, just as death is qualitatively different from a sentence of years.[253] The Court's "children are different" jurisprudence casts the prosecutor's decision in the proper light. If children deserve individualized consideration from a judicial actor in the decision of whether to impose life without parole, then they deserve the same individualized judicial consideration in the transfer decision.

Furthermore, in prosecutorial discretion states, the prosecutorial decision is both unguided and final.[254] The prosecutor need not state her reasons for making the transfer.[255] Even if she were to state her reasons, there is no appellate process in which to challenge the decision.[256] Surely, there is no process more ripe for abuse and arbitrary and capricious decision-making. Prosecutorial discretion statutes should be abolished.[257]

2. Judicial Discretion Statutes

Juvenile transfers are infrequent. Only about 1% of petitioned juvenile cases result in transfers to adult court.[258] Juvenile transfers occur as a result of the unbounded discretion of the decision-maker. Thus, juvenile transfers

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253. *See* Clausel & Bonnie, *supra* note 145, at 196–97 (positing that the few courts that have struggled with this use of prosecutorial discretion "seem to be predicated on the idea that transfer decisions are 'qualitatively different' from other prosecutorial decisions in criminal justice administration in the way that the death penalty is 'qualitatively different' from imprisonment").

254. OJJDP, TRYING JUVENILES AS ADULTS, *supra* note 15, at 5; Redding, *supra* note 16, at 718 (noting the exception of the few states that have reverse-back provisions).

255. OJJDP, TRYING JUVENILES AS ADULTS, *supra* note 15, at 5.

256. Redding, *supra* note 16, at 718.

257. *See* Bishop & Frazier, *Transfer of Juveniles to Criminal Court*, *supra* note 200, at 300 (recommending abolition after a study of the practice showed that without objective, substantive guidelines, "it is almost inevitable that highly unpredictable and indefensible outcomes will result"); Scott, *supra* note 42, at 554 (arguing that removal of prosecutorial discretion statutes would assist in achieving fairness and social welfare goals). Abolishing prosecutorial discretion transfers and legislative exclusion statutes will have a large effect. One mega-study showed that the vast majority of juvenile cases were transferred to adult court through legislative exclusion (41.6%) and prosecutorial direct file (34.7%) versus judicial waiver (23.7%), despite the fact that most states have judicial waiver. OJJDP, TRYING JUVENILES AS ADULTS, *supra* note 15, at 12.

258. OJJDP, TRYING JUVENILES AS ADULTS, *supra* note 15, at 10.

present a situation very much like that presented to the Court in *Furman*.[259] Juvenile transfer hearings are ripe for arbitrary and capricious decisions.[260]

Just as in the death penalty context, state legislatures and juvenile judges should be striving to find criteria that identify the worst of the worst before transferring a child to adult court. As with the penalty phase of a capital case, there should be an exclusive statutory list of aggravating circumstances. The aggravating circumstances should be objective and concrete. For example, the most objective criteria would be the offense and the juvenile's past contacts with juvenile court.[261] There should be a presumption that nonviolent, nonperson offenses, such as property and drug crimes, are not sufficiently serious for transfer unless they have occurred multiple times.[262] Nonamenability to treatment, maturity, and predictions of future dangerousness should not be aggravating factors pursued by the prosecutor because there is no reliable scientific measure of these factors.

In mitigation, the juvenile should be able to present any mitigating factors to prove the nonexistence of any of the above aggravating circumstances (e.g., non-serious crime or first offense). The age of the juvenile and all background information about the child's family, education, and mental and physical health should only be presented if they serve as mitigating circumstances. Any doubt about the juvenile's guilt should also be considered as a mitigating factor. The court should pay for any experts needed to evaluate the child. Amenability to treatment should also be a mitigating factor, although evidence of such mitigation should be subject to cross-examination and rebuttal. Donna Bishop and Charles Frazier recommend that "nonamenability to treatment" can be made more precise "(e.g., to be adjudged nonamenable to treatment the record must reveal at least three prior adjudications of delinquency and at least one prior commitment to a residential treatment program)."[263] Additionally, as others have persuasively argued, a transfer should require a judicial finding that the juvenile has the developmental competence to stand trial and to aid in his

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259. *See* Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and usual."). The plurality's concern in *Furman* was both the infrequency of the imposition of death and the lack of standards governing its imposition. *Id.* This parallel has been drawn by Franklin Zimring, who described judicial waiver laws as the juvenile equivalents of the standardless capital punishment statutes condemned in *Furman*. Franklin Zimring, *Notes Toward a Jurisprudence of Waiver*, *in* MAJOR ISSUES IN JUVENILE JUSTICE INFORMATION AND TRAINING: READINGS IN PUBLIC POLICY 193 (John Hall et al. eds., 1981).

260. *See supra* Part V.A.

261. *See* Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction*, *supra* note 183, at 111 ("[T]ransfer criteria should focus directly on the present offense and record of recidivism rather than on amorphous factors like amenability to treatment or dangerousness.").

262. *See* OJJDP, TRYING JUVENILES AS ADULTS, *supra* note 15, at 12 (showing that 36% of transferred juvenile felony defendants in the seventy-five largest counties were charged with property, drug, or public order offenses).

263. Bishop & Frazier, *Transfer of Juveniles to Criminal Court*, *supra* note 200, at 301 (internal quotation marks omitted).

defense in adult court.[264] Finally, as Franklin Zimring has persuasively argued, the judge must find that the maximum sanction available to her in juvenile court is not sufficient for retributive, deterrent, or rehabilitative purposes for the offender.[265]

As required with death sentences, the judge who chooses to transfer a child would be required to make a written set of findings about aggravating and mitigating circumstances.[266] This written finding would comport with detailed and state-specified criteria justifying the transfer.[267] If taken seriously, that written record would then be the best indicator of whether the judge acted in an arbitrary and capricious manner.[268]

In addition, a judge's decision to transfer a juvenile should be appealable, and that appeal should occur *before* the case progresses in adult court.[269] Many states lack a process for appealing the waiver decision.[270] In the states that have an appellate process, the transferred juvenile cannot appeal until after an adult conviction and sentencing.[271] Most of the damage will have occurred by this point.

The appellate record would include a transcript of the proceedings and the judge's written findings as specified by the statute. As with death penalty appeals, the most meaningful review process would include an individualized review and a proportionality review, in which the appellate court should compare the factors in the current case to the factors in other cases that were transferred to look for uniformity.[272]

Such procedural safeguards cannot prevent judges from making arbitrary and capricious decisions, but they can make the transfer process more

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264. Redding, *supra* note 16, at 747–48; Scott & Grisso, *supra* note 71, at 797–98. At the writing of Redding's article, Virginia was the only state that predicated transfer on a finding that a juvenile was competent to stand trial, although there is a statutory presumption of competence. Redding, *supra* note 16, at 752–53.

265. Franklin E. Zimring, *The Treatment of Hard Cases in American Juvenile Justice: In Defense of Discretionary Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 267, 276 (1991) ("[T]he standard for making a waiver decision should be a determination that the maximum social control available in juvenile court falls far short of the minimum social control necessary if a particular offender is guilty of the serious crime he is charged with.").

266. *See* Zimring, *The Punitive Necessity of Waiver*, *supra* note 15, at 221 (suggesting a requirement for "extensive written justifications" of waiver decisions).

267. *See* Redding, *supra* note 16, at 747–52 (recommending a very detailed statutory scheme).

268. *Cf.* Hoeffel, *supra* note 182, at 793–97 (advocating the need for a record of the jury's decision-making process in capital cases as the only real guard against arbitrary and capricious decision-making).

269. *See* Redding, *supra* note 16, at 749 (arguing that a judge's subjective, discretionary determinations about maturity should be subject to *de novo* review to allow a body of law to develop on the subject).

270. Logan, *supra* note 49, at 716.

271. *Id.* at 716 & n.158. Further, if waiver is reviewed, it is reviewed only for an "abuse of discretion," which means the decision is almost never overturned. *Id.* at 717; *see also* Clausel & Bonnie, *supra* note 145, at 184 (noting that reversals of transfer decisions are rare).

272. *See* Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction*, *supra* note 183, at 1092–94 (describing a new statutory requirement in Minnesota creating an appellate division in the office of the state public defender with hopes of subjecting juvenile courts to accountability through appellate review).

transparent and objective.[273] Transfer hearings can end a juvenile's childhood status, and with it, most hope for treatment and change. The process due in a juvenile transfer proceeding should be commensurate with the seriousness of the proceeding's consequences. Capital penalty procedures that were developed to help guide discretion are a good place to start.

VI. CONCLUSION

Over the last three decades, juvenile transfer has become an ugly, cancerous growth on the body of juvenile court. It is an embarrassingly arbitrary, punitive, and ineffective system. The mythical juvenile "super-predator" cannot justify the low age limits and minor offenses for which children can be transferred to adult court.

With the Court's recent protection of juveniles from harsh treatment through application of death penalty jurisprudence, there is hope for change. Specifically, because the Court endorses that both children and death are "different" and deserving of special treatment, there is ample doctrinal room to apply some of the death penalty's more robust procedural protections to the anemic procedures of juvenile transfer.

Because of their unique positions in their respective systems, the imposition of the death penalty and of juvenile transfer should only occur under limited and predictable circumstances. A death sentence is the ultimate punishment, "unique in its severity and irrevocability."[274] Similarly, "[t]ransfer to criminal court is the ultimate response available within the terms of reference to juvenile court . . . . Waiver represents a judgment that a person no longer merits the consideration, regard and special protection provided by law for juveniles."[275] Furthermore, the transferred child faces incarceration with adults, abuse at their hands, and a likely life of recidivism. No statute, judge, or prosecutor should impose adult criminal status on a child without full-bodied due process.

There are three basic lessons to take away from death penalty jurisprudence and apply to juvenile transfer to improve its viability. First, the Court has built limitations to the eligibility of who can face the death penalty. Most relevant here, the Court eliminated children under eighteen from its reach, relying heavily on research demonstrating the developmental immaturity of adolescents. That same research caused the Court to decide that juveniles who did not commit a homicide also did not deserve a sentence of life without parole. Key to these decisions is the knowledge that childhood behavior is

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273. *See* Bishop & Frazier, *Transfer of Juveniles to Criminal Court*, *supra* note 200, at 301 (advocating reliance on judicial, and not prosecutorial, waiver because "it permits judges to 'individualize' justice within a framework in which the exercise of discretion can be carefully circumscribed and open to review").

274. Gregg v. Georgia, 428 U.S. 153, 187 (1976) (citing Furman v. Georgia, 408 U.S. 238, 286–91 (1972)).

275. FRANKLIN E. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE (1982).

transient and that experts are not practiced at determining who will, in fact, grow out of the delinquent behavior. Kids should have an opportunity for change.

Likewise, and for the same reasons, legislatures should narrow the categories of youth eligible for transfer. Most research indicates that children under fifteen years old are incapable of understanding adult proceedings. Further, first-time offenders should be given the opportunity to grow out of their behavior, and those who commit nonviolent, nonperson offenses should not be eligible for transfer unless they are repeat offenders.

Second, the lessons of the death penalty are fairly clear when it comes to mandatory transfer provisions. Mandatory death sentences were outlawed in 1976, and the Court in *Miller* has now emphasized that, because children are different, they deserve individualized considerations as well. Legislative exclusion laws and mandatory judicial transfer deprive children of their limited rights to due process, including an opportunity to present their individual circumstances to the deciding judge.

Finally, the most intractable issue for both the death penalty process and juvenile transfer is how to adequately guide the discretion of the decision-maker so the decisions are not arbitrary and capricious. Because there is almost no guidance given to the juvenile judge, an importation of some of the basic penalty phase processes will go a long way to improve the objectivity, transparency, and fairness of the process. The prosecutor should only present objective aggravating factors, such as the nature of the crime and previous record; the juvenile should be able to present any mitigation in his favor; the judge should produce a detailed written record of his decision; and there should be a full and immediate appeal if the judge decides to transfer the child.

As for the juvenile system's unique prosecutorial discretion procedure, it must be abolished. Giving the prosecutor unfettered and unchecked discretion on whether to send a child directly to adult court is a license for abuse. As the story of prosecutorial transfer in Florida shows, prosecutors use it far too often and in an arbitrary and capricious manner. A prosecutor should no more get to decide to transfer a child to adult court than to decide who should get the death penalty.

Juvenile transfer is not as dire or as final as death, but to place a developmentally immature child in a criminal adult situation is to send his childhood off to a slow, but certain, death. The Court appears newly energized to give children a chance to rehabilitate. Now is the time to create greater due process in juvenile transfer, and the capital punishment system is a good place to seek guidance.