Loyola University Chicago Law Journal

Volume 50
Issue 1 *Fall 2018*

Article 13

2018

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Recommended Citation

Tiffani N. Darden, *Constitutionally Different: A Child's Right to Substantive Due Process*, 50 Loy. U. Chi. L. J. 211 ().
Available at: https://lawecommons.luc.edu/luclj/vol50/iss1/13

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Constitutionally Different:

A Child's Right to Substantive Due Process

*Tiffani N. Darden**

Kent v. United States *required trial courts to conduct an individualized assessment before transferring a juvenile defendant to criminal jurisdiction. Several decades later, in* Miller v. Alabama*, the Supreme Court prohibited imposing life without parole sentences upon youth offenders without first conducting an individualized assessment. The latter holding also pronounced that juveniles are constitutionally different from adults, finding support in social science, developmental psychology and neuroscience advancements. This same body of adolescent behavioral research casts fundamental fairness concerns on a transferred youth's ability to effectively participate in other parts of the justice process when removed to criminal court.*

Whereas due process and the Eighth Amendment have fully draped constitutional juvenile issues to date, my Article proposes that substantive due process more aptly secures a youth offender's liberty interests when battling disadvantages attributable to their youthfulness traits as experienced throughout the entire justice process—from adequate representation, to transfer, to trial participation, to the sentencing phase. At present, fourteen states absolutely deprive juveniles of an individualized assessment at any juncture in the justice process, including at the initial jurisdictional transfer determination. This Article contributes the first holistic analysis for recognizing the constitutional difference between juveniles and their adult counterparts at critical adjudicatory points, not only at transfer or the sentencing stage, through a substantive due process framework.

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INTRODUCTION

The phrase "juveniles are constitutionally different from adults" means something more than prohibiting the death penalty and life-without-parole sentences for youth offenders.[1] Many juvenile sentencing cases rest on this commonsense observation affirmed through social science, developmental psychology, and neuroscience.[2] But when juveniles find

1. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016) (citing Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 567 U.S. 460 (2012)).

2. Many amicus briefs have been filed in the Supreme Court citing such studies. *See, e.g.*, Brief for the American Psychological Association et al. as Amici Curiae in Support of Petitioners at 13–24, *Miller*, 567 U.S. 460 (Nos. 10-9646, 10-9647) [hereinafter Brief for the APA in *Miller*] (arguing developmental neuroscience research supports that both the structure of the adolescent brain, and the way it functions, are immature compared to the adult brain); Brief for the American Medical Association and the American Academy of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 4–30, *Miller*, 567 U.S. 460 (Nos. 10-9646, 10-9647) [hereinafter Brief for the AMA in *Miller*] (arguing that juveniles have less "voluntary control of behavior" than adults and that there is a biological basis for their behavioral immaturities); Brief for the American Psychological Association et al. as Amici Curiae Supporting Petitioners at 6–27, *Graham*, 560 U.S. 48 (Nos. 08-7412, 08-7621) [hereinafter Brief for the APA in *Graham*] (arguing that developmental psychology and neuroscience research supports that juveniles are more immature, vulnerable, and changeable than adults); Brief for the American Medical Association and the American Academy of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 4–30, *Graham*, 560 U.S. 48 (Nos. 08-7412, 08-7621) (arguing, as they did in *Miller*, that juveniles have less voluntary control over their behavior than adults and that there is a biological basis for their behavioral immaturities); Brief for the American Psychological Association, and the Missouri

themselves in criminal court, constitutional fundamental fairness demands that the entire justice process—not merely sentencing—must be adjusted to accommodate their maturity deficiencies.[3]

Upon transfer to criminal jurisdiction, a juvenile typically receives treatment equal to their adult counterparts, except under limited circumstances at the sentencing stage. The juvenile court to criminal court transfer mechanism dates back to the inception of juvenile courts.[4] But juvenile offenders' lack of developmental maturity makes them uniquely vulnerable throughout the justice process for the same reasons undergirding juvenile sentencing reform.[5] The state maintains full authority to transfer a juvenile to criminal jurisdiction, but substantive due process commands that affirmative rights be given to these juvenile defendants to ensure fairness when the risk involves loss of liberty.[6] Identifying these critical stages and providing an individualized assessment for transferred youth offenders aligns with political history

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Psychological Association as Amici Curiae Supporting Respondent at 4–13, *Roper*, 543 U.S. 551 (No. 03-633) (arguing that adolescents think and behave differently from adults, emphasizing that they engage in more risk-taking, do not properly consider consequences, and their brains are not fully developed); Brief of the Coalition for Juvenile Justice as Amicus Curiae in Support of Respondent at 8–11, *Roper*, 543 U.S. 551 (No. 03-633) (emphasizing research illustrating juveniles' mental deficiencies); Brief of the American Medical Association et al. as Amici Curiae in Support of Respondent at 4–20, *Roper*, 543 U.S. 551 (No. 03-633) (arguing that adolescents at age sixteen and seventeen think and behave differently from adults, emphasizing that they engage in more risk-taking, do not properly consider consequences, and their brains are not fully developed).

3. *See* Schall v. Martin, 467 U.S. 253, 263 (1984) ("We have tried . . . to strike a balance—to respect the 'informality' and 'flexibility' that characterize juvenile proceedings, and yet to ensure that such proceedings comport with 'fundamental fairness' demanded by the Due Process Clause." (citation omitted)); Breed v. Jones, 421 U.S. 519, 540 (1975) (reiterating the goal that "to the extent fundamental fairness permits, adjudicatory hearings [should] be informal and nonadversary"); McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971) (emphasizing the factfinding procedures required to satisfy fundamental fairness in juvenile proceedings); *In re* Winship, 397 U.S. 358, 369 (1970) (Harlan, J., concurring) (finding that using the same evidentiary standard in juvenile justice cases as in civil cases "amount[s] to a lack of fundamental fairness"); *In re* Gault, 387 U.S. 1, 30–31 (1967) ("[W]e do hold that the hearing must measure up to the essentials of due process and fair treatment.").

4. *See* David S. Tanenhaus, *The Evolution of Transfer Out of the Juvenile Court*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 13, 13–14 (Jeffrey Fagan & Franklin E. Zimring eds. 2000) ("[T]he history of transfer reveals a diversity of practices, which emerged in the years between the establishment of the nation's first juvenile court in 1899 and the Supreme Court's pronouncements about the constitutionality of transfer in *Kent v. United States*.").

5. *See infra* notes 156–158 (explaining the Court's designation of "youthful traits"); *see generally supra* note 2 (stating that juveniles are "constitutionally different than adults" based on developmental psychology and research).

6. *See infra* Part II.

and Supreme Court constitutional trends.

Kent v. United States and *Montgomery v. Louisiana* form long fought bookends to the treatment of juvenile offenders.[7] In 1966, the *Kent* Court reaffirmed the original motivations behind establishing juvenile courts by articulating procedural requirements for the discretionary transfer of youth offenders to criminal jurisdiction.[8] Fast-forward to *Miller v. Alabama*, decided in 2012, which prohibited sentencing juvenile offenders under mandatory life-without-parole statutes.[9] Under *Miller*, now retroactively applied through *Montgomery*, the Supreme Court demonstrated its reliance on expert opinions in adolescent development to assist in setting constitutional boundaries for the treatment of juvenile offenders.[10] The *Kent* and *Miller* Courts suggested individualized factors for trial courts to consider when making decisions about transfer and sentencing.[11] In light of *Miller*, *Montgomery*, decided in 2016, noted that, because "children are constitutionally different from adults," they "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored."[12]

State supreme courts often bifurcate transfer and sentencing issues: transfer from juvenile to criminal court receives a procedural due process analysis, while sentencing invokes Eighth Amendment issues. In this Article, I posit that the Supreme Court's more recent juveniles "are different from adults" designation creates a substantive due process right that is not limited to Eighth Amendment sentencing issues but rather spans the entire justice process.[13] The same adolescent developmental

7. *See generally* Kent v. United States, 383 U.S. 541 (1966); Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

8. *Kent*, 383 U.S. at 554 ("[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.").

9. Miller v. Alabama, 567 U.S. 460, 489 (2012) ("[O]ur individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.").

10. *Id.* at 488 ("[B]y [the transfer hearing] the expert's testimony could not change the sentence; whatever she said in mitigation, the mandatory life-without-parole prison term would kick in.").

11. *See id.* at 480 ("[W]e require [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."); *Kent*, 383 U.S. at 566–68 (listing eight factors for a judge to consider when deciding whether the juvenile will be transferred to criminal court. These include, for example, "[t]he seriousness of the alleged offense to the community . . ." and "[t]he sophistication and maturity of the juvenile . . . .").

12. *Montgomery*, 136 S. Ct. at 736–37.

13. *Id.* at 736 (citing Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); *Miller*, 567 U.S. 460).

research that the courts relied on to reform sentencing norms has also been used to identify other stages in the adjudication process wherein youth offenders may work at a disadvantage to their adult counterparts, calling into question constitutional fundamental fairness concerns.[14] For example, the adult competency standard applied may not encompass a juvenile immaturity evaluation. This distinction calls into question juvenile defendants' ability to understand their basic rights and effectively participate in their criminal trials. Youthfulness may also lessen a child's ability to adequately assist counsel. Merging the lessons from *Kent* and *Miller* inevitably leads to the conclusion that a juvenile's immaturity deficits should be assessed at every critical juncture in the justice process, starting with transfer and extending to all mandatory sentencing statutes.

The Supreme Court's categorization of children as constitutionally different from adults recognizes a salient concept that should affect any contact a minor may have with the criminal courts.[15] This is a substantive due process right requiring affirmative action from states that transfer jurisdiction for those accused while under eighteen years old to adult courts. All fifty states exercise the right to remove children from juvenile jurisdiction,[16] but fourteen states currently administer *wholly* unconstitutional systems. In these states, there is no juncture at which a juvenile receives an individualized assessment before or during sentencing. This is an unconstitutional "absolute deprivation" considering their age status.[17]

The individualized assessment oversight should begin when the state seeks to transfer a juvenile to criminal jurisdiction. Only six states place the transfer from juvenile to criminal court solely in the discretion of juvenile court judges, who, by constitutional requirement, must make an individualized assessment: Hawaii, Kansas, Maine, Missouri, Tennessee, and Texas.[18] Juveniles may also find themselves in a criminal court

14. *See supra* note 2; *In re* Gault, 387 U.S. 1, 30–34 (1967); *see generally* Emily Buss, *The Missed Opportunity in* Gault, 70 U. CHI. L. REV. 39 (2003) (discussing *Gault*'s implications).

15. *Montgomery*, 136 S. Ct. at 736 (citing *Roper*, 543 U.S. 551; *Graham*, 560 U.S. 48; *Miller*, 567 U.S. 460).

16. PATRICK GRIFFIN, ET AL., U.S. DEP'T OF JUSTICE, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 2 (2011), https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf.

17. NAT'L CENTER FOR JUVENILE JUSTICE, DIFFERENT FROM ADULTS: AN UPDATED ANALYSIS OF JUVENILE TRANSFER AND BLENDED SENTENCING LAWS WITH RECOMMENDATIONS FOR REFORM 7 (2008), http://www.ncjj.org/PDF/MFC/MFC_Transfer_2008.pdf.

18. *See* HAW. REV. STAT. § 571-22(a) (2018) ("The court may waive jurisdiction and order a minor . . . held for criminal proceedings after full investigation and hearing where the person . . . is

through mandatory judicial waiver, prosecutorial direct file, or statutory exclusion. Six states require mandatory judicial waiver without the safety valve of reverse waiver or criminal blended sentencing.[19] Two states permit prosecutorial discretion with no provisions for reverse waiver or criminal blended sentencing.[20] And finally, seven state legislatures have enacted statutory exclusions to juvenile jurisdiction without an option for reverse waiver or criminal blended sentencing when the juvenile defendant comes before the court.[21] State supreme courts have wholly

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alleged to have committed an act that would constitute a felony if committed by an adult . . . ."); KAN. STAT. ANN. § 38-2347(a)(1) (2018) ("[T]he county or district attorney[] . . . may file a motion requesting that the court authorize prosecution of the juvenile as an adult under the applicable criminal statute. The juvenile shall be presumed to be a juvenile, and the presumption must be rebutted by a preponderance of the evidence."); ME. STAT. tit. 15, § 3101(4)(A) (2018) ("When a petition alleges that a juvenile committed an act which would be murder or a Class A, B or C crime if committed by adult, the court shall, upon request of the prosecuting attorney, continue the case for further investigation and for a bind-over hearing to determine whether the jurisdiction of the Juvenile Court over the juvenile should be waived."); MO. REV. STAT. § 211.071(1) (2018) ("If a petition alleges that a child between the ages of twelve and seventeen has committed an offense which would be considered a felony if committed by an adult, the court may, upon . . . motion . . . order a hearing and may, in its discretion, dismiss the petition and such child may be transferred . . . ."); TENN. CODE ANN. § 37-1-134(a)(2) (2018) (requiring "[a] hearing on whether the transfer should be made"); TEX. FAM. CODE § 54.02(c) (2017) ("The juvenile court shall conduct a hearing without a jury to consider transfer of the child for criminal proceedings.").

19. *See* IND. CODE § 31-30-3-6 (2018) ("Upon motion by the prosecuting attorney, the juvenile court shall waive jurisdiction if" the child is charged with a felony, or the child has previously been charged with a nontraffic misdemeanor or felony.); LA. CHILD. CODE ANN. art. 305(A) (2017) (explaining that mandatory waiver is required for those age fifteen and older charged with first or second degree murder, first degree rape, or aggravated kidnapping); N.C. GEN. STAT. ANN. § 7B-2200 (2017) ("If the alleged felony constitutes a Class A felony and the court finds probable cause, the court shall transfer the case to the superior court for trial as in the case of adults."); N.D. CENT. CODE § 27-20-34(1)(b) (2015) (requiring judicial transfer of children over fourteen years old if it "determines that there is probable cause to believe the child committed . . . the offense of murder or attempted murder; gross sexual imposition or the attempted gross sexual imposition of a victim by force or by threat of imminent death, serious bodily injury, or kidnapping . . . ."); N.J. STAT. ANN. § 2A:4A-26.1(c) (West 2018) ("[T]he court shall waive jurisdiction of a juvenile delinquency case without the juvenile's consent and shall refer the case to the appropriate court and prosecuting authority if" the juvenile is fifteen or older and is charged with one of the specified crimes); OHIO REV. CODE ANN. §§ 2152.10, 2152.12 (West 2018) (stating circumstances in which a child sixteen or older is eligible for mandatory transfer in certain circumstances); 14 R.I. GEN. LAWS § 14-1-3 (2018).

20. *See* D.C. CODE § 16-2307(a) (2018); LA. CHILD. CODE ANN. art. 305(B)(1)(b) (2018).

21. *See* ALA. CODE § 12-15-204(a)(1)–(7) (2018) (listing crimes for which those over the age of sixteen are automatically charged as adults); IND. CODE § 31-30-1-4(a)(1)–(10) (2018) (listing crimes for which those between the ages of sixteen and eighteen are charged automatically as adults); LA. CHILD. CODE ANN. art. 305(A)(1)–(2) (2018) (excluding those aged fifteen and older from juvenile jurisdiction after certain procedures are followed and the person is charged with first or second degree murder, "aggravated or first degree rape, or aggravated kidnapping"); MINN. STAT. § 260B.007(6)(b) (2018) (excepting from the definition of "delinquent child," a child who is charged with first degree murder over the age of sixteen); S.C. CODE ANN. § 63-19-20(1) (2018)

supported these methods based on various constitutional arguments.[22]

Once transferred under these automatic transfer provisions, *Miller* comes into play to require an individualized assessment at the sentencing stage.[23] The *Miller* Court's holding should not only work to determine the appropriateness of life-without-parole sentences for juveniles. An individualized assessment should also be required to apply any mandatory minimum sentence provisions applied to juveniles. Accordingly, the constitutionality determination should be adjusted to focus on the defendant's age and whether the state provided an effective individualized assessment at either the transfer or sentencing stage. Furthermore, I argue, a substantive due process right holds states responsible for effective participation throughout the justice process when youthful immaturity presents as the "Achilles heel" to fundamental fairness principles.

In this Article, I will move along considering the full meaning of the phrase "juveniles are constitutionally different" and its implications across the whole justice process.[24] That juveniles are constitutionally different from adults cannot hold meaning in only the three already recognized instances: death penalty, mandatory life without parole, and non-homicide offenses.[25] Based on the same evidence supporting these Supreme Court holdings, we know that transfer to adult court creates problematic constitutional questions long before the courts attempt to sentence the worst among youthful offenders.[26] Therefore, we must flesh out what this slow, twenty-year constitutional epiphany means to the middle, not just along the edges.

(excepting from the terms "Child" or "Juvenile" those who are charged with a Class A, B, C, or D felony); UTAH CODE ANN. § 78A-6-701(1) (West 2018) ("The district court has exclusive jurisdiction over all persons 16 years of age or older charged with an offense that would be murder or aggravated murder if committed by an adult."); WASH. REV. CODE § 13.04.030(1)(e)(v)(A)–(C) (2018) (excepting from juvenile jurisdiction sixteen or seventeen year olds charged with serious violent offenses, certain other violent offenses, or rape of a child in the first degree).

22. *See, e.g.*, State v. Angel C., 715 A.2d 652 (Conn. 1998); People v. Patterson, 25 N.E.3d 526 (Ill. 2014); State v. Hall, 350 So. 2d 141 (La. 1977); Commonwealth v. Wayne W., 606 N.E.2d 1323 (Mass. 1993); State v. Angilau, 245 P.3d 745 (Utah 2011).

23. Miller v. Alabama, 567 U.S. 460, 489 (2012) ("[O]ur individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.").

24. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016) (citing Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); *Miller*, 567 U.S. 460).

25. *See generally Miller*, 567 U.S. 460 (relating to mandatory sentencing schemes imposing life without parole statutes upon juveniles); *Graham*, 560 U.S. 48 (prohibiting life without parole sentences for non-homicide offenses); *Roper*, 543 U.S. 551 (barring death penalty for juveniles).

26. *See supra* note 2.

Part I reviews the Supreme Court's sentencing cases that define juveniles as constitutionally different from their adult counterparts.[27] These pronouncements find their justification in social science, developmental psychology, and advancements in neuroscience, which together inform more than culpability.[28] This research also gives insight into a juvenile defendant's ability to effectively participate in the justice process once transferred to adult jurisdiction.[29] In Part II, I propose that substantive due process provides a constitutional doctrine to protect youth, based on their age status, when removed from juvenile jurisdiction to criminal court.[30] This argument extends the Supreme Court's reasoning from the sentencing stage to other critical stages wherein a juvenile defendant's youthfulness traits make them uniquely vulnerable.[31] Part III illustrates how juveniles are shuttled through the adult justice system with no individualized assessment at any critical juncture in the process.[32] The discussion addresses those states that absolutely deprive juvenile defendants of any status recognition once transferred to criminal court.[33] Finally, Part IV analyzes the transfer process in depth.[34] This deliberation details jurisdictional transfer mechanisms that consider an individualized assessment and alternative transfer methods that forgo such considerations.[35] In conclusion, the system of statutorily converting juvenile delinquents into criminal

27. *See infra* Part I.

28. *See, e.g.*, Brief for the APA in *Miller*, *supra* note 2, at 25–26 (citing Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 AM. PSYCHOLOGIST 739, 742 (2009)) (stating "By now, '[t]here is incontrovertible evidence of significant changes in brain structure and function during adolescence,'" and noting that brain structures that are essential to "planning, motivation, judgment, and decision-making . . ." are developed during adolescence); Brief for the AMA in *Miller*, *supra* note 2, at 7–10 ("Scientists have identified various interrelated immaturities in adolescents' self-regulatory abilities that contribute to their limitation in controlling their impulses and their greater tendency to engage in risky or reckless behavior."); Brief for the APA in *Graham*, *supra* note 2, at 16 (citing Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625, 626–34 (2005), and explaining that a study "found that exposure to peers during a risk-taking task doubled the amount of risky behavior among mid-adolescents (with a mean age of 14), increased it by 50 percent among college undergraduates (with a mean age of 19), and had no impact at all among young adults.").

29. *See supra* note 28.

30. *See infra* Part II.

31. *See infra* Part II.

32. *See infra* Part III.

33. *Infra* Part III.

34. *Infra* Part IV.

35. *Infra* Part IV.

defendants requires that their youthfulness traits be weighed long before reaching the fateful sentencing stage, based on a substantive due process right that permeates the justice process.

I. VALIDATING THAT CHILDREN ARE CONSTITUTIONALLY DIFFERENT FROM ADULTS

The juvenile sentencing trilogy sets forth categorical bans for juvenile offenders, those under the age of eighteen years old at the time of their alleged criminal act: *Roper v. Simmons* prohibited the death penalty, *Graham v. Florida* prohibited life without parole for those committing non-homicide offenses, and *Miller v. Alabama* prohibited applying mandatory life-without-parole sentencing statutes.[36] Importantly, in *Roper*, the Supreme Court relied on social science, developmental psychology and neuroscience to augment the commonsense reasoning it used to support previous age-based holdings.[37]

Roper v. Simmons marked a continuation in the Supreme Court's attempt to articulate the role of age when imposing the death penalty.[38] The constitutional difference between adults and juveniles rests on evidence-based conclusions that youth possess a diminished culpability, such that conventional penological justifications prove impertinent in this context.[39] First, a "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."[40] Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. . . .This is explained in part by

36. *See generally* Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 576 U.S. 460 (2012).

37. *Roper*, 543 U.S. at 564–75.

38. *See generally Roper*, 543 U.S. 551 (finding it unconstitutional to impose capital punishment for crimes committed while under the age of eighteen); *see also* Johnson v. Texas, 509 U.S. 350, 367 (1993) ("A sentence in a capital case must be allowed to consider the mitigating qualities of youth in the course of its deliberations over the appropriate sentence."); Stanford v. Kentucky, 492 U.S. 361, 405 (1989) (finding that "the execution of juvenile offenders violates contemporary standards of decency"); Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) (reiterating that "the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation."); Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982) (holding youth to be a necessary mitigating factor in death penalty cases, characterizing youth as "more than a chronological fact," but as a "time and condition of life when a person may be most susceptible to influence and to psychological damage").

39. *Roper*, 543 U.S. at 569–75.

40. *Id.* at 569 (quoting *Johnson*, 509 U.S. at 367).

the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment."[41] And third, "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed."[42]

According to the *Roper* Court, juveniles' lack of maturity explains that "their irresponsible conduct is not as morally reprehensible as that of an adult."[43] Additionally, juveniles' "vulnerability and comparative lack of control over their immediate surroundings" lessens the expectation and responsibility to remove themselves from a harmful situation.[44] And finally, a juvenile's amorphous self-constitution tamps down the validity of any definitive determinations that "even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."[45] The *Graham* majority echoed *Roper*'s acceptance of the constitutional difference between juveniles and adults, stating that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."[46]

After *Graham*, in *J.D.B. v. North Carolina*, the Court addressed whether a *Miranda* custody determination must consider the juvenile suspect's age.[47] The Court reached back to its older juvenile-related holdings leaning on common sense to decide that children should not be held to the same standard as adults.[48] In this context, the Supreme Court opined that

> officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child's age. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult.[49]

Only one year later, the Supreme Court returned to external experts to

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41. *Id.* (citing *Eddings*, 455 U.S. at 115).

42. *Id.* at 570.

43. *Id.* (quoting *Thompson*, 487 U.S. at 835).

44. *Id.* (citing Stanford v. Kentucky, 492 U.S. 361, 395 (1989) (Brennan, J., dissenting)).

45. *Id.*

46. Graham v. Florida, 560 U.S. 48, 68 (2010).

47. J.D.B. v. North Carolina, 564 U.S. 261 (2011); *see Roper*, 543 U.S. 551. *See generally* Miranda v. Arizona, 384 U.S. 436 (1966) (holding that the Fifth Amendment requires that law enforcement officials advise suspects of their right to remain silent and to obtain an attorney during interrogations while in police custody).

48. *J.D.B.*, 564 U.S. at 262 ("In the specific context of police interrogation, events that 'would leave a man cold and unimpressed can overawe and overwhelm' a teen." (quoting Haley v. Ohio, 332 U.S. 596, 599 (1948))).

49. *Id.* at 279–80.

uphold constitutional sentencing boundaries for juveniles.[50] Of significance, *Miller* introduced the procedural requirement of an individualized assessment to accompany the prohibition against applying mandatory life-without-parole statutes to juvenile defendants in criminal court.[51] Thereafter, *Montgomery v. Louisiana* labeled the new rule to be a substantive change of law duly implemented through procedure.[52] Under a dimmer spotlight, the *Montgomery* Court rejected the state's argument that the individualized assessment conducted at the transfer stage substitutes for an individualized assessment at the sentencing stage.[53]

In *Miller*, the two cases under review involved fourteen-year-old defendants prosecuted in adult criminal courts based on transfer statutes controlled by prosecutorial discretion.[54] The Court addressed the constitutionality of mandatory life without the possibility of parole statutes as applied to juvenile offenders.[55] The Court relied on two sets of sentencing cases to determine the sentencing scheme was unconstitutional: categorical bans based on disproportionality between the defendant's characteristics and the offense committed and prohibition against imposing the death penalty without an individualized consideration of the defendant's characteristics.[56] With these precedents in mind, the Court reiterated *Roper's* core reasoning and *Graham*, which "establish[ed] that children are constitutionally different from adults for sentencing purposes."[57] The *Miller* Court laid bare the intersection between youth and sentencing as follows:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may

50. Miller v. Alabama, 567 U.S. 460 (2012).

51. *Id.*

52. Montgomery v. Louisiana, 136 S. Ct. 718 (2016).

53. *Id.* at 734–35.

54. *Miller*, 567 U.S. at 466, 468–69 (describing the Arkansas and Alabama statutes permitting transfer of the juvenile defendants to adult criminal court, both under prosecutorial discretion).

55. *Id.* at 465.

56. *Id.* at 470.

57. *Id.* at 461 (citing Roper v. Simmons, 543 U.S. 551, 569 (2005); Graham v. Florida, 560 U.S. 48, 68 (2010)).

> have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.[58]

Although the Court did not remove life without parole as a sentencing option for juveniles, Justice Kagan, writing for the majority, predicted that in light of the sentencing trilogy's statements on "children's diminished culpability and heightened capacity for change, . . . appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[59]

In *Montgomery*, the Supreme Court granted retroactive application for its ban against sentencing juveniles under mandatory life-without-parole statutes.[60] The Court's explanation for why *Miller* constituted a new substantive rule, not merely a procedural change, helps clarify the interplay between an offender's age and the sentencing determination.[61] The Court stated that:

> A hearing where "youth and its attendant characteristics" are considered as sentencing factors is necessary to separate those juveniles who may be sentenced to life without parole from those who may not. The hearing does not replace but rather gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity.[62]

At first blush, it seems that the sentence length dictates the need for an individualized assessment. The Court made it clear that the Eighth Amendment violation is sentencing a juvenile to life without parole, except in the rarest of circumstances; only through an individualized assessment may courts avoid imposing such a disproportionate punishment.[63] *Montgomery* reminded us that *Miller* not only required trial courts to consider the offender's age, but also went further to

58. *Id.* at 477–78 (citations omitted) (citing J.D.B. v. North Carolina, 564 U.S. 261, 269 (2011); *Graham*, 560 U.S. at 78).

59. *Id.* at 479.

60. Montgomery v. Louisiana, 136 S. Ct. 718, 732 (2016).

61. "Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence." *Id.* at 732–33.

62. *Id.* at 735 (citations omitted) (quoting *Miller*, 567 U.S. at 465).

63. "*Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. . . . Before *Miller*, every juvenile convicted of a homicide offense could be sentenced to life without parole." *Id.* at 734.

"establish[] that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'"[64]

Constitutional procedures erected at the outcome stage do not clear the state's conscience. With the *parens patriae* duty now fermented into constitutional law, policymakers must address the juvenile defendant's ability to fairly fight at the stages leading up to a sentencing hearing.[65] The Supreme Court reflected on a collection of youthfulness traits to conclude that juvenile offenders possess a lesser culpability as compared to adults, which led to tangible results in the sentencing context.[66] The question remains as to what other tangible results may be gained through the Supreme Court's acknowledgment that juveniles are constitutionally different from adults according to evidence-based traits of youthfulness. Individualized assessment tailored to the adjudicatory stage may be required to protect the substantive rights these differences create.

II. MOLDING A JUSTICE PROCESS FOR JUVENILES OFFENDERS

The Court's initial interventions with administering justice for juveniles came down as fundamental fairness holdings, grounded in due process, and meant to restrain juvenile courts.[67] In the criminal context, the Court has embraced the juvenile court's recognition that children are different from adults by articulating custodial rights under the Fourth Amendment and sentencing rights under the Eighth Amendment.[68] The juvenile sentencing cases *Roper*, *Graham*, *Miller*, and *Montgomery* significantly changed how the constitutional standards applied to youth offenders.[69] These cases prohibited states from executing juveniles, imposing sentence of life without parole for those juveniles convicted of non-homicide offenses, and applying mandatory life-without-parole

64. *Id.* (quoting *Miller*, 567 U.S. at 472).

65. *See* ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 69–70 (2008) ("[T]he state's *parens patriae* authority is invoked when the government acts on the basis of society's moral obligation to care for its weak and dependent members; here, the focus is on the interest and welfare of individual children affected by the regulation.").

66. *See Montgomery*, 136 S. Ct. at 733 (Explaining that children's "lack of maturity and an underdeveloped sense of responsibility," vulnerability "to negative influences and outside pressures," and character that is "not as well formed as an adult's" makes children less culpable than adults (internal quotations omitted) (quoting *Miller*, 567 U.S. at 460, 471)).

67. Schall v. Martin, 467 U.S. 253, 263 (1984); Breed v. Jones, 421 U.S. 519, 530–31 (1975); McKeiver v. Pennsylvania, 403 U.S. 528, 543 (1971); *In re* Winship, 397 U.S. 358, 369 (1970) (Harlan, J., concurring); *In re* Gault, 387 U.S. 1 (1967).

68. Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48, 68 (2010); *Miller*, 567 U.S. at 479; *Montgomery*, 136 S. Ct. at 734.

69. *See generally Roper*, 543 U.S. 551; *Graham*, 560 U.S. 48; *Miller*, 567 U.S. 460; *Montgomery*, 136 S. Ct. 718.

statutes to juveniles.[70] The Court's prospective impact on juvenile sentencing appears clear cut, but the reverberation of its rulings throughout the justice process is much less straightforward.

A. The Genesis of Individualization and its Intersection with Substantive Due Process

In constitutional terms, the Supreme Court's treatment of juveniles establishes a categorical approach that requires contextual application via individualized assessment. In *Graham v. Florida*, the Court categorically banned life without parole for non-homicide offenses with the contextual caveat that juveniles should be given a reasonable opportunity for parole.[71] In *J.D.B. v. North Carolina*, the Court implored law enforcement to consider an offender's age when deciding whether individuals realize that they are being held in police custody.[72] In *Montgomery v. Louisiana*, the Court clarified that juveniles should be sentenced to life without parole only on rare occasions and that an individualized assessment must be performed before imposing such a harsh penalty.[73]

Legislation affecting a juvenile's treatment in the justice process must consider their unique traits of youthfulness to pass constitutional muster. The Supreme Court provides limited direction for states implementing its declaration that "children are constitutionally different;" thus, lawmakers traverse murky territory.[74] The statutory confluence that absolutely deprives an accused juvenile offender in criminal court of an individualized assessment highlights structural problems that require a unitary constitutional resolution. A moderate extension of the juvenile sentencing cases reveals the need to develop special sentencing guidelines for juveniles transferred to criminal courts. More ambitious

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70. *Roper*, 543 U.S. at 569 (barring capital sentences for juveniles); *Graham*, 560 U.S. at 68 (prohibiting life without parole sentences for non-homicide offenses); *Miller*, 567 U.S. at 479 (holding that juvenile mandatory life sentences without parole are unconstitutional); *Montgomery*, 136 S. Ct. at 732 (holding *Miller* applies retroactively).

71. *Graham*, 560 U.S. at 75.

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

73. *Montgomery*, 136 S. Ct. at 735.

74. *Miller*, 567 U.S. at 471 (citing *Roper*, 542 U.S. 551; *Graham*, 560 U.S. at 68). In *Making the Crime Fit the Punishment*, Professor Joseph Kennedy articulates a quasi-constitutional clear statement rule for interpreting federal criminal statutes grounded in substantive due process. This need partially arises because "it is hard to infer from the Court's past decisions on the federal sentencing guidelines, mandatory minimum sentences, or the death penalty any desire to substitute the Court's own moral judgments about the proportionality of punishment for the judgment of the relevant legislative body." Joseph E. Kennedy, *Making the Crime Fit the Punishment*, 51 EMORY L.J. 753, 760–761 (2002).

arguments arise, as set forth below, regarding an adolescent's ability to fully and effectively participate in trial proceedings.[75] What should we consider the overarching constitutional guidance, beyond a simple "children are different" when determining how a state should treat its juvenile offenders?

Substantive due process accommodates the requirement that states remain cognizant that children are different from adults when transferred to criminal court, recognizing this as a permeating right to ensure a juvenile's constitutional treatment throughout the justice process. Some constitutionally regulated areas, such as term-of-years sentences, effective assistance of counsel, conditions of incarceration, and the presumption of competency to stand trial have yet to be analyzed in light of the criminal defendant's youthfulness traits. This oversight seems detrimental considering the well-documented disadvantages and consequences that someone's immaturity may play during the adjudication phase.[76] Such recognition does not require states to grant juvenile courts exclusive jurisdiction over juvenile offenders, but it does require that we identify points that are ripe for affecting fundamental fairness based on youthfulness traits.

From the perspective of juvenile offenders, their status demands the state to acknowledge the deficiencies associated with their youthfulness. The liberty interest for transferred youth, protected pursuant to substantive due process, would run more broadly than an Eighth Amendment protection attached on the backend, at the sentencing phase.[77] These rights may be reasonably accommodated through an individualized assessment, combined with any assistance required to ensure fundamental fairness in adjudication proceedings, mitigated punishments where appropriate, and rehabilitative services needed to facilitate a meaningful opportunity for release.

Substantive due process rights stem from values deeply rooted in American legal history and traditions but also allow for expressing national values through constitutional law.[78] A transferred juvenile's constitutional protections properly show our nation's both traditional and historical support for individualized assessment. While individualized

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75. *See infra* notes 140–144 and accompanying text.

76. *See, e.g.*, Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable Than Adults*, 18 BEHAV. SCI. L. 741 (2000).

77. Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 171–73 (2015).

78. Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)).

assessment for juveniles is abundant in our nation's history and traditions,[79] the Supreme Court exercises restraint when establishing a fundamental right under substantive due process.[80] But, in using expert research to usher in the approach of distinguishing children from adults, individualization, and the importance of rehabilitation in criminal court for juvenile offenders, the Court expands criminal courts' obligations to act in the children's best interest when they are transferred to criminal court.[81]

The pathway to no individualized assessment creates a constitutionally untenable justice process. The obvious solutions come into play by enacting the provisions available in other jurisdictions: reverse waiver, expanded criminal blended sentencing, judicial approval of prosecutorial direct file, and so on.[82] At present, the Supreme Court's juvenile sentencing trilogy legitimizes the child development research that supports more sweeping reforms such as increasing the jurisdictional age limit for courts.[83] A more consistent change would be to recognize juveniles, a discrete class of individuals, as a known quantity deserving of affirmative protections that permeate the justice process. But the state bears additional burdens above and beyond its obligations to adult defendants when transferring juveniles from this safe harbor to criminal jurisdiction. Similar to the Sixth Amendment right to counsel, youthfulness requires tangible procedural protections at critical stages in the justice process.[84] Moreover, comparable to special qualifications required of death penalty counsel, attorneys for juveniles should possess

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79. As compared to the historical explanation, a second explanation has been described where substantive due process can be used by the "Supreme Court to protect new rights and to invalidate governmental policies even if those policies have longstanding and continuing support in American law and society . . . [and for] identification of personal liberties that it deems appropriate for our contemporary society." Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 107, 112 (2006).

80. [B]ased on reason and therefore on reasons, albeit reasons grounded ultimately on considerations of philosophical, moral, and political theory . . . informed by an elaborate process of adjudication, including arguments and counterarguments from the parties and from amici curiae, . . . in the end, the Court must defend its judgment in a written opinion.

Id. at 110.

81. When not supported by the Constitution, original intent, or "the immanent values of American history and tradition[, i]t will instead have to defend itself by articulating with clarity and integrity the constitutional values that inform its judgment." Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts and Law*, 117 HARV. L. REV. 4, 106 (2003).

82. *See* GRIFFIN ET AL., *supra* note 16 (explaining various transfer mechanisms).

83. Miller v. Alabama, 567 U.S. 460, 479 (2012); Graham v. Florida, 560 U.S. 48, 68 (2010); Roper v. Simmons, 543 U.S. 551, 569 (2005).

84. U.S. CONST. amend. VI.

adequate credentials when representing juveniles in criminal court.[85]

The right to counsel, pursuant to the Sixth Amendment, attaches throughout the justice process. In *Massiah v. United States*, the Supreme Court made clear that a defendant's right to assistance from counsel attaches before trial.[86] In reviewing an interrogation not formally conducted in custody, the Court affirmed *Powell v. Alabama*'s statement that "from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important, the defendants . . . [are] as much entitled to such aid [of counsel] during that period as at the trial itself."[87] In *Escobedo v. State of Illinois*, the Court clarified that pre-indictment interrogations sit alongside preliminary hearings and arraignments, with each stage capable of "affect[ing] the whole trial."[88] From a global perspective, the Court reasoned that:

> [N]o system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, these rights. If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.[89]

Similar to the right to counsel, for juveniles transferred to criminal court, a permeating right should attach when the juvenile is initially transferred to criminal court, persist as the case percolates through the justice process, and continue through sentencing. This right requires the implementation of procedural measures—an individualized assessment—to ensure fundamental fairness despite juveniles' youthfulness and immaturity. In addition to competency, we may even imagine a second look at standards for requiring attorney qualification for juveniles' legal representation. And the list may grow as social science,

85. *See* Counsel for Financially Unable Defendants, 18 U.S.C. § 3599(b) (2018) (requiring attorneys who are provided to defendants that are financially unable to obtain adequate representation to "have been admitted to practice in the court in which the prosecution is to be tried for not less than five years, and must have had not less than three years of experience in the actual trial of felony prosecutions in that court.").

86. Massiah v. United States, 377 U.S. 201, 206 (1964).

87. *Id.* at 205 (alterations and omission in original) (quoting Powell v. Alabama, 287 U.S. 45, 60 (1932)).

88. Escobedo v. Illinois, 378 U.S. 478, 485–86 (1964) (quoting Hamilton v. Alabama, 368 U.S. 45, 54 (1961)).

89. *Id.* at 490.

developmental psychology, and neuroscience connect with the criminal courts to identify disparities and disadvantages unique to juvenile offenders.

The juvenile offender transferred to criminal court challenges our constitutional and societal commitments to fundamental fairness.[90] Whether prosecuting a juvenile or adult, common goals emerge to underscore fundamental fairness: the defendant should understand the legal proceedings, be able to assist counsel, and make decisions independently based on sound, rational mental faculties.[91] From a constitutional perspective, juveniles' maturity may greatly compromise their ability to meet the competency threshold to stand trial.[92] From a societal perspective, most juvenile offenders (especially those transferred to criminal jurisdiction) re-enter their communities with the viewpoint that Lady Justice failed them in the fairness department. This contributes to recidivism because it feeds hopelessness and engraves chips on juvenile offenders' shoulders.

Criminal laws, both in isolation and in the aggregate, would violate a substantive due process right to individualized review when they are enacted without deliberating the difference between children and adults in light of research from social science, developmental psychology, and neuroscience.[93] For example, blanket prescriptions like statutory exclusion and mandatory sentences should be considered unconstitutional as applied to juveniles, because they are not accompanied by an individualized assessment or alternatively, evidence-

90. SCOTT & STEINBERG, *supra* note 65, at 150–52 (noting that this challenge to fairness arises from a lack of emphasis on competence in criminal proceedings); *Introduction to Part II: Adolescents' Capacities as Trial Defendants*, YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 67, 68–70 (Thomas Grisso & Robert G. Schwartz eds., 2000); Thomas Grisso, *What we Know about Youths' Capacities as Trial Defendants*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE *supra*, at 139, 159.

91. *See* SCOTT & STEINBERG, *supra* note 65, at 150; *Introduction to Part II: Adolescents' Capacities as Trial Defendants*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE, *supra* note 90, at 67, 68–70; Thomas Grisso, *What We Know about Youths' Capacities as Trial Defendants*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE, *supra* note 90, at 139, 159.

92. *See* Dusky v. United States, 362 U.S. 402, 402 (1960) (explaining that the test for competency to stand a criminal trial is "whether [the defendant] has a rational as well as factual understanding of the proceedings against him"). Currently, only three states provide competency hearings that include developmental immaturity for juvenile offenders: South Dakota, New Hampshire and Maine. Six states have no juvenile standard for competency evaluations: Hawaii, Montana, North Dakota, Oklahoma, Indiana and Rhode Island. *Juvenile Court*, *Competency 2015*, JUV. JUST. GEOGRAPHY, POL'Y, PRAC. & STAT., http://www.jjgps.org/juvenile-court#competency-to-stand-trial?category=1 (last visited Nov. 28, 2018).

93. *See supra* notes 2, 28.

based legitimate government justifications.[94] Note that this suggestion in no way forecloses reaching equal outcomes for an adult and juvenile offender, but a deliberative study process must precede any such statute's passage. This substantive right would most often manifest through procedural requirements.

As previously set forth, substantive due process rights are deeply rooted in American legal history and tradition, but they also allow for the expression of national values through constitutional law.[95] History and tradition confirm that children require special attention when accused of criminal activity, and both the process of adjudication and punishment should vary from adult criminal trials due to sweeping considerations that are unique to the offender's age.[96] Considering the historical separation between juvenile and adult offenders, which has been illustrated in legal precedent combined with empirical research on adolescents, provides a necessary check on judicial overreach.[97] Regarding history and tradition, Justice Harlan, in *Poe v. Ullman*, infamously wrote that:

> through the course of this Court's decisions [due process] has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society . . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.[98]

The terms and conditions applied to juvenile delinquents build on age-old principles. The socio-political history, dating back to Progressive era reforms and legal precedent, shows the deep roots individualized review for juveniles has in American history; however, this issue as a procedural

94. Post, *supra* note 81, at 97–98 (arguing that whereas substantive due process finds support in tradition, the *Lawrence v. Texas* opinion demonstrates that "the Court is concerned with constitutional values that have not heretofore found their natural home in the Due Process Clause").

95. Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977).

96. In describing the historical tradition approach based on *Glucksberg*, Conkle explains "it is our national history that delimits and circumscribes the rights that qualify for special protection. And this national history is itself revealed by 'deeply rooted' societal patterns and legal policies." Conkle, *supra* note 79, at 91.

97. "[T]he approach of historical tradition provides an objective standard of decisionmaking, and it is a standard that judges are competent to employ on a consistent and principled basis." *Id.* at 92. Judicial overreach has been a traditional argument against enumerating new fundamental rights, stemming from the failures of the *Lochner v. New York* era, when a right to free contracting was deemed fundamental as a substantive due process right. 198 U.S. 45 (1905). This view of freedom to contract as a fundamental right resulted in lack of governmental regulation regarding labor conditions and pay.

98. Poe v. Ullman, 367 U.S. 497, 542 (1961).

problem suffers from such an analytical approach.[99] The common law drew age distinctions in an attempt to assign culpability for criminal behavior.[100] Juvenile courts were established pursuant to the common law doctrine of *parens patriae*.[101] The foundational goal of rehabilitating delinquents remains a founding pillar of juvenile jurisdiction.[102]

The Supreme Court accommodated youthfulness traits in sentencing juveniles by accepting advancements in social science, developmental psychology, and neuroscience.[103] On its face, this breaks the historical, traditional mold. It moves the Court further from majoritarian support to upholding a counter-majoritarian narrative deemed constitutional by an independent, yet unelected federal branch of government.[104]

Substantive due process as a doctrinal justification draws skepticism from some legal observers and provides legal cover for the Court's intervention into truly controversial national conversations.[105] Skeptics of enumerating new substantive due process rights might argue that, if the Supreme Court enumerated a fundamental right to individualized review, it would at minimum substitute its judgment for that of elected state legislators in shaping criminal law, as it applies to juvenile offenders; on the other hand, the proposal herein may be viewed as a nudge for state legislators to rethink their policymaking process when criminalizing juvenile behavior.[106] Substantive due process rights are

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99. *Glucksberg* requires a narrowly defined issue supported through history and tradition. Conkle argues that, in determining whether a substantive due process right exists, the Court "is discerning the precise nature of the political-moral issue at hand so that it can determine whether an asserted claim of liberty has the affirmative support of a historical tradition, thereby providing the claim with a majoritarian sanction." Conkle, *supra* note 79, at 93.

100. *See* Tiffani Darden, *Exploring the Spectrum: How the Law May Advance a Social Movement*, 48 ARIZ. ST. L.J. 261, 273–74 (2016) (explaining how *Graham*, *Roper*, and *Miller* considered juveniles' lack of culpability due to immaturity to require individualized review in certain circumstances).

101. Tanenhaus, *supra* note 4, at 17–18 (illustrating that the recognition of the childhood and social conceptions of law informed the juvenile courts' basis in the medieval English doctrine of *parens patriae*).

102. *See* Darden, *supra* note 100, at 273 (explaining the holdings in *Graham*, *Roper*, and *Miller* "that juveniles carry less culpability" and therefore "deserve lesser punishment and more rehabilitation").

103. *See supra* notes 2, 3, 28; Conkle, *supra* note 79, at 94, 139–40 (illustrating the ingredients of a forward looking rationale, as compared to a backward looking rationale).

104. Conkle, *supra* note 79, at 107, 112 (explaining that an unelected Court using the "theory of reasoned judgment permits substantive due process to perform a *nationalizing function* through the recognition and protection of fundamental rights as a matter of constitutional law").

105. *Id.* at 64.

106. Conkle opined that "it is hardly surprising that some have condemned the entire enterprise of substantive due process, calling it an unjustified judicial usurpation of political power and a flagrant violation of the basic principle of majoritarian self-government." *Id.* at 78–79.

based on the Court's reasoned judgment, which entails balancing personal liberty interests against countervailing government interests.[107] The state's interests in supporting jurisdictional waiver to criminal court for juvenile offenders can be gleaned from adoption of the *Kent* factors by most state courts. Noticeably, the proffered reasons for supporting jurisdictional waiver omit any attempt to reconcile these interests, centered around public safety, with the state's "best interest" commitment to minor children.

The Supreme Court rarely grants affirmative rights through its constitutional interpretations, and the Court's constitutional explications rarely arrive as a package deal adhering throughout an entire process; instead, substantive due process holdings lean toward prohibiting government interventions associated with a well-defined interest.[108] Here, the liberty interest revolves around recognizing that juvenile offenders lack the capacity to endure an adult criminal justice system, and the resulting need to construct evidence-based policies identifying where their youthful traits make juveniles acutely vulnerable to suffering disadvantages based on their age. To fully appreciate this constitutional protection, we must not isolate any particular stage in the justice process from transfer to adjudication to sentencing. Instead, the notion that "children are different" requires states to view a process that at any juncture may disadvantage juvenile offenders in different ways based on individualized traits, culminating in the aggregate at the Eighth Amendment sentencing stage.[109]

The constitutional acceptance that children are different from adults seems to have penetrated only so far through our treatment of juvenile offenders. Whereas the juvenile court stridently implements philosophies and practices that stand in stark contrast to criminal jurisdiction, not much promise for an overhaul appears on the horizon for children who find themselves dropped into an adult's world. Juvenile and criminal courts have shared a nebulous partition for over one hundred years. Since the inception of juvenile courts, state legislatures have debated upper age limits and the transfer option.[110] Judicial waiver stood as the predominant

107. *Id.* at 66–67 (explaining this approach and noting that the Court used it in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and in *Lawrence v. Texas*, 539 U.S. 558 (2003)).

108. *See* Yoshino, *supra* note 77, at 167–68 (illustrating the Court's shift from the use of negative/positive rights to a concept of equality).

109. U.S. CONST. amend. VIII.

110. Tanenhaus, *supra* note 4, at 21 (noting that age limits "kept older children out of the juvenile justice system" and the transfer option allowed judges to remove those accused of heinous

transfer mechanism for several decades, during which time judges undertook individualized assessments of youth offenders to determine their amenability to treatment or their need for more severe punishment in criminal court.[111] Individualized assessment should not end once the decision to transfer a juvenile to criminal court has been made. A substantive due process right to individualized review throughout the entire process in criminal court will ensure juveniles are afforded the same opportunity to withstand the criminal justice process as adults.

B. Fictitious Status Equivalence

The legal fiction of children being equal to their adult counterparts may be written in statutes, but it does not convert the state's substantive commitments to juveniles.[112] The Supreme Court has made clear that even though criminal courts may handle cases involving juvenile offenders, states must accommodate youthful attributes when appropriate.[113] The choice to transfer children from juvenile jurisdiction should not exonerate states from their *parens patriae* duties for minors in government custody. Lessened culpability requires more than merely a reduced sentence to fulfill a state's obligations to its youthful individuals. The Supreme Court chipped away at the worst-case scenarios using broad language, but its opinions leave little guidance for decisions regarding transfer and sentencing of children in criminal court.[114]

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crimes from the juvenile system); Franklin E. Zimring, *The Punitive Necessity of Waiver*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT, *supra* note 4, at 207, 207 (characterizing the transfer option as a "universal exception to a universal rule").

111. Robert O. Dawson, *Judicial Waiver in Theory and Practice*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT, *supra* note 4, at 45, 45 (illustrating that judicial waiver weighed the juvenile's capability of rehabilitation against "whether the interest of the community would be served by the prosecution of that offense in criminal court rather than juvenile court").

112. For example, Louisiana state actors may transfer juvenile offenders to adult criminal court using various procedures: discretionary waiver, mandatory waiver, prosecutorial discretion and statutory exclusion. Once in criminal jurisdiction, the justice system provides no pathway back to juvenile jurisdiction via reverse waiver or juvenile or criminal blended sentencing provisions. *Juvenile Court*, *Transfer Provisions*, JUV. JUST. GEOGRAPHY, POL'Y, PRAC. & STAT., http://www.jjgps.org/jurisdictional-boundaries/louisiana#transfer-provisions?age=-1&offense=-1&policy=3&year=2016 (last visited Nov. 28, 2018).

113. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016); Miller v. Alabama 567 U.S. 460. 479 (2012); Graham v. Florida, 560 U.S. 48, 68 (2010); Roper v. Simmons, 543 U.S. 551, 576–77 (2005).

114. Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 147 (2013) ("The Court has reached the outer limits of what it can accomplish through interpretation of the Eighth Amendment. . . . The specific amount by which sentences imposed on youths should be substantially discounted is a political and legislative value

Together, *Roper*, *Graham*, and *Miller* shined a light on juvenile sentencing practices.[115] But the constitutional difference between juvenile and adult offenders implicates fundamental fairness rights long before reaching the sentencing phase. In *Miller*, the Supreme Court began drawing distinctions between the purpose of individualized assessments at varying phases in the adjudication process.[116] The *Miller* majority distinguished between an individualized assessment for a juvenile offender at a discretionary judicial waiver determination and at the sentencing stage.[117] The Court gave two reasons for making this distinction: first, "the decisionmaker typically will have only partial information at this early, pretrial stage about either the child or the circumstances of his offense;" and second, "the question at transfer hearings may differ dramatically from the issue at a post-trial sentencing. . . . It is easy to imagine a judge deciding that a minor deserves a (much) harsher sentence . . . while still not thinking life-without-parole appropriate."[118] For those reasons, a judge's available discretion at the transfer stage cannot substitute for discretion at post-trial sentencing in adult court—and so cannot satisfy the Eighth Amendment.

Miller dismissed the argument that a jurisdictional waiver evaluation equates to the individualized assessment required to ensure the constitutional protections attached with imposing a sentence of life without parole.[119] Therefore, the imagination need not travel far to argue in good faith that discretionary transfer statutes also may not stand in lieu of pinpointing the critical stages where one's youthful individual traits must be acknowledged to guarantee fundamental fairness in the justice process.

With this in mind, the same social science, developmental psychology, and neuroscience research supports the need for individualized assessments in other specific parts of the criminal justice process where constitutional rights are potentially infringed due to a juvenile's immaturity.[120] Trial rights for youth offenders as trial defendants provide

choice."); Christopher Slobogin, *Treating Juveniles like Juveniles: Getting Rid of Transfer and Expanded Adult Court Jurisdiction*, 46 TEX. TECH L. REV. 103, 110 (2013) (questioning the diminished capacity rationale's application to juvenile reform beyond death penalty and mandatory life without parole).

115. *See Roper*, 543 U.S. at 556; *Graham*, 560 U.S. at 68; *Miller*, 567 U.S. at 479; *Montgomery*, 136 S. Ct. at 734.

116. *Miller*, 567 U.S. at 480–89.

117. *Id.*

118. *Id.* at 488.

119. *Id.* at 482–83.

120. *See supra* notes 2, 28.

the most urgent example where policy recommendations based on developmental research would have a constitutional foothold under current substantive due process arguments as an area in which "juveniles are constitutionally different from adults."[121] Adjusting competency standards for transferred juveniles marks a solid next target in both expanding a juvenile's distinct constitutional rights as compared to their adult counterparts and defining a permeating right, under substantive due process, for youth offenders in criminal courts.[122]

Few jurisdictions weigh a juvenile's diminished capacity, as compared to adult offenders, when considering their ability to meet constitutional competency standards.[123] In juvenile court, competency holds less significance because, at least in theory, the civil proceedings of that court seek to rehabilitate rather than punish the accused.[124] But juvenile developmental characteristics should affect the competency evaluation, and this evaluation then necessarily demands a resolution that is different from that of an adult deemed incompetent to stand trial.

This opinion enjoys credibility among scholars. In *Youth on Trial* and *Rethinking Juvenile Justice*, scholars asserted that ensuring a defendant's competence serves more than an individualistic interest. It also secures societal interests in three ways: "preserving the dignity of the criminal process, reducing the risk of erroneous convictions, and protecting the defendant's decision-making autonomy."[125] The denoted baseline, wrapped into the term "competency," must be present throughout the

121. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 733 (2016) (citing Roper v. Simmons, 543 U.S. 551 (2005)); SCOTT & STEINBERG, *supra* note 65, at 150 (explaining that using these differences when implementing the principles of proportionality and due process is a way to further ensure fundamental fairness). Richard J. Bonnie & Thomas Grisso, *Adjudicative Competence and Youthful Offenders*, *in* YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE, *supra* note 90, at 73, 85–86, 90 ("In our view, considerations of both fairness and judicial economy suggest that the juvenile's competence to proceed in the criminal court should be a prerequisite for waiver of jurisdiction by the juvenile court.").

122. "In short, the same concerns that support the prohibition against trying criminal defendants who are incompetent due to mental impairment apply with equal force when immature youths are subject to criminal proceedings." SCOTT & STEINBERG, *supra* note 65, at 157.

123. Three states provide competency hearings that include developmental immaturity for juvenile offenders: South Dakota, New Hampshire and Maine. Six states have no juvenile standard for competency evaluations: Hawaii, Montana, North Dakota, Oklahoma, Indiana and Rhode Island. *Juvenile Court*, *Competency 2015*, JUV. JUST. GEOGRAPHY, POL'Y, PRAC. & STAT., http://www.jjgps.org/juvenile-court#sex-offense-registry?year=2015 (last visited Nov. 28, 2018).

124. Bonnie & Grisso, *supra* note 121, at 82–83 (noting that because juvenile proceedings do not have the punitive purposes of criminal proceedings, the importance of competency is diminished based on juvenile proceedings' "rehabilitative objectives").

125. *Id.* at 76; *see also* SCOTT & STEINBERG, *supra* note 65, at 153 (noting that these three basic functions serve as basic rationales for the competence requirement).

justice process—from pretrial hearings, to plea offerings, to trial and sentencing. Reviewing the subject from an adult defendant's viewpoint and layering in the complications for juvenile defendants based on social science research clearly exposes how policy suggestions from the past two decades should now gain greater fortitude as constitutional obligations under the juvenile sentencing holdings.[126]

Dusky v. United States set forth the path for measuring a criminal defendant's competency to stand trial.[127] A criminal defendant must have both a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and a "rational as well as factual understanding of proceedings against him."[128] Shortly thereafter, *Drope v. Missouri* solidified competency as a fundamental fairness right.[129] Based on Supreme Court precedent, an adult defendant, when deemed incompetent to stand trial, will spend up to six months receiving rehabilitative psychiatric care.[130]

Youth competency requires a different approach. An individualized assessment provides valuable insight because maturity varies greatly from one juvenile offender to another.[131] The sophisticated offender with superior knowledge based on repeat contact with the system has proven to be a myth; instead, intelligence, race, socioeconomic status, and mental health, rather than experience, influence children's understanding of the legal process.[132] For some youth, their attorney may be able to informally fill in the gaps of their knowledge. But an immature youth, or one suffering from emotional disturbances or learning disabilities, will not be cured in six months with a pill or institutionalization.[133] Unfortunately, social scientists and juvenile advocates have concluded that merely requesting an evaluation provides a constitutional salve with little

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126. *See Roper*, 543 U.S. at 576–77; Graham v. Florida, 560 U.S. 48, 68 (2010); Miller v. Alabama, 567 U.S. 460, 479 (2012); *Montgomery*, 136 S. Ct. at 734.

127. 362 U.S. 402 (1960).

128. *Id.* at 402.

129. 420 U.S. 162 (1975).

130. Bonnie & Grisso, *supra* note 121, at 78–79.

131. "There is a great deal of individual variation in maturation rates; . . . [A]dolescence and adulthood are not tidy developmental categories; the transition to adulthood is a gradual process." SCOTT & STEINBERG, *supra* note 65, at 237. *See* Grisso, *supra* note 90, at 163 (showing that youths under fourteen years old are less likely to be competent, but age tends to be a bad indicator of competence for youths ages fourteen to sixteen).

132. Grisso, *supra* note 90, at 151–52, 163 (pointing to studies that show intellectual functioning, ethnicity and socioeconomic status, mental disorder are correlative to understanding of legal information rather than age and experience).

133. *Id.* at 164.

attention given to "getting it right" on mental competency.[134] At this time, some states address competency to stand trial at the waiver stage, either via statute or pursuant to judicial mandate.[135]

Upon counsel's advice, defendants must individually decide whether to plead guilty, whether to seek a jury or bench trial, whether to testify or exercise the Fifth Amendment right to remain silent, whether a particular defense seems advantageous, and whether the overall strategy feels palpable. A lack of competency to stand trial in adult criminal court poses the greatest threat to adolescents fifteen years old and younger.[136] First, the standard criteria of mental illness presents differently in youth than they do in adults.[137] Second, a youth offender may be at a disadvantage due to developmental immaturity, a trait not contemplated when evaluating adults for competency.[138] Younger defendants may understand the proceedings to a satisfactory degree on the surface, but their decision-making acumen could be impaired based on developmental immaturity.[139]

In *Youth on Trial*, Professor Thomas Grisso separates minors' abilities into two concepts: (1) adolescents' competence to stand trial and (2) their effectiveness of participation.[140] An example showing an adolescent's lack of competence to stand trial manifests in juveniles' incomplete understanding of rights.[141] Also, youth offenders do not fully appreciate

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134. SCOTT & STEINBERG, *supra* note 65, at 151 (illustrating that competency requirements were a response to judicial decisions requiring it for due process and not for the purpose of ensuring juveniles were actually competent to stand trial); Bonnie & Grisso, *supra* note 121, at 78 (noting that, in practice, "adjudicative competence is that asking the question is more important than getting the 'right' answer" because "the criminal justice system [has] a variety of motivations for raising" the competence issue other than the basic rationales underlying the doctrine itself); *see* VA. CODE § 16.1-269.1(A)(3) (2018) (requiring a juvenile to be considered "competent to stand trial" as a condition to discretionary judicial transfer. In Virginia, juveniles are "presumed to be competent and the burden is on the party alleging the juvenile is not competent to rebut the presumption by a preponderance of the evidence . . .").

135. SCOTT & STEINBERG, *supra* note 65, at 151.

136. "Judicial review of the defendant's competence for criminal adjudication should be mandatory in cases involving fourteen- to fifteen-year-old defendants." Bonnie & Grisso, *supra* note 121, at 90.

137. SCOTT & STEINBERG, *supra* note 65, at 159–60; Bonnie & Grisso, *supra* note 121, at 87–88; Grisso, *supra* note 90, at 160 (noting that youths have certain psychosocial characteristics that are "in transition," including responsibility, temperance, and perspective).

138. Note 137, *supra*.

139. Note 137, *supra*.

140. "[E]ffectiveness of participation focuses us on a continuum of lesser to greater capacities for contributing to one's defense, and it provides a foundation for seeking ways to maximize defendants' effectiveness." Grisso, *supra* note 90, at 141.

141. SCOTT & STEINBERG, *supra* note 65, at 159 (illustrated through a conversation with one of the author's twelve-year-old son, who when asked what the right to remain silent meant,

long-term consequences.[142] Moreover, their status as adolescents in a process inundated with adults could inhibit effective participation.[143]

I propose that effective assistance of counsel should also be enveloped into the substantive due process rights that deserve protection based on a juvenile's constitutional differences from their adult counterparts. Even before transfer, based possibly on prosecutorial discretion, juveniles may have shucked the right to remain silent and attain counsel, thus providing information that the prosecutor can use to make a decision on waiver.[144] However, many youths do not fully appreciate their rights and the role that counsel can play in protecting those rights.[145] This deficit based on maturity associated with age cannot go ignored by state courts.

The juvenile sentencing cases formulate a constitutional class, but the procedural cases predating this era too often simply conscript adult rights to be applied in the juvenile context. *In re Gault* recognized concerns affiliated with young defendants, which heightened the attorney's role:

> The participation of counsel will, of course, assist the police, Juvenile Courts and appellate tribunals in administering the privilege [against self-incrimination]. If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.[146]

The Court often speaks in cautionary terms, but the Court has never installed state obligations unique to a juvenile offender in criminal courts before the sentencing stage.

As the Court's doctrine creates a paint-by-numbers portrait of juvenile justice, legal commentators and advocates continue to understand the full heft to be gained from the Court's supplementation of common sense by considering science and social science to attain some significance in shaping constitutional law. The *Graham* and *Miller* Courts hypothesized

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responded "It means you don't have to say anything until the police ask you a question."); Grisso, *supra* note 90, at 149 (stating that one-half to two thirds of adolescents did not understand that a court could not penalize them for avoiding self-incrimination, compared to thirty percent of adults).

142. Bonnie & Grisso, *supra* note 121, at 91.

143. SCOTT & STEINBERG, *supra* note 65, at 160 (arguing that an adolescent may not understand the role of an attorney and may feel as though all of the adults are allied against them, particularly if they see their attorney speaking with the prosecutor outside of the courtroom); Bonnie & Grisso, *supra* note 121, at 89.

144. THOMAS J. BERNARD & MEGAN C. KURLYCHEK, THE CYCLE OF JUVENILE JUSTICE 167 (2d ed. 2010).

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

146. *Id.* at 55.

that harsh sentences may share a connection to an adolescent's inability to effectively communicate with law enforcement and meaningfully engage in criminal court proceedings.[147] Scholarship fully diagnoses the import of lessened culpability both before and after the Court's reliance on social science, developmental psychology and neuroscience research; the rehabilitation ideal also receives much attention, but the role of trial competence deserves analysis in this context.[148]

The fundamental fairness rights historically granted to children in juvenile court protected their individual procedural rights.[149] The Supreme Court's sentencing cases bring individualization to this same group even when they have been deemed adults under criminal law.[150] Youthfulness traits transcend the jurisdictional distinction established in state houses. The sentencing trilogy resurrected and formalized what was already known from *Kent v. United States* and the cases injecting fundamental fairness into the juvenile court.[151] The reach to realizing that children are constitutionally different seems able to grow with our knowledge about adolescent development if challenges are properly scrutinized under substantive due process in a manner established by the Court's Fourth and Eighth Amendment precedents.[152]

III. The Constitutional Difference Transcends Jurisdiction

In nearly a dozen states, transfer and sentencing procedures suppress any formal weight that may be given to youthful characteristics.[153] There exists a too-often-traveled but rarely exposed unconstitutional road to

147. Graham v. Florida, 560 U.S. 48, 78 (2010); Miller v. Alabama, 567 U.S. 460, 477–78 (2012). *See* ELIZABETH SCOTT ET AL., MODELS FOR CHANGE: SYS. REFORM IN JUVENILE JUSTICE, THE SUPREME COURT AND THE TRANSFORMATION OF JUVENILE SENTENCING 4 (2015), http://www.modelsforchange.net/publications/778 (noting that "'developmental' incompetence has become very salient in the past generation").

148. SCOTT ET AL., *supra* note 147, at 4.

149. *In re Gault*, 387 U.S. 1.

150. Montgomery v. Louisiana, 136 S. Ct. 718, 735–36 (2016); *Miller*, 567 U.S. at 480; *Graham*, 560 U.S. at 68; Roper v. Simmons, 543 U.S. 551, 573 (2005).

151. Kent v. United States, 383 U.S. 541, 553–54 (1966).

152. Pointing to *Lawrence v. Texas* and *Grutter v. Bollinger* as illustrations, Professor Robert Post observes that the Supreme Court's approach to constitutional law at times permits space for adjustment when constitutional culture and values are not settled on a contentious social debate. Post, *supra* note 81, at 104–05. Conkle, *supra* note 79, at 67–68 ("[S]ubstantive due process protects a set of evolving national values, values that command widespread contemporary support, as evidenced by legal developments and societal understandings that may change over time.").

153. These include Alabama, DC, Hawaii, Louisiana, Maine, New Hampshire, North Dakota, South Carolina, Utah, and Washington. *See generally Juvenile Court*, *Intake and Diversion 2016*, JUV. JUST. GEOGRAPHY, POL'Y, PRAC. & STAT., http://www.jjgps.org/juvenile-court#sex-offense-registry?year=2015.

treatment as an adult in the justice process. The only detour that may occur arises for those being threatened with life-without-parole sentences upon conviction.[154] Some states convict more juveniles than others under life-without-parole statutes: Michigan convicted disproportionately large numbers of juvenile offenders pursuant to those statutes, along with California, Florida, Louisiana, and Pennsylvania.[155] Beginning in *Roper v. Simmons* and culminating with *Montgomery v. Louisiana*, the Supreme Court depended on generalized youthful traits to mitigate the most severe of those sentences.[156] These characteristics include immaturity, susceptibility to environmental pressures, and malleable personalities.[157] The Court's acceptance of this developmental psychology supported a conclusion that an adolescent's amorphous self-determination undermines the notion that "even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."[158]

A. Beyond Juvenile Jurisdiction for Severe Misdeeds

In Vienna Township, Michigan, in October 2017, five teens were held without bond on second-degree murder and conspiracy to commit second-degree murder charges.[159] The teens, ranging from age fifteen to seventeen, had thrown numerous rocks off a bridge onto the expressway below.[160] One of those rocks struck and damaged a van, which swerved off the road.[161] The front-seat passenger in that van, a young father returning home from a blue-collar hard day's work, died from their ill-fated actions.[162] The Genesee County prosecutor swiftly decided to try all five defendants in adult criminal court.[163] This case raises policy

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154. *Miller*, 567 U.S. at 489.

155. AMNESTY INT'L & HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE U.S., 35 tbl.5 (2005), https://www.hrw.org/report/2005/10/11/rest-their-lives/life-without-parole-child-offenders-united-states.

156. *See* Montgomery v. Louisiana, 136 S. Ct. 718 (2016); Roper v. Simmons, 543 U.S. 551, 553 (2005).

157. *Montgomery*, 136 S. Ct. at 733; *Roper*, 543 U.S. at 569–70.

158. *Roper*, 543 U.S. at 553.

159. Karma Allen, *4 of 5 Teens in Deadly Michigan Rock-Throwing Case Attempt Plea Deals*, ABC NEWS (July 17, 2018, 4:35 AM), https://abcnews.go.com/US/teens-deadly-michigan-rock-throwing-case-accept-plea/story?id=56634773.

160. *Id.*

161. Mike Martindale, *4 of 5 Teens Accept Plea Deals in I-75 Rock-Throwing Death*, DETROIT NEWS (July 16, 2018, 2:48 PM), https://www.detroitnews.com/story/news/2018/07/16/4-teens-accept-plea-deal-75-rock-throwing-death/789011002/.

162. *Id.*

163. *5 Teens Charged as Adults in Rock-Throwing Death on I-75 in Vienna Township*, WWMT.COM (Oct. 23, 2017), https://wwmt.com/news/state/5-teens-charged-as-adults-in-rock-throwing-incident-on-i-75-in-vienna-township.

questions stemming from traditional legal practices, developmental psychology, constitutional shifts in favor of children's rights in the criminal system, and social attitudes. Public comments demanding retribution and shunning contrary perspectives spewed forth in response to this tragedy.[164] Many expressed sentiments similar to the following: "What thoughtless idiots! They deserve long prison sentences. So unbelievably senseless." Yes, bad acts warrant due consequences; these teens should, if found guilty under the law, be held accountable for their misdeeds. But the law no longer tolerates an unmoored mob mentality or turning a blind eye on the perpetrators' age-related developmental shortcomings. The justice process cannot overlook the constitutionally recognized differences between children and adults when prosecuting or punishing criminality.[165]

Raising the jurisdictional limit in Michigan would have affected the fate of those teens from Vienna, but a singular focus on jurisdictional age limits leaves intact transfer procedures. The national "raise-the-age" campaign has proven successful just this year in nudging New York and North Carolina to raise the age at which offenders are automatically sent to criminal court, a legislative change to be gradually phased in over two to three-year periods.[166] Michigan sits alongside a handful of states reticent about increasing the maximum jurisdictional age for juvenile courts above sixteen years old.[167] But not even successful raise-the-age advocacy could save the five youths charged in Genesee County, Michigan from a justice process that appears unwilling to consider their

164. Associated Press, *5 Michigan Teens Charged with Murder After Rock Thrown from Highway Overpass Kills Man*, CHI. TRIB. (Oct. 23, 2017, 10:56 PM), https://www.chicagotribune.com/news/nationworld/midwest/ct-michigan-teens-rock-incident-20171023-story.html.

165. Montgomery v. Louisiana, 136 S. Ct. 718, 733 (2016); (citing Roper v. Simmons, 543 U.S. 551 (2005)).

166. *See generally* RAISE THE AGE NY, http://raisetheageny.com/ (last visited Nov. 29, 2018).

167. States that limit juvenile jurisdiction to age sixteen or below are Wisconsin, Michigan, Texas, Georgia, South Carolina, and Missouri. *See* WIS. STAT. § 938.02(10m) (2018) (defining "juvenile" when "investigating or prosecuting a person who is alleged to have violated any state or federal criminal law or any civil law or municipal ordinance," as not including "a person who has attained 17 years of age"); MICH. COMP. LAWS § 712A.2(a) (2018) (granting exclusive original jurisdiction to the family division of circuit court for those under 17 years old if they are charged with certain offenses); TEX. FAM. CODE ANN. § 51.02(2)(A) (West 2015) (defining "[c]hild" as someone "ten years of age or older and under 17 years of age"); GA. CODE ANN. § 15-11-2(10)(B) (2018) (defining "[c]hild" as someone "[u]nder the age of 17 years when alleged to have committed a delinquent act"); S.C. CODE ANN. § 63-19-20(1) (2008) (defining "[c]hild" as "a person less than seventeen years of age"); MO. REV. STAT. § 211.031(1)(3) (2018) ("[T]he juvenile court . . . shall have exclusive original jurisdiction in proceedings . . . [i]nvolving . . . any person who is alleged to have violated a state law . . . prior to attaining the age of seventeen years.").

age as a mitigating factor.

The Genesee County prosecutor's press conference addressed the circumstances surrounding the victim's death, the charges, and potential punishments while ignoring the age of those accused.[168] And in Michigan, their age will not be considered to mitigate their blameworthiness for these actions or the sentence if convicted on these charges. In the worst-case scenario, they are convicted of second-degree murder and the judge entertains a sentence of life without parole.[169] Remember, of course, that this is an outcome that the Supreme Court thinks should be imposed rarely.[170] In fact, the Supreme Court purchased Lady Justice discerning spectacles to use whenever minors enter any jurisdiction threatening the loss of their liberty, be it juvenile or criminal.

There was one moment in which the Genesee Sheriff spoke incontrovertible truth: "At the end of the day nobody wins. The young people are charged criminally, a young boy lost his father and all of the families are left grieving."[171] From there, these state-elected law enforcement officials digressed into statements wholly detached from constitutional norms.[172] The prosecutor and sheriff boasted about their dereliction of the indisputable constitutional norm that children are different from adults.[173] Sheriff Pickell approached the podium by stating "I want to commend Prosecutor Leyton for the strong stand that he has taken today in charging second-degree murder along with conspiracy and other charges."[174] The joint press conference continued along with one revelatory statement after another showing both men's obliviousness about what most know to be adolescent behavior.

The sheriff justified the charges in terms of general deterrence: "I think if there's any admonition, any warning that both David and I can give—

168. Brian Thompson, *Five Teens Charged with Murder in Rock Throwing Incident Near Flint*, MI HEADLINES (Oct. 23, 2017), https://www.miheadlines.com/2017/10/23/five-teens-charged-with-murder-in-rock-throwing-incident-near-flint/ [hereinafter Genesee County Press Conference] (providing a video of the press conference).

169. *See* Miller v. Alabama, 567 U.S. 460, 479–80 (2012) (describing that in some states, judges do have the discretion to apply life-without-parole to juveniles).

170. *See Miller*, 567 U.S. at 479 ("[G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.").

171. Genesee County Press Conference, *supra* note 168; Amanda Jackson, *Rock Dropped from Overpass Kills Passenger in Car; Teens Charged*, CNN (Oct. 24, 2017, 5:27 AM), https://www.cnn.com/2017/10/23/us/flint-teens-rock-throwing-murder-trnd/index.html (reporting incident and including video coverage).

172. *See generally* Genesee County Press Conference, *supra* note 168.

173. *Id.*

174. *Id.*

it's telling young people: you make a bad decision, you could be spending the rest of your life in prison. This is not a prank."[175] The psychological evidence, of course, does not support general deterrence as an effective punishment goal for juveniles.[176] Yet both men impressed upon their audience that the prosecutor "threw the book" at these teens and he could not could not "charge anything more."[177] And "second-degree murder is punishable by up to life in prison."[178] Meanwhile, *Graham* and *Miller* dedicated their prose to undercutting the legitimacy of life without parole for juveniles.[179]

The prosecutor referenced these teenagers using adult standards of behavior, stating what "a reasonable person would know," and claiming that "these people should have known better. These people should have realized that their actions would cause great bodily harm or death and under Michigan law that's second-degree murder."[180] The act, in and of itself, is a childish activity. And the conspiracy attaches because law enforcement believed that "prior to the actual events they discussed getting rocks and going out there and hurling them."[181] The irony reveals itself when noting that these actions are exactly those that juveniles commonly exhibit. Juveniles more often act in groups and exhibit an increased susceptibility to peer pressure.[182]

The prosecutor and sheriff sought to allay the public's fears that anyone may be "soft on crime" by reminding the community that law enforcement threw the book at these young defendants, that a more serious charge could not be brought under state law, and that second-degree murder is eligible for a sentence of life in prison. Yet children are not miniature adults.[183] This realization guides the hallmarks of our juvenile justice system and the impetus for our Supreme Court's mandate

175. *Id.*

176. Roper v. Simmons, 543 U.S. 551, 571 (2005) ("[T]he absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.").

177. Genesee County Press Conference, *supra* note 168.

178. *Id.*

179. *See* MICH. COMP. LAWS § 750.317 (2018) ("[M]urder of the second degree . . . shall be punished by imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same."). *See generally* Genesee County Press Conference, *supra* note 168.

180. *See generally* Genesee County Press Conference, *supra* note 168.

181. *Id.*

182. Dustin Albert et al., *Peer Influences on Adolescent Decision Making*, 22 CURRENT DIRECTIONS PSYCHOL. SCI. 114, 115 (2013), *available at* https://journals.sagepub.com/doi/pdf/10.1177/0963721412471347 ("[P]eer influences [are] a primary contextual factor contributing to adolescents' heightened tendency to make risky decisions.").

183. J.D.B. v. North Carolina, 564 U.S. 261, 274 (2011).

that these youthful characteristics should be considered before imposing a punishment of life without parole on young offenders.[184] Raise-the-age efforts address the most significant contributor to children being retained in juvenile courts: the upper and lower age limits established by state jurisdiction.[185] Yet transfer laws lay bare deficiencies in the justice process, which, with no pause, neglect to make an individualized assessment of youthful traits indispensable when considering culpability and punishment.[186]

Youthful characteristics lessen one's culpability for criminal behavior—meaning age transcends both crime and jurisdictional boundaries.[187] Michigan's justice process ignores this constitutional mandate. Michigan keeps company with approximately a dozen states that forge a pathway lacking any accommodation for youthfulness once a minor is transferred to criminal court.[188] And this road sits obscured from the public's eye. How does this happen?

In these states, a youth offender is transferred to criminal court through prosecutorial direct file or statutory exclusion, neither of which requires an individualized assessment.[189] Then, Michigan state law does not afford this jurisdictional assignment any right to reconsideration through a reverse waiver hearing which would usually entail an individualized assessment by the criminal judge.[190] If convicted, state law may require

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184. Miller v. Alabama, 567 U.S. 460, 480 (2012).

185. *See, e.g.*, *id.* at 466, 468 (referencing Arkansas and Alabama age limits); RAISE THE AGE NY, *supra* note 166.

186. *See* GRIFFIN, ET AL., *supra* note 16 (analyzing state transfer laws).

187. Thompson v. Oklahoma, 487 U.S. 815, 833–35 (1988) ("[T]he Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation.").

188. *See Juvenile Court*, *Intake and Diversion 2016*, *supra* note 153.

189. *See* GRIFFIN, ET AL., *supra* note 16, at 2 ("Statutory exclusion laws grant criminal courts exclusive jurisdiction over certain classes of cases involving juvenile-age offenders. If a case falls within a statutory exclusion category, it must be filed originally in criminal court."); Benjamin Steiner & Emily Wright, *Assessing the Relative Effects of State Direct File Waiver Laws on Violent Juvenile Crime: Deterrence or Irrelevance?*, 96 J. CRIM. L. & CRIMINOLOGY 1451, 1451 (2006) ("Concurrent jurisdiction, or direct file, statutes afford prosecutors the unreviewable discretion to charge certain juveniles in either juvenile or criminal court.").

190. *See* GRIFFIN, ET AL., *supra* note 16, at 2 ("Reverse waiver laws allow juveniles whose cases are in criminal court to petition to have them transferred to juvenile court."); *see also* Written Comments of Amicus Curiae Human Rights Watch, Henry Hill v. United States, Case No. 12.866, Inter-Am. Comm'n H.R. app. (2014), *available at* https://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/2014_03_19_hrw_amicus_appendix_state_transfer_laws.pdf [hereinafter State-By-State Summary of Transfer Laws] (noting that Michigan does not provide a reverse waiver mechanism).

a minimum or mandatory punishment with no option for a blended sentence which would permit an individualized assessment.[191] Instead, with no reverse waiver or blended sentencing statute in Michigan, the final opportunity for an individualized assessment would be a petition to consider life without parole.[192] Most serious charges that fall within this window are not eligible for the harshest penalty available to juvenile offenders and thus miss this opportunity as well. Because this system does not take youthfulness into account, it does not comport with constitutional standards.

Moreover, this case study shows how the justice process grants little attention to a teen's competency to stand trial. Three of the five teens accused in Michigan sought competency hearings.[193] The state examiners deemed all three mentally competent to stand trial in criminal court.[194] In response, their defense attorneys requested independent evaluations; the trial judge granted these defense motions.[195] One lawyer stated,

> While my client may be considered competent to aid in his defense in the cozy confines of a doctor's office, under the bright lights of the courtroom, juveniles tend to have a different mindset. . . . In these circumstances where we have a child facing his loss of liberty, it's extremely prudent to leave no stone unturned and get this independent examination.[196]

Every state grants judges the discretion to transfer cases from juvenile to criminal court.[197] Discretionary judicial waiver takes place under transparent due process standards.[198] In conjunction with employing juvenile psychology experts who are knowledgeable of the offender's circumstances, the juvenile judge makes an individual assessment based on several factors that evaluate the alleged offense, the defendant's

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191. *See* GRIFFIN, ET AL., *supra* note 16, at 3 (showing which states employed certain waiver and sentencing schemes as of 2011).

192. Miller v. Alabama, 567 U.S. 460, 489 (2012) ("*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.").

193. *See* Martindale, *supra* note 161.

194. *Id.*

195. *Id.*

196. Oona Goodin-Smith, *Teens Charged in Deadly I-75 Rock Throwing to Get Second Mental Health Exam*, MLIVE (Jan. 11, 2018), https://www.mlive.com/news/flint/index.ssf/2018/01/second_opinion_needed_before_t.html (quoting Frank J. Manley).

197. *See* State-By-State Summary of Transfer Laws, *supra* note 190.

198. Kent v. United States, 383 U.S. 541, 555–57 (1966) (explaining that "the critically important" judicial waiver decision entitles a juvenile "to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision.").

background and profile, and institutional concerns.[199] Only fifteen states grant prosecutors discretion to choose to bring charges against a youth defendant in either juvenile or criminal court.[200] Of these prosecutorial direct file states, only Michigan and Florida do not provide a check on these decisions by a criminal judge via reverse waiver procedures.[201] In Michigan, the minimum age for prosecutorial discretion is set at fourteen years old for enumerated offenses; thereafter, these juveniles must be sentenced "in the same manner as an adult."[202] And although many states have enacted blended sentencing statutes that consider a defendant's age after conviction in criminal court, the Michigan blended sentencing statute only provides for individualized assessment under limited circumstances involving drug charges.[203]

Some states responded to *Miller v. Alabama* with sweeping reforms targeted at the juvenile system.[204] Texas overhauled its system to abandon life without parole as a sentencing option for convicted juveniles, permit transfer only through discretionary waiver provisions, and permit juveniles to challenge transfer decisions through an expedited appeals process.[205] California dispensed with prosecutorial direct file by passing Proposition 57, which requires a juvenile court to review transfer petitions seeking to prosecute youth offenders in criminal court.[206] On the other end of the spectrum, Michigan state actors continue to demonstrate a persistent reticence against moderating their treatment of juvenile offenders to reflect the essence of recent constitutional rulings.[207]

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199. *See, e.g.*, MICH. COMP. LAWS § 712A.4(4)(a)–(f) (2018) (explaining that a judge must consider the "seriousness of the alleged offense . . . [t]he culpability of the juvenile [and] . . . [t]he adequacy of the punishment or programming available in the juvenile justice system," among other factors when determining whether to waive jurisdiction).

200. *See* State-By-State Summary of Transfer Laws, *supra* note 190.

201. *See id.* at 10, 23 (providing data for Florida and Michigan).

202. MICH. COMP. LAWS § 712A.2d (2018).

203. *Id.* § 712A.2d (1)–(9) (explaining that a court must consider specified individual factors when determining whether to grant prosecutorial waiver, but this only applies in regard to "specified juvenile violation[s]," which include assault with a dangerous weapon, arson, escape from a juvenile facility, and drug offenses, none of which would have applied to the Vienna defendants).

204. *See* 567 U.S. 460, 480 (2012).

205. TEX. FAM. CODE ANN. § 54.02 (West 2017).

206. *Proposition 57: The Public Safety and Rehabilitation Act of 2016 Frequently Asked Questions*, CAL. DEP'T CORR. & REHAB., (updated May 2018), https://www.cdcr.ca.gov/proposition57/docs/FAQ-General-Pro-57-Final-Regs-May-2018.pdf.

207. *See* Jessica Pishko, *The Troubled Resentencing of America's Juvenile Lifers*, THE NATION (Jun. 21, 2017), https://www.thenation.com/article/juvenile-lifers-last-chance/.

In fact, the Michigan Supreme Court initially declined to retroactively resentence juveniles previously sentenced to life.[208] Eventually, the Supreme Court's ruling in *Montgomery v. Louisiana* initiated a resentencing process that has produced mixed outcomes across the country.[209] In the same year, many states—California, Connecticut, Florida, Illinois, Iowa, Louisiana, Ohio, and Wyoming—ruled that resentencing should contemplate a meaningful opportunity for release and not result in a de facto life sentence exceeding natural life expectancy.[210] On the other hand, Michigan prosecutors initially sought to reinstate the life-without-parole sentences for a significant portion of the state's petitioners in contradiction of progressive interpretations.[211] But, the state's legislature eventually enacted law requiring the courts to impose "a term of imprisonment for which the maximum term shall be 60 years and the minimum term shall be not less than 25 years or more than 40 years."[212] As interpreted by the Michigan Court of Appeals, the

208. People v. Carp, 852 N.W.2d 801, 849 (Mich. 2014), *cert. granted, judgment vacated sub nom.* Carp v. Michigan, 136 S. Ct. 1355 (Mem) (2016), *and cert. granted, judgment vacated sub nom.* Davis v. Michigan, 136 S. Ct. 1356 (Mem) (2016).

209. 136 S. Ct. 718 (2016).

210. People v. Franklin, 370 P.3d 1053, 1060, 1064 (Cal. 2016) (quoting CAL. PENAL CODE § 3051(e) (2018)) (stating "[i]n short, a juvenile may not be sentenced to the functional equivalent of LWOP for a homicide offense without the protections outlined in *Miller*" and explaining that "[t]he Legislature has declared that '[t]he youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain release'"); Connecticut v. Delgado, 151 A.3d 345, 355 (Conn. 2016) (applying *Montgomery* in a resentencing case but ultimately finding the particular case did not need resentencing); Atwell v. Florida, 197 So. 3d 1040, 1048 (Fla. 2016) ("A presumptive parole release date set decades beyond a natural lifespan is at odds with the Supreme Court's recent pronouncement in *Montgomery*."); People v. Reyes, 63 N.E.3d 884, 888 (Ill. 2016) ("A mandatory term-of-years sentence that cannot be served in one lifetime has the same practical effect on a juvenile defendant's life as would an actual mandatory sentence of life without parole—in either situation, the juvenile will die in prison . . . . [A] juvenile may not be sentenced to a mandatory, unsurvivable prison term without first considering in mitigation his youth, immaturity, and potential for rehabilitation."); State v. Sweet, 879 N.W.2d 811, 839 (Iowa 2016) ("[W]e adopt a categorical rule that juvenile offenders may not be sentenced to life without the possibility for parole under article I, section 17 of the Iowa Constitution."); State *ex rel.* Morgan v. Louisiana, 217 So. 3d 266, 277 (La. 2016) (finding a ninety-nine year sentence to be "the functional equivalent of" a life sentence warranting an opportunity for release); State v. Moore, 76 N.E.3d 1127, 1137 (Ohio 2016) ("[T]he Eighth Amendment prohibits the imposition of a sentence that denies a juvenile some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."); Poitra v. Wyoming, 368 P.3d 284, 290 (Wyo. 2016) (noting that "[t]he law has drawn a bright line at the age of eighteen" before which there must be a "meaningful chance at parole," but that the defendant was over the age of eighteen when he committed the crime).

211. Ryan Grimes, *Prosecutors Ignoring Supreme Court Call to Give Juvenile Lifers a New Sentence, Says ACLU*, MICH. RADIO (Dec. 12, 2016), http://www.michiganradio.org/post/prosecutors-ignoring-supreme-court-call-give-juvenile-lifers-new-sentence-says-aclu.

212. MICH. COMP. LAWS § 769.25(9) (2018).

statute directed prosecutors to pursue the maximum term.[213]

The jurisdictional transfer from juvenile to criminal court begins the wrenching consequences for youth fighting against a powerful "tough on crime" tide. The Utah Supreme Court, in *State v. Angilau*, provided an example of the standard reasoning applied in cases transferred without an individualized judicial determination.[214] The state court applied a rational basis analysis to the substantive due process arguments, because in its view, no fundamental right or interest arises when assigning adjudicatory jurisdiction.[215] The juvenile court system stands under legislative authority, "and the legislature can choose to exclude certain minors from that system so long as the exclusion is not arbitrary or impermissibly discriminatory."[216] To these legal boundaries, the Utah court reasoned that

> [p]rotection of society from dangerous individuals is unquestionably a legitimate government purpose, and potentially longer incarceration is rationally related to that purpose. The qualifications regarding age and severity of crime are not arbitrary, because they reasonably relate to the degree of threat to society that an individual might pose. . . . Nor are those qualifications discriminatory in ways objectionable under the Utah or federal constitutions.[217]

The Utah Supreme Court toes a familiar analytical line in dispensing with the procedural due process challenge. Narrowing the question to its simplest deductive logic, the state supreme court reasoned that the juvenile defendant "did not possess any initial statutory rights associated with juvenile court protections and thus could not be deprived of rights he never held."[218] The defendant's pathway to criminal court in Utah sits in direct contrast to the transfer statute reviewed in *Kent v. United States*, wherein the juvenile court presumptively held jurisdiction in the first instance.[219]

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213. *See* People v. Skinner, 877 N.W.2d 482, (Mich. Ct. App. 2017), *rev'd* 918 N.W.2d 292 (Mich. 2018).

214. 245 P.3d 745 (Utah 2011).

215. *Id.* at 749 (quoting State v. Candedo, 232 P.3d 1016 (Utah 2010)) ("This court will uphold a statute under the rational basis standard 'if it has a reasonable relation to a proper legislative purpose, and [is] neither arbitrary nor discriminatory.'").

216. *Id.* (citing State *ex rel.* N.H.B., 777 P.2d 487, 492 (Utah Ct. App. 1989)).

217. *Id.* at 750.

218. *Id.* at 751 ("Because Mr. Angilau held no initial right (statutory or constitutional) to be brought before a juvenile court, there was no need for a hearing before charging him in adult court. The automatic waiver statute, therefore, does not violate procedural due process.").

219. *Compare* Kent v. United States, 383 U.S. 541 (1966) (providing presumptive jurisdiction), *with Angilau*, 245 P.3d at 751 (denying juvenile court protections).

This rational basis analysis clearly omits the "constitutionally different" language considered in the juvenile sentencing trilogy, thus showing how putting these pieces together has yet to take hold in the transfer context.[220] Moreover, the Utah court's treatment of the sentencing issue in the procedural due process realm calls into question the fuller understanding of youth relied upon by the United States Supreme Court. Consider the following passage:

> Mr. Angilau argues he had a liberty interest at stake because of the longer and harsher sentences available in adult criminal court, and because of the possibility of being incarcerated in adult institutions. The incarceration question is a distinct and separate issue, which we do not address here, because it is not the subject of the automatic waiver statute. The statute at issue controls jurisdiction but mentions nothing regarding location or conditions of incarceration. As far as the "harsher" sentences available in adult court are concerned, they do not implicate a liberty interest for Mr. Angilau, because he was never entitled to juvenile jurisdiction once he met the criteria in the automatic waiver statute. One cannot hold an interest in something to which one was never entitled.[221]

In this case, and in post-*Miller* cases, we see how this distinction becomes untenable if the mantra that "children are constitutionally different from adults" is to carry any weight to invoke continued reform.

B. The Progressive Movement Envisioned A Different Path

The government's *parens patriae* authority grounds the juvenile justice system in common law.[222] It encompasses an obligation to protect a child's welfare.[223] For the Progressive reformers who created the juvenile justice system, rehabilitation meant a government obligation to return juvenile offenders into society as fully functioning contributors.[224] Advancements in psychiatry and psychology fueled the notion that professionals could diagnose and cure deviant behavioral patterns in children.[225] The government also exercised its police power to serve societal interests.[226] The Progressive's approach focused on the

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220. Montgomery v. Louisiana, 136 S. Ct. at 733 (citing Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama 132 S. Ct. 2455 (2012)).

221. *Angilau*, 245 P.3d at 750 (citations omitted) (citing UTAH CODE ANN. § 78-A-6-701 (West 2018); State v. Mohi, 901 P.2d 991, 1005 (Utah 1995)).

222. *See* Tanenhaus, *supra* note 4, at 18; SCOTT & STEINBERG, *supra* note 65, at 70.

223. SCOTT & STEINBERG, *supra* note 65, at 69–70.

224. *Id.* at 93.

225. *Id.* at 87–88.

226. *See* Berman v. Parker, 348 U.S. 26, 32 (1954) ("Public safety, public health, morality,

individual offender, assuming society would receive residual benefits in decreased juvenile crime rates and increased numbers of productive citizens.[227]

The traditional juvenile court sought to reform delinquency on a lesser scale than the crimes currently addressed through transfer to criminal court and blended sentencing statutes.[228] Juvenile incidents involving murder, rape, and lethal violence did not present with the frequency seen in modern society.[229] In its original form, transfer to criminal court, when approved through judicial process, served two pragmatic ends: (1) the state's obligation to protect both citizens and other incarcerated juveniles from incorrigible defendants and (2) the recognition that not every child will be amenable to rehabilitation.[230] Early juvenile court proponents frowned upon procedure and legal representation because the proceedings were not meant to have an adversarial nature.[231] Instead, the court aimed to understand the act in question and provide a rehabilitative prescription to prevent future transgressions.[232]

Over time, the court's indeterminate sentencing power, cloaked under individualized treatment motives, deteriorated into unpredictable punitive detention terms.[233] *In re Gault* exposed deficiencies of the juvenile courts.[234] If the courts randomly meted out punishment without showing reformation in defendants, then the youth defendants deserved procedural rights akin to their adult counterparts in criminal court.[235] The

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peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of police power to municipal affairs.").

227. *See* SCOTT & STEINBERG, *supra* note 65, at 87 (explaining objectives).

228. CHAD R. TRULSON ET. AL, LOST CAUSES: BLENDED SENTENCING, SECOND CHANCES AND THE TEXAS YOUTH COMMISSION 17 (2016).

229. *Id.* ("More serious offenders—youthful murderers, rapists, and other violent youths—were simply few and far between in those days, and were never the driving force in the development of early juvenile institutions such as house of refuge or, for that matter, the juvenile court.").

230. SCOTT & STEINBERG, *supra* note 65, at 97 (noting the pragmatic effects of judicial transfer).

231. *Id.* at 87.

232. *Id.* at 87–88.

233. "The rulings of the courts slowly began to abandon individualized treatment and proportionality in juvenile punishment and instead began to resemble adult criminal courts with penal sentences justified with *parens patriae*." Lahny R. Silva, *The Best Interest Is the Child: A Historical Philosophy for Modern Issues*, 28 BYU J. PUB. L. 415, 424 (2014).

234. *See* BERNARD & KURLYCHEK, *supra* note 144, at 95–96.

235. *Id.* at 100–01 ("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. . . . The Court also made it clear it would view the juvenile justice system from a due process perspective. Thus, *parens patriae* was dead . . . .").

In re Gault majority held that "the appearance as well as the actuality of fairness . . . may be a more impressive and more therapeutic attitude so far as the juvenile is concerned."[236] With that, the *parens patriae* doctrine lost its omniscience for justifying unbridled control over a youth's fate. For each right permitted adult offenders, the Supreme Court weighed it against the purpose undergirding a separate juvenile court. For example, *McKeiver v. Pennsylvania* addressed the right to a jury trial.[237] The Court reasoned that the need for clear fact-finding in juvenile courts suffered no harm when judges performed the task in lieu of juries.[238]

The Supreme Court granted youth a panoply of other procedural rights to secure fundamental fairness in juvenile court proceedings.[239] These due process rights stabilized the ability to treat children differently from adults while preserving the legal protections given anyone at risk of losing their liberty to incarceration.[240] Institutional growing pains led to the import of rights borrowed from adults and scaled to children's prerogatives. This period brought necessary order to juvenile adjudicatory proceedings. These cases also established juvenile traits that transcend jurisdiction when applying constitutional criminal procedure. Whereas social science provided an undercurrent to the Supreme Court's decisions, the Court has seemed more so guided by social science, developmental psychology and neuroscience in its Eighth Amendment pronouncements since *Roper v. Simmons*.[241]

236. *In re* Gault, 387 U.S. 1, 26 (1967).

237. McKeiver v. Pennsylvania, 403 U.S. 528, 530 (1971).

238. *Id.* at 545–46; BERNARD & KURLYCHEK, *supra* note 144, at 112.

239. *See* Kent v. United States, 383 U.S. 541, 561–62 (1966) (affording juveniles due process rights including the right to a hearing and to retain effective counsel); *see also In re Gault*, 387 U.S. at 33–34, 55–56 (providing juveniles the right to notice of charges, confrontation of witnesses, cross-examination, privilege against self-incrimination).

240. BERNARD & KURLYCHEK, *supra* note 144, at 103–04 (explaining that the Supreme Court held that juveniles do not have to give up any legal protections in exchange for special care and concerns).

241. *See* Johnson v. Texas, 509 U.S. 350, 367 (1993) ("A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults . . . . [Therefore, a] sentencer in a capital case must be allowed to consider the mitigating qualities of youth in the course of its deliberations over the appropriate sentence."); *but see* Stanford v. Kentucky, 492 U.S. 361, 378 (1989) ("The battle must be fought, then, on the field of the Eight Amendment; and in that struggle socioscientific, ethicoscientific, or even purely scientific evidence is not an available weapon."), *overruled by* Roper v. Simmons, 543 U.S. 551 (2005); *see also* Thompson v. Oklahoma, 487 U.S. 815, 835 (1988) ("[T]he Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation."); *see also* Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982) (holding youth to be a necessary mitigating factor in death penalty cases, characterizing youth as "more than a chronological fact," but as a "time and condition

During the 1990s, public sentiment dictated that a juvenile committing an adult act must serve an adult sentence because the offense's severity signified the juvenile's maturity.[242] Constitutional law now concedes that, despite their transfer to criminal court, we still need to recognize that youth offenders are not adults.[243] This means more than just revamping sentencing procedures at the most severe edges. States must review the full justice process when transferring juveniles to the adult justice system. These children are not "miniature adult" criminals; the Progressive era reformers acknowledged this distinction and constitutional juvenile sentencing cases affirm the distinction with evidence from social science, developmental psychology, and neuroscience evidence.[244] The Supreme Court resurrected the legal differences due juvenile offenders after a long stint in which politics controlled the narrative to reorganize the laws that govern juvenile courts and transfer mechanisms of transfer to criminal court.[245] The Supreme Court tussled with advocates through the 1960s and 1970s in calming the pendulum swing between constitutional rights for juveniles in the justice system; the most recent sentencing opinions open another frontier for rights discovery independent of understanding this state created juvenile court system.[246]

IV. THE GATEKEEPERS TO CRIMINAL COURTS

Juvenile crimes fall on an expansive spectrum, ranging from petty theft to heinous murders. The system deals with both extremes through concrete policies. Minor offenses often fulfill the requirements for diversionary programs in juvenile court. On the other end of the spectrum, the Supreme Court provides guidance on how to sentence juveniles who commit the most unconscionable crime of murder, which cannot result in the death penalty or a mandatory sentence of life without parole.[247] A large swath of criminal behavior may be found between these extremes. Transfer statutes display the struggle to adequately handle these cases. The Supreme Court, in *Graham v. Florida* and *Miller v.*

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of life when a person may be most susceptible to influence and to psychological damage").

242. BERNARD & KURLYCHEK, *supra* note 144, at 164.

243. Montgomery v. Louisiana, 136 S. Ct. 718, 733 (citing Miller v. Alabama, 567 U.S. 460 (2012); *Roper*, 543 U.S. at 569–70; Graham v. Florida, 560 U.S. 48, 68 (2010)).

244. *See* J.D.B. v. North Carolina, 564 U.S. 261, 274–75 (2011).

245. *See* BERNARD & KURLYCHEK, *supra* note 144, at 182–84.

246. *Id.* at 182–83.

247. *See generally Roper*, 543 U.S. 551 (barring capital sentences for juveniles); *Miller*, 567 U.S. at 478 (finding mandatory life without parole sentencing schemes for juvenile offenders unconstitutional).

Alabama, addressed each theory of criminal punishment as it applied to juvenile offenders.[248] Whereas rehabilitation is a central goal for the juvenile courts, transfer statutes inherently bring all four theories of punishment to bear upon a juvenile offender.

A. The Gray Area: From Juvenile to Criminal Jurisdiction for Unpredictable Youth

Transfer statutes unlock the criminal courts to young offenders.[249] These statutes reveal inconsistencies in constitutional protections afforded juvenile offenders, expose state resistance to Supreme Court pronouncements, and mark the starting point for advocacy efforts.[250] Many youth will eventually outgrow their criminal behaviors, no matter how extreme their one-time tendency to violence or irreverence to property rights.[251] The rare juvenile delinquent who exhibits career criminal antisocial behavior typically starts at a relatively young age with multiple escalating contacts with law enforcement.[252] Summarily, the "hard" cases in this context involve older yet mentally immature teenagers charged with criminal acts. Developing perfect policy solutions proves difficult because maturity fluctuates from one adolescent to the next, and maturity even varies from one trait to another for any given individual.

Youth carted into the adult criminal justice system lose access to many beneficial features unique to juvenile jurisdiction: most importantly, the priorities of individualization and rehabilitation. States have expanded transfer through legislation to exclude offenses from juvenile jurisdiction, delegate transfer discretion to prosecutors, and permit blended sentencing, all of which have encroached upon the historical role of judges in making transfer decisions.[253] Statutory exclusion continuously

248. *See* generally *Graham*, 560 U.S. 48 (prohibiting juveniles from being sentenced to prison for life without parole for non-homicide offenses); *Miller*, 567 U.S. 460 (prohibiting juveniles from receiving mandatory life sentences without possibility of parole for homicides).

249. *See* GRIFFIN, ET AL., *supra* note 16, at 2 (explaining various transfer mechanisms).

250. *See supra* notes 188–192 and accompanying text.

251. MARVIN E. WOLFGANG ET AL., INTER-UNIV. CONSORTIUM FOR POLITICAL AND SOC. RESEARCH, DELINQUENCY IN A BIRTH COHORT IN PHILADELPHIA, PENNSYLVANIA, 1945–1963 (1999), *available at* www.icpsr.umich.edu/icpsrweb/RCMD/studies/7729.

252. COMMITTEE ON LAW AND JUSTICE & BOARD ON CHILDREN, YOUTH, AND FAMILIES, JUVENILE CRIME JUVENILE JUSTICE 66 (Joan McCord et al. eds., 2001), *available at* https://www.nap.edu/read/9747/chapter/5 ("It has long been known that most adult criminals were involved in delinquent behavior as children and adolescents; most delinquent children and adolescents, however, do not grow up to be adult criminals.").

253. Dawson, *supra* note 111, at 45.

envelops larger portions of youth offenders as states lower their jurisdictional age, add more crimes to the automatic transfer list, and supplant age-offense criteria for "once an adult, always an adult" jurisdictional rules.[254]

The transfer population represents a small percentage of youth in the justice system.[255] Beginning in 1994, cases transferred by judicial discretion greatly decreased, in part because juvenile violent crime declined and in part because prosecutorial discretion and automatic waiver statutes replaced the former heavy reliance on judicial waiver.[256] Although few states fully track transfer numbers, of those that do, those states "that have only judicial waiver laws . . . [see] average transfer rates [that] are generally lower than those in the remaining seven states, which have statutory exclusion laws, prosecutorial discretion laws, or both."[257]

Judicial waiver numbers give insight into this demographic. Just over 600,000 juveniles confront a formal waiver petition in the juvenile courts annually.[258] Of the cases that apply discretional judicial waiver, approximately one percent of those who were sixteen years old and older were transferred, while only 0.1% of juveniles who were age fifteen and below were transferred from juvenile court.[259] Black males over age sixteen are removed from juvenile jurisdiction at a higher percentage than their white peers.[260] Violent offenses against a person result in transfer

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254. Lydia E. Frost Clausel & Richard J. Bonnie, *Juvenile Justice on Appeal*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT, *supra* note 4, at 181, 187 ("Under recent reforms of the transfer process, many states have enlarged the category of cases for which criminal court jurisdiction is exclusive—by lowering the jurisdictional age, expanding the category of serious charges triggering criminal court jurisdiction, or supplementing age-offense criteria with criteria relating to the juvenile's prior offense history."). *See e.g.* MICH. COMP. LAWS § 712A.4(5) (2018).

255. "Less than a quarter of the cases reached criminal court via judicial waiver. More common were exclusion cases (42%) and prosecutorial direct files (35%)." *See* GRIFFIN ET AL., *supra* note 16, at 12.

256. *Id.* at 10.

257. *Id.* at 17–18.

258. SARAH HOCKENBERRY & CHARLES PUZZANCHERA, U.S. DEP'T OF JUSTICE, DELINQUENCY CASES WAIVED TO CRIMINAL COURT, 2011 at 1 (2014), *available at* https://www.ojjdp.gov/pubs/248410.pdf ("In 2011, U.S. Courts with juvenile jurisdiction handled more than 1.2 million delinquency cases. More than half (54%) of these cases were handled formally (i.e., a petition was filed requesting an adjudication or waiver hearing).").

259. *See* SARAH HOCKENBERRY & CHARLES PUZZANCHERA, NAT'L CTR. FOR JUVENILE JUSTICE, JUVENILE COURT STATISTICS 2016 40 (2016) ("Cases involving juveniles age 16 or older were much more likely to be judicially waived to criminal court than those involving younger juveniles").

260. *Id.*

more often than property offenses.[261] The judicial transfer numbers greatly decreased after the mid-nineties, falling to around 5,400 in 2011.[262] Experts attribute this trend in part due to the expansion of non-judicial transfer statutes.[263]

A statutory transfer process begins the absolute deprivation for some of their liberty interest. Under some circumstances, the defendant receives an individualized assessment—but not always. After removal from juvenile jurisdiction, trial courts need to focus on how youthfulness affects fundamental fairness at other critical stages.

B. The Individualized process of Discretionary Judicial Waiver

Through the 1970s and into the 1980s, juvenile court judges in most states held the exclusive authority to make the transfer determinations for youth defendants.[264] Judicial waiver, unlike statutory exclusion and prosecutorial direct file, requires a resource investment, both human capital and financial. This burden emanates from the efforts needed to prepare individualized files for the judge's consideration. It entails a collection of professionals investigating the offense, putting together a report profiling the alleged offender, indulging a hearing, and fulfilling proof requirements.[265]

Mandatory and presumptive judicial waiver laws chip away at judges' ability to exercise discretion over transfer after conducting an individualized assessment.[266] Presumptive waiver places the burden on defendants to persuade courts against transfer.[267] Mandatory waiver removes any subjective considerations, because the juvenile judge plays only a ministerial role limited to deciding (1) whether the case comports with statutory requirements, and (2) whether the state presents probable cause for its charges.[268] Prosecutorial direct file, another limit on judicial waiver, occurs before an accused youth even steps foot in the courtroom.[269] On this front, the *Kent* Court provided a road map for lower

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261. *Id.* at 39.

262. HOCKENBERRY & PUZZANCHERA, *supra* note 258, at 1 (stating that delinquency cases peaked at 13,600 case in 1994 and decreased by 61 percent to 4,500 cases in 2011).

263. *Id.* at 1–2.

264. GRIFFIN ET AL., *supra* note 16, at 8.

265. Dawson, *supra* note 111, at 54–56.

266. *Id.* at 46.

267. *Id.* at 57.

268. *Id.* at 58, 65.

269. *Id.* at 53.

courts in this effort.[270]

In *Kent v. United States*, the Supreme Court reviewed the procedural requirements for discretionary judicial waiver.[271] The relevant transfer statute required a "full investigation" of the circumstances for transferring jurisdiction but set no standards for the court's decision as to waiver.[272] The defense attorney had filed two motions: a motion for a hearing on the waiver issue and petitioner's psychiatric condition; and a motion for access to the social services file developed during the petitioner's probation period.[273] The juvenile court summarily transferred the case to criminal jurisdiction without addressing the motions, conferring with the petitioner's attorney or parents, or recording its factual findings or reasoning.[274] The court considered three pieces of information: staff recommendations, the social services file, and the probation office's report.[275] The petitioner's attorney did not gain access to these documents.[276] Kent eventually stood trial in the criminal system, where the jury convicted him on all charges.[277]

On appeal, the Supreme Court accepted a single issue: "the infirmity of the proceedings by which the Juvenile Court waived its otherwise exclusive jurisdiction . . . ."[278] The petitioner argued that there were apparent process deficiencies—no hearing, no written reasons for transfer, and no access to pertinent documents.[279] The Supreme Court expressed no concern with the juvenile court's wide latitude to wield its discretion in making the transfer decision, but it did take issue with the court's "arbitrary procedure."[280] The Court's analysis centered on procedural due process and fairness principles.[281] The following excerpt summarizes the Court's thoughts on how procedural due process and fundamental fairness apply when transferring someone from juvenile to criminal jurisdiction:

270. Kent v. United States, 383 U.S. 541, 566–67 (1966).
271. *Id.* at 544.
272. *Id.* at 547.
273. *Id.* at 545–46.
274. *Id.* at 546.
275. *Id.* at 547.
276. *Id.*
277. *Id.* at 550.
278. *Id.* at 552.
279. *Id.*
280. "The statute gives the Juvenile Court a substantial degree of discretion as to the factual considerations to be evaluated, the weight to be given them and the conclusion to be reached. It does not confer upon the Juvenile Court a license for arbitrary procedure." *Id.* at 553.
281. *Id.*

> [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. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children . . . permitted this procedure. We hold that it does not.[282]

Following its procedural cautions, the Court moved on to set forth reasons for its ruling, grounded in the original intentions behind creating a juvenile system separate from criminal courts.[283] It explicitly acknowledged that the juvenile justice system works on a different plane from ordinary criminal law.[284] As it did again in *In re Gault*, one year later, the Court in *Kent* recognized that juvenile jurisdiction provided specific protections that were not available once a juvenile was transferred to criminal court.[285] The Court considered these civil rights on the same level as risking comparatively harsher punishments that may be imposed once transferred to criminal court.[286]

In the end, the Court concluded that the juvenile judge should have held a hearing, provided relevant documents to the petitioner's attorney, and developed a written record explaining its reasons to transfer jurisdiction.[287] The Court reasoned that this result was dictated not only by the statute but also by "the context of constitutional principles relating to due process and the assistance of counsel."[288] Despite Kent's heinous charges, including burglary and rape, the Court still held steadfast to the thought that transfer to "adult criminal treatment" should be the exception, not the rule, for those initially falling within juvenile

282. *Id.* at 554.

283. *See id.* at 554–56 (discussing the original theory and policy behind the jurisdiction's Juvenile Court Act).

284. "The theory of the District's Juvenile Court Act, like that of other jurisdictions, is rooted in social welfare philosophy rather than in the *corpus juris*." *Id.* at 554.

285. *In re* Gault, 387 U.S. 1, 21 (1967) ("[J]uveniles obtain benefits from the special procedures applicable to them which more than offset the disadvantages of denial of the substance of normal due process"). For example, juvenile offenders enjoy limited anonymity, detention among other youth as opposed to adult inmates, efforts at community reintegration, and, importantly, the ability to retain certain civil rights such as voting and eligibility for public employment. *Kent*, 383 U.S. at 556–57.

286. "In these circumstances, . . . 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." *Kent*, 383 U.S. at 557.

287. *Id.*

288. *Id.*

jurisdiction.[289]

The Court suggested that individualized considerations overlap those that bear on individualized sentencing determinations. The *Kent* Appendix lists eight factors:

> 1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
>
> 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
>
> 3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
>
> 4. The prosecutive merit of the complaint . . . .
>
> 5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults . . . .
>
> 6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
>
> 7. The record and previous history of the juvenile . . . .
>
> 8. The prospects of adequate protection of the public and the likelihood of reasonable rehabilitation . . . by the use of procedures, services and facilities currently available . . . .[290]

Noticeably, the *Kent* factors reflect the themes expressed as policy through the *Miller* holding developed five decades later.[291] The delineation between juvenile and criminal court systems rests in their objectives: juvenile courts are to "provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The state is *parens patriae* rather than the prosecuting attorney and judge."[292] The Supreme Court affirmed the appellate court's priority that youth offenders should be tried in juvenile courts as the rule and adult criminal courts as the exception, and then only after an individualized assessment.[293] Most states adopted the *Kent* factors and its requirement of a hearing and written findings as the constitutional guide for judges when exercising their discretion to transfer

289. "[I]t is implicit in [the Juvenile Court] scheme that non-criminal treatment is to be the rule—and the adult criminal treatment, the exception which must be governed by the particular factors of individual cases." *Id.* at 560–61 (alteration in original) (quoting Harling v. United States, 295 F.2d 161, 164–65 (D.C. Cir. 1961)).

290. *Id.* at 566–67.

291. *Compare id.*; *with* Miller v. Alabama, 567 U.S. 460, 477–78 (2012).

292. *Kent*, 383 U.S. at 554–55.

293. *Id.* at 560–61.

juveniles, grant a motion for reverse transfer, impose an adult sentence when a juvenile sentencing option exists by law, or impose blended sentences.[294]

Years before *Roper v. Simmons*, Lydia E. Frost Clausel and Richard I. Bonnie argued that statutory exclusion combined with an individualized assessment in criminal court may alleviate constitutional fundamental fairness concerns.[295] They pointed to a trend in appellate court opinions expressing reservations about automatic transfer laws when there was no standing without any reverse waiver provision in place.[296] Criminal court judges in jurisdictions with a reverse waiver provision hold a second chance card: reverse judicial waiver permits transfer back from criminal to juvenile jurisdiction for cases placed on the criminal docket through direct file or statutory exclusion.[297] Most states employ the *Kent* factors as a guide for judges presented with these reverse waiver and blended sentencing options.[298] Yet reverse waiver statutes are an insufficient countermeasure to the problems apparent with statutory exclusion and prosecutorial discretion laws, though, because criminal court staff are ill-sourced to adequately investigate reverse waiver or juvenile sentencing factors.[299]

Hughes v. Delaware illustrated the due process problem that transfer statutes pose. In *Hughes*, the issue was whether a statute requiring that all children charged with a felony to be automatically transferred from family court to superior court without judicial investigation was unconstitutional.[300] The Supreme Court of Delaware held that the statute

294. *See, e.g.*, Gonzales v. Tafoya, 515 F.3d 1097, 1128 (10th Cir. 2008) (upholding district court's discretion to impose an increased adult sentence on juvenile without submitting penalty to a jury); Flakes v. People, 153 P.3d 427, 430 (Colo. 2007) (holding that district court has discretion on whether to impose blended sentence after direct file transfer to criminal court and remanded for resentencing); Moon v. State, 451 S.W.3d 28, 51–52 (Tex. Crim. App. 2014) (holding case-specific findings of fact, including seriousness of offense, must be sufficient to support waiving juvenile court jurisdiction); State v. Dixon, 967 A.2d 1114, 1116 (Vt. 2008) (remanding trial court's denial of motion for reverse transfer to juvenile jurisdiction as an abuse of discretion).

295. Clausel & Bonnie, *supra* note 254, at 190.

296. *Id.*

297. Dawson, *supra* note 111, at 50; Barry C. Feld, *Legislative Exclusion of Offenses from Juvenile Court Jurisdiction: A History and Critique*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT, *supra* note 4, at 83, 100.

298. Feld, *supra* note 297, at 120.

299. Donna Bishop & Charles Frazier, *Consequences of Transfer*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT, *supra* note 4, at 227, 242–43.

300. The amendment provided that "if a child reaches his eighteenth birthday prior to an adjudication on a charge of delinquency arising from acts which would constitute a felony," the Family court must automatically transfer the matter to Superior Court. 69 Del. Laws 205 (1994).

violated the constitutional guarantees of both due process and equal protection under the law.[301] First, the statute violated the constitutional due process guarantees because it eliminated judicial review to assess the basis, if any, for prosecuting a child as an adult.[302] Second, the statute violated constitutional guarantees of equal protection of the law because children unfairly *charged* with committing a felony, but ultimately convicted of a misdemeanor, were accorded disparate treatment from those children initially charged only with a misdemeanor.[303] The Court noted that the statute would be constitutional if it included a reverse waiver provision.[304]

In *In re Boot*, the statute under consideration conferred exclusive original jurisdiction over certain youthful offenders on the adult criminal court without the benefit of a reverse transfer hearing.[305] The defendants argued that the statute was unconstitutional on due process, equal protection, and Eighth Amendment grounds.[306] The Supreme Court of Washington upheld the constitutionality of the statute.[307] However, in a concurring opinion, a justice of the court questioned whether the lack of judicial authority to transfer the case back to juvenile court rendered this statute unconstitutional as applied.[308] In conclusion, frontline scholars were correct when they cautiously surmised that "[t]hough the law is only beginning to develop in this area, it appears that an opportunity for individualization through a reverse waiver hearing may be a constitutionally required safety valve in some situations."[309]

> The statute also alters the existing scheme by preventing the defendant from obtaining judicial review of an important aspect of the amenability process. First, by mandating that those offenders falling under its purview be automatically transferred to Superior Court . . . . Moreover, the provision explicitly eliminates the reverse amenability process in the Superior Court under section 1011 for those children transferred to that court for trial as adults.

Hughes v. State of Delaware, 653 A.2d 241, 247 (Del. 1994).

301. *Hughes*, 653 A.2d at 252.

302. "Independent judicial review to assess the basis for prosecuting a child as an adult is a 'prerequisite for sustaining the constitutionality of the Delaware statutory framework.'" *Id.* at 250 (quoting Marine v. State, 624 A.2d 1181, 1186 (Del. 1993)).

303. *Id.* at 252.

304. *Id.*

305. *In re* Boot, 925 P.2d 964, 969 (Wash. 1996).

306. *Id.* at 966, 972.

307. *Id.* at 966–67.

308. *Id.* at 977 (Alexander, J., concurring) (citing Hughes v. State, 653 A.2d 241 (Del. 1994)) ("[W]hile in the abstract such restraints exist, there is no provision in this statute for a judicial proceeding where the prosecutor's discretion is tested. Although I will presume good faith on the part of the charging authority, that is not sufficient to protect a child's constitutional rights.").

309. Clausel & Bonnie, *supra* note 254, at 192.

C. Tough on Crime: Transfer Without Individualized Assessment

Transfer to criminal court precedes harsh punishments and, for juveniles, deprivation of rights in the justice process.[310] When questioning whether juveniles have a right to avoid that transfer, we must note that juvenile courts draw their authority solely from legislative grants of jurisdiction. This may empower the legislature to define jurisdictional boundaries, removing the argument that youth have a right to be tried in the juvenile courts. But this fact does not usurp the right for an individualized assessment at critical points within the justice process. Statutory exclusion and prosecutorial direct file forgo altogether or shroud in opacity any individual assessment of a youth's character, background, and the circumstances surrounding the offense. Statutory exclusion policies displace juveniles to the criminal courts based on their offense category, chronological age, and, at times, their criminal history.[311] Those policies also allow prosecutors to manipulate the charged offense, permitting them limited discretion under this pathway to transferring youth.[312] Some prosecutors share concurrent jurisdiction between the juvenile and criminal courts and may direct file in either jurisdiction.[313] Prosecutors may or may not consider juveniles' individualized traits, but if they do, this consideration is devoid of transparency or accountability.[314]

Transfer laws come in three varieties. Twenty-nine states use statutory exclusion laws and automatic transfer statutes to initiate a case against a juvenile in criminal court or to immediately transfer a case from juvenile to criminal court based on the defendant's age, the crime committed, and sometimes the juvenile's previous record.[315] Forty-five states and the District of Columbia allow juvenile judges to transfer a case to the criminal court in response to the prosecution's motion.[316] Finally, fourteen states and the District of Columbia permit prosecutors to direct file charges against a juvenile in criminal court.[317] Every state employs

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310. Feld, *supra* note 297, at 83.

311. *See* Dawson, *supra* note 111, at 66 (adding that these categories reflect legislative judgment that these are the only criteria which are suitable to make the sorting decision and providing statutory examples of each).

312. Feld, *supra* note 297, at 98.

313. *Id.*

314. *See* Dawson, *supra* note 111, at 53 (stating that prosecutorial selection for judicial waiver decisions lack "prior or concurrent procedures" and that "[n]egative decisions are not subject to review").

315. GRIFFIN ET AL., *supra* note 16, at 6.

316. *Id.* at 2.

317. *Id.* at 3.

at least one of these three transfer laws.[318] In addition, twenty-five states permit reverse waiver, wherein a criminal court judge can return a defendant to juvenile court or apply juvenile sentencing principles.[319] Other states also implement statutes mandating that after a juvenile has been transferred from juvenile jurisdiction to criminal court, all subsequent charges must be tried in criminal court.[320] Additionally, blended sentencing provisions play into the sentencing options for juveniles that commit more serious crimes.

Of all the transfer mechanisms, prosecutorial discretion presents the greatest concern. Summarily, "[d]iscretionary prosecutorial waiver supplants the juvenile court system processes that were historically designed to treat each child individually like a child."[321] In some states, prosecutors can transfer any case to criminal court based solely on a juvenile's age.[322] Other states limit prosecutorial transfer to certain serious crimes, but even then, prosecutors need not provide an explanation for their decisions.[323] Statutory exclusion statutes are by no means a suitable alternative, but at least they remove the perception of bias and inappropriate exercises of authority. Notably, prosecutors employ both mechanisms sans a judicial hearing or producing a formal record. Both prosecutorial discretion and statutory exclusion transfer mechanisms prohibit participation from judges, defendants, and their legal representatives.

Again, the argument runs that youth offenders do not hold an inherent right to remain within the juvenile court jurisdiction because state legislatures created these courts.[324] Accordingly, state legislatures may constitutionally define access to juvenile jurisdiction as they see fit so

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318. *Id.* at 2.

319. RICHARD E. REDDING, U.S. DEP'T OF JUSTICE, JUVENILE TRANSFER LAWS: AN EFFECTIVE DETERRENT TO DELINQUENCY? 2 (2010), *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/220595.pdf.

320. GRIFFIN ET AL., *supra* note 16, at 2.

321. Sally T. Green, *Prosecutorial Waiver into Adult Criminal Court: A Conflict of Interests Violation Amounting to the States' Legislative Abrogation of Juveniles' Due Process Rights*, 110 PENN. ST. L. REV. 233, 280 (2005).

322. *See, e.g.*, NEB. REV. STAT. §§ 43-276(1), 29-1816(1)(a)(ii)–(iii) (2018) (requiring consideration of circumstances in exercising prosecutorial discretion while limiting prosecutorial discretion to juveniles over fourteen years old accused of a felony or traffic violation); WYO. STAT. ANN. § 14-6-203(f) (2018) (mandating certain factors that the prosecutor must consider while limiting prosecutorial discretion for felony cases to those over the age of seventeen and violent felony cases to where the minor is over fourteen years old).

323. *See* GRIFFIN ET AL., *supra* note 16, at 20.

324. *See generally* Cox v. United States, 473 F.2d 334 (4th Cir. 1973); United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972).

long as their transfer rules are neither arbitrary nor discriminatory classifications.[325] The following excerpt from Colorado's Supreme Court represents this justification:

> It is clear that the General Assembly intended to exclude certain offenders from the juvenile court system by defining certain serious offenses as per se criminal and properly within the constitutional jurisdiction of the district court even if committed by a juvenile over the age of 14. This is not unreasonable in light of the apparent legislative decision that certain repeat offenders, or those who have committed serious offenses, should be separated from those juveniles who perpetrate relatively less serious or less violent crimes and who, in the view of the legislature, are more likely candidates for rehabilitation.[326]

Statutory exclusion does a haphazard job of combining age and charged offense to render transfer determinations.[327] These laws cast a monolithic net intended to gather "irredeemable" youth based on offense severity and chronological age. These populations show great diversity in terms of maturity, sophistication, and amenability to rehabilitation—leading to overbreadth of transfers to criminal court and misalignment with the legislative and institutional goals that are appropriate for this age group.[328]

State supreme courts overwhelmingly characterize jurisdictional waiver as a purely procedural matter working independently of equal protection and Eighth Amendment concerns, both because (1) again, juvenile courts are a state legislative creation and (2) attendant constitutional rights are present whether a youth is tried in a juvenile or criminal court. The due process argument concludes that "the character of the proceeding," not its "consequences to the accused," is determinative when reviewing the level of procedural protections that are owed to alleged offenders.[329] These courts characterize the limited reach of *Kent* as not speaking to transfer mechanisms *in toto*, but only to discretionary judicial waiver.[330] Moreover, *Kent* does little to describe

325. Woodward v. Wainwright, 556 F.2d 781, 785 (5th Cir. 1977) (holding that there is no inherent right to be treated as a juvenile and thus state legislatures may restrict when accuseds are treated as juveniles); People v. Thorpe, 641 P.2d 935, 939 (Colo. 1982) (affirming prosecutorial discretion without mandatory judicial hearing in the absence of suspect factors); State v. Berard, 401 A.2d 448, 453 (R.I. 1979) (holding that statutory exclusion is a "reasonable and rational classification and that it violates neither the due process clause nor the equal protection clause of the Fourteenth Amendment").

326. *Thorpe*, 641 P.2d at 940.

327. *See, e.g.*, State v. Angel C., 715 A.2d 652, 661–62 (Conn. 1998).

328. Feld, *supra* note 297, at 118; Clausel & Bonnie, *supra* note 254, at 188.

329. Cox v. United States, 473 F.2d 334, 336 (4th Cir. 1973).

330. Clausel and Bonnie write that "[i]t must be emphasized, however, that *Kent* is better seen

the evidence needed to cross over a youth into criminal jurisdiction. In summation, under current systems, no one stands accountable or draws scrutiny for transfer decisions, not even judges in most states.[331]

The separation of powers doctrine shelters prosecutorial discretion, an executive branch function, from court oversight, excepting arbitrary classifications based on race and religion; though age and offense would not qualify.[332] In *United States v. Bland*, the United States Court of Appeals for the District of Columbia offered an influential opinion on the constitutionality of that prosecutorial discretion.[333] The federal statute at issue excluded from juvenile jurisdiction "those 16 and older charged by the United States attorney with murder, forcible rape, robbery while armed, burglary in the first degree, or assault with intent to commit one of these offenses, or any such offense and a properly joinable offense."[334] The defendant argued that the provision violated his right to due process.[335] According to the court, prosecutorial discretion only requires review under allegations that disparate treatment between charging decisions was based on "race, religion, or other arbitrary classification[s]."[336]

Judge Skelly Wright penned a dissent that focused on the indistinguishable consequences flowing from the waiver decision regardless of the transfer mechanism. He noted that the procedural protections due to the defendant remain the same, regardless of whether a judge waived the defendant into criminal court or a prosecutor brought the defendant there initially.[337] He defined the issue as "not *whether* the prosecutor should be permitted to make waiver decisions, but rather *how* he should go about making those decisions."[338] The prosecutor's

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as a procedural due-process decision because the Supreme Court said nothing to question the fundamentally discretionary character of the decision and did not prescribe any substantive criteria." Clausel & Bonnie, *supra* note 254, at 184.

331. Thus, the overall picture is that transfer is outside the reach of the rule of law. The decision whether a youth should be treated as a juvenile or an adult lies within the virtually unreviewable discretion of legislators (who draw unreviewable classifications based on age, offense, and perhaps offense history), prosecutors (who need give no reasons at all), or judges (who must give a reason compatible with whatever the legislature has prescribed in the statute).

Id. at 198.

332. *Id.* at 192–97.

333. 472 F.2d 1329 (D.C. Cir. 1972).

334. *Id.* at 1333 (citing H.R. REP. No. 91-1303, at 226 (1970)).

335. *Id.* at 1331.

336. *Id.* at 1336 (citing Oyler v. Boles, 368 U.S. 448 (1962)).

337. *Id.* at 1342–50 (Wright, J., dissenting).

338. *Id.* at 1342.

partisanship earned him an additional layer of skepticism addressed by the *Kent* hearing requirements.[339] And Judge Wright's dissenting opinion lends no analytical value to the "dubious vestiture-divestiture distinction" used by the majority opinion; instead, the dispositive facts rest in the different treatment given children in juvenile courts as compared to criminal courts.[340] And so, because "the consequences to the child are precisely the same[,] . . . the procedural protections should be identical."[341] Due process inheres to the individual, yet the prescription varies based on the offender's age, notwithstanding the accessibility of juvenile jurisdiction for minors.[342]

One dramatic point that Judge Wright dealt with was that the prosecutor's waiver decision removes the consideration of the offender's juvenile status from the equation after removal to criminal court and that this decision is "largely unreviewable."[343] For this reason, "it is especially vital that the procedures be fair at the one point in the criminal process where these matters are considered."[344] Judge Wright characterized the juvenile judicial system as "another system of justice with different procedures, a different penalty structure, and a different philosophy of rehabilitation."[345] Although given limited legal import, Judge Wright addressed the dilemma that despite the inability to predict an offender's rehabilitative potential, stowing juveniles away in adult facilities almost guarantees their unwanted exposure to harmful conditions and influences.[346]

Juvenile defendants argue against prosecutorial discretion on the grounds that it occurs without a hearing and that it encroaches upon the judiciary's authority to sentence convicted defendants. This power to levy charges falls within the traditional functions of the executive branch

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339. *Id.* at 1343–44 (referencing Kent v. United States, 383 U.S. 541 (1966)).

340. *Id.* at 1343.

341. Thus the United States Attorney's charge acts to divest the Juvenile Court of its pre-existing exclusive jurisdiction in precisely the same manner as does the juvenile judge's waiver decision. Since the divestiture is the same, the procedural rights accompanying it should be the same, and we need look no farther than *Kent* to determine what those rights are.

Id. at 1343, 1344.

342. "It should be clear, then, that the test for when the Constitution demands a hearing depends not on which government official makes the decision, but rather on the importance of that decision to the individual affected." *Id.* at 1345.

343. *Id.* at 1348.

344. *Id.*

345. *Id.* (citing McKeiver v. Pennsylvania, 403 U.S. 528, 550–51 (1971); Kent v. United States, 383 U.S. 541, 557 (1968)).

346. *Id.* at 1349–50.

through prosecutorial discretion.[347] In *Cox v. United States*, the Fourth Circuit observed that while the consequences of judicial and prosecutorial waiver may be identical from a defendant's perspective, the constitutional analysis depends on the decision maker.[348] As far as constitutional due process protections, the hearing requirement applies only to judicial and quasi-judicial proceedings, not prosecutorial decisions.[349] Many states followed the *Cox* approach to uphold the constitutionality of their state legislatures' delegation of authority over the transfer decision from juvenile to adult court to prosecutors. Notably, in these analyses, the court focuses on "the character of the proceeding, rather than its consequences to the accused, [as] largely determinative of his rights."[350] The prosecutor's discretion also falls under the umbrella of executive power and thus sits apart from judicial requirements without a legislative grant.[351]

The Court's opinion in *Roper v. Simmons* reinvigorated the state's role in protecting children beyond juvenile jurisdiction and into the criminal court context.[352] The three common transfer mechanisms all have unique challenges directly related to whether each weighs in earnest a juvenile offender's youthful traits. For example, prosecutorial direct file takes place in a cloaked space with no accountability from an adversarial hearing or judicial review. New Jersey enacted a law to address this problem by requiring that prosecutors provide written reasons for seeking transfer to criminal court and receive judicial approval for that request.[353] Another criticism targets discretionary judicial review. Specifically, the trial court's transfer decision receives a perfunctory review, if at all, only after the defendant's conviction and sentencing. Texas remains one of a few states that allows transfer solely through discretionary judicial waiver.[354] The Texas legislature passed a law granting transferred youth the right to appeal a transfer decision before their final judgment and

347. Russell v. Parratt, 543 F.2d 1214, 1216–17 (8th Cir. 1976).

348. Cox v. United States, 473 F.2d 334, 336 (4th Cir. 1973).

349. *Id.*

350. Jackson v. State, 311 So. 2d 658, 661 (Miss. 1975).

351. *Russell*, 543 F.2d at 1216–17.

352. [N]otwithstanding the societal response, the historical goals upon which the juvenile court system was established must still function today in concert with the doctrine of *parens patriae*. The Supreme Court's reasoning in *Roper* "awakens" the sleeping doctrine of *parens patriae* by reiterating some of the very same observations regarding differences between adults and youth that originally motivated the establishment of the juvenile court system.

Green, *supra* note 321, at 265.

353. *In re* V.A., 50 A.3d 610, 616 (N.J. 2012).

354. *See* State-by-State Summary of Transfer Laws, *supra* note 190.

tasking the state supreme court to implement procedures for an expedited decision on those appeals.[355]

As reviewed in detail above, the *Kent* factors ask judges to review three categories of evidence: the offense, the defendant, and institutional concerns.[356] The *Kent* factors also arise in the criminal context for reverse waiver, blended sentencing, and youthful offender sentencing determinations. Statutory exclusion and prosecutorial direct file seem to be the only fateful determinations in this process that escape any requirement for individualized assessment requirements.

Collectively, pursuant to *Kent* and the juvenile sentencing trilogy, the Supreme Court has cultivated an unenumerated constitutional right that is available to juvenile offenders independent of attendant procedures.[357] The line between procedural and substantive rights appears blurred under due process holdings. State supreme court cases analyzing statutory exclusion and prosecutorial discretion determine that a juvenile's procedural rights are preserved because juvenile courts exercise jurisdiction only to the extent granted under state legislative authority, such that transfer to criminal court does not deprive the juvenile defendant of any constitutional criminal procedure rights. This analysis wholly overlooks the thrust behind the argument that "children are different" and the philosophical and expert justifications underpinning juvenile courts and the more recent sentencing opinions.

Roper, *Graham*, and *Miller*, along with the subsequent case of *Montgomery v. Louisiana*, which made *Miller* applicable, prompted the resentencing of juveniles then serving sentences of life without parole.[358] The strength of the movement ignited as a result of these doctrinal shifts cannot be understated. Most germane to this Article, the juvenile sentencing trilogy forced courts and legislatures to view juvenile behavior through the redemptive lens of expert researcher. The courts must balance an individual's background against the severity of his crime when imposing sentences. The Supreme Court's mandates continue to reinvigorate, strengthen, and define the penological goal of juvenile rehabilitation though state-level decision makers register this pursuit to varying degrees. Additionally, in some states, these cases provided persuasive legal footing to argue for raising the minimum criminal court

355. TEX. FAM. CODE ANN. § 56.01 (West 2017).

356. Kent v. United States, 383 U.S. 541, 566–67 (1966); Dawson, *supra* note 111, at 56–57.

357. *Kent*, 383 U.S. 541; Miller v. Alabama, 567 U.S. 460 (2012); Graham v. Florida, 560 U.S. 48 (2010); Roper v. Simmons, 543 U.S. 551 (2005).

358. *Roper*, 543 U.S. 551; *Graham*, 560 U.S. at 74–75; *Miller*, 567 U.S. at 478; Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016).

jurisdictional age.[359]

The Supreme Court's constitutional reforms were met with mixed reactions from state courts, legislatures, and executive branches. For example, some state courts embraced the chance to resentence juveniles serving life-without-parole sentences.[360] They provided a meaningful opportunity for release into the community. Other state courts and executive branches, pursuant to *Montgomery*, ensured that these juveniles would receive mandated rehearings but used them to impose even lengthier sentences with parole.[361] These defendants will receive nothing less than their original life-without-parole sentence. Yes, advocates enjoyed some success in changing maximum jurisdictional age statutes.[362] But juvenile transfer laws, the most common gateway to lengthy sentences, remain widely unyielding to litigation and unnoticed through the political process.

Eighth Amendment and due process arguments do not fully resolve the more nuanced issues associated with juvenile offenders transferred to criminal courts. Some scholars argue that *Graham* created a right to rehabilitation via its holding that juveniles committing a non-homicide offense should be given a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[363] But there does not seem to be much detail about achieving rehabilitation for this population.[364] The Eighth Amendment argument runs into the doctrinal hurdle of characterizing transfer as punishment.[365] We know there are many adverse consequences absent from juvenile courts that threaten youth who are transferred to criminal jurisdiction. All roads, however, lead to the conclusion that juveniles are constitutionally different from adults; and even the transfer and sentencing stages incompletely identify the need to compensate for youthfulness traits throughout the entire justice process. A permeating substantive due process right based on age status and its attendant disadvantages in achieving fundamental fairness

359. *See supra* text accompanying notes 166–167 (explaining the successes of raise-the-age campaigns).

360. Pishko, *supra* note 207.

361. *Id.*

362. *See supra* notes 166–167.

363. Neelum Arya, *Using* Graham v. Florida *to Challenge Juvenile Transfer Laws*, 71 LA. L. REV. 99, 100, 124 (2010) (quoting *Graham*, 560 U.S. at 75).

364. "In the end, the Court does not specifically explain what type of rehabilitation is required for youth, rather Justice Kennedy declares that '[i]t is for legislatures to determine what rehabilitative techniques are appropriate and effective.'" *Id.* at 128 (alteration in original) (quoting *Graham*, 560 U.S. at 73–74).

365. *Id.* at 138.

at certain stages of the justice process seems aligned with fully interpreting the juvenile sentencing cases.

CONCLUSION

The statutory web spun by the states leaves a constitutionally vulnerable hatch wherein youth can matriculate through the justice process without receiving an individualized assessment at any stage. Even though jurisdictions retain every right to weigh these youthfulness traits to varying degrees, more than a dozen states give no credence to constitutional distinctions between juveniles and their adult counterparts once those juveniles are brought into the criminal justice process.[366] Beginning in the eighties, state policymakers spasmodically built elaborate legislative schemes to account for juvenile offenders. States employ three common mechanisms to transfer juveniles to criminal court without an individualized assessment: mandatory juvenile transfer, statutory exclusion, and prosecutorial direct file.[367] Once in criminal court, even fewer states present the opportunity for a juvenile to backtrack via reverse waiver or criminal blended sentencing.[368] Finally, many states automatically bring any subsequent charges in criminal court pursuant to "once an adult, always an adult" policies.[369] Whether knowingly or unwittingly, these statutory pathways intersect in a manner at odds with the Supreme Court's pronouncement that children are, indeed, different from adults.[370]

Juvenile jurisdiction imbues an acceptance of children being different, yet policymakers driven by social influence equivocate on executing and prioritizing retribution against rehabilitative goals.[371] Juvenile courts are moored to constitutional principles through the fundamental fairness guaranteed by due process. Before the sea change initiated by the Supreme Court's reasoning in *Roper v. Simmons*, state supreme courts were beginning to question the constitutionality of dropping juveniles into the criminal system without contemplating their age at any point in the justice process.[372] Now, social science, developmental psychology,

366. *See Juvenile Court*, *Intake and Diversion 2016*, *supra* note 153.

367. *See* GRIFFIN ET AL., *supra* note 16.

368. *See* State-By-State Summary of Transfer Laws, *supra* note 190.

369. *See id.*

370. Montgomery v. Louisiana, 136 S. Ct. 718, 733 (2016) (citing Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 567 U.S. 460 (2012)).

371. *See supra* notes 159–175.

372. State v. Angel C., 715 A.2d 652 (Conn. 1998); *In re* Boot, 925 P.2d 964, 976–79 (Wash. 1996) (Alexander, J., concurring); Marine v. State, 607 A.2d 1185, 1209 (Del. 1992).

and neuroscience all demonstrate that youth are immature, susceptible to external stressors, and transitory.[373] These traits, especially in combination, have led the Supreme Court to conclude that children possess a diminished culpability and can experience rehabilitation.

The Supreme Court has sought to protect juveniles in the criminal context through categorical bans and the procedural requirement of individualized assessment.[374] But these restrictions apply only to the harshest penalties: death and life without parole.[375] The Court's analyses of these penalties discount the retributive goal, emphasize rehabilitation, dismiss incapacitation, and express skepticism toward their deterrent value. Currently, we see state supreme courts deliberating in earnest how to reconcile mandatory minimum sentences with the Court's more recent pronouncements. Myriad state legislative responses to the *Miller* and *Montgomery* resentencing project also serve as a litmus test of both resistant and changing attitudes toward juvenile sentencing.

At this point, children possess a permeating right in the form of individualized assessment, a right that places affirmative duties on state actors. The norm that "children are constitutionally different from adults" stands as a transferable observation that manifests to meet fundamental fairness goals.[376] Similar to the Sixth Amendment's "critical stages" in the justice process, the ever-growing knowledge of youthfulness makes it incumbent on the criminal justice system to identify when children are susceptible to their inherent deficiencies.[377] Thus far, the Supreme Court has acknowledged these traits when applying the Fourth and Eighth Amendments. This must somehow translate further into the law.

Alternate approaches have arisen to cure this problem. For example, every arrested youth should enter the justice process through the juvenile courts with a presumption against transfer to criminal court. If transferred to criminal court, an individualized assessment must be the procedural hurdle to transfer, whether initiated by the court or via a transparent prosecutorial motion for jurisdictional change. States could eliminate mandatory sentencing and require trial courts to conduct an individualized assessment before sentencing juvenile offenders. A more fulsome option would be to identify critical stages throughout the justice

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373. *See supra* note 2.

374. *Miller*, 567 U.S. 460; *Graham*, 560 U.S. 48; *Roper*, 543 U.S. 551.

375. *See, e.g.*, *Miller*, 567 U.S. 460 (banning mandatory life without parole sentences for juveniles); *Graham*, 560 U.S. 48 (prohibiting life without parole sentences for non-homicide offenses); *Roper*, 543 U.S. 551 (barring the death penalty for juveniles).

376. Montgomery v. Louisiana, 136 S. Ct. 718, 733 (2016) (citing *Roper*, 543 U.S. 551; *Graham*, 560 U.S. 48; *Miller*, 567 U.S. 470).

377. *See supra* text accompanying notes 86–89.

process, those that require explicit consideration of how youthfulness traits affect courts' treatment of juveniles being tried in adult courts. Legal commentators present cogent arguments supporting rehabilitation as a requisite component to incarcerating juveniles. On the other hand, in some states, individualism for sentences less than life without parole proves nonexistent. Jurisdictions operating a justice process with the constitutionally vulnerable space described above sentence juveniles "in the same manner as adults." This practice conflicts with the now-universal norm: children are different.