

JUVENILE SENTENCING REFORM: LAW, POLICY AND PREVENTION

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The *Miller* Revolution

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ABSTRACT: In a series of cases culminating in Miller v. Alabama, the United States Supreme Court has limited the extent to which juveniles may be exposed to the harshest criminal sentences. Scholars have addressed discrete components of these recent decisions, from their Eighth Amendment methodology to their effect upon state legislation. In this Article, I draw upon that scholarship to make a broader claim: the Miller trilogy has revolutionized juvenile justice. While we have begun to see only the most inchoate signs of this revolution in practice, this Article endeavors to describe what this revolution may look like both in the immediate term and in years to come. Part II demonstrates how the United States went from being the leader in progressive juvenile justice to being an international outlier in the severity of its juvenile sentencing. Part III examines the Miller decision, as well as its immediate predecessor cases, and explains why Miller demands a capacious reading. Part IV explores the post-Miller revolution in juvenile justice. Specifically, Part IV makes the case for two immediate groundbreaking corollaries that flow from Miller: (1) the creation of procedural safeguards for juveniles facing life without parole (“LWOP”) comparable to those recommended for adults facing the death penalty; and (2) the elimination of mandatory minimums for juveniles altogether. Part IV also identifies ways in which juvenile justice advocates can leverage the moral leadership of the Miller Court to seek future reform in three key areas: juvenile transfer laws; presumptive sentencing guidelines as they apply to children; and juvenile conditions of confinement.

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I. INTRODUCTION

A juvenile justice revolution in America is underway. After decades of increasingly punitive treatment of juveniles in our criminal justice system,¹ the tide is turning. Legislatures, courts and executive actors are reconsidering the propriety of criminal laws as they apply to children in fundamental ways. In one way or another,² this revolution can be linked to the Supreme Court's

1. See *infra* Part II.

2. There is great debate over whether the Supreme Court can generate social change or whether it responds to social change once it is underway. That debate is not the focus of my Article. For a discussion of those issues see generally GERALD N. ROSENBERG, *THE HOLLOW HOPE*:

recent decision in *Miller v. Alabama*, where the Court held that the Eighth Amendment prohibits mandatory life without parole (“LWOP”) sentences for juveniles—even those convicted of homicide.³ Following *Roper v. Simmons*⁴ and *Graham v. Florida*,⁵ *Miller* was the last of three recent Supreme Court cases dealing with juvenile sentencing.⁶ Together these cases—which I refer to as the *Miller* trilogy—stand for the proposition that children are constitutionally different for sentencing purposes, and state practices must reflect that fact.

This Article maintains that *Miller* was a revolutionary decision and that it portends a tremendous shift in juvenile justice policy and practice.⁷ Some scholars and advocates have begun to recognize the outer limits of the *Miller* decision and have articulated expansive readings of the *Miller* trilogy. For example, Professor Will Berry has argued that *Miller’s* call for individualized sentencing for juveniles should apply to all instances where the defendant faces a death-in-custody sentence.⁸ Professor Barry Feld has called for legislation that would respond to *Graham* and *Miller* by imposing a categorical “Youth Discount” at sentencing.⁹ Many have called for a re-examination of juvenile justice practices across the board in the wake of *Miller*.¹⁰ The premise of these arguments—that the language, logic, and science of the *Miller* decision demand a capacious reading—is sound.

CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008) (questioning whether the Supreme Court can bring about meaningful social change); Brian K. Landsberg, *Enforcing Desegregation: A Case Study of Federal District Court Power and Social Change in Macon County Alabama*, 48 LAW & SOC’Y REV. 867 (2014) (suggesting that despite judicial constraints courts can generate social reform); Mark Tushnet, *Some Legacies of Brown v. Board of Education*, 90 VA. L. REV. 1693 (2004) (suggesting that the Court can articulate powerful principles of social reform despite constraints imposed on the judicial branch).

3. *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

4. *Roper v. Simmons*, 543 U.S. 551 (2005).

5. *Graham v. Florida*, 560 U.S. 48 (2010).

6. The Court also dealt with the retroactivity of *Miller* in its recent decision, *Montgomery v. Louisiana*, but I refer to the *Miller* trilogy in this Article as the three cases that dealt with constitutional sentences for juveniles on the merits. See *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016) (holding that *Miller* is retroactively applicable).

7. In the wake of *Miller*, courts and scholars have grappled with the often-messy questions of implementation: Is *Miller* retroactive? Are life sentences or de facto life sentences also within the purview of *Graham* and *Miller*? How do states that long ago abolished parole afford juveniles relief under *Graham* and *Miller*? These questions are vitally important, and I have weighed in on some of them in prior works. See generally Cara H. Drinan, *Graham on the Ground*, 87 WASH. L. REV. 51 (2012); Cara H. Drinan, *Misconstruing Graham & Miller*, 91 WASH. U. L. REV. 785 (2014). They are not, however, the focus of this Article.

8. William W. Berry III, *The Mandate of Miller*, AM. CRIM. L. REV., Spring 2014, at 345.

9. Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 LAW & INEQ. 263, 264 (2013).

10. See, e.g., Elizabeth S. Scott, “Children are Different”: *Constitutional Values and Justice Policy*, 11 OHIO ST. J. CRIM. L. 71, 73 (2013); see also *id.* at 75 (arguing that “[t]he recent Supreme Court opinions reinforce [a] developmental approach [to youth crime regulation] and elevate its stature to one grounded in constitutional principle”).

In this Article, I build upon these arguments and identify truly revolutionary changes in juvenile justice policy and practice that are possible post-*Miller*. Some of these changes are already underway. For example, one state supreme court has banned mandatory sentences for juveniles across the board—an unthinkable action even as recently as the late 20th century.¹¹ Other changes are nascent and demand greater exploration so that they can be pursued in the years to come, including repealing mandatory juvenile transfer laws and overhauling juvenile conditions of confinement.

This Article proceeds in three Parts. Part II demonstrates how this nation went from being the leader in progressive juvenile justice to being an international outlier in the severity of its juvenile sentencing. In answering this question, Part II traces the development of mandatory juvenile sentences in this country and identifies two forces driving that development: the practice of transferring juvenile cases to adult court and the emergence of determinate sentencing schemes. Part III examines the *Miller* decision and the cases immediately preceding it at a granular level and explains why *Miller* demands a capacious reading. Part IV then explores the post-*Miller* revolution in juvenile justice that is afoot in two ways. Part IV first makes the case for two immediate corollaries that flow from *Miller*: (1) the creation of procedural safeguards for children facing life without parole comparable to those recommended for adults facing the death penalty; and (2) the elimination of mandatory minimums for children altogether. Part IV then turns to the juvenile justice frontier and articulates several revolutionary changes that should be explored post-*Miller*. These include repealing mandatory transfer laws, changing presumptive sentencing guidelines as they apply to children, and rethinking juvenile conditions of confinement. Such actions could set in motion a return to the rehabilitative juvenile justice model this country began with more than a century ago. This Article concludes by addressing the issue of political feasibility and identifies data that suggests state actors can partake in the *Miller* revolution that is underway.

II. THE ARC OF AMERICAN JUVENILE JUSTICE: FROM PROGRESSIVE LEADER TO INTERNATIONAL OUTLIER

Juvenile courts and the distinct treatment of juveniles charged with crimes are now established features of the American criminal justice system—features that have been emulated globally.¹² In recent years, however, two developments in American criminal procedure converged to expose juveniles to potentially extreme mandatory sentences: (1) the transfer of juvenile delinquents to adult criminal court; and (2) the trend toward determinate sentencing schemes. These two developments were the perfect storm that

11. See *infra* note 192 and accompanying text.

12. See Franklin E. Zimring & David S. Tanenhaus, *Introduction to CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 1* (Franklin E. Zimring & David S. Tanenhaus eds., 2014).

generated mandatory, extreme sentences for children in the criminal justice system. In this Part of the Article, I provide a brief historical overview of American juvenile justice and then turn to illustrating how juvenile transfer laws and determinate sentencing schemes together exposed our youth to the most severe sanctions without any room for discretion.

A. GENERAL OVERVIEW OF JUVENILE JUSTICE

Juvenile justice is now a well-established feature of our criminal justice system. Established in Illinois in 1899, every jurisdiction in the country has a separate juvenile justice system.¹³ Prompted by Progressive Era reformers, the early juvenile court was attentive to the differences between adults and children and emphasized age-appropriate punishment and treatment for juvenile offenders.¹⁴ As described by Aaron Kupchik:

Founders of the juvenile justice system believed that juveniles who misbehaved were products of pathological environments rather than intrinsically evil. The target of the juvenile justice system was the deprivation, not the depravation, of delinquent youth. The court's mission was to resocialize youth and provide them with the necessary tools for adopting a moral lifestyle.¹⁵

Over time, several features emerged as defining attributes of the American juvenile justice system: (1) a degree of informality relative to criminal court proceedings; (2) great discretion afforded to the judge who was able to tailor the intervention to the particular juvenile in each case; and (3) a fundamental shared belief that childhood is a period of dependency and risk, where the state had a role to play for a child in jeopardy.¹⁶ Today, developed countries around the world have installed juvenile justice systems modeled after the American system.¹⁷

Professor Terry Maroney has described three primary phases in the development of American juvenile justice prior to the immediate post-*Miller* era.¹⁸ The first phase, discussed above, was prompted by the rehabilitative

13. *Id.*

14. AARON KUPCHIK, JUDGING JUVENILES: PROSECUTING ADOLESCENTS IN ADULT AND JUVENILE COURTS 10–11 (2006).

15. *Id.* at 11.

16. FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 6–7 (2005); *see also* KUPCHIK, *supra* note 12, at 51.

17. Zimring & Tanenhaus, *supra* note 12, at 1; *see also* ZIMRING, *supra* note 16, at 33 (“No legal institution in Anglo-American legal history has achieved such universal acceptance among the diverse legal systems of the industrial democracies.”).

18. Terry A. Maroney, *The Once and Future Juvenile Brain*, in CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE, *supra* note 12, at 189, 189. Juvenile justice scholars agree that we have entered a new era of policy in the last decade. *See, e.g., id.* (“We surely now have moved into a new era of juvenile justice.”); Elizabeth S. Scott, *Miller v. Alabama and the (Past and) Future of*

ideal of the late 19th century and expressed optimism about the juvenile's capacity for change and society's obligation to support that change.¹⁹ By the middle of the 20th century, the Supreme Court recognized the evolving punitive nature of "civil" juvenile proceedings and granted juveniles²⁰ many of the procedural safeguards associated with the adult criminal justice system.²¹ The zenith of this "due process era" of juvenile justice was the Supreme Court's decision in *In re Gault*, which held that juveniles had the right to counsel during delinquency proceedings.²² Finally and most recently, American juvenile justice shifted radically to a posture of fear and containment. In the 1990s, fueled by criminologists who predicted a wave of juvenile "super-predators" and skyrocketing homicide rates, state laws shifted to expose children to even harsher procedures and punishments.²³

By the beginning of the 21st century, the United States was an international outlier in its harsh sentences for juvenile criminal defendants. Until 2005, the United States was the only developed country that subjected children to the death penalty.²⁴ Today it is the only nation that employs juvenile life without parole.²⁵ Two recent developments, in particular, led to the practice of extreme sentences for juvenile offenders: juvenile transfer laws which removed children from juvenile proceedings and placed them under the jurisdiction of adult criminal courts and the general trend toward determinate sentencing schemes.

B. JUVENILE TRANSFER LAW: KIDS IN ADULT COURT

From the inception of the juvenile court to the mid-1970s, a child who was accused of committing a crime was initially and usually processed in the

Juvenile Crime Regulation, 31 LAW & INEQ. 535, 536 (2013) (discussing the moral panic that drove policies of the 1990s and the shifts that have emerged in the last decade).

19. Maroney, *supra* note 18, at 189.

20. Some academics have suggested that juvenile defendants have fared worse in the post-*Gault* era. See, e.g., Franklin E. Zimring & David S. Tanenhaus, *On Strategy and Tactics for Contemporary Reforms*, in CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE, *supra* note 12, at 216, 231–32 (describing the contrast between an early juvenile court where the judge had tremendous power and discretion and the post-*Gault* expansion of prosecutorial power at the expense of judicial and probation authority).

21. See Maroney, *supra* note 18, at 189.

22. *In re Gault*, 387 U.S. 1, 4 (1967).

23. Maroney, *supra* note 18, at 189. See generally Franklin E. Zimring, *American Youth Violence: A Cautionary Tale*, in CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE, *supra* note 12, at 7; see also Scott, *supra* note 18, at 537–41.

24. *Roper v. Simmons*, 543 U.S. 551, 575 (2005) ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.")

25. Brief of Amici Curiae Amnesty Int'l, et al. Supporting Petitioners at 5–6, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647), 2012 WL 174238.

juvenile justice system.²⁶ In that system, the judge enjoyed great power and flexibility relative to today's criminal court judges. The ethic of "*parens patriae*" permeated the juvenile court and typically prompted judges to provide social services that were lacking for the youth offender.²⁷ In this context, it was the juvenile judge's decision when and if to transfer a child to adult court.²⁸ The transfer decision involved a hearing at which the state had to persuade the juvenile judge that the juvenile was not amenable to rehabilitation, had committed a crime too serious for adjudication in juvenile court given its punitive limits, or both.²⁹

Transfer was not common; it was the exception. In recent years, though, an increasing number of children have been transferred from juvenile court to adult court. This trend, and the psychology accompanying it, has changed the model of criminal justice for kids altogether. Beginning in the 1970s, states amended their laws in a number of ways, making it easier for children to be prosecuted in adult criminal courts.³⁰ Some state laws reduced the age at which a juvenile judge was authorized to transfer a child to adult court, while others state laws automatically excluded certain juvenile defendants from the juvenile court's jurisdiction based upon the child's age or the charged offense.³¹ Finally, some states amended their laws to vest the prosecutor with unilateral power to make the juvenile transfer decision.³²

Laws granting this unilateral discretion to prosecutors, also known as "direct file" laws, have been most problematic, as scholars and the Supreme Court have noted.³³ Professor Franklin Zimring, for example, has posited that get-tough transfer legislation from the 1990s may have been an attempt "to push the allocation of power in juvenile courts closer to the model of prosecutorial domination that has been characteristic of criminal courts in the United States for a generation."³⁴ Whether intentional or not, direct file laws certainly "create[] more power or less work for juvenile court

26. KUPCHIK, *supra* note 14, at 1.

27. *Id.* at 11 ("The founders of the juvenile court imagined a judge and probation officer, assisted by medical and psychological treatment professionals, diagnosing and remedying a youth's problems without the need to constrict due process rules.").

28. Franklin E. Zimring, *The Power Politics of Juvenile Court Transfer in the 1990s*, in CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE, *supra* note 12, at 37, 42 ("The long-standing method of transfer was a hearing held before a juvenile court judge who had the power to waive the juvenile court's jurisdiction.").

29. *Cf.* ZIMRING, *supra* note 16, at 141–44 (discussing the mission of juvenile court as being its primary limitation in that some juvenile cases warrant a punishment response the juvenile court cannot impose).

30. KUPCHIK, *supra* note 14, at 154–59.

31. *See id.*

32. *Id.* at 156–58.

33. *Id.* (defining the process and explaining its problems).

34. Zimring, *supra* note 28, at 44.

prosecutors, or both.”³⁵ In *Miller*, the Supreme Court also noted the dangers of direct file laws for juveniles: “several States at times lodge this decision exclusively in the hands of prosecutors, again with no statutory mechanism for judicial reevaluation. And those ‘prosecutorial discretion laws are usually silent regarding standards, protocols, or appropriate considerations for decision-making.’”³⁶

While state transfer laws vary in their scope and mechanism, in the aggregate, they result in many children being tried in adult court and exposed to generally applicable penalty provisions.

C. DETERMINATE SENTENCING SCHEMES: A PARALLEL TREND

Around the same time that states were amending their transfer laws, state and federal governments also implemented mandatory sentencing schemes for adult offenders.³⁷ Beginning in the 1970s, lawmakers and politicians embraced a tough-on-crime stance across the board. By the 1990s, criminologists predicted increasing rates of violent crime and the emergence of a juvenile “super-predator.”³⁸ Nationwide, lawmakers responded in several ways, one of which entailed shifting from indeterminate sentencing schemes where judges had discretion regarding a defendant’s sentence, to a scheme that imposed mandatory minimums. “On the state level this trend began in New York in 1973, with California and Massachusetts following soon thereafter. While the trend toward mandatory minimums in the states was gradual, by 1983, 49 of the 50 states had passed such provisions.”³⁹ At the same time, states increased the number of crimes on the books⁴⁰ and eliminated or narrowed parole provisions.⁴¹

35. *Id.*; see also *id.* at 45 (“So the proliferation of direct file provisions is really an enhancement of prosecutorial power as much as it is a legislative judgment about which juveniles should be transferred to criminal court, because it is contingent on prosecutorial charging discretions.”).

36. *Miller v. Alabama*, 132 S. Ct. 2455, 2474 (2012) (citing P. GRIFFIN ET AL., DEP’T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 5 (2011)).

37. The *Miller* Court noted that state legislators were not necessarily considering the interaction of these separate legislative efforts, and yet the consequences were dire for juveniles. *Id.* at 2472.

38. See Zimring & Tanenhaus, *supra* note 12, at 105–06.

39. U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 9 (1991), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf.

40. Cf. Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation’s Federal Criminal Laws*, WALL STREET J. (July 23, 2001), <http://online.wsj.com/news/articles/SB10001424052702304319804576389601079728920> (estimating that there are at least 3000 federal criminal laws and recognizing that the true number is probably beyond estimation).

41. Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, AM. CRIM. L. REV., Spring 2013, at 315–20 (describing the “death of parole” at the state and federal level).

These two parallel trends created the perfect storm for juveniles in the criminal justice system. State law often made it very easy for a child to be tried in adult court. Once a child was in adult court, he was exposed to generally applicable mandatory minimum sentences. The two inmates whose cases were addressed by the *Miller* Court provide good illustrations of this dynamic. Kuntrell Jackson was charged with capital felony murder, and Arkansas law permitted the prosecutor to charge him as an adult based on the nature of the charge itself.⁴² Once in adult court, a jury convicted Jackson of both capital murder and aggravated robbery.⁴³ As the judge noted in Jackson's case, Arkansas law permitted only one sentence: life without parole.⁴⁴ Similarly, in Evan Miller's case, the prosecutor moved to transfer his case to adult court in Alabama, succeeded in that transfer, and charged Miller with murder in the course of arson.⁴⁵ A jury found Miller guilty, and again, Alabama law permitted only one sentence: life without parole.⁴⁶

The statutes at issue in *Miller* were not outliers. As the *Miller* Court noted, 28 states and the Federal Government imposed mandatory life without parole on some juveniles convicted of murder in adult court.⁴⁷ The Court also noted that many state transfer laws left no room for judicial discretion: "Of the 29 relevant jurisdictions, about half place at least some juvenile homicide offenders in adult court automatically, with no apparent opportunity to seek transfer to juvenile court."⁴⁸ Thus the *Miller* Court squarely addressed the two dynamics that I have discussed in this Part of the Article: parallel state trends toward trying children in adult court and toward imposing mandatory minimums. These two trends converged to expose our nation's children to severe, mandatory sentences. By 2005, the Supreme Court took up the issue of extreme juvenile sentences, scaling back the extent to which states could impose those sentences on children.

III. THE MILLER TRILOGY

This Part begins by examining the *Miller* decision, as well as its immediate predecessor cases, at a granular level; it then goes on to explain why *Miller* demands a capacious reading by courts and scholars.

A. THE MILLER TRILOGY: ROPER, GRAHAM & MILLER

The road to *Miller* began with *Roper v. Simmons* in 2005.⁴⁹ In *Roper*, the Supreme Court held that executing individuals who had committed their

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

43. *Id.*

44. *Id.*

45. *Id.* at 2462.

46. *Id.* at 2462–63.

47. *Id.* at 2471.

48. *Id.* at 2474.

49. *Roper v. Simmons*, 543 U.S. 551 (2005).

crimes prior to the age of 18 was unconstitutional.⁵⁰ The *Roper* Court employed longstanding Eighth Amendment analysis for the capital setting: it examined juveniles as a group and asked whether the use of execution was proportionate given the diminished culpability of juvenile offenders.⁵¹ In assessing proportionality, the Court looked at the “objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question” and then exercised its own “independent judgment” as to “whether the death penalty is a disproportionate punishment for juveniles.”⁵² The *Roper* Court ultimately found that a majority of states forbid the practice of juvenile capital punishment; that it was rarely employed in the states that permitted it; and that the national trend was moving away from subjecting juveniles to the death penalty.⁵³ On this basis, the Court held that the Eighth Amendment forbids juvenile execution.⁵⁴

Having demonstrated that the practice was inconsistent with “evolving standards of decency,” the *Roper* Court proceeded to render its own judgment regarding the penalty as it applied to juveniles.⁵⁵ The Court focused on three reasons why juveniles are categorically different from adults and thus should not be exposed to capital punishment: they lack maturity; they are far more susceptible to external pressures; and their moral character is still fluid.⁵⁶ Finally, the Court held that, in light of juveniles’ diminished culpability, neither stated rationale for the death penalty, deterrence or retribution, was adequate justification.⁵⁷

Two aspects of the *Roper* decision are noteworthy in the context of *Miller* and its import. First, the *Roper* Court drew upon science and the proven fact that children are not just small adults. The Court’s discussion of the unique attributes of children was anchored in social science work, documenting the inchoate nature of the adolescent brain.⁵⁸ The scientific bent to the *Roper* Court’s decision laid important foundation for both the *Graham* and *Miller* decisions.

Second, the *Roper* Court noted that the United States was out of sync with the rest of the world in its use of juvenile capital punishment. While the Court explained that its decision rested on an analysis of legislative trends coupled with its own independent judgment, the Court said: “Our determination that the death penalty is disproportionate punishment for offenders under 18

50. *Id.* at 577–78.

51. *Id.* at 564.

52. *Id.*

53. *Id.* at 567–68.

54. *Id.* at 578.

55. *Id.* at 563, 568.

56. *Id.* at 569–70.

57. *Id.* at 571–72.

58. *Id.* at 569–70 (discussing the lack of maturity and recklessness, susceptibility to negative outside influences, and transient character of youth, citing the science behind each point).

finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”⁵⁹ The *Roper* Court’s reference to American sentencing practices relative to the international arena was also important to the *Graham* and *Miller* decisions, as those cases also examined a sentencing practice foreign to most developed countries.

Five years after *Roper*, in *Graham v. Florida*, the Court took up the question of whether a life without parole sentence was permissible for a nonhomicide juvenile offender.⁶⁰ Writing for the majority, Justice Kennedy held that the Constitution categorically forbids such a sentence.⁶¹ First, he explained that the Eighth Amendment bars both “barbaric” punishments and punishments that are disproportionate to the crime committed.⁶² Within the latter category, the Court explained that its cases fell into one of two classifications: (1) cases challenging the length of term-of-years sentences given all the circumstances in a particular case; and (2) cases where the Court has considered categorical restrictions on the death penalty.⁶³ Because *Graham*’s case challenged “a particular type of sentence” and its application “to an entire class of offenders who have committed a range of crimes,” the Court found the categorical approach appropriate and relied upon its recent death penalty case law for guidance.⁶⁴

Just as the Court had done in *Roper*, the *Graham* Court looked to objective indicia of national consensus, beginning with relevant legislation regarding juvenile life without parole. Justice Kennedy explained that while 37 states, the District of Columbia, and the federal government permitted life without parole sentences for nonhomicide juvenile offenders, the actual sentencing practices of these jurisdictions told another story.⁶⁵ Based on the evidence before it, the Court determined that at the time of the decision, there were only 123 nonhomicide juvenile offenders serving life without parole sentences nationwide with 77 of them being in Florida prisons.⁶⁶ Given the “exceedingly rare” incidence of the punishment in question, the Court held that there was a national consensus against life without parole sentences for nonhomicide juvenile offenders.⁶⁷

Consistent with *Roper*, the *Graham* Court acknowledged that “community consensus” was “entitled to great weight,” but it proceeded to render its own

59. *Id.* at 575.

60. *Graham v. Florida*, 560 U.S. 48, 52–53 (2010).

61. *Id.* at 79.

62. *Id.* at 59.

63. *Id.* at 59–61.

64. *Id.* at 61–62.

65. *Id.* at 62–63.

66. *Id.* at 64.

67. *Id.* at 67.

judgment regarding the constitutionality of Graham's sentence.⁶⁸ The Court focused on two aspects of the case: first, the uniqueness of juvenile offenders—specifically their lessened culpability and their greater capacity for reform—and second, the historical treatment of nonhomicide crimes as less severe than crimes where a victim is killed.⁶⁹ Looking at these two features, the Court reasoned that “when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.”⁷⁰ The Court also examined the various justifications for criminal sanctions and determined that none could justify life without parole for juvenile defendants like Graham. Accordingly, the Court held:

A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation. . . . The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.⁷¹

Thus, the Court found life without parole sentences unconstitutional for juvenile nonhomicide offenders and, with its decision, entitled Terrence Graham and those similarly situated to a new sentence.

As the Supreme Court acknowledged in *Graham*, its decision applied to only a small number of inmates nationwide.⁷² However, more than 2000 inmates nationwide were serving life without parole on the basis of a juvenile homicide conviction. In this sense, the *Graham* decision begged the question: whether the Eighth Amendment also precluded life without parole for juveniles convicted of homicide offenses. Two years later, the Court took up that question in *Miller v. Alabama*. In an opinion authored by Justice Kagan, the majority held that the Eighth Amendment bars mandatory life without parole for juveniles—even those convicted of a homicide offense.⁷³

The *Miller* Court explained that its decision rested on two relevant strands of precedent: (1) its line of cases adopting categorical bans on certain sentencing practices; and (2) its line of cases requiring certain procedural

68. *See id.* at 67–75.

69. *Id.* at 68–69.

70. *Id.* at 69.

71. *Id.* at 75.

72. *Id.* at 64 (“Thus, adding the individuals counted by the study to those we have been able to locate independently, there are 123 juvenile nonhomicide offenders serving life without parole sentences. A significant majority of those, 77 in total, are serving sentences imposed in Florida. The other 46 are imprisoned in just 10 States—California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and Virginia.” (citation omitted)).

73. *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012).

safeguards in the capital sentencing context.⁷⁴ As to the first line of cases, the Court viewed its ban on mandatory life without parole for juveniles as analogous to its ban on the death penalty for the intellectually disabled or its ban on life without parole for nonhomicide juvenile offenders. In both cases, the Court determined that the sentence at issue was disproportionate in light of the mitigating attributes of the defendant.⁷⁵ As to the second line of cases, the *Miller* Court explained that, for juveniles, life without parole is analogous to the death penalty:

And this lengthiest possible incarceration is an “especially harsh punishment for a juvenile,” because he will almost inevitably serve “more years and a greater percentage of his life in prison than an adult offender.” The penalty when imposed on a teenager, as compared with an older person, is therefore “the same . . . in name only.”⁷⁶

In light of these two lines of precedent—those finding certain punishments excessive for classes of offenders and those dealing with procedural safeguards required in the capital context—the *Miller* Court forbade the states from sentencing juveniles to life without parole under a mandatory sentencing scheme.⁷⁷ The *Miller* trilogy stands for the proposition that children are different in the eyes of the law. These cases also send important signals to state actors about the propriety of various juvenile justice practices.

B. COURTS SHOULD READ MILLER CAPACIOUSLY

A narrow reading of *Miller* says that juveniles may not be sentenced to life without parole under a mandatory sentencing scheme—that the sentence is still permissible, but states must implement a new process for its use.⁷⁸ However, the language, logic, and science of the decision demand a broader and richer reading.

To begin, the four dissenting Justices in *Miller* recognized the decision for what it was—nothing short of revolutionary. Chief Justice Roberts posited

74. *Id.* at 2463–64.

75. *Id.*

76. *Id.* at 2466 (citation omitted) (quoting *Graham v. Florida*, 560 U.S. 48, 70 (2010)).

77. *Id.* (“[T]he mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law’s harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham’s* (and also *Roper’s*) foundational principle: that imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.”).

78. *See, e.g., Chambers v. State*, 831 N.W.2d 311, 328–31 (Minn. 2013) (holding *Miller* is procedural and not retroactive), *abrogated by Montgomery v. Louisiana*, 135 S. Ct. 718, 736 (2016) (holding *Miller* is substantive and retroactive).

that “[t]he principle behind today’s decision seems to be *only* that because juveniles are different from adults, they must be sentenced differently,”⁷⁹ and that such a principle and the process the majority employed in applying it “has no discernible end point.”⁸⁰ Similarly, Justice Thomas wrote that *Miller* “lays the groundwork for future incursions on the States’ authority to sentence criminals.”⁸¹

Beyond the fact that the dissenting Justices recognized the breadth of the decision, there are at least four reasons why an expansive reading is warranted. First, the *Miller* decision (and the work that the *Graham* Court had done in laying the foundation for *Miller*) was an enormous break from Eighth Amendment precedent dealing with non-death sentences. The Court made this break because it was dealing with children. Prior to *Graham*, the Court had not invalidated a custodial sentence since its 1983 decision in *Solem v. Helm*.⁸² In the three decades between *Solem* and the culmination of the *Miller* trilogy, the Court examined other proportionality challenges to equally draconian custodial sentences and rejected the inmate’s challenge in each instance.⁸³ Equally important, the Court historically had made clear that the bar for making such a challenge was an incredibly high one: “Although ‘no penalty is *per se* constitutional,’ the relative lack of objective standards concerning terms of imprisonment has meant that ‘[o]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [are] exceedingly rare.”⁸⁴ Thus, the mere fact that the Court agreed with a defendant’s proportionality challenge outside the death penalty context in the *Graham* and *Miller* decisions renders the decisions monumental in their own right.

Second, the *Miller* opinion insists that a child’s developmental environment matters at sentencing, and thus state actors cannot comply with the decision in a perfunctory manner. The *Miller* Court explained that mandatory life without parole “precludes consideration of [the juvenile’s] 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

79. *Miller*, 132 S. Ct. at 2482 (Roberts, C.J., dissenting) (emphasis added).

80. *Id.* at 2481.

81. *Id.* at 2486 (Thomas, J., dissenting).

82. *See generally* *Solem v. Helm*, 463 U.S. 277 (1983) (finding unconstitutional a life without parole sentence under a South Dakota recidivist statute for a defendant who passed a bad check).

83. *See generally* *Ewing v. California*, 538 U.S. 11 (2003) (rejecting petitioner’s proportionality challenge to a sentence of 25 years to life under state’s three strikes law); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (rejecting petitioner’s proportionality challenge to a sentence of mandatory term of life in prison without the possibility of parole for possessing more than 650 grams of cocaine).

84. *Harmelin*, 501 U.S. at 1001 (alteration in original) (citation omitted) (quoting *Solem*, 463 U.S. at 289–90).

dysfunctional.”⁸⁵ Mandatory life without parole also precludes the sentencer from considering the role that the juvenile played in the crime and whether he may have been charged with a lesser crime but for his immaturity and incompetency in navigating the criminal justice process.⁸⁶ Thus, according to the *Miller* Court, context matters—both life context and crime context—and the sentencer must take both into account before imposing the harshest sentence upon a juvenile.

Relatedly, the *Miller* Court made clear that in order to appreciate the context in which the juvenile has committed a homicide crime (or at least been convicted of one), states must employ a process that allows the defendant to explain his life context. The majority explained that “the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations.”⁸⁷ Further, it noted that, since the early 1980s, the Court had recognized youth itself as a relevant mitigating factor at sentencing and that “[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered’ in assessing his culpability.”⁸⁸ Thus, *Miller* demands an expansive reading because the decision is so heavily focused on the juvenile’s developmental context and procedural safeguards that can illuminate that context.

Third, the *Miller* Court continued to emphasize—as the *Roper* and *Graham* Courts had done—science as it relates to juveniles, noting that brain science suggests that children should be treated differently than adults in the criminal justice process. Referring to its earlier decisions in *Roper* and *Graham*, the *Miller* Court explained that those “decisions rested not only on common sense—on what ‘any parent knows’—but on science and social science as well.”⁸⁹ The *Miller* Court went on to reiterate how that science informs legal decisions. The science shows that only a relatively small percentage of juvenile offenders later “develop entrenched patterns of problem behavior.”⁹⁰ The same body of science tells us that juvenile brains have not developed fully, especially in the areas that relate to behavioral control.⁹¹ The science further shows that, because adolescence is “transient” by definition, we can expect

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

86. *Id.* at 2468–69 (“[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings.” (alteration in original) (quoting *Graham v. Florida*, 560 U.S. 48, 78 (2010))).

87. *Id.* at 2466.

88. *Id.* at 2467 (alteration in original) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982)).

89. *Id.* at 2464 (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005)).

90. *Id.* (quoting *Roper*, 543 U.S. at 570).

91. *Id.*

juveniles to possess greater capacity for reform and rehabilitation than their adult counterparts.⁹²

Finally, the *Miller* Court suggested in dicta that it was concerned with juvenile justice practices beyond the juvenile LWOP schemes at issue in that case. The Court spent a significant amount of time responding to the states' claim that youth was already taken into account at the transfer stage and thus need not also be taken into account at the final sentencing stage.⁹³ It explained that many states use mandatory transfer systems and that even in states where the transfer system provides some discretion, it is often "lodge[d] . . . exclusively in the hands of prosecutors . . . [a]nd those 'prosecutorial discretion laws are usually silent regarding standards, protocols, or appropriate considerations for decision-making.'"⁹⁴

The majority went on to explain that, even where judges enjoy some discretion regarding the transfer decision, the system is poorly designed to protect the interests of the child.⁹⁵ Not only does the judge have limited information at the transfer juncture, but the judge often faces extreme choices between a lenient sentence in juvenile court and an extreme one in adult court.⁹⁶ Finally, the *Miller* majority stated that, in light of its reasoning in the *Miller* trilogy, juvenile life without parole should be a rare sentence—even for juveniles who commit homicide.⁹⁷ In doing so, the *Miller* majority made clear that its opinion was an indictment of broader juvenile justice practices and not simply a decision requiring a certain process before states could impose life without parole.

For the reasons discussed above, we must read *Miller* broadly and recognize it as a radical decision aimed at prompting juvenile justice reform.⁹⁸ *Roper* abrogated the Court's relatively recent position on the death penalty for juveniles because science revealed that children were different from a neurological and psychological standpoint.⁹⁹ *Graham* departed from three decades of the Supreme Court rejecting term-of-years proportionality challenges precisely because the case dealt with children. And *Miller* was the apex of these decisions because, again, there the Court concluded that

92. *Id.* at 2464–65.

93. *Id.* at 2474–75.

94. *Id.* at 2474.

95. *Id.*

96. *Id.* at 2474–75.

97. *Id.* at 2469 (“[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.”).

98. *Cf.* Nancy Gertner, *Miller v. Alabama: What It Is, What It May Be, and What It Is Not*, 78 MO. L. REV. 1041 (2013) (exploring the question of whether *Miller* was a watershed opinion and concluding that it was for juveniles but not for Eighth Amendment analysis more generally).

99. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989) (holding that the Eighth Amendment did not prohibit imposing the death penalty on 16- and 17-year-old children), *abrogated by Roper v. Simmons*, 543 U.S. 551 (2005).

“imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.”¹⁰⁰ The *Miller* trilogy represents the Court’s attempt to provide some outer limits on the manner in which children are sentenced and the extent to which they can be exposed to the law’s harshest sentences.

Chief Justice Roberts dismissed the majority’s logic, suggesting that “[t]he principle behind today’s decision seems to be *only* that because juveniles are different from adults, they must be sentenced differently.”¹⁰¹ Indeed, that allegation may be true. But to the extent that it is, the *Miller* decision cannot be said to rest on flimsy chronological line-drawing. Rather, the *Miller* opinion reflects nothing more than a return to the original American mode of sentencing juveniles—a mode recognizing that because children have not yet fully matured they deserve to be treated differently when the state metes out a custodial sentence. This recognition is what shaped the early American juvenile justice system, and it is the basis upon which our society has deemed juveniles unprepared to vote, to purchase alcohol, and to enlist in the military. Thus, the child-centric nature of the *Miller* trilogy calls on states to rethink the manner in which children are treated in criminal proceedings.

IV. THE MILLER REVOLUTION UNDERWAY AND ON THE HORIZON

In the wake of the *Miller* decision, juvenile justice reform is possible—indeed happening—in ways that were inconceivable even 20 years ago.¹⁰² This Part advances the central thesis of the Article: that *Miller*’s moral leadership

100. *Miller*, 132 S. Ct. at 2466.

101. *Id.* at 2482 (Roberts, C.J., dissenting) (emphasis added).

102. Many scholars have begun to explore the ways in which the *Miller* trilogy has opened the door to legislative and judicial reform of juvenile justice practices. See, e.g., Berry, *supra* note 8, at 338–48 (arguing for extension of *Miller* rule to all cases where defendant faces death-in-custody sentence); Amy E. Halbrook, *Juvenile Pariahs*, 65 HASTINGS L.J. 1, 4–7 (2013) (positing that *Miller* undermines the legitimacy of mandatory sex offender registries for juveniles); Janet C. Hoefel, *The Jurisprudence of Death and Youth: Now the Twain Should Meet*, 46 TEX. TECH L. REV. 29, 51–55 (2013) (arguing that *Miller* calls into question current juvenile transfer laws); Emily C. Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper*, Graham & J.D.B., 11 CONN. PUB. INT. L.J. 297, 308–18 (2012) (arguing pre-*Miller* that juvenile life without parole sentences are unconstitutional for felony murder offenses); Scott, *supra* note 10, at 101–03 (suggesting *Miller* requires states to rethink not just sentencing but modes of incarceration and rehabilitation altogether); Sarah A. Kellogg, Note, *Just Grow Up Already: The Diminished Culpability of Juvenile Gang Members After Miller v. Alabama*, 55 B.C. L. REV. 265, 266–68 (2014) (*Miller* calls into question general legislation designed to address gang crime as it applies to juveniles.); Mariko K. Shitama, Note, *Bringing Our Children Back from the Land of Nod: Why the Eighth Amendment Forbids Condemning Juveniles to Die in Prison for Accessorial Felony Murder*, 65 FLA. L. REV. 813, 845–53 (2013) (arguing post-*Miller* that juvenile life without parole sentences are unconstitutional for felony murder offenses for same); Andrea Wood, Comment, *Cruel and Unusual Punishment: Confining Juveniles with Adults After Graham and Miller*, 61 EMORY L.J. 1445, 1482–85 (2012) (suggesting *Miller* requires states to rethink not just sentencing but modes of incarceration and rehabilitation altogether).

has enabled revolutionary changes to juvenile justice policy and practice in this country. It proceeds in two Subparts. In the first Subpart, I make the case for two immediate corollaries that flow from *Miller*: (1) the creation of procedural safeguards for children facing LWOP comparable to those recommended for adults facing the death penalty; and (2) the elimination of mandatory minimums for children altogether. While these shifts in juvenile justice practice may be radical, they are readily defensible post-*Miller*. In the second section, I turn to the juvenile justice frontier and articulate several revolutionary changes that can and should be explored post-*Miller*. Specifically, I address mandatory transfer laws, presumptive sentencing guidelines as they apply to children, and juvenile conditions of confinement.

A. THE MILLER REVOLUTION UNDERWAY

In this Subpart, I argue that two juvenile sentencing reform measures, while groundbreaking, flow directly from the *Miller* decision and are readily achievable if not already underway: (1) the creation of procedural safeguards for children facing LWOP comparable to those recommended for adults facing the death penalty; and (2) and the elimination of mandatory minimums for children altogether. I discuss each claim in greater detail below.

1. *Miller* Suggests a *Wiggins* Requirement for Juveniles Facing LWOP

Recognizing that death is distinct from custodial sentences,¹⁰³ the Supreme Court has established constitutionally required procedural safeguards in the capital sentencing context.¹⁰⁴ Children now have a constitutional right to similar safeguards because in *Graham*, and especially *Miller*, the Court treated LWOP as tantamount to the death penalty for children.¹⁰⁵ When the state seeks to impose life without parole upon a juvenile homicide defendant, the state court judge should ensure that the child facing that sentence has a right to representation on par with that of a capital defendant¹⁰⁶—qualified counsel, a team that includes a mitigation specialist, and perhaps more specific juvenile expertise.¹⁰⁷

103. *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (“[E]xecution is the most irremediable and unfathomable of penalties . . . death is different.”) (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)).

104. *See infra* notes 119–37 and accompanying text.

105. David Siegel, *What Hath Miller Wrought: Effective Representation of Juveniles in Capital-Equivalent Proceedings*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 363, 363–64 (2013).

106. To be sure, there are many places in the country where courts do not adequately safeguard the rights to which capital defendants are entitled. My point here is that, to the extent that the Supreme Court has articulated the right of effective representation for capital defendants, that same articulation now applies to children facing life without parole.

107. *See generally* GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES (AM. BAR ASS’N 2003).

i. Procedural Safeguards in the Death Penalty Context

The Supreme Court first established the constitutional standard for review of ineffective assistance of counsel claims in *Strickland v. Washington*.¹⁰⁸ Clients challenging the efficacy of their representation under *Strickland* are required to show that: (1) counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense.¹⁰⁹ In terms of the first prong, the Court has identified certain minimum attributes of effective representation, such as maintaining conflict-free representation, consulting the client on major decisions, keeping the client informed of developments in the case, and bringing to bear the skill necessary to subject the outcome of the case to adversarial testing.¹¹⁰

Beyond these threshold components, though, the Court has been reticent to define the contours of defense counsel's specific obligations under the first prong of *Strickland*. As the *Strickland* Court explained: "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. More specific guidelines are not appropriate. . . . The proper measure of attorney performance remains simply reasonableness under prevailing professional norms."¹¹¹

As for the second prong of the *Strickland* test, the Supreme Court has imposed an incredibly high burden—indeed, some have argued insurmountable burden¹¹²—upon clients claiming ineffective assistance. The *Strickland* Court explained that "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."¹¹³ Analysis under this prong should be highly deferential to defense counsel and the range of judgment calls that counsel are required to make.¹¹⁴

108. *Strickland v. Washington*, 466 U.S. 668 (1984).

109. *Id.* at 687.

110. *Id.* at 687–88.

111. *Id.* at 688 (explaining that ABA Standards may serve as "guides" for determining objectively reasonable performance).

112. See, e.g., Stephen F. Smith, *Taking Strickland Claims Seriously*, 93 MARQ. L. REV. 515, 518–26 (2009) (explaining the *Strickland* test and identifying its flaws in application); see also *id.* at 526 ("Courts rarely reverse convictions for ineffective assistance of counsel, even if the defendant's lawyer was asleep, drunk, unprepared, or unknowledgeable. In short, any 'lawyer with a pulse will be deemed effective.'" (quoting Stephanos Bibos, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 1 (footnote omitted))).

113. *Strickland*, 466 U.S. at 694.

114. *Id.* at 689 ("Judicial scrutiny of counsel's performance must be highly deferential A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's

Under this approach, the Court has rejected *Strickland* claims where defense counsel refused to cooperate in presenting perjured testimony;¹¹⁵ where defense counsel appeared by speakerphone at a plea hearing;¹¹⁶ where defense counsel advised a quick no-contest plea without first filing a motion to suppress one of defendant's confessions;¹¹⁷ and where a trial court prevented the defendant from conferring with counsel between direct and cross-examination.¹¹⁸ Lower courts have followed suit, applying *Strickland* in a way that largely insulates defense counsel from ineffective assistance of counsel claims.¹¹⁹

Despite this generally deferential standard for defense counsel, the Court has applied the *Strickland* test with more bite in the capital context. The Supreme Court has emphasized in a series of cases that capital defense counsel have a special obligation to gather and present mitigating evidence that may persuade a jury to spare the defendant's life. In *Williams v. Taylor*, defense counsel failed to discover and present evidence related to Williams' childhood abuse and neglect; his parents' imprisonment for that abuse; his abusive experience in foster care while his parents were incarcerated; and evidence that he was borderline mentally retarded and had suffered several head injuries.¹²⁰ In applying the *Strickland* test, the Court held that counsel's representation of Williams had been deficient and that the inefficacy prejudiced the outcome of his case.¹²¹

conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" (citation omitted) (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)); see also *Lockhart v. Fretwell*, 506 U.S. 364, 368–71 (1993) (explaining that the central question in *Strickland* claims is whether counsel's performance compromised defendant's right to a fair trial).

115. See *Nix v. Whiteside*, 475 U.S. 157, 186–87 (1986) (Blackmun, J., concurring) ("To the extent that Whiteside's claim rests on the assertion that he would have been acquitted had he been able to testify falsely, Whiteside claims a right the law simply does not recognize. . . . Since Whiteside was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice." (citation omitted)).

116. See *Wright v. Van Patten*, 552 U.S. 120, 125–26 (2008) (per curiam) (finding that lower court's determination on the issue was not an unreasonable application of law and thus denying petitioner's request for habeas relief).

117. See *Premo v. Moore*, 562 U.S. 115, 122–25 (2011). "In determining how searching and exacting their review must be, habeas courts must respect their limited role in determining whether there was manifest deficiency in light of information then available to counsel." *Id.* at 125.

118. See *Perry v. Leeke*, 488 U.S. 272, 283–85 (1989).

119. See, e.g., *Halverson v. State*, 372 N.W.2d 463, 466 (S.D. 1985) ("Halverson's allegations as to ineffective counsel fail. He has not shown by a preponderance of the evidence that a different result would have occurred if his attorney had been awake at the arraignment and objected when the state's attorney made a plea for a longer sentence."); *Moore v. State*, 227 S.W.3d 421, 426 (Tex. App. 2007) (rejecting *Strickland* claim on basis of attorney falling asleep during state's cross-examination of defendant).

120. *Williams v. Taylor*, 529 U.S. 362, 370 (2000).

121. *Id.* at 399.

Four years later, the Court again found defense counsel's performance ineffective in the capital case of *Wiggins v. Smith*.¹²² In that case, defense counsel failed to put on any evidence regarding the defendant's childhood, which was marked by neglect, an alcoholic mother, repeated foster home stints, long absences from school, and at least one episode of being abandoned for days with no food.¹²³ The Court held that counsel did not comport with prevailing standards of performance. In reaching its conclusion, the Court referred both to standard practice in Maryland at the time of defendant's trial and to the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("Guidelines").¹²⁴ The *Wiggins* Court explained:

The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." Despite these well-defined norms, however, counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources.¹²⁵

Scholars have recognized that the *Wiggins* Court "promoted a longstanding guideline of the ABA—that capital counsel thoroughly explore the social background of the defendant—to the level of constitutional mandate."¹²⁶ And in the wake of *Wiggins*, the Supreme Court has continued to emphasize the importance of mitigating evidence in capital trials.¹²⁷

In addition to the emphasis on mitigation, there are two other aspects to capital defense that are relevant to children facing LWOP and the lawyers representing them. First, capital defense counsel must be attuned to the question of whether their client is intellectually disabled and thus ineligible for the death penalty under *Atkins v. Virginia*.¹²⁸ The *Atkins* Court employed clinical definitions of intellectual disability and noted that they "require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that

122. *Wiggins v. Smith*, 539 U.S. 510 (2003).

123. *Id.* at 525.

124. *Id.* at 524–25.

125. *Id.* at 524 (citation omitted).

126. *Leading Cases*, 117 HARV. L. REV. 226, 282 (2003); see also Cara H. Drinan, *The Revitalization of Ake: A Capital Defendant's Right to Expert Assistance*, 60 OKLA. L. REV. 283, 298–300 (2007) (discussing the interplay of *Wiggins* and *Ake*).

127. See, e.g., *Porter v. McCollum*, 558 U.S. 30, 42–44 (2009) (holding that defense counsel's failure to uncover and present mitigation evidence regarding defendant's mental health, family background, and military service was deficient).

128. *Atkins v. Virginia*, 536 U.S. 304, 311–12, 321 (2002) (holding that execution of the intellectually disabled is cruel and unusual punishment).

became manifest before age 18.”¹²⁹ Since *Atkins*, states have developed their own definitions of intellectual disability for *Atkins* purposes.¹³⁰ Defense counsel is obligated to explore whether the defendant’s social history presents a possible *Atkins* claim. If so, special, nonlegal expertise will be required.¹³¹

Finally, in capital cases where “the defendant’s mental condition is seriously in question,” the defendant has a constitutional right to expert psychiatric assistance at the state’s expense if necessary.¹³² In *Ake v. Oklahoma*, the Supreme Court recognized that, when the state relies upon expert testimony to secure a death sentence, the defendant must have an adequate opportunity to rebut that expert testimony.¹³³ In *Ake*’s case, defense counsel requested funding to secure a psychiatric determination of his sanity at the time of the crime.¹³⁴ The trial court denied the funds, and the state not only convicted *Ake*, but also used psychiatric expertise to prove at sentencing that he posed a future danger to society.¹³⁵ The jury sentenced *Ake* to death.¹³⁶ The *Ake* Court held that this denial of expert assistance worked a fundamental unfairness in *Ake*’s trial and that the due process clause required state-funded expert assistance on such facts.¹³⁷ Since *Ake*, indigent defendants have argued for, and have obtained, state-funded experts to testify on a wide range of psychiatric issues.¹³⁸

Thus, in capital cases, the Supreme Court has imposed enhanced procedural safeguards to ensure the fairness of the trial and its outcome. As discussed above, the *Strickland* test applies with its greatest force in the capital context; the *Atkins* decision imposes upon capital defense counsel a heightened duty to explore clients’ intellectual disabilities; and the *Ake* decision requires states to fund psychiatric experts when necessary in capital trials. Because the Supreme Court has treated LWOP for children as tantamount to the death penalty, these procedural safeguards now apply to children facing LWOP.

129. *Id.* at 318; see also John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J.L. & PUB. POL’Y 689, 694–97 (2009) (describing the clinical definitions and the *Atkins* framework).

130. Blume et al., *supra* note 129, at 697–703 (highlighting the flaws in many of these definitions).

131. See, e.g., Nancy Haydt, *Intellectual Disability: A Digest of Complex Concepts in Atkins Proceedings*, CHAMPION, Jan.–Feb. 2014, at 44 (arguing that too many ill-qualified individuals are permitted to testify as so-called *Atkins* experts and identifying skills and training that mental health professionals must have for *Atkins* expert status); *id.* at 45. (“Because intellectual disability is a clinical diagnosis, *Atkins* proceedings require expert testimony.”).

132. *Ake v. Oklahoma*, 470 U.S. 68, 82–83 (1985).

133. *Id.* at 81–82.

134. *Id.* at 72.

135. *Id.* at 72–73.

136. *Id.* at 73.

137. *Id.* at 80–83.

138. Drinan, *supra* note 126, at 287–88 (describing the expansion of the *Ake* entitlement outside the capital context and outside the psychiatric context).

ii. *The Miller Court Treated LWOP Like a Death Sentence for Kids*

Graham and *Miller* suggest that LWOP for children is tantamount to the death penalty. In *Graham*, the Court employed its categorical approach in assessing *Graham*'s proportionality challenge—an approach it had previously reserved for capital cases.¹³⁹ In assessing *Graham*'s challenge, the Court noted that “[LWOP] sentences share some characteristics with death sentences” in that “the sentence alters the offender’s life by a forfeiture that is irrevocable.”¹⁴⁰ Further, the *Graham* Court recognized that LWOP as applied to children is especially harsh, noting that “a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.”¹⁴¹

The *Miller* Court further developed the concept that LWOP for children is akin to the death penalty. Citing *Woodson v. North Carolina*,¹⁴² where the Court held unconstitutional a mandatory death sentence for first degree murder, the *Miller* Court recognized that in capital cases it “has required sentencing authorities to consider the characteristics of a defendant and the details of his offense before sentencing him to death.”¹⁴³ The Court then noted that, because “*Graham* . . . likened life without parole for juveniles to the death penalty itself,” the same individualized sentencing requirement must pertain when a juvenile faces an LWOP sentence.¹⁴⁴ In exposing the constitutional infirmity of mandatory LWOP schemes, the *Miller* Court explained that youth itself is “more than a chronological fact” and may be the most powerful mitigating factor available to a defendant.¹⁴⁵

The Court has now joined these two lines of precedent—the line elevating mitigation to a constitutional requirement for capital defendants and the line treating LWOP as tantamount to a death sentence for children.

139. *Graham v. Florida*, 560 U.S. 48, 60–62 (2010).

140. *Id.* at 69.

141. *Id.* at 70.

142. *Woodson v. North Carolina*, 428 U.S. 280 (1976).

143. *Miller v. Alabama*, 132 S. Ct. 2455, 2458 (2012).

144. *Id.* at 2463–64.

145. *Id.* at 2467 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)); *see also id.* at 2468 (“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 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.” (citations omitted)).

Accordingly, state court judges should ensure that juveniles facing LWOP receive representation on par with best practices for death penalty representation. In other words, the same enhanced procedural safeguards required for capital cases now apply to cases where children face LWOP.

iii. *Wiggins/Atkins/Ake for Kids*

What exactly should enhanced procedural safeguards for children facing LWOP look like? The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (“Guidelines”) provide a good starting point, as the Court has incorporated the Guidelines into its Sixth Amendment efficacy analysis.¹⁴⁶ To begin, the Guidelines state that defense counsel in capital cases must have sufficient training and expertise in capital representation.¹⁴⁷ They also highlight the importance of mitigation evidence through standards that require defense counsel to have sufficient skill in investigating and presenting mitigation evidence, as well as experience working with expert witnesses, especially mental health experts.¹⁴⁸

Given the complexity of capital cases, even qualified defense counsel cannot work alone. The Guidelines describe a “Defense Team,” which includes lead counsel and at least one associate counsel.¹⁴⁹ Lead counsel is then advised to retain as additional members of the Team: “at least one mitigation specialist and one fact investigator; at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments; and any other members needed to provide high quality legal representation.”¹⁵⁰ The Commentary to the Guidelines makes clear that the Team described in the Standard is a minimum and that lead counsel is responsible for ensuring that other members will be added to the team if additional skill and expertise are required (or if funds are not available, the issue is at least preserved for appeal).¹⁵¹

In sum, the Guidelines set forth a standard for high-quality legal representation in the death penalty setting, including a team of relevant specialists working to buttress the legal skills of qualified counsel. Because the Supreme Court has treated LWOP for kids as analogous to a death sentence for adults, it then follows that juveniles facing LWOP should enjoy protections analogous to those set forth in the Guidelines. This imposes several obligations upon states trying juveniles for crimes that carry possible LWOP

146. See generally GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES (AM. BAR ASS’N 2003).

147. *Id.* §§ 5.1, 8.1.

148. *Id.* § 5.1.

149. *Id.* § 10.4(A).

150. *Id.* § 10.4(C).

151. *Id.* § 10.4 cmt.

sentences. First, just as the Guidelines require that defense counsel in capital cases have sufficient training and expertise in capital representation,¹⁵² juveniles facing an LWOP sentence should also have counsel experienced in the representation of juveniles facing adult sentences in adult court.¹⁵³ The National Juvenile Defender Center has promulgated standards that address in great detail the obligations of counsel representing juveniles from initial client contact through the pretrial process, at adjudicatory hearings, and when the client faces the risk of adult prosecution.¹⁵⁴ For a juvenile facing a murder charge in adult court and an LWOP sentence, Standard 8.1 is most relevant. It says that “[s]pecialized training and experience are prerequisites to providing effective assistance of counsel to youth facing adult prosecution.”¹⁵⁵ Such training and experience are required because the lawyer must be familiar with the process by which the juvenile defendant will be transferred out of juvenile court; the presumption for or against keeping the defendant in juvenile court; and adult criminal court rules.¹⁵⁶

Counsel must also have specialized training in child and adolescent development so that she can educate the court as to how youth alone places a defendant at a significant disadvantage in the criminal justice process. For example, the Supreme Court has acknowledged what “any parent knows:”¹⁵⁷ that children are less mature and less responsible than adults; that children do not have the same capacity to appreciate the long-term consequences of their decisions; and that children may be overwhelmed by potentially coercive environments, even when a reasonable adult would not be.¹⁵⁸ Competent counsel for a juvenile facing LWOP must be able to explain her client’s developmental issues and the impact they have on her client’s competency to stand trial, to assist with their own defense, and to endure adult protocols and facilities.¹⁵⁹

152. *Id.* §§ 5.1, 8.1.

153. Expertise in juvenile representation is required whenever a child faces detention. For example, even in a discretionary transfer hearing, the lawyer must have experience with, and ability to explain, juvenile rehabilitation to a judge. *See generally* Thomas F. Geraghty & Will Rhee, *Learning from Tragedy: Representing Children in Discretionary Transfer Hearings*, 33 WAKE FOREST L. REV. 595 (1998). Because a child would only face an LWOP sentence in adult court, I am not addressing the issues of representation in juvenile delinquency proceedings, an issue fraught with its own challenges. *See generally* Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child’s Counsel in Delinquency Cases*, 81 NOTRE DAME L. REV. 245 (2005).

154. *See generally* NAT’L JUVENILE DEF. STANDARDS (NAT’L JUVENILE DEF. CTR. 2012).

155. *Id.* § 8.1.

156. *Id.* § 8.1(a).

157. *Roper v. Simmons*, 543 U.S. 551, 569 (2005).

158. *J. D. B. v. North Carolina*, 564 U.S. 261, 272–73 (2011).

159. NAT’L JUVENILE DEF. STANDARDS §§ 8.1(b)–(d); *see also id.* § 8.6 (“Upon determination that the client will be prosecuted in adult court, counsel must zealously oppose placement of the client in adult jail or detention. Counsel must be aware of and raise the risks associated with incarcerating young people among adults, and be able to propose alternative placements in the juvenile justice system and/or release of the client on bail.”).

Related, counsel for a juvenile defendant facing LWOP must be able to communicate with her client in a “developmentally appropriate” way regarding a number of key issues.¹⁶⁰ She must be able to discuss with her client the transfer process and all of its components, including factors relevant to the transfer decision such as whether to participate in diagnostic programs, and the severe consequences that can attach if the defendant is tried as an adult.¹⁶¹ Counsel should also be able to discuss sentencing possibilities in an appropriate way. Many juveniles serving extreme custodial sentences have reported that they simply did not appreciate the meaning of a lengthy sentence—either they did not think they would actually serve such a long time or they simply could not grasp what such a sentence would entail.¹⁶² Thus, competent counsel will have the specialized training and experience to communicate with and represent a juvenile facing an LWOP sentence.

Second, the same emphasis that *Wiggins* put upon mitigation for capital representation should apply to the representation of juveniles facing LWOP. In fact, the sentencing phase of a capital trial entails an inquiry comparable to that described by the *Miller* Court for children facing LWOP. The Eighth Amendment requires that the sentencer in a capital case be able to consider *all* relevant mitigation evidence: “A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.”¹⁶³ Similarly, the *Miller* Court condemned mandatory imposition of LWOP on children:

Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender’s age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one.¹⁶⁴

According to *Miller*, before imposing LWOP on a juvenile, a sentencing body must consider: (1) the aspects of youth itself that may explain the criminal act, the defendant’s reduced culpability, and the defendant’s compromised ability to participate in his own defense;¹⁶⁵ (2) the defendant’s

160. *Id.* § 8.2 (“Counsel must use developmentally appropriate language to fully advise the client of the procedures that may lead to adult prosecution and the various ways that the state could proceed.”).

161. *Id.* § 8.2, cmt.

162. AMNESTY INT’L & HUMAN RIGHTS WATCH, *THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES* 52–53 (2005), <https://www.amnesty.org/en/documents/AMR51/162/2005/en> (citing examples of juvenile defendants who simply did not grasp what a life sentence would entail).

163. *Jurek v. Texas*, 428 U.S. 262, 271 (1976).

164. *Miller v. Alabama*, 132 S. Ct. 2455, 2767–68 (2012).

165. *Id.* at 2468 (“Mandatory life without parole for a juvenile precludes consideration of

family and home environment;¹⁶⁶ and (3) the circumstances of the homicide offense, including the extent to which accomplices and external influences were involved.¹⁶⁷ This inquiry into relevant mitigation, as described by the *Miller* Court, mirrors the mitigation inquiry of a capital trial's sentencing phase.

In order to gather and prepare such mitigation evidence, counsel for a juvenile defendant facing LWOP will need team members comparable to those contemplated by the ABA guidelines for death penalty cases.¹⁶⁸ At a minimum, this means that the team should include a mitigation specialist and some member who is trained to screen for mental health issues.¹⁶⁹ A mitigation specialist is tasked with an enormous job. She is responsible for conducting a comprehensive investigation of the defendant's life history, including family and educational background, biological issues, psychological issues, and social environment.¹⁷⁰ To compile this history, the mitigation specialist typically needs to conduct repeated, extensive interviews with the defendant and his family members,¹⁷¹ as well as other individuals who can illuminate the defendant's life, such as friends, doctors, teachers, and employers.¹⁷² The mitigation specialist will also need to do an exhaustive review of all relevant documents and records in the defendant's life history—such as medical records, school records, and behavioral records during periods of incarceration.¹⁷³ These records may reveal that the defendant had

his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.”); *see also id.* (stating that mandatory LWOP “ignores that [a defendant] 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”).

166. *Id.* (stating that mandatory LWOP “prevents taking into account the family and home environment that surrounds [a defendant]—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional”).

167. *Id.* (stating that mandatory LWOP “neglects the circumstances of the homicide offense, including the extent of [a defendant’s] participation in the conduct and the way familial and peer pressures may have affected him”).

168. *See supra* notes 149–51 and accompanying text.

169. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES § 10.4(C)(2) (AM. BAR. ASS’N 2003).

170. Daniel L. Payne, *Building the Case for Life: A Mitigation Specialist as a Necessity and a Matter of Right*, 16 CAP. DEF. J. 43, 45–48 (2003).

171. Interviewing the defendant's family members can be especially complex and time-consuming. *See id.* at 46 (“The family will likely have firsthand knowledge of many of the events in the defendant's life and can detail many of the most traumatic experiences of the defendant's childhood. Unfortunately, this group often can be the least likely to give a complete and accurate description of a defendant's life because they do not want to believe that their own shortcomings in raising and relating to the defendant were in any way responsible for his criminal activity. Multiple visitations are often required to convince these people that the mitigation evidence that they can offer will not shift the blame to them, but rather offer an explanation of the circumstances that led to the crime that may be useful in saving the defendant's life.” (citations omitted)).

172. *Id.* at 47.

173. *Id.*

intellectual impairments from an early age, suggesting a need for further testing; or they may indicate that the defendant suffered abuse at an early age that could have shaped his behavior and criminal conduct. Only a mitigation specialist can properly conduct this time-intensive inquiry,¹⁷⁴ and it may generate evidence that is lifesaving for the capital defendant or juvenile defendant facing LWOP.

Just as the Guidelines state that death penalty counsel should retain “any other members needed to provide high quality legal representation,”¹⁷⁵ this is also true in juvenile LWOP cases. Because of the unique characteristics of youth, this may require defense counsel to retain an expert who can testify to those features of youth that render a juvenile defendant less culpable and more amenable to rehabilitation. In the same way that *Atkins* experts have emerged to educate courts regarding intellectually disabled capital defendants, there may be a need for “*Miller* experts” to educate courts regarding youthful defendants facing LWOP. A so-called *Miller* expert could address a wide range of issues related to youthful defendants and their involvement in the criminal justice system. For example, a *Miller* expert could testify to the following mitigating facts: that youth are biologically less culpable than adult defendants;¹⁷⁶ that youth are more likely to commit crimes out of peer pressure and circumstantial factors than adults;¹⁷⁷ that the majority of youthful offenders will outgrow their unlawful behavior;¹⁷⁸ and that incarceration in adult prison not only fails to rehabilitate youth, but actually has a criminogenic effect on them.¹⁷⁹ Finally, under *Ake*, counsel representing a juvenile facing LWOP should argue, if necessary, that state funds are required to compensate a mitigation specialist or a *Miller* expert

174. *Id.* at 48–49. (“Because only an individual with education and experience in social work is qualified to make a thorough and complete investigation into a defendant’s biosocial and psychosocial history, a mitigation specialist is the only individual who can sufficiently complete this type of investigation in a capital case. Furthermore, the need for a detailed investigation into a defendant’s records and repeated interviews with those who have contact with the defendant effectively precludes any other member of the defense team from being able to complete the mitigation investigation.” (citations omitted)).

175. GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEF. COUNSEL IN DEATH PENALTY CASES § 10.4.

176. See generally Beatriz Luna, *The Relevance of Immaturities in the Juvenile Brain to Culpability and Rehabilitation*, 63 HASTINGS L.J. 1469 (2012).

177. Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 830 (2003) (“[Y]ouths are likely to act more impulsively and to weigh the consequences of their options differently from adults, discounting risks and future consequences, and over-valuing (by adult standards) peer approval, immediate consequences, and the excitement of risk taking.”).

178. *Id.* at 834 (“Most youths will outgrow their inclination to get involved in crime and mature into persons who do not reject the law’s values.”).

179. Robert E. Pierre, *Adult System Worsens Juvenile Recidivism, Report Says*, WASH. POST (Nov. 30, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/11/29/AR2007112901936.html>.

because only with such expertise can the defendant have a fair trial consistent with the *Miller* Court directives.

Recognizing the specialized nature of juvenile representation in LWOP proceedings, the Campaign for the Fair Sentencing of Youth released standards for the practice in 2015.¹⁸⁰ The first of its kind, Trial Defense Guidelines: Representing a Child Client Facing a Possible Life Sentence (“Trial Defense Guidelines”) draws heavily on the best practices articulated in the ABA Death Penalty Guidelines and the National Juvenile Defense Standards discussed above. The new Trial Defense Guidelines address basics such as the necessary members of a legal team representing a child client facing a possible life sentence, including two attorneys, an investigator, and a mitigation specialist.¹⁸¹ But the Trial Defense Guidelines also set forth detailed qualifications for each team member, the most important of which is that each member “will advocate zealously for a sentence other than life.”¹⁸² Moreover, the Trial Defense Guidelines address challenges such as managing interaction with the child-client’s family and ensuring that the child-client be held in a juvenile facility until the maximum age allowed and that he receive “legally mandated safety protections.”¹⁸³ The Trial Defense Guidelines are comprehensive and ambitious,¹⁸⁴ and they provide practitioners in this field a practical way to implement the constitutional arguments advanced in this Part of the Article.

In sum, the *Miller* Court joined two lines of precedent: the line of cases elevating mitigation to a constitutional requirement in capital cases, and the line of cases treating LWOP for children as comparable to the death penalty for adults. As a result, children facing LWOP now have a right to enhanced procedural safeguards on par with what the Court has laid out for capital defendants, and as reflected in the newly released Trial Defense Guidelines. By ensuring that juveniles facing LWOP have representation that meets these standards, state court judges can guarantee that juveniles facing LWOP receive an individualized sentence as contemplated by the *Miller* Court, and that LWOP is imposed only in the most extreme cases.¹⁸⁵

180. See generally THE CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, TRIAL DEFENSE GUIDELINES: REPRESENTING A CHILD CLIENT FACING A POSSIBLE LIFE SENTENCE (2015), <http://fairsentencingofyouth.org/wp-content/uploads/2015/03/Trial-Defense-Guidelines-Representing-a-Child-Client-Facing-a-Possible-Life-Sentence.pdf>.

181. *Id.* § 1.1.

182. *Id.*

183. See *id.* §§ 1.4, 2.8.

184. The Guidelines are also very new, and they have yet to be cited by any court (at least according to a Westlaw search performed by the author on February 1, 2016). Nonetheless, counsel should urge courts to adopt the Guidelines as the relevant standard for implementing the mandate of the *Miller* decision.

185. Cf. *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (“Because that holding is sufficient to decide these cases, we do not consider Jackson’s and Miller’s alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those

2. *Miller* Signals the End to Juvenile Mandatory Minimums

Since the *Miller* decision, states' responses—both legislative and judicial—have run the gamut. Some states have responded in salutary ways by enacting reforms that address not just the immediate requirements of *Miller*, but also the animating principles of the decision. However, other states have enacted legislation that may comply with a hyper-technical reading of *Miller*, but eviscerate its larger message regarding the diminished culpability of children. This section surveys the spectrum of responses to the question of what sentences are permissible post-*Miller*. Having done so, I argue that *Miller* should be read to preclude mandatory minimums for juveniles, and thus legislation that simply replaces juvenile LWOP with alternative mandatory sentences, especially steep ones, violates *Miller*.

i. *The Spectrum of State Responses*

In the last four years, states have responded to *Miller* in a wide variety of ways. While *Miller* presented many issues of implementation for lower courts and legislatures,¹⁸⁶ in this Article I am particularly interested in how states have answered the following question: if *Miller* holds that juveniles convicted of homicide may not be sentenced to mandatory LWOP, what sentence is permissible for a juvenile homicide defendant?

Some states have heeded the call of the *Miller* Court and have comprehensively reconsidered LWOP and extreme custodial sentences as they apply to children. To begin, nine states have abolished juvenile LWOP, and three more have banned it for some categories of juveniles.¹⁸⁷ Two of these states—West Virginia and Delaware—also provide for ongoing, periodic review of children serving lengthy custodial sentences.¹⁸⁸ Under West Virginia's new law, a juvenile convicted of an offense that would otherwise

14 and younger. But given 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.").

186. Two issues have been particularly vexing for actors implementing *Miller*. First, lower courts have been split on the question of whether *Miller* applies retroactively, though the Supreme Court just resolved that issue. See *supra* note 6. Second, courts have grappled with whether *Miller* also sweeps more broadly than LWOP sentences and addresses mandatory life sentences and mandatory term-of-years sentences that are tantamount to life sentences. Compare *Goins v. Smith*, 556 Fed. Appx. 434, 440 (6th Cir. 2014) (affirming juvenile defendant's 84-year sentence post-*Graham* and *Miller*), with *Bear Cloud v. State*, 334 P.3d 132, 141–42 (Wyo. 2014) (holding that aggregate sentence of more than 45 years was de facto LWOP and was barred by *Miller*).

187. See generally THE SENTENCING PROJECT, SLOW TO ACT: STATE RESPONSES TO 2012 SUPREME COURT MANDATE ON LIFE WITHOUT PAROLE 2 (2014) (listing Hawaii, Massachusetts, Texas, West Virginia, and Wyoming as states that have abolished juvenile LWOP post-*Miller*), http://sentencingproject.org/doc/publications/jj_State_Responses_to_Miller.pdf; see also *Two Years Since Miller v. Alabama*, CAMPAIGN FOR FAIR SENT'G YOUTH (June 25, 2014), <http://fairsentencingofyouth.org/2014/06/25/two-years-since-miller-v-alabama>.

188. See H.B. 4210, 82d Leg., 1st Sess. (W. Va. 2014); S.B. 9, 147th Gen. Assemb., Reg. Sess. (Del. 2013).

permit an LWOP sentence is eligible for parole review after serving 15 years. The West Virginia law also requires the sentencing court to consider a comprehensive list of mitigating factors drawn from the *Miller* Court's language before imposing any sentence on a juvenile transferred to adult criminal court.¹⁸⁹ Similarly, Delaware's new law precludes LWOP for juveniles and instructs the sentencing judge to exercise discretion when imposing a juvenile homicide sentence in light of the mitigating aspects of youth addressed in *Miller*.¹⁹⁰ The new legislation also applies retroactively, thereby entitling Delaware inmates currently serving an LWOP sentence for a juvenile crime to a resentencing hearing.¹⁹¹

Some state supreme courts have also read *Miller* broadly. The Massachusetts high court held that *Miller* applies retroactively and precludes juvenile LWOP under any circumstance,¹⁹² and the Iowa Supreme Court, applying the *Miller* framework, held that all mandatory minimums for juveniles are unconstitutional.¹⁹³ These legislative and judicial responses reflect a holistic interpretation of the *Miller* decision and its motivating rationales.

189. W. Va. H.B. 4210 (codified at W. VA. CODE §§ 61-11-23(c)(1-15)) (listing the following 15 factors: "(1) [a]ge at the time of the offense; (2) [i]mpetuosity; (3) [f]amily and community environment; (4) [a]bility to appreciate the risks and consequences of the conduct; (5) [i]ntellectual capacity; (6) [t]he outcomes of a comprehensive mental health evaluation conducted by a mental health professional licensed to treat adolescents in the State of West Virginia . . . ; (7) [p]eer or familial pressure; (8) [l]evel of participation in the offense; (9) [a]bility to participate meaningfully in his or her defense; (10) [c]apacity for rehabilitation; (11) [s]chool records and special education evaluations; (12) [t]rauma history; (13) [f]aith and community involvement; (14) [i]nvolvement in the child welfare system; and (15) [a]ny other mitigating factor or circumstances)." The new legislation similarly sets forth factors that the parole board should take into account when periodically assessing the parole eligibility of juveniles. *See id.* (codified at W. VA. CODE § 62-12-13b(b)) (requiring the parole board to consider "the diminished culpability of juveniles as compared to that of adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner during incarceration" and requiring the board to consider: (1) "educational and court documents; (2) [p]articipation in available rehabilitative and educational programs while in prison; (3) [a]ge at the time of the offense; (4) [i]mmaturity at the time of the offense; (5) [h]ome and community environment at the time of the offense; (6) [e]fforts made toward rehabilitation; (7) [e]vidence of remorse; and (8) [a]ny other factors or circumstances the board considers relevant.").

190. *See* Del. S.B. 9; *see also Delaware Enacts Sentence Review Process for Youth*, CAMPAIGN FOR FAIR SENT'G YOUTH (June 10, 2013), <http://fairsentencingofyouth.org/2013/06/10/delaware-entacts-sentence-review-process-for-youth>.

191. *Delaware Eliminates Death in Prison Sentences for Children*, EQUAL JUST. INITIATIVE (June 13, 2013), <http://www.eji.org/node/779>.

192. *Diatchenko v. Dist. Attorney*, 1 N.E.3d 270, 281-82 (Mass. 2013) (holding that *Miller* applies retroactively and that the Massachusetts Declaration of Rights forbids LWOP sentence for juveniles).

193. *State v. Lyle*, 854 N.W.2d 378, 384, 400 (Iowa 2014) (interpreting the Iowa state constitution to prohibit "all mandatory minimum sentences of imprisonment for youthful offenders"); *see also infra* notes 218-24 and accompanying text.

On the other end of the spectrum, some states have missed the mark by replacing mandatory juvenile LWOP with another mandatory juvenile sentence and, in some cases, still leaving juveniles exposed to an LWOP sentence.¹⁹⁴ For example, two states have enacted post-*Miller* legislation that replaces mandatory LWOP with a mandatory minimum of 40 years for juveniles convicted of homicide.¹⁹⁵ Other states have imposed similarly steep mandatory minimums and still permit juvenile LWOP. For example, Pennsylvania's new legislation permits an LWOP sentence and simply adds less punitive alternatives for juveniles convicted of first and second-degree murder.¹⁹⁶ Under the new law, a Pennsylvania juvenile convicted of first-degree murder may be sentenced either to LWOP or a minimum of 35 years to life if the defendant is between 15 and 17 years. Similarly, Louisiana's revised law requires juveniles convicted of murder to serve a mandatory minimum of 35 years before parole eligibility, and it too permits juvenile LWOP.¹⁹⁷

Of the 13 states that have passed legislation in response to *Miller*, nine still permit juvenile LWOP, and none set an alternative minimum sentence at less than 25 years.¹⁹⁸ While some response is better than none,¹⁹⁹ state legislation that replaces mandatory juvenile LWOP with an alternative, steep sentence and that fails to account for the mitigating qualities of youth at sentencing does not do justice to the *Miller* decision. As illustrated in the next subsection, *Miller* precludes mandatory minimums for juveniles. State actors should bear that in mind when crafting their responses to *Miller*.²⁰⁰

194. See generally THE SENTENCING PROJECT, *supra* note 187 (documenting states' responses to the *Miller* decision).

195. *Id.* at 2 (citing Nebraska and Texas legislation that requires a minimum of 40 years for juveniles convicted of homicide).

196. See generally Act of Oct. 25, 2012, 2012 Pa. Laws 1655 (2012). See also *Juvenile Life Without Parole (JLWOP) in Pennsylvania*, JUV. L. CIR., <http://www.jlc.org/current-initiatives/promoting-fairness-courts/juvenile-life-without-parole/jlwop-pennsylvania> (last updated Mar. 26, 2013).

197. H.B. 152, 2013 Leg., Reg. Sess. (La. 2013). The same terms also apply under Florida's post-*Miller* legislation. See THE SENTENCING PROJECT, *supra* note 187, at 2.

198. THE SENTENCING PROJECT, *supra* note 187, at 2.

199. 28 states had mandatory LWOP sentences for juveniles convicted of homicide when *Miller* was decided in 2012. *Miller v. Alabama*, 132 S. Ct. 2455, 2471 (2012). 15 states have yet to respond with legislation to address the *Miller* ruling. THE SENTENCING PROJECT, *supra* note 187, at 2. This does not mean that all 15 states continue to violate *Miller*. For example, in Massachusetts, there has been no legislative response, *id.*, but because the state Supreme Court has abolished juvenile life without parole, one is not required. See *supra* note 187 and accompanying text.

200. Even in jurisdictions where the state legislature has enacted post-*Miller* sentencing protocols, executive and judicial actors can challenge the constitutionality of such laws on a facial and as-applied basis. Moreover, 15 states have yet to respond and still have the opportunity to craft legislation that is devoid of mandatory minimums for children.

i. *Miller Precludes Mandatory Minimums for Juveniles*

While mandatory minimum sentences have been unsuccessfully challenged on various constitutional grounds in the past,²⁰¹ *Miller* has breathed new life into such challenges as they apply to juveniles. In fact, even before *Graham* and *Miller*, post-*Roper*, Professor Feld argued that:

The reduced criminal responsibility of adolescents is equally diminished when states sentence juveniles to Life Without Parole (LWOP) and the functional equivalents of ‘virtual life.’ Although the Supreme Court’s capital punishment jurisprudence insists that ‘death is different,’ no principled bases exist by which to distinguish the diminished responsibility that bars the death penalty from adolescents equally reduced culpability that warrants shorter sentences for all serious crimes.²⁰²

After the *Graham* Court barred LWOP for nonhomicide juvenile defendants, Professor Martin Guggenheim argued in a comprehensive article that *Graham* rendered applying adult mandatory minimums to juveniles unconstitutional.²⁰³ As he explained:

A state sentencing statute that requires, regardless of the defendant’s age, that a certain sentence be imposed based on the conviction violates a juvenile’s substantive right to be sentenced based on the juvenile’s culpability. When the only inquiry made by the sentencing court is to consult the legislature’s mandatory punishment for the crime, without any further inquiry into whether the punishment is appropriate for a juvenile, for no other reason than it is appropriate for an adult, the Constitution requires more.²⁰⁴

In a prior essay, I suggested that the *Miller* decision rendered invalid mandatory sentences for juveniles.²⁰⁵ This Article aims to further develop that claim with two points.²⁰⁶ First, one cannot square mandatory sentencing of

201. Alex Dutton, Comment, *The Next Frontier of Juvenile Sentencing Reform: Enforcing Miller’s Individualized Sentencing Requirement Beyond the JLWOP Context*, 23 TEMP. POL. & C.R. L. REV. 173, 178–79 (2013) (“Mandatory minimums have been challenged on separation of powers, due process, and equal protection grounds. No matter the legal basis, the clear consensus from the courts is that legislatures control sentencing policy.” (citations omitted)).

202. Barry C. Feld, *Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences*, 10 J.L. & FAM. STUD. 11, 61–62 (2007) (footnotes omitted).

203. Martin Guggenheim, *Graham v. Florida and a Juvenile’s Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 490–91 (2012).

204. *Id.* (emphasis omitted).

205. Drinan, *supra* note 7, at 789 n.26 (“The claim that *Miller* rendered invalid any and all mandatory minimums for juveniles is outside the scope of this Essay, but I think the *Miller* opinion supports that position. As noted [above] the *Miller* Court consistently insisted upon the importance of discretion at post-trial sentencing of a juvenile. One has to wonder how the discretion described by the *Miller* Court can exist under a mandatory sentencing scheme of any kind.”).

206. I am aware of only two other authors who have argued post-*Miller* that the Court’s

juveniles with the language of the *Miller* Court. The *Miller* opinion is replete with discussion of process and the importance of discretion for juvenile sentencing. The Court explained that “[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender’s age and the wealth of characteristics and circumstances attendant to it.”²⁰⁷ And later: “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.”²⁰⁸ To be sure, the *Miller* Court was examining and speaking of LWOP, but in an earlier part of the decision, the majority recognized that “none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific.”²⁰⁹ This language suggests that states cannot comport with *Miller* by replacing mandatory life without parole with another mandatory sentence—let alone a steep one.

The *Miller* decision recognizes that nothing about the Court’s children-are-different jurisprudence is crime-specific; it also recognizes that process matters when sentencing children. The Court’s position that “none of what [*Graham*] said about children . . . is crime-specific”²¹⁰ is really no different from the position that none of what *Roper*, *Graham*, and *Miller* said about children is *sentence*-specific. The sentencing process and discretion called for by the *Miller* Court are simply incompatible with a mandatory sentencing scheme—whether it is a mandatory sentence of life without parole or a mandatory sentence of 35 years.

Second, one cannot square mandatory sentencing for juveniles with the *logic* of the *Miller* Court. The *Miller* Court drew on two separate strands of precedent: its cases dealing with categorical bans on certain sentencing practices and its line of cases prohibiting the mandatory imposition of capital punishment.²¹¹ The first line of cases to which the *Miller* Court refers says “that children are constitutionally different from adults for purposes of sentencing.”²¹² It went on to reiterate what *Roper* and *Graham* had recognized: that brain and social science confirm children are less culpable and more amenable to reform and that these differences must be taken into account at

decision renders unconstitutional mandatory minimums for juveniles. *See generally* Dutton, *supra* note 201 (suggesting advocates can challenge mandatory non-JLWOP sentences using *Miller*’s approach and using California’s mandatory gang and firearm enhancement laws as examples); Rachael Frumin Eisenberg, Comment, *As Though They Are Children: Replacing Mandatory Minimums with Individualized Sentencing Determinations for Juveniles in Pennsylvania Criminal Court After Miller v. Alabama*, 86 TEMP. L. REV. 215 (2013) (arguing that Pennsylvania’s use of adult mandatory minimums for juveniles was unconstitutional post-*Miller*).

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

208. *Id.* at 2468.

209. *Id.* at 2465.

210. *Id.*

211. *Id.* at 2463–64.

212. *Id.* at 2464.

sentencing.²¹³ Because the *Miller* Court cemented this “kids are different” approach, one cannot claim post-*Miller* that such differences are irrelevant outside the context of LWOP. Rather, the *Miller* trilogy leads to the conclusion that kids are fundamentally different for purposes of culpability and rehabilitation and that these differences should be considered whenever a child faces a custodial sentence.

Further, the *Miller* Court drew on its line of cases requiring “that capital defendants have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors,”²¹⁴ especially those dealing with “the ‘mitigating qualities of youth.’”²¹⁵ This line of cases requires the states to provide defendants with an opportunity to present mitigating factors that may impact the sentence—including youth, substance abuse, a history of violence within the family, developmental challenges, or traits that suggest amenability to rehabilitation. The *Miller* Court borrowed from this line of cases to say that kids are different and that these differences should be illuminated in an individualized, discretionary sentencing scheme. Thus, the logic of *Miller*, in addition to its language, suggests that mandatory minimums—schemes that preclude individual consideration of mitigating factors, including youth—are incompatible with the *Miller* trilogy.²¹⁶

Critics will argue that there is no limiting principle to this claim—that if indeed juveniles cannot be subject to mandatory sentences, the entire process of sentencing juveniles in adult court is undermined, as determinate sentencing schemes are the national norm.²¹⁷ However, that outcome does not necessarily follow. Prohibiting mandatory minimums for juveniles does not preclude their appearance in adult criminal court, although it may make juvenile sentencing in adult court more time-consuming and resource intensive. But as the Supreme Court has held before, efficiency and fiscal constraints must yield to the observance of constitutional rights.²¹⁸ Further, if

213. *Id.* at 2464–65 (discussing social sciences studies regarding the development of the juvenile brain that were relied on in earlier Supreme Court cases).

214. *Id.* at 2467.

215. *Id.* (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

216. It is also important to consider the question of juvenile mandatory minimums in the context of mandatory minimums altogether. Criminal justice reform advocates have argued for years that mandatory minimums not only dehumanize the criminal defendant facing them, but also that they place an unsustainable burden on our criminal justice system by leading to bloated prison populations. *See, e.g.*, Mary Price, *Mill(er)ing Mandatory Minimums: What Federal Lawmakers Should Take from Miller v. Alabama*, 78 MO. L. REV. 1147 (2013) (discussing the link between mandatory minimums and over-incarceration and urging that *Miller*-like emphasis on proportionality can reduce incarceration levels). In recent years, as states have faced significant corrections costs and budget shortfalls, lawmakers have looked for ways to unravel the impact of mandatory minimums on prison populations. In this climate, the moral leadership of the *Miller* decision may facilitate the elimination of juvenile mandatory minimums, and juvenile justice advocates should seize upon the opportunity.

217. *See supra* Part II.C.

218. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493, 510–11, 543–44 (2011) (affirming finding of

it is simply too onerous for states to sentence juveniles in adult court without relying upon mandatory sentencing schemes, that reality may compel prosecutors and legislators to reconsider when, and how frequently, children should be transferred to adult court.

The Iowa Supreme Court's recent decision in *State v. Lyle* illustrates these issues well.²¹⁹ In *Lyle*, the Iowa Supreme Court became the first in the nation to declare that its state constitution barred mandatory minimum sentences for juveniles.²²⁰ The defendant in that case, 17-year-old Andre Lyle, Jr., was involved in "inane juvenile schoolyard conduct."²²¹ Lyle and his companion punched the victim outside of their high school "and took a small bag of marijuana from him," claiming that they had paid five dollars for the marijuana bag and that it had not been delivered.²²²

Lyle was charged as an adult in criminal court and the trial judge imposed the mandatory sentence applicable to his case: ten years, seven of which Lyle would be required to serve before parole consideration.²²³ In an expansive opinion documenting the evolution of juvenile justice in this country and the United States Supreme Court's recent juvenile cases, the Iowa Supreme Court rejected the concept of mandatory minimums for children, explaining that such sentences are "too punitive for what we know about juveniles."²²⁴ The Court reasoned that:

Miller is properly read to support a new sentencing framework that reconsiders mandatory sentencing for all children. Mandatory minimum sentencing results in cruel and unusual punishment due to the differences between children and adults. This rationale applies to all crimes, and no principled basis exists to cabin the protection only for the most serious crimes.²²⁵

Eighth Amendment violation due to prison overcrowding and requiring state to either improve conditions at state's expense or release inmates); *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963) (holding that the Sixth Amendment right to counsel applies to states and thus imposing burden on states to pay for that representation).

219. *State v. Lyle*, 854 N.W.2d 378 (Iowa 2014).

220. *Id.* at 398. ("Upon exercise of our independent judgment, as we are required to do under the constitutional test, we conclude that the sentencing of juveniles according to statutorily required mandatory minimums does not adequately serve the legitimate penological objectives in light of the child's categorically diminished culpability."). *But see, e.g.*, *State v. Imel*, No. 2 CA-CR2015-0112, 2015 WL 7373800, at *3 (Ariz. Ct. App. Nov. 20, 2015) (rejecting *Lyle's* reasoning); *State v. Taylor G.*, 110 A.3d 338, 346-47 (Conn. 2015) (rejecting claim that *Miller* precludes mandatory minimums for juveniles); *State v. Brown*, 331 P.3d 781, 796-97 (Kan. 2014) (finding 20-year juvenile mandatory minimum permissible after *Miller*).

221. *Lyle*, 854 N.W.2d at 401.

222. *Id.* at 381.

223. *Id.*

224. *Id.* at 400.

225. *Id.* at 402.

The dissenting justices expressed great concern about the administrative burdens that will be imposed on district courts in the absence of mandatory minimums for juveniles.²²⁶ Justice Zager estimated that there are more than 100 Iowan inmates serving a mandatory sentence that was imposed upon them as a juvenile.²²⁷ He recognized that “[b]ased on the majority’s opinion, all of those juveniles must be resentenced and have an individualized sentencing hearing. It will take hundreds, if not thousands, of hours to perform this task.”²²⁸ Worse still, according to the dissenting justices, defendants will have the right to put on expert and other relevant witnesses and district courts will be required to take into consideration *Miller* factors such as juveniles’ diminished culpability and their capacity for rehabilitation.²²⁹ The dissenting justices expressed fear that “[i]n sum, ‘the trial court must consider all relevant evidence’ of the distinctive youthful attributes of the juvenile offender. The possibilities are nearly endless.”²³⁰ And yet the majority was undeterred by these administrative realities and recognized that “individual rights are not just recognized when convenient.”²³¹

Lyle, then, demonstrates a critical tension around the claim that juveniles ought not be subject to mandatory minimums. It is true that precluding mandatory minimums for juveniles increases the administrative burden on the judicial system. However, it is not true that precluding mandatory minimums for children bars the executive from prosecuting a juvenile in adult court. Nor is it true that precluding mandatory minimums for children bars a judge from sentencing a juvenile to a statutorily set minimum term;

226. The dissenting Justices also disagreed fundamentally with the majority’s reading of *Miller* and the state Constitution. See generally *id.* at 404–20.

227. *Id.* at 419 (Zager, J., dissenting).

228. *Id.*

229. *Id.* (“And, of course, there will be expert witnesses: social workers, psychologists, psychiatrists, substance-abuse counselors, and any number of related social scientists. And, other witnesses: mothers, fathers, sisters, and brothers.”); see also *id.* (“After the parade of witnesses ends, the district court must then produce for each juvenile offender a detailed, reasoned sentencing decision. District courts must consider the ‘juvenile’s lack of maturity, underdeveloped sense of responsibility, vulnerability to peer pressure, and the less fixed nature of the juvenile’s character,’ keeping in mind that these are ‘mitigating, not aggravating factors’ in the decision to impose a sentence. It does not end there. District courts must recognize juveniles’ capacity for change and ‘that most juveniles who engage in criminal activity are not destined to become lifelong criminals.’ If tempted to impose a harsh sentence on even a particularly deserving offender, ‘the district court should recognize that a lengthy prison sentence . . . is appropriate, if at all, only in rare or uncommon cases.” (citations omitted)).

230. *Id.* at 420 (citation omitted).

231. *Id.* at 403 (“This process will likely impose administrative and other burdens, but burdens our legal system is required to assume. Individual rights are not just recognized when convenient. Our court history has been one that stands up to preserve and protect individual rights regardless of the consequences. The burden now imposed on our district judges to preserve and protect the prohibition against cruel and unusual punishment is part of the price paid by many judges over the years that, in many ways, has helped write the proud history Iowans enjoy today.”).

rather, judges may do so *after* considering the individual juvenile before them.²³²

In Lyle's case, according to the majority's rule, the district court judge would have been able to sentence Lyle to ten years in prison for the schoolyard fight, so long as she had come to that judgment after considering Lyle's youth and all of its attendant circumstances. It may be the case that exercising that judgment is more time-consuming for the courts; it may be that a judge would be unlikely to impose such a sentence after considering Lyle's age and other relevant factors. But precluding mandatory minimums for children is not tantamount to ending the prosecution of children in adult court.

However, suppose that state court judges in Iowa dread juvenile sentencing because of the *Miller* protocol that the state Supreme Court has now mandated. Or suppose that prosecutors do not want to pursue an adult criminal sentence except in rare cases because of the burden of justifying such sentences under the *Miller* factors. It may turn out that precluding juvenile mandatory minimums forces state actors to internalize the full costs of prosecuting children as adults. And it may follow that, as a result of internalizing those costs, over time, state actors charge juveniles as adults only very sparingly. Given what science has revealed about juveniles and their capacity for change and the Supreme Court's incorporation of that science, such an outcome seems logical. In fact, such an outcome would merely be a return to the juvenile justice model that was founded in this country more than a century ago.²³³

This section argued that *Miller* was a revolutionary decision and that it has enabled groundbreaking juvenile justice reforms such as procedural safeguards for children facing LWOP on par with best practices in capital representation and the elimination of mandatory minimums for juveniles. As groundbreaking as these measures may sound to those who still recall the juvenile super-predator fear of the 1990s,²³⁴ these two measures are readily defensible under *Miller* and to some extent they are already underway.

B. THE MILLER REVOLUTION ON THE HORIZON

While some reform measures flow directly from *Miller* and are within the grasp of juvenile justice advocates, others are farther away on the horizon but

232. *Id.* ("It is important to be mindful that the holding in this case does not prohibit judges from sentencing juveniles to prison for the length of time identified by the legislature for the crime committed, nor does it prohibit the legislature from imposing a minimum time that youthful offenders must serve in prison before being eligible for parole. Article I, section 17 only prohibits the one-size-fits-all mandatory sentencing for juveniles.").

233. See *supra* Part II.A.

234. Nick Straley, *Miller's Promise: Re-evaluating Extreme Criminal Sentences for Children*, 89 WASH. L. REV. 963, 990-93 (2014) (discussing the juvenile super-predator prediction of the early 1990s and its impact on juvenile justice policy).

still achievable post-*Miller*. This subsection addresses three areas ripe for reform in the wake of *Miller*: (1) juvenile transfer laws; (2) presumptive sentencing guidelines as they apply to children; and (3) juvenile conditions of confinement.

1. Juvenile Transfer Laws

Juvenile justice advocates have recognized for years that juvenile transfer laws have made it too easy and too common for children to be tried and convicted in adult criminal court.²³⁵ Past challenges to various transfer laws have been unfruitful.²³⁶ But today, in the wake of the *Miller* trilogy, there is newfound traction to these claims challenging the constitutionality of mandatory transfer laws.

As was addressed in Part III, *Miller* and its immediate predecessor cases changed the landscape for the treatment of children in the criminal justice system. After *Miller*, it is now possible to challenge automatic transfer laws as impermissible “one size fits all” treatment of juveniles. In fact, the *Miller* Court not only took issue with conflating adult and juvenile sentencing generally, but it also criticized mandatory transfer provisions explicitly.²³⁷ It explained that mandatory transfer laws, depending upon their operation, can vest prosecutors with too much unbridled discretion, force judges into making extreme sentencing choices, and jeopardize a child’s well-being.²³⁸

The language and logic of the *Miller* trilogy, then, have further eroded the legitimacy of transfer laws—laws that have been under attack for decades. Scholars have seized upon this newfound basis for challenging juvenile transfer laws. Professor Hoeffel recently argued that juvenile transfer laws should be reconsidered through the lens of capital jurisprudence.²³⁹ Noting that transfer and death penalty proceedings have much in common in their stakes and finality,²⁴⁰ she argues for two developments. First, Hoeffel argues that the current transfer laws should be amended to narrow the pool of

235. See, e.g., David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555 (2004) (arguing against the trend of transferring juvenile cases to adult court).

236. See, e.g., *Commonwealth v. Cotto*, 753 A.2d 217, 224 (Pa. 2000) (rejecting claim that juvenile transfer statute violated Due Process Clause); *In re Interest of D. M. L.*, 254 N.W.2d 457, 459 (S.D. 1977) (rejecting claim that juvenile transfer statute was unconstitutionally vague).

237. See *supra* notes 93–97 and accompanying text.

238. *Miller v. Alabama*, 132 S. Ct. 2455, 2474–75 (2012).

239. Hoeffel, *supra* note 102, at 31.

240. *Id.* at 30 (“The parallels between the death penalty and juvenile transfer are striking. Both involve a decision to expose a person to the most severe set of penalties available to the relevant justice system: a death sentence for adults in adult court; a transfer to adult court for youth in juvenile court. The decision to send an adult to his death is a decision to end his life; the decision to send a juvenile to adult court is a decision to end his childhood. Both decisions signify a life not worth saving, and therefore, both decisions are to apply to the ‘worst of the worst.’ As a result of the finality and seriousness of their consequences, both processes should require the strictest of procedures for reliable imposition of those consequences.” (footnote omitted)).

juveniles who are eligible for transfer to adult court in the first place.²⁴¹ Second, she argues that the transfer decision-making process should be done on an individual basis—like capital sentencing proceedings—incorporating all relevant mitigation evidence.²⁴² Hoeffel therefore unites both capital and juvenile strands of case law to challenge existing transfer laws.²⁴³ Other scholars have proposed similar reforms post-*Miller*.²⁴⁴ Amending juvenile transfer law is now clearly on the horizon.²⁴⁵

2. Presumptive Sentencing Guidelines for Children

As explained above, mandatory minimums arguably are now unconstitutional under *Miller*, and one state Supreme Court has already held as much.²⁴⁶ For the same reason, juvenile justice advocates should look to challenge presumptive and advisory sentencing guidelines if they do not account for youth as a mitigating factor.

Sentencing guidelines range from mandatory to advisory. If a sentence is truly mandatory, it means that once the jury has convicted the defendant of a certain charge, the judge has no choice but to impose the sentence prescribed by the legislature for that crime.²⁴⁷ A presumptive sentencing guideline, however, suggests a predetermined sentence for a crime, but permits the judge to impose a more lenient alternative sentence if the judge determines that there are mitigating circumstances. Typically, the legislature determines in advance what mitigating factors might justify a downward departure from the presumptive sentence.²⁴⁸ Advisory guidelines are voluntary in that they

241. *Id.* at 47–49 (suggesting several bright-line rules to narrow the pool of juveniles eligible for transfer to adult court).

242. *Id.* at 49–55.

243. *Id.* at 30. (“The Court’s recent insistence that ‘if . . . ‘death is different,’ children are different too’ gives weight to the application of Eighth Amendment death penalty jurisprudence to juvenile sentences other than death in *Graham v. Florida* and *Miller v. Alabama*.” (footnotes omitted)).

244. Brice Hamack, *Go Directly to Jail, Do Not Pass Juvenile Court, Do Not Collect Due Process: Why Waiving Juveniles into Adult Court Without a Fitness Hearing Is a Denial of Their Basic Due Process Rights*, 14 WYO. L. REV. 775, 805–27 (2014) (relying upon the “juveniles are different” line of cases to argue that transfer without a hearing violates due process rights); Wendy N. Hess, *Kids Can Change: Reforming South Dakota’s Juvenile Transfer Law to Rehabilitate Children and Protect Public Safety*, 59 S.D. L. REV. 312, 331–32 (2014) (arguing for a return to discretionary, individual juvenile transfer post-*Miller*); Christopher Slobogin, *Treating Juveniles Like Juveniles: Getting Rid of Transfer and Expanded Adult Court Jurisdiction*, 46 TEX. TECH L. REV. 103, 121–29 (2013) (arguing for a juvenile justice system without transfer post-*Miller*); Rachel Jacobs, Note, *Waiving Goodbye to Due Process: The Juvenile Waiver System*, 19 CARDOZO J.L. & GENDER 989, 992 (2013) (arguing that existing waiver procedures violate Due Process).

245. *But see* *People v. Patterson*, 25 N.E.3d 526, 553 (Ill. 2014) (rejecting an Eighth Amendment challenge to a mandatory transfer law based on *Miller*).

246. *See supra* notes 212–19 and accompanying text.

247. As discussed in Part III of this Article, Evan Miller was sentenced to life without parole in Alabama under a mandatory sentencing scheme.

248. *See* Kim S. Hunt & Michael Connelly, *Advisory Guidelines in the Post-Blakely Era*, 17 FED. SENT’G REP. 233, 233–35 (2005) (providing overview of presumptive sentencing guidelines and

provide a benchmark for the sentencing judge, but the judge may depart from the suggested sentence with or without explanation.²⁴⁹

In light of *Miller*, juvenile justice advocates should insist that youth itself be a relevant mitigating factor when presumptive sentencing guidelines apply. As the *Miller* Court explained, there are many “mitigating qualities of youth.”²⁵⁰ Youth is a “time of immaturity, irresponsibility, impetuosity[,] and recklessness,” and it is a period during which “a person may be most susceptible to influence and to psychological damage.”²⁵¹ Thus, youth alone should at least be permissible grounds for a judge to impose a more lenient sentence than what the presumptive guideline suggests.

But not all presumptive sentencing guidelines include youth as a mitigating factor in its own right. For example, Alaska provides presumptive sentencing guidelines for felonies and separately lists aggravating factors and mitigating factors in the statute.²⁵² The Alaska statute lists 20 separate mitigating factors that “may allow imposition of a sentence below the presumptive range.”²⁵³ Only one of the 20 mitigating factors relates to youth, and it does not recognize youth in its own right as a mitigating variable. The statute permits a lesser sentence than the presumptive one if “the conduct of a youthful defendant was substantially influenced by another person more mature than the defendant.”²⁵⁴ Moreover, the burden is on the defendant to prove to the judge by clear and convincing evidence each mitigating factor.²⁵⁵ Alaska is not alone in its disregard for youth as a mitigating factor in and of itself.²⁵⁶ Because the Supreme Court has elevated youth in its own right to be

the rationales for them); *see also* CONN. GEN. ASSEMBLY, LEGISLATIVE PROGRAM REVIEW AND INVESTIGATIONS COMM., CONNECTICUT MANDATORY MINIMUM SENTENCES BRIEFING (2005), http://www.cga.ct.gov/2005/pridata/Studies/Mandatory_Minimum_Sentences_Briefing.htm (providing examples of crimes that carry a presumptive minimum versus those that carry a mandatory minimum).

249. *See, e.g., Sentencing Guidelines Overview*, MD. ST. COMMISSION ON CRIM. SENT’G POL’Y, www.msccsp.org/Guidelines/Overview.aspx (last visited Apr. 22, 2016) (“The sentencing guidelines are advisory and judges may, at their discretion, impose a sentence outside of the guidelines. If judges choose to depart from the sentencing guidelines, the Code of Maryland Regulations (COMAR) 14.22.01.05(A) mandates ‘The judge shall document on the guidelines worksheet the reason or reasons for imposing a sentence outside of the recommended guidelines range.’ In practice, however, the judiciary has generally neglected to provide an explanation for departure. For example, in 61% of the fiscal year 2005 cases that resulted in a departure from the guidelines, the reason(s) for departure was not provided.”). *See generally* Hunt & Connelly, *supra* note 248.

250. *Miller v. Alabama*, 132 S. Ct. 2455, 2467 (2012) (citation omitted).

251. *Id.* (alteration in original) (citations omitted).

252. ALASKA STAT. § 12.55.155(c) (2014) (listing aggravating factors); *id.* § 12.55.155(d) (listing mitigating factors).

253. *Id.* § 12.55.155(d).

254. *Id.* § 12.55.155(d)(4).

255. *Id.* § 12.55.155(f)(1).

256. *See, e.g., Considerations in Imposing Sentence*, IND. CODE § 35-38-1-7.1 (2015) (listing eleven mitigating circumstances the court may consider, none of which relate to youth); *Imposition of*

a mitigating factor of constitutional significance, states must consider youth at sentencing even in a presumptive sentencing context.

3. Juvenile Conditions of Confinement

In its recent juvenile sentencing decisions, the Supreme Court has focused on *what* sentence the states may impose rather than the conditions under which juveniles are required to serve those sentences. Yet, the Court has repeatedly expressed concern with the vulnerability of youth in its recent juvenile Eighth Amendment cases²⁵⁷ as well as in other constitutional settings.²⁵⁸ Juvenile justice advocates should leverage the Court's emphasis on the vulnerability and susceptibility of youth to seek improved conditions of confinement for youth in the years to come. Arguably, there are countless defects with American modes of incarceration, many of which are especially problematic for juveniles. However, this Article suggests two areas that are ripe for post-*Miller* reform: juvenile incarceration with adults and juvenile solitary confinement—both of which should be abolished.

Each year, approximately 250,000 youth are tried in the adult criminal justice system²⁵⁹ and on any given day over 100,000 juveniles are incarcerated.²⁶⁰ Since the 1980s, juveniles have increasingly been housed with adult inmates in prisons and jails.²⁶¹ Between 1983 and 1998, the number of juveniles in adult jails grew by more than 300%. In approximately the same time period, the number of juveniles admitted to state prisons more than doubled.²⁶² Today there are approximately 10,000 juveniles in adult prisons and jails on a daily basis.²⁶³

Presumptive Sentence; Jury Requirements; Departure Sentencing; Substantial and Compelling Reasons for Departure; Mitigating and Aggravating Powers, KAN. STAT. ANN. 21-6815(c)(1) (2014 Supp.) (listing nonexhaustive mitigating factors, none of which include youth). *But see* ARIZ. REV. STAT. § 13-701(E)(1) (2015 Supp.) (listing age of defendant as a mitigating factor); N.C. GEN. STAT. ANN. § 15A-1340.16(e)(4) (2013) (listing youth as mitigating factor).

257. *See generally supra* Part III.

258. *See, e.g.,* J. D. B. v. North Carolina, 564 U.S. 261, 271–73 (2011) (holding that juvenile defendant's age informs Miranda analysis because children are less mature and responsible); Safford Unified Sch. Dist. v. Redding, 557 U.S. 364, 375, 377 (2009) (finding unconstitutional school strip search of child in part because of adolescent vulnerability); Planned Parenthood v. Casey, 505 U.S. 833, 970–71 (1992) (upholding parental consent provision in state abortion law, among others, on grounds of juvenile immaturity and lack of judgment).

259. Ashley Nellis, *Addressing the Collateral Consequences of Convictions for Young Offenders*, CHAMPION, July–Aug. 2011, at 20, 20; T.J. Parsell, *In Prison, Teenagers Become Prey*, N.Y. TIMES (June 5, 2012), <http://www.nytimes.com/roomfordebate/2012/06/05/when-to-punish-a-young-offender-and-when-to-rehabilitate/in-prison-teenagers-become-prey>.

260. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, JUVENILES IN ADULT PRISONS AND JAILS: A NATIONAL ASSESSMENT 4 (2000), <https://www.ncjrs.gov/pdffiles1/bja/182503.pdf>.

261. *Id.* at 5 (citing a 366% change in number of juveniles in adult jails).

262. *Id.* at 6 (citing growth in juvenile admissions to adult prisons from 3400 in 1985 to 7400 in 1997).

263. *Children in Prison*, EQUAL JUST. INITIATIVE, <http://www.eji.org/childrenprison> (last visited Apr. 22, 2016); *see also* CAMPAIGN FOR YOUTH JUSTICE, KEY FACTS: CHILDREN IN ADULT JAILS

Housing youth inmates with adults persists despite the well-documented, tragic realities of the practice. To begin, children housed in adult facilities lack the educational and rehabilitative services they need during a critical period of development.²⁶⁴ Even more acute is the concern that juveniles in adult facilities are subject to physical and sexual victimization. When Congress passed the Prison Rape Elimination Act (“PREA”) in 2003, it found that “more than any other group of incarcerated persons, youth incarcerated with adults are probably at the highest risk for sexual abuse.”²⁶⁵ Since then, the trend has only worsened. A recent Justice Department study found that juvenile inmates suffer higher rates of staff sexual assault than adult inmates do, and the reported numbers are thought to be low.²⁶⁶

Moreover, because of their physical and emotional immaturity, juveniles among adult inmates are most likely to be subject to physical assault and coercion.²⁶⁷ Based on his own experience as a juvenile housed in an adult facility, T.J. Parsell, recounts that:

At the time I was sent to prison, for robbing a Fotomat with a toy gun, I was still a boy—physically, cognitively, socially and emotionally—and ill equipped to respond to the sexualized coercion of older, more experienced convicts. On my first day, I was drugged, gang raped and turned into sexual chattel.²⁶⁸

He notes that his experience was not atypical and that “juveniles [are] five times as likely to be sexually assaulted in adult rather than in juvenile

AND PRISONS, <http://www.campaignforyouthjustice.org/documents/KeyFactsonYouthinAdultJailsandPrisons.pdf>; HEATHER C. WEST & WILLIAM J. SABOL, BUREAU OF JUSTICE STATISTICS, PRISON INMATES AT MIDYEAR 2008: STATISTICAL TABLES 20, tbl.21 (2009), <http://www.bjs.gov/content/pub/pdf/pimo8st.pdf> (reporting that in 2008 there were 3650 inmates under 18 housed in state prisons).

264. CAMPAIGN FOR YOUTH JUSTICE, *supra* note 263, at 1.

265. *Id.* (quoting NAT’L PRISON RAPE ELIMINATION COMM’N, NAT’L PRISON RAPE COMM’N REPORT 18 (2009), <http://www.ncjrs.gov/pdffiles1/226680.pdf>).

266. Aviva Shen, *Teenagers in Adult Prisons More Likely to Be Sexually Abused by Staff, DOJ Finds*, THINKPROGRESS (May 16, 2013, 4:30 PM), <http://thinkprogress.org/justice/2013/05/16/2023511/teenagers-in-adult-prisons-more-likely-to-be-sexually-abused-by-staff-doj-finds>.

267. See Jim Lynch, *Juvenile Prisoners in Michigan Allege Rape, Abuse*, DETROIT NEWS (April 1, 2015, 11:32 PM), <http://www.detroitnews.com/story/news/politics/2015/04/01/juvenile-prisoners-michigan-allege-rape-abuse/70813032> (discussing the recent lawsuit that was filed in Michigan where state law permits juveniles as young as 13 to be incarcerated alongside adults); Naomi Spencer, *Widespread Abuse of Juvenile Inmates in Michigan Prisons*, WORLD SOCIALIST WEB SITE (Dec. 14, 2013), <http://www.wsws.org/en/articles/2013/12/14/mich-d14.html> (“According to federal data, incarcerated youth are eight times more likely to be subjected to sexual violence in adult facilities.”). The United States is also suing over the treatment of adolescents at Rikers, the nation’s second-largest jail. Benjamin Weiser et al., *U.S. Plans to Sue New York over Rikers Island Conditions*, N.Y. TIMES (Dec. 18, 2014), <http://www.nytimes.com/2014/12/19/nyregion/us-plans-to-sue-new-york-over-rikers-island-conditions.html>.

268. Parsell, *supra* note 259.

facilities—often within their first 48 hours of incarceration.”²⁶⁹ In short, life for a juvenile within an adult correctional institutional is a daily quest for survival.

Ironically, some adult correctional institutions recognize that youth are unsafe among the general inmate population and place them in solitary confinement—a condition which can be equally, if not more harmful, to juveniles. Adults in solitary confinement can suffer psychological trauma.²⁷⁰ For juveniles, who are at a critical stage of development, the outcomes can be devastating, including depression, anxiety, and psychosis.²⁷¹ Most juvenile suicides that happen within correctional facilities occur within solitary confinement.²⁷² For these reasons, the United Nations passed a resolution in 1990 prohibiting the use of solitary confinement for juveniles.²⁷³ The American Academy of Child & Adolescent Psychiatry opposed the use of juvenile solitary confinement and stated that youth held in isolation for more than 24 hours should be evaluated by a mental health professional.²⁷⁴ Most recently, President Obama adopted the Justice Department’s recommendation to ban solitary confinement for juveniles in federal prisons.²⁷⁵ Countless social scientists have joined the chorus of objection to juvenile solitary confinement. And yet the practice persists.

In the wake of *Miller*, juvenile justice advocates should seize upon the Supreme Court’s moral leadership and argue that because children are constitutionally different, their conditions of confinement must reflect that difference.²⁷⁶ Several organizations have called for the abolition of housing juveniles with adults in jail and prison,²⁷⁷ and New York City officials recently agreed to prohibit the use of solitary confinement for inmates under the age

269. *Id.* (citing Prison Rape Elimination Act of 2003, Pub. L. No. 108-79, § 2(4), 117 Stat. 972, 972).

270. See generally Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477 (1997); Shira E. Gordon, Note, *Solitary Confinement, Public Safety, and Recidivism*, 47 U. MICH. J.L. REFORM 495 (2014).

271. *Solitary Confinement of Juvenile Offenders*, AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY, http://www.aacap.org/AACAP/Policy_Statements/2012/Solitary_Confinement_of_Juvenile_Offenders.aspx.

272. *Id.*

273. G.A. Res. 45/113 (Dec. 14, 1990).

274. *Solitary Confinement of Juvenile Offenders*, *supra* note 271.

275. Barack Obama, Opinion, *Barack Obama: Why We Must Rethink Solitary Confinement*, WASH. POST (Jan. 25, 2016), https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html.

276. See, e.g., Wood, *supra* note 102 (applying *Miller* to question the confinement of juveniles with adults).

277. Liz Ryan, *Prison Rape Elimination Act Can Keep Children Out of Adult Jails*, HUFFINGTON POST (Mar. 18, 2013, 12:10 PM), http://www.huffingtonpost.com/2013/03/18/prison-rape-elimination-act_n_2901001.html (citing consensus among various stakeholders that juveniles should not be housed with adult inmates).

of 21.²⁷⁸ Change is afoot on juvenile conditions of confinement post-*Miller*. The time is ripe for making that change a reality.

V. CONCLUSION

Miller has revolutionized juvenile justice. This Article developed two corollaries that logically flow from the *Miller* trilogy: the creation of procedural safeguards for children facing LWOP comparable to those recommended for adults facing the death penalty and the elimination of mandatory minimums for children. It also identified three key areas for reform post-*Miller* that are farther away on the horizon, but are nevertheless attainable: transfer law reform, revised presumptive sentencing guidelines for youth, and improved juvenile conditions of confinement.

This Article concludes by recognizing two realities. First, it is important to note that there are many good reasons for state actors to pursue the juvenile justice practices proposed herein and many of these reasons have nothing to do with the *Miller* opinion. The fact is, our nation's juvenile justice practices have spun out of control. Even in the absence of the *Miller* decision, holistic rethinking is in order. The *Miller* decision, while significant, does not offer outlier insights. Rather, the decision confirms what advocates and academics have known for years: kids are different; they change by definition; and society has an obligation to foster improvement over entrenched criminal behavior.

Second, the *Miller* trilogy arguably represents the Court's efforts to bring the law into step with the direction of juvenile justice reform at the state level. As Professor Elizabeth Scott explains, in the early 21st century, there has been a marked dissipation of the "moral panic" of the 1990s: "Many lawmakers and politicians—from the Supreme Court to big city mayors—appear ready to rethink the punitive approach of the 1990s, and recent surveys indicate strong public support for a rehabilitative approach to teenage crime."²⁷⁹ In the four years since *Miller* was decided, there are already some signs that state actors are reading *Miller* expansively and accepting the Court's invitation to rethink juvenile sentencing. Nine states have abolished the practice of juvenile LWOP in the wake of *Miller*, while other states have precluded the sentence for certain categories of juvenile offenders.²⁸⁰ A majority of state courts that have considered whether *Miller* applies retroactively have concluded that it must, and the Supreme Court recently affirmed those rulings.²⁸¹ Prominent leaders

278. Michael Winerip & Michael Schwartz, *Rikers to Ban Isolation for Inmates 21 and Younger*, N.Y. TIMES (Jan. 13, 2015), <http://www.nytimes.com/2015/01/14/nyregion/new-york-city-to-end-solitary-confinement-for-inmates-21-and-under-at-rikers.html>.

279. Scott, *supra* note 18, at 541.

280. *Two Years Since Miller v. Alabama*, *supra* note 187.

281. Jody Kent Lavy, Opinion, *Signs of Hope and Justice Two Years After Miller v. Alabama*, JUV. JUST. INFO. EXCHANGE (July 8, 2014), <http://jjie.org/signs-of-hope-and-justice-two-years-after-miller-v-alabama/107244>; see also discussion of *Montgomery v. Louisiana*, *supra* note 6.

have spoken publicly about the cruelty, inhumanity, and general senselessness of juvenile LWOP in the two years since the *Miller* decision. In many ways, the *Miller* revolution is underway.

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The War on Kids: How American Juvenile Justice Lost Its Way

The War on Kids: How American Juvenile Justice Lost Its Way, Oxford University Press (2017 Forthcoming)

Posted: 8 Mar 2017

Cara H. Drinan (https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=854726)
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Date Written: February 27, 2017

Abstract

In 2003, when he was sixteen, Terrence Graham and three other teens attempted to rob a barbeque restaurant in Jacksonville, Florida. Though they left with no money, and no one was seriously injured, Terrence was sentenced to die in prison for his involvement in that crime. As shocking as Terrence's sentence sounds, it is merely a symptom of contemporary American juvenile justice practices. Today in this country, adolescents are routinely transferred out of juvenile court and into adult criminal court without any judicial oversight. Once in adult court, children can be sentenced without regard for their youth. Juveniles are housed in adult correctional facilities; they may be held in solitary confinement; and they experience the highest rates of sexual and physical assault among inmates. Until 2005, children convicted in America's courts were subject to the death penalty; today, they still may be sentenced to die in prison – no matter what efforts they make to rehabilitate themselves. America has waged a war on kids.

The War On Kids reveals how the United States went from being a pioneer to an international pariah in its juvenile sentencing practices. While academics and journalists have recognized the failings of juvenile justice practices in this country and have called for change, recent Supreme Court decisions and political developments make those calls a reality today. The War On Kids seizes upon this moment of judicial and political recognition that children are different in the eyes of the law. The book chronicles the shortcomings of juvenile justice by drawing upon social science, legal decisions and first-hand correspondence with Terrence and others like him – individuals whose adolescent errors have cost them their lives. At the same time, The War On Kids maps out concrete steps that states can take to correct the course of American juvenile justice.

Keywords: juveniles, juvenile justice, Miller, Roper, Graham, juvenile sentencing, Eighth Amendment,

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Youth Confinement: The Whole Pie 2019

By Wendy Sawyer

Press Release

December 19, 2019

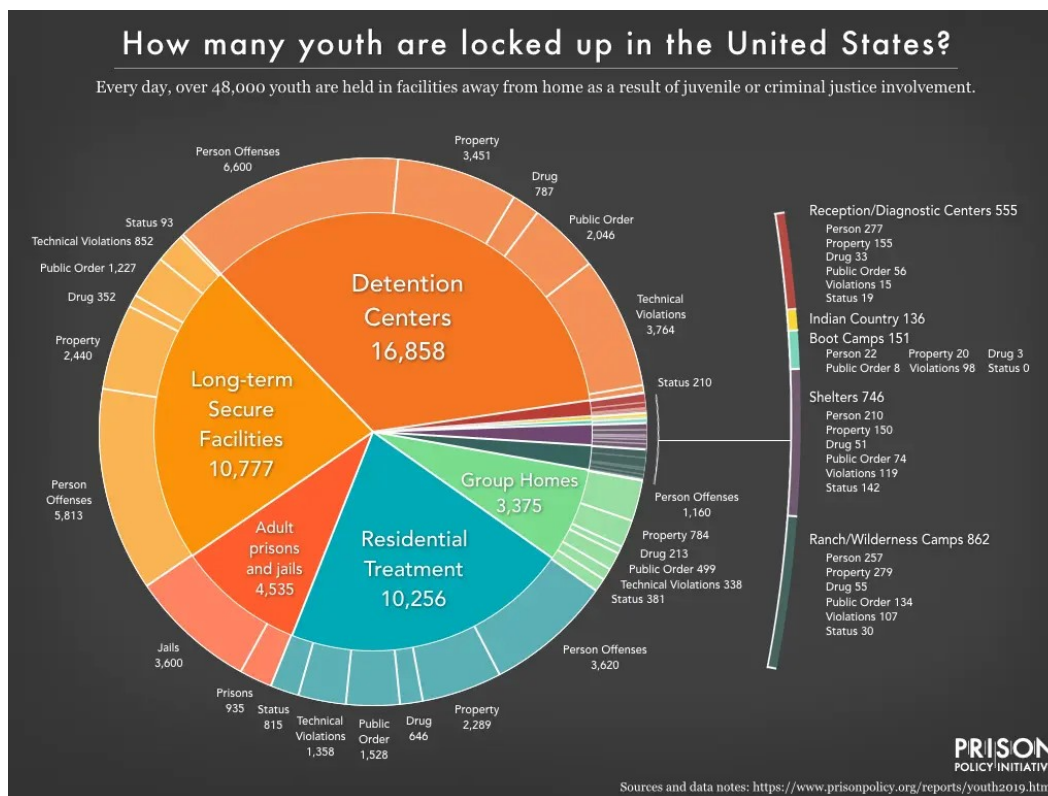
On any given day, over 48,000 youth in the United States are confined in facilities away from home as a result of juvenile justice or criminal justice involvement. Most are held in restrictive, correctional-style facilities, and thousands are held without even having had a trial. But even these high figures represent astonishing progress: Since 2000, the number of youth in confinement has fallen by 60%, a trend that shows no sign of slowing down.

What explains these remarkable changes? How are the juvenile justice and adult criminal justice systems different, and how are they similar? Perhaps most importantly, can those working to reduce the number of adults behind bars learn any lessons from the progress made in reducing youth confinement?

This report answers these questions, beginning with a snapshot of how many justice-involved youth are confined, where they are held, under what conditions, and for what offenses. It offers a starting point for people new to the issue to consider the ways that the problems of the criminal justice system are mirrored in the juvenile system: racial disparities, punitive conditions, pretrial detention, and overcriminalization. While acknowledging the philosophical, cultural, and procedural differences between the adult and juvenile justice systems,

① the report highlights these issues as areas ripe for reform for youth as well as adults.

This updated and expanded version of our original 2018 report also examines the dramatic reduction in the confined youth population, and offers insights and recommendations for advocates and policymakers working to shrink the adult criminal justice system.



Demographics and disparities among confined youth

Generally speaking, state juvenile justice systems handle cases involving defendants under the age of 18.

② (This is not a hard-and-fast rule, however; every state makes exceptions for younger people to be prosecuted as adults in some situations or for certain offenses. ③) Of the 43,000 youth in juvenile facilities, more than two-thirds (69%) are 16 or older. Troublingly, more than 500 confined children are no more than 12 years old. ④

Black and American Indian youth are overrepresented in juvenile facilities, while white youth are underrepresented. These racial disparities

⑤ are particularly pronounced among both Black boys and Black girls, and while American Indian girls make up a small part of the confined population, they are extremely overrepresented relative to their share of the total youth population. While 14% of all youth under 18 in the U.S. are Black, 42% of boys and 35% of girls in juvenile facilities are Black. And even excluding youth held in Indian country facilities, American Indians make up 3% of girls and 1.5% of boys in juvenile facilities, despite comprising less than 1% of all youth nationally. ⑥

Racial disparities are also evident in decisions to transfer youth from juvenile to adult court. In 2017, Black youth made up 35% of delinquency cases, but over

half (54%) of youth judicially transferred from juvenile court to adult court. Meanwhile, white youth accounted for 44% of all delinquency cases, but made up only 31% of judicial transfers to adult court. And although the total number of youth judicially transferred in 2017 was less than half what it was in 2005, the racial disproportionality among these transfers has actually increased over time. Reports also show that in California, prosecutors send Hispanic youth to adult court via “direct file” at 3.4 times the rate of white youth, and that American Indian youth are 1.8 times more likely than white youth to receive an adult prison sentence.

Most youth are held in correctional-style facilities

Juvenile court terminology

The terms used in the juvenile justice system differ from those used in adult courts, but have distinct meanings and describe different processes, in many cases they can be thought parallel to each other. In the juvenile system, youth have “adjudicatory hearings” instead they are “adjudicated” rather than “convicted,” and found “delinquent” instead of “guilty” are given “dispositions” instead of “sentences,” and are “committed” instead of “incarcerated.” While adults and youth in adult jails and prisons are considered either “unconvicted” (or “convicted,” the status of youth in juvenile facilities is either “detained” or “committed.” This distinction is particularly important for this report: “detained” youth are held in juvenile facilities before their juvenile or criminal court hearings, or before decisions have been made about appropriate sanctions or placement. Committed youth have been adjudicated (convicted) and a decision has been made to transfer legal responsibility over them to the state for the period of their disposition (sentence).

See “Juvenile Court Terminology” by the National Juvenile Defender Center for more information.

Justice-involved youth are held in a number of different types of facilities. (See “types of facilities” sidebar.) Some facilities look a lot like prisons, some are prisons, and others offer youth more freedom and services. For many youth, “residential placement” in juvenile facilities is virtually indistinguishable from incarceration.

Types of facilities

Juvenile facilities in the Census of Juveniles in Residential Placement (CJRP) self-classify into one of nine categories, which we have divided into “correctional” facilities, which are more restrictive, and “residential-style” facilities, which may allow youths more freedom to participate in community life (school, work, etc.) and/or may provide more tailored programs or services. Definitions for each facility type that follow are from the CJRP glossary, developed by the Center for Juvenile Justice.

Correctional facilities:

1. Detention center: A short-term facility that provides temporary care in a physically restrictive environment for juveniles in custody pending court disposition and, often, for juveniles who are adjudicated delinquent and awaiting disposition or placement elsewhere, or are awaiting transfer to another jurisdiction.
2. Long-term secure facility: A specialized type of facility that provides strict confinement for its residents. Includes training schools, reformatories, and juvenile correctional facilities.
3. Reception/diagnostic center: A short-term facility that screens persons committed to juvenile courts and assigns them to appropriate correctional facilities.

Residential-style facilities:

4. Residential treatment center: A facility that focuses on providing some type of individualized or planned treatment program for youth (substance abuse, sex offender, mental health issues, etc.) in conjunction with residential care.
5. Group home: A long-term facility in which residents are allowed extensive contact with the community, such as attending school or holding a job. Includes halfway houses.
6. Ranch/wilderness camp: A long-term residential facility for persons whose behavior necessitates the strict confinement of a long-term secure facility, often allowing the contact with the community. Includes ranches, forestry camps, wilderness or marine programs, or farms.
7. Shelter: A short-term facility that provides temporary care similar to that of a detention center, but in a physically unrestricting environment. Includes runaway/homeless types of shelters.
8. Boot camp: A secure facility that operates like military basic training. There is an emphasis on physical activity, drills, and manual labor. Strict rules and drill instructor tactics are used to break down youth’s resistance. Length of stay is generally longer than detention but shorter than most long-term commitments.
9. Other: Includes facilities such as alternative schools and independent living, etc. (In the Census, no youth were reported in facilities that self-classified as “other.”)

As of 2016, confined youth were held in 1,772 juvenile facilities, including 662 detentive shelters, 131 shelters, 58 reception/diagnostic centers, 344 group homes, 30 ranch/wilderness care facilities, 30 long-term secure facilities (“training schools”), and 678 residential treatment centers.

Youth in **Indian country**

⑦ are held in facilities operated by tribal authorities or the Bureau of Indian Affairs. Most youth are held in facilities that only hold people 17 or younger, but some are held in facilities that hold both adults and youth. Indian country facilities are not included in the Census of Juvenile Residential Placement, which makes their populations difficult to compare with those of other juvenile facilities. ⑧

Jails are adult facilities operated by local authorities. They generally hold adults who are awaiting trial or who have been convicted of low-level offenses. Jails are designed for shorter periods of incarceration (typically under one year), and generally provide fewer services and programs. According to federal legislation (the Juvenile Justice and Delinquency Prevention Act (JJDP) and the Prison Rape Elimination Act) (PREA), youth charged as adults should be held in juvenile facilities unless a judge determines otherwise, and when they *are* held in adult facilities they are supposed to be separated by sight and sound from incarcerated adults. If they do have contact with adults, it must be under direct staff supervision. Of course, states vary in how strictly they comply with these standards.

Prisons are adult facilities operated by state or federal

⑨ authorities, typically holding people with longer-term sentences. The same federal legislation (JJDP and PREA) applies to prisons as well as jails.

Most youth in juvenile facilities

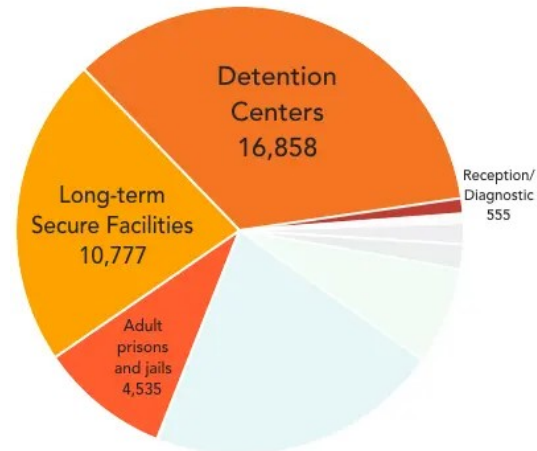
⑩ experience distinctly carceral conditions, in facilities that are:

- **Locked:** 92% of youth in juvenile facilities are in locked facilities. According to a 2018 report, 52% of long-term secure facilities, 44% of detention centers, and 43% of reception/diagnostic centers also use “mechanical restraints” like handcuffs, leg cuffs, restraining chairs, strait jackets, etc. Forty percent of long-term secure facilities and detention centers isolate youth in locked rooms for four hours or more.
- **Large:** 81% are held in facilities with more than 21 “residents.” Over half (51%) are in facilities with more than 51 residents. More than 10% are held in facilities that hold more than 200 youth.
- **Long-term:** Two-thirds (66%) of youth are held for longer than a month; about a quarter (24%) are held over 6 months; almost 4,000 youths (8%) are held for over a year. ⑪

Two out of every three confined youth are held in the most restrictive facilities — in the juvenile justice system’s versions of jails and prisons, or in *actual* adult jails and prisons. 4,535 confined youth — nearly 1 in 10 — are incarcerated in adult jails and prisons, where they face greater safety risks and fewer age-appropriate services are available to them.

Two-thirds of confined youth are in the most restrictive facilities

68% are held in either the juvenile justice system’s versions of jails and prisons or in *actual* adult jails and prisons



⑫⑬ At least another 28,190 are held in the three types of juvenile facilities that are best described as correctional facilities: (1) detention centers, (2) long-term secure facilities, and (3) reception/diagnostic centers. ⑭ 99.7% of all youth in these three types of correctional facilities are “restricted by locked doors, gates, or fences” ⑮ rather than staff-secured, and 60% are in large facilities designed for more than 50 youth.

The largest share of confined youth are held in detention centers. These are the functional equivalents of jails in the adult criminal justice system. Like jails, they are typically operated by local authorities, and are used for the temporary restrictive custody of defendants awaiting a hearing or disposition (sentence). Over 60% of youth in detention centers fall into those two categories.

⑯

But how many of the 17,000 children and teenagers in juvenile detention centers should really be there? According to federal guidance, “...the purpose of juvenile detention is to confine only those youth who are serious, violent, or chronic offenders... pending legal action. Based on these criteria, [it] is not considered appropriate for status offenders and youth that commit technical violations of probation.” Yet almost 4,000 youth are held in detention centers for these same low-level offenses. And nearly 2,000 more have been *sentenced* to serve time there for other offenses, even though detention centers offer fewer programs and services than other facilities. In fact, “National leaders in juvenile justice... support the prohibition of juvenile detention as a dispositional option.”

The most common placement for committed (sentenced) youth is in long-term secure facilities, where the conditions of confinement invite comparisons to prisons. Often called “training schools,” these are typically the largest and oldest

facilities, sometimes holding hundreds of youths behind razor wire fences, where they may be subjected to pepper spray, mechanical restraints, and solitary confinement.

⑰

The third correctional-style facility type, reception/diagnostic centers, are often located adjacent to long-term facilities; here, staff evaluate youth committed by the courts and assign them to correctional facilities. Like detention centers, these are meant to be transitional placements, yet over half of the youth they hold are there longer than 90 days. More than 1 in 7 youth in these “temporary” facilities is held there for over a year.

Outside of these correctional-style facilities, another 15,400 youth are in more “residential” style facilities that are typically less restrictive, but vary tremendously, ranging from secure, military-style boot camps to group homes where youth may leave to attend school or go to work. Most of these youth (78%) are still in locked facilities rather than staff-secured, and conditions in some of these facilities are reportedly worse than prisons. Almost 9 out of 10 youth in these more “residential” facilities are in residential treatment facilities or group homes. Less frequently, youth are held in ranch or wilderness camps, shelters, or boot camps.

Some facility types are much worse than others

The type of facility where a child is confined can affect their health, safety, access to services, and outcomes upon reentry. Adult prisons and jails are unquestionably the worst places for youth. They are not designed to provide age-appropriate services for children and teens, and according to the Campaign for Youth Justice, youth in adult facilities may be placed in solitary confinement to comply with the PREA safety standard of “sight and sound” separation from incarcerated adults. Youth in adult facilities are also 5 times more likely to commit suicide than those in juvenile facilities.

Correctional-style juvenile detention centers and long-term secure “youth prisons” are often very harmful environments, too. In the Survey of Youth in Residential Placement, more youth in detention and corrections programs reported sexual victimization, fear of attack, solitary confinement, strip searches, use of restraints, unnecessary use of force, and poor relations with staff. Correctional-style facilities also tend to be larger, and youth in larger facilities (with more than 25 beds) report higher rates of sexual victimization. Youth in detention centers, in particular, report receiving the fewest education services, such as special

education, GED preparation, and job training. These youth are also most likely to report difficulty sleeping because of light, indicating that, like many adult facilities, the lights are left on even at night. For a youth population that typically come with a history of trauma and victimization, confinement under any conditions leads to worse outcomes, but the punitive correctional-style facilities are especially dehumanizing.

Locked up before they're even tried

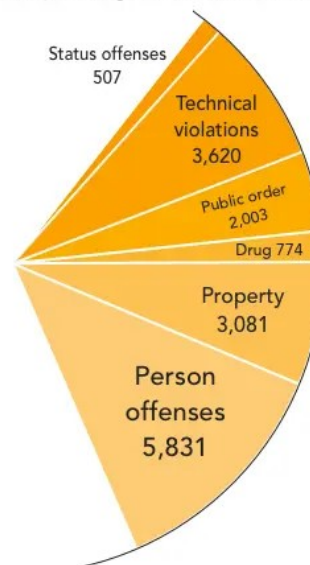
To be sure, many justice-involved youth are found guilty of serious offenses and could conceivably pose a risk in the community. But pretrial detention is surprisingly common; judges choose to detain youth in over a quarter (26%) of delinquency cases, resulting in a disturbing number of youth in juvenile facilities who are not even serving a sentence.

More than 9,500 youth in juvenile facilities — or 1 in 5 — haven't even been found guilty or delinquent, and are locked up before a hearing (awaiting trial).

Another 6,100 are detained awaiting disposition (sentencing) or placement. Most detained youth are held in detention centers, but nearly 1,000 are locked in long-term secure facilities — essentially prisons — without even having been committed. Of those, less than half are accused of violent offenses.

Nearly 16,000 youths are "detained" in juvenile facilities

"Detained" youths - those held awaiting a hearing, sentence, or placement - include 4,000 charged with status offenses or technical violations.



⑱

Even if pretrial detention might be justified in some serious cases, over 3,200 youth are detained for technical violations of probation or parole, or for status offenses, which are “behaviors that are not law violations for adults.”

⑲

Once again mirroring the adult criminal justice system, youth pretrial detention is marred by racial disparity. Less than 21% of white youth with delinquency cases

are detained, compared to 32% of Hispanic youth, 30% of Black youth, 26% of American Indian youth, and 25% of Asian, Native Hawaiian, or Pacific Islander youth. Time held pretrial isolates youth from their families and communities and exposes them to the risk of victimization while detained. Yet in 2017, over 40% of detained youth had been held for longer than 30 days, and nearly 500 had already been detained for over a year.

Finally, youth that are transferred to the adult system can be subject to pretrial detention if their family or friends cannot afford bail. As a result, they may be jailed in adult facilities for weeks or months without even being convicted.

Incarcerated for minor offenses

Far from locking up youth only as a last resort, the juvenile justice system confines large numbers of children and teenagers for the lowest-level offenses. For nearly 1 in 5 youth in juvenile facilities, the most serious charge levelled against them is a technical violation (15%) or a status offense (4%).

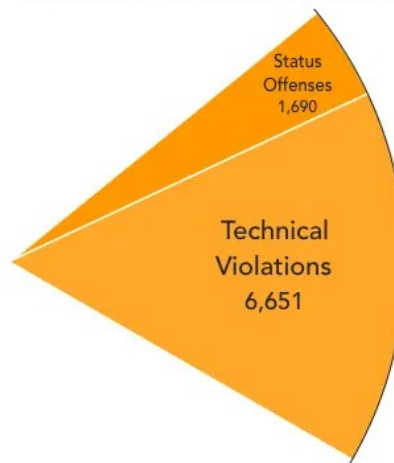
⑩ These are behaviors that would not warrant confinement except for their status as probationers or as minors.

These are youth who are locked up for not reporting to their probation officers, for failing to complete community service or follow through with referrals — or for truancy, running away, violating curfew, or being otherwise “ungovernable.”

⑪ Such minor offenses can result in long stays or placement in the most restrictive environments. Almost half of youths held for status offenses are there for over 90 days, and almost a quarter are held in the restrictive, correctional-style types of juvenile facilities.

How many youth are locked up for the most minor offenses?

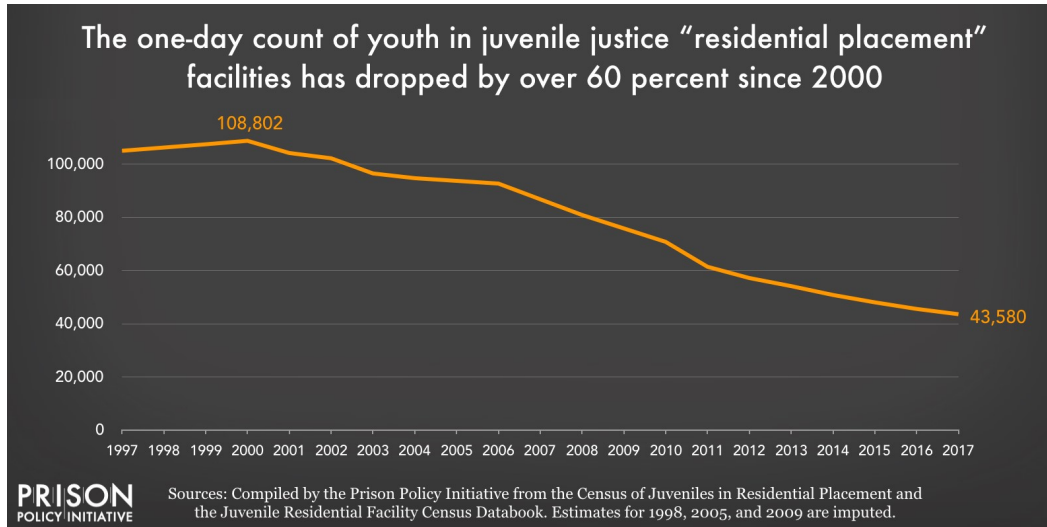
8,341 youth are held for probation violations or status offenses



Progress toward decarceration of the juvenile justice system

The fact that nearly 50,000 youth are confined today — often for low-level offenses or before they’ve had a hearing — signals that reforms are badly needed

in the juvenile justice system. Confinement remains a punishing, and often traumatizing, experience for youth who typically already have a history of trauma and victimization. Without discounting the many ongoing problems discussed in this report, however, there is another, more positive story about juvenile justice reform.



The number of youth confined in juvenile facilities has dropped by over 60% since its peak in 2000, while the adult incarcerated population (which peaked later) has fallen just 10% since 2007. The number of youth held in adult prisons and jails has also dropped dramatically ([see that chart here](#)), although nearly 1 in 10 confined youth are still held in adult facilities.

Policymakers focused on the juvenile justice system have responded far more rationally to the falling crime rate and to the mounting evidence of “what works” compared to those working on the adult criminal justice system. At a time when a 50% reduction in the adult prison and jail population over 10 or 15 years still seems radical to many, the juvenile system has already cut the number of confined youth by 60% since 2000, and continues to decarcerate at a rate of roughly 5% year over year. The number of youth in adult prisons and jails has also dropped by over 60% since 2000. And over the same period, nearly 1,300 juvenile facilities have closed, including over two-thirds of the largest facilities. From an adult criminal justice reform perspective, this is enviable progress.

The progress toward decarceration in the juvenile system can’t be attributed to any single change; rather, historical factors, ongoing research, and dogged advocacy efforts all played important roles. Juvenile crime rates dropped. Some of the most egregious conditions of confinement were widely publicized, jolting policymakers to action. Adolescent brain research made it impossible to deem youth fully culpable and incapable of change. Evidence piled up showing that confinement leads to worse outcomes.

Much of the progress can be attributed to the work of advocates who pushed for federal legislation to protect confined youth (especially PREA and the JJDP), and for state laws that “raised the age” of juvenile court jurisdiction, discouraged transfers to adult courts, and allowed for more individualized sentencing. Many of these strategies have parallels in the criminal justice reform movement, such as repealing mandatory minimum sentences, while others, like “raise the age,” don’t really apply. But juvenile justice reform advocates have also had success with strategies to both improve conditions and reduce the use of confinement that the broader criminal justice reform movement can adopt.

An inexhaustive list of successful reform strategies that have been used to decarcerate the juvenile justice system, and that could be adapted and applied to the adult criminal justice system, includes:

- **Closing and repurposing prisons and detention centers, and redirecting resources to serve people in their communities:** Missouri closed its correctional-style “training schools” 30 years ago, replacing them with a well-staffed network of smaller, dorm-like “treatment centers” focused on rehabilitative programming. This has become known as the “Missouri Model” of juvenile justice reform. While there have been no comparable statewide initiatives to close adult prisons, the Vera Institute of Justice and the Prison Law Office have taken officials from various states to visit prisons in Northern Europe to see for themselves how a more humane correctional system can enhance rehabilitation efforts and reduce the harms of incarceration.
- **Developing programs to safely serve people charged with violent offenses in their homes and communities:** While efforts to reduce adult prison and jail populations generally exclude people charged with violent offenses, juvenile justice experts have pushed for “no reject policies,” recognizing that home- and community-based interventions are more effective than incarceration for youth charged with *all* kinds of offenses. The field has developed evidence-based programs that reduce violence and delinquent, criminal, and aggressive behavior among youth with “elevated risk levels” — without confinement. Criminal justice reform advocates have begun to recognize the need for new approaches to violence, and can look to these programs as models for supportive, non-carceral alternatives.
- **Changing laws to make certain offenses “non-jailable”:** In the juvenile justice context, states like Utah and Massachusetts have removed status offenses from juvenile court jurisdiction, and federal legislation (the JJDP) mandates the deinstitutionalization of status offenders. (The JJDP makes an exception for youth who have violated a valid court order (the “VCO exception”), but several states have passed laws to counteract that exception.) A number of states, including California, Hawaii, Kentucky,

Georgia, Florida, Mississippi, and Texas, have also ended commitment to secure juvenile facilities for low-level or nonviolent offenses.

- **Issuing civil citations in lieu of arrest to divert people away from court intervention:** Delaware’s Juvenile Civil Citation program and Florida’s Judicial Circuit Civil Citation and Similar Prearrest Diversion program are examples of two statewide efforts to offer youth accused of misdemeanors alternative, community-based sanctions, such as family counseling and treatment for substance abuse or mental health, and restorative measures such as community service, apology letters, community impact statements, restitution, etc. While cite-and-release programs are common in the adult criminal justice system, they generally serve to prevent jail detention, not prosecution. These youth programs, however, allow youth to avoid prosecution and its consequences altogether. From November 2018 to October 2019, nearly 10,000 (or 62%) of eligible youth in Florida avoided formal prosecution through pre-arrest diversion.
- **Capping sentences to reduce time under correctional supervision:** Kentucky, Utah, and Tennessee have set limits on the amount of time youth can be in out of home placement, on probation, and/or under court supervision, and Georgia reduced maximum sentences for certain felonies from 5 years to 18 months. Such limits are rare in the adult system, where, for example, indeterminate sentences are the norm and long probation sentences often lead to further supervision or incarceration — but Florida’s two year cap on probation sentences (Fla. Stat. S 948.04) stands out as one example of this strategy applied in the adult system.
- **Shifting funding to develop and expand community-based alternatives to incarceration:** Just last year, Tennessee committed \$4.5 million per year to expand community-based services and to provide juvenile courts with more treatment options. Georgia, which created a grant program in 2013 for counties that reduce the number of committed youth, has shifted \$30 million to community-based alternatives and closed several juvenile facilities. This “justice reinvestment” model has been implemented in many states’ adult systems as well, but these examples show the value in focusing on “front end” reforms to reduce overall incarceration.
- **Recognizing and addressing the impact of trauma on justice-involved populations:** An estimated 90% of justice-involved youth have experienced serious trauma in their lifetime. Understanding the impact of trauma on cognitive development and behavior, policymakers and practitioners have increasingly called for trauma-informed care — not punishment — for justice-involved youth. Yet although incarcerated adults also typically have a history of traumatic victimization, recognition of past trauma has yet to inform sentencing and treatment for most justice-involved adults. Making policymakers and the public more aware of the link between victimization

and justice system involvement could help shift political winds to take a less punitive, and more supportive, approach.

Conclusions

This “big picture” report not only reveals ways in which the juvenile justice system must improve, but also offers lessons from progress that has already been made. States have reduced the number of youth in confinement by more than half without seeing an increase in crime — a victory that should embolden policymakers to reduce incarceration further, for youth and adults alike.

By our most conservative estimates, states could release at least 13,500 more youth *today* without great risk to public safety. These include almost 1,700 youth held for status offenses, 1,800 held for drug offenses other than trafficking, over 3,300 held for public order offenses not involving weapons, and 6,700 held for technical violations.

②② States should also look more closely at youth detained pretrial. Beyond youth detained for those low-level offense categories, over 7,000 ②③ others are held before they’ve been found guilty or delinquent; many, if not all, of these youth would be better served in the community.

Beyond releasing and resentencing youth, states should remove all youth from adult jails and prisons, close large juvenile facilities, and invest in non-residential community-based programs.

②④ Legislators should continue to update laws to reflect our current understanding of brain development and criminal behavior over the life course, such as raising the age of juvenile court jurisdiction and ending the prosecution of youth as adults. ②⑤

But lawmakers who support reducing incarceration among youth should also consider supporting radical reforms to the *adult* criminal justice system. Like youth confinement,

②⑥ adult incarceration inflicts lasting physical, mental, and economic harm on individuals and families. And falling rates of both youth crime and youth incarceration provide evidence that bold reforms — such as making more offenses “non-jailable” and expanding community-based alternatives to incarceration — could be applied to the adult system while maintaining public safety.

Like the criminal justice and juvenile justice systems themselves, the efforts to reverse mass incarceration for adults and to deinstitutionalize justice-involved youth have remained curiously distinct. But the two systems have more problems

— and potentially, more solutions — in common than one might think. The momentum of decarceration in the juvenile justice system must continue, and it should inspire bolder reforms in the criminal justice system as well.

A note about language used in this report

Many terms related to the juvenile justice system are contentious. We have elected to refer to people younger than 18 as “youth(s)” and avoid the stigmatizing term “juvenile” except where it is a term of art (“juvenile justice”), a legal distinction (“tried as juveniles”), or the most widely used term (“juvenile facilities”). We also chose to use the terms “confinement” and “incarceration” to describe residential placement, because we concluded that these were appropriate terms for the conditions under which most youth are held (although we recognize that facilities vary in terms of restrictiveness). Finally, the racial and ethnic terms used to describe the demographic characteristics of confined youth (e.g. “American Indian”) reflect the language used in the data sources.

Finally, because this report is directed at people more familiar with the criminal justice system than the juvenile justice system, we occasionally made some language choices to make the transition to juvenile justice processes easier. For example, we use the familiar term “pretrial detention” to refer to the detention of youths awaiting adjudicatory hearings, which are not generally called trials.

Footnotes

1. A full explanation of the juvenile justice process is beyond the scope of this report. The Office of Juvenile Justice and Delinquency Prevention offers a concise overview and diagram of the [Juvenile Justice System Structure & Process](#). Prof. Michele Deitch authored a more comprehensive overview of the history, standards, legislation, and contemporary issues related to the juvenile justice system in Ch. 1 of the National Institute of Corrections’ [“Desktop Guide to Quality Practice for Working with Youth in Confinement”](#) (2014). [↗](#)
2. Each state decides what age limits and statutes fall under the jurisdiction of their juvenile justice system and who can be prosecuted within the criminal justice system. Currently, 5 states continue to automatically prosecute 17-year-olds as adults — Georgia, Michigan, Missouri, Texas, and Wisconsin. Missouri raised the age of juvenile court jurisdiction to 17 in 2018; the law will go into effect January 1, 2021. Additionally, some states also define the *lower* bounds of the juvenile justice system; in North Carolina, for example, children as young as 6 can be adjudicated in the juvenile justice system. [↗](#)
3. In 2016, [23 states and the District of Columbia](#) had at least one provision that allowed youth to be prosecuted as adults with no specified minimum age. In the states that specified a minimum age for transferring youth to criminal court, the youngest children that could be transferred were 10 years old (in Iowa and Wisconsin). [↗](#)
4. These young children are sometimes confined for long periods of time. At the time of the survey, about 13% of children 12 or younger had been held for more than 6 months; 25 of them had already been held for over a year. [↗](#)

5. The W. Haywood Burns Institute provides detailed data analysis of racial disparities in youth incarceration; for its analysis of trends in racial disparities, see the 2016 report “Stemming the Rising Tide: Racial and Ethnic Disparities in Youth Incarceration & Strategies for Change.” For another, more concise overview of the history and research on widening racial disparities among justice-involved youth, see *Teen Vogue’s* 2018 article, “The Criminal Justice System Discriminates Against Children of Color.” Data on the U.S. youth population by race and ethnicity for a given year can be found at The Annie E. Casey Foundation Kids Count Data Center. [▶](#)
6. Girls are also represented more in Indian country facilities than they are in all other juvenile facilities; girls make up 38% of all youth in Indian country facilities, compared to 15% of all youth in all other juvenile facilities. [▶](#)
7. According to 18 U.S.C. S 1151, “Indian country” refers to “(a) all land within the limits of any Indian reservation... (b) all dependent Indian communities within the borders of the United States... and (c) all Indian allotments, the Indian titles to which have not been extinguished....” [▶](#)
8. Some details are available in “Jails in Indian Country, 2016,” including a list of facilities by state, the number of youths 17 or younger held in each by gender, rated capacity of each facility, offense data, and conviction status. Unfortunately, youth in Indian country facilities cannot be compared to those in other juvenile facilities by age or offense type (these are reported differently than in the Census of Juveniles in Residential Placement), and data on security type (locked versus staff-secured) and length of stay are not reported for Indian country facilities. [▶](#)
9. In 2017, 893 youth in adult prisons were incarcerated in state prisons. 42 youths age 17 or younger were under the federal Bureau of Prisons (BOP) jurisdiction; they were housed in unspecified private facilities contracted by the BOP. [▶](#)
10. This does not include youth in Indian country facilities, as not all of these details are available in the Bureau of Justice Statistics’ report, “Jails in Indian Country, 2016.” [▶](#)
11. These time frames were measures of “days since admission” at the time of the survey, so they actually measure how long youth had already been held, not a disposition (sentence) length. These time frames are therefore not necessarily reflective of how long surveyed youths were ultimately confined. [▶](#)
12. According to federal legislation (the Juvenile Justice and Delinquency Prevention Act, or JJDPA, and the Prison Rape Elimination Act, or PREA), youth charged as adults should be put in juvenile residential placement, not in adult facilities, unless a judge determines after a hearing that they cannot be put in placement. When they are held in adult facilities, they must be housed separately and protected from physical and “sight and sound” contact with adults. When youth and adults come into contact in these facilities, it should only be under direct staff supervision. Furthermore, facilities should avoid putting youth in isolation to comply with these standards. State compliance with JJDPA and with PREA’s “Youthful Inmates Standard” varies, however. [▶](#)
3. The Campaign for Youth Justice details many of the problems with incarcerating youth in adult facilities in its fact sheets, “Key Facts: Youth in the Justice System” and “Let’s Get Children Out of Adult Courts, Jails & Prisons.” In 2016, *The Atlantic* reported, in greater depth, the risks of sexual abuse and violence to youth in adult facilities. Richard E. Redding’s report, “The Effects of Adjudicating And Sentencing Juveniles As Adults: Research and Policy Implications” in *Youth Violence and Juvenile Justice* (2003) discusses the impact of trying and sentencing youth as adults on deterrence, case outcomes, and recidivism, and the conditions of confinement differences between adult and juvenile facilities. [▶](#)
4. The 28,190 youth in detention centers, long-term secure facilities, and reception/diagnostic centers discussed in this section do not include those in similar facilities in Indian country. While most of the Indian country facilities holding youth age 17 or younger have “Juvenile Detention” or “Detention Center” in their names, “Jails in Indian Country, 2016” does not provide comparable facility details those in the Census of Juveniles in Residential Placement. [▶](#)
5. The Census of Juveniles in Residential Placement states that “locks indicated” means “[the] facility indicated that juveniles are restricted within the facility or its grounds by locked doors, gates, or fences some or all of the time.” [▶](#)
6. Of the 16,858 youth in detention centers in 2017, 10,639 (63%) were detained before adjudication/conviction or disposition/sentencing. 7,495 were detained awaiting juvenile court adjudication (hearing), 726 were detained awaiting a criminal court hearing, 277 were detained awaiting a transfer hearing, and 2,141 were adjudicated but were detained awaiting disposition (sentencing). 3,133 (19%) were committed after adjudication or criminal conviction. The remaining 3,086 (18%) were either detained awaiting placement, placed there

- as part of a diversion arrangement, or were held for “other/unknown” reasons. [↗](#)
17. For more on “youth prisons,” see [Youth First Initiative’s](#) website; “The Facts Report” has more detailed descriptions comparing youth prisons to adult prisons. For more on conditions of confinement in juvenile facilities, see “[Survey of Youth in Residential Placement: Conditions of Confinement](#)” by Andrea J. Sedlak, Ph.D. (May 2017). Note that the Survey of Youth in Residential Placement data is from 2003; the survey has only been conducted once so more recent data is not available. [↗](#)
 18. Of the 986 youth detained in long-term facilities, 440 are held for person (violent) offenses. 187 are held for property offenses, and 359 are held for technical violations or drug, public order, or status offenses. [↗](#)
 19. In “[Juveniles in Residential Placement, 2013](#)” (2016), the Office of Juvenile Justice and Delinquency Prevention defines status offenses as “behaviors that are not law violations for adults, such as running away, truancy, and incorrigibility.” For a deep dive into status offenses, see Vera Institute for Justice’s 2017 report “[Just Kids: When Misbehaving Is a Crime](#) .” [↗](#)
 20. In 21 states, an even greater portion of youth in juvenile facilities are held for these offenses, including 38% in New Mexico; 37% in Nebraska; 36% in North Carolina; 34% in Arizona; 32% in Alaska; 30% in West Virginia; 29% in Michigan; 27% in Alabama and New York; 26% in Pennsylvania; 25% in Wyoming; 23% in California, Kentucky, Montana, Nevada, and North Dakota; 22% in Arkansas, Oklahoma, and Texas; 21% in Virginia; and 20% in Hawaii. Source: Detailed Offense Profiles for each state in 2017 from the [EZACJRP U.S. & State Profiles](#) . [↗](#)
 21. Although the JJDPA’s “[Deinstitutionalization of Status Offenders](#)” requirement states that youth charged with status offenses should not be placed in secure confinement, courts in some states take advantage of an exception allowing judges to confine youth for status offenses for up to 7 days, if the offense violates a valid court order, such as “attend school regularly.” In FY 2016, this “valid court order exception” was used to confine 5,591 youth for status offenses in 24 states. [↗](#)
2. See the [methodology](#) for details about this estimate. For those curious about what behaviors are included in some of these offense categories, the [Census of Juveniles in Residential Placement Glossary](#) states that “other drug offenses” include “drug possession or use, possession of drug paraphernalia, visiting a place where drugs are found, etc.” and “other public order offenses” include “obstruction of justice (escape from confinement, perjury, contempt of court, etc.), non-violent sex offenses, cruelty to animals, disorderly conduct, traffic offenses, etc.” 13,500 is a conservative estimate based on the most obvious low-level offenses, including status offenses, technical violations, and the offenses listed above. A more aggressive estimate could include all non-violent offenses. [↗](#)
 3. Our estimate includes 6,995 youth detained in juvenile facilities awaiting juvenile court adjudication, criminal court hearing, or transfer hearing, as well as 56 unconvicted youth in Indian country facilities. It does not include any of the 3,600 youth detained in adult jails in 2017, even though many are likely unconvicted, because their conviction status was not reported. See the [methodology](#) for details. [↗](#)
 4. Many juvenile justice-focused organizations have proposed policy changes at every stage of the process. A few excellent examples include recommendations from the [Annie E. Casey Foundation, Campaign for Youth Justice](#) (pages 38-44), [W. Haywood Burns Institute](#) (pages 13-15), and the [Youth First Initiative](#). [↗](#)
 5. For a summary of this research, see [Community-Based Responses to Justice-Involved Young Adults](#) by Vincent Schiraldi, Bruce Western, and Kendra Bradner (2015) . [↗](#)
 6. The broad harms of youth incarceration are well documented, from [pretrial detention](#) to [conditions in juvenile correctional facilities](#) (“youth prisons”) and [adult facilities](#). While incarceration inflicts serious harm to incarcerated adults, the experience of being removed from their homes and locked up is uniquely damaging for youth, who are in a critical stage of development and are more vulnerable to abuse than adults. [↗](#)

Read about the data

In an effort to capture the full scope of youth confinement, this report aggregates data on youth held in both juvenile and adult facilities. Unfortunately, the juvenile

and adult justice system data are not completely compatible, both in terms of vocabulary and the measures made available.

Because we anticipate this report will serve as an introduction to juvenile justice issues for many already familiar with the adult criminal justice system, we have attempted to bridge the language gap between these two systems wherever possible, by providing criminal justice system “translations.” It should be noted, however, that the differences between juvenile and criminal justice system terminology reflect real (if subtle) philosophical and procedural differences between the two parallel systems.

The Office of Juvenile Justice and Delinquency Prevention (OJJDP) provides easy access to detailed, descriptive data analysis of juvenile residential placements and the youths held in them. In contrast, the Bureau of Justice Statistics (BJS) provides very limited information on youth held in other settings. For youths in adult prisons, all that is readily accessible in government reports is their number by sex and by jurisdictional agency (state or federal). In annual government reports on jails, youths are only differentiated by whether they are held as adults or juveniles. Slightly more detailed information is reported on youths in Indian country facilities, but the measures reported are not wholly consistent with the juvenile justice survey, and facility-level analysis is necessary to separate youths from adults for most measures.

Despite these challenges, this report brings together the most recent data available on the number of youths held in various types of facilities and the most serious offense for which they are charged, adjudicated, or convicted. The only youth included in this analysis are involved in the juvenile or criminal justice process. Youth who are put in out-of-home placements because their parents or guardian are unwilling or unable to care for them (i.e. dependency cases) are not included in this analysis. The approximately 5,000 children in the custody of the Office of Refugee Resettlement (ORR) for immigration reasons are also not included, since they are not held there due to juvenile or criminal justice involvement. While these various systems that keep children in out-of-home arrangements are interrelated, an analysis of the impact of immigration or child welfare policies on youth justice system involvement is beyond the scope of this report.

Data sources:

- **Juvenile facilities:** Most of the data in this report comes from the Census of Juveniles in Residential Placement (CJRP) in 2017. The Office of Juvenile Justice and Delinquency Prevention (OJJDP) reports one-day counts of youth under 21 in “juvenile residential facilities for court-involved offenders” on the Easy Access to the Census of Juveniles in Residential Placement (EZACJRP) website. It includes facility data

including facility self-classification (type), size, operation (local, state, or private), and whether it is locked or staff secure. It also includes data on the youth held in these facilities, including offense type, placement status, days since admission, sex, race, and age. The analysis of juvenile facility characteristics and demographics of youth in juvenile facilities are based on cross tabulation using the “National Crosstabs” tool.

The Juvenile Residential Facility Census Databook: 2000-2016 (JRFC) was used to supplement the CJRP data, and provided more information about the number, size, and type of juvenile facilities over time.

- **Adult jails:** The Bureau of Justice Statistics (BJS) reports the number of people age 17 or younger held in local jails with a breakdown of how many are held as adults versus juveniles in Table 3 of *Jail Inmates in 2017*.
- **Adult prisons:** BJS reports the yearend count of “prisoners age 17 or younger under jurisdiction of federal correctional authorities or the custody of state correctional authorities” in Table 11 of *Prisoners in 2017*. (The BJS Corrections Statistical Analysis Tool (CSAT) — Prisoners also reports these counts from 2000-2016.) *Prisoners in 2017* states that “the Federal Bureau of Prisons holds prisoners age 17 or younger in private contract facilities,” but it is unclear which facilities actually hold these youth. We included these facilities in our count of adult prisons, but it is possible that the 42 youth under Federal Bureau of Prisons (BOP) jurisdiction in 2017 may have been captured in the Census of Juveniles in Residential Placement data, and therefore it’s possible they were double-counted.
- **Indian country:** BJS reports the number of youths age 17 and younger in Indian country jails by facility and sex in Appendix table 4 of *Jails in Indian Country, 2016*. Although BJS provides a national estimate using data imputed for nonresponse in the same table (estimating 110 males and 60 females), we used the reported numbers (84 males and 52 females) because they correspond to the more detailed facility-level data. Using the breakdown by facility, we were able to determine how many youth are held in facilities that only hold youth versus those in combined adult/juvenile facilities. These youth are included in our total population of youth confinement, but excluded from analysis of the characteristics of juvenile facilities and youth in residential placement, which is based on the Census of Juveniles in Residential Placement (CJRP) data. BJS reports some details that are similar to CJRP data, but do not match them enough to the two combine datasets (for example, offense categories are different, completely excluding technical violations and status offenses).

To compare racial and ethnic representation in juvenile facilities to the general population of all youths (17 or younger) in the U.S., we used general population

data from the 2018 “Child population by race and age group” table by the Kids Count Data Center (The Annie E. Casey Foundation).

The estimate of the number of youth confined for low-level offenses who could be considered for release (in the Conclusions section) includes 13,506 held in juvenile facilities on a given day in 2017. 1,690 of these youth were held for status offenses, 1,820 for “other drug offenses,” 3,345 for “other public order offenses,” and 6,651 for technical violations. Additionally (although the offense categories are inconsistent with those in the CJRP), Indian country facilities holding only youth age 17 or younger held 60 youth for seemingly low-level offenses: 16 for public intoxication, 2 for DWI/DUI, and 42 for “other unspecified” (this dataset does not include technical violations or status offenses as offense categories). These youth in Indian country facilities could also be considered for release, but they are not included in this estimate. We did not include youth held in adult prisons and jails in this estimate because offense types were not reported for them.

The estimate of the number of youth detained pretrial who could be considered for release includes 6,995 youth detained in juvenile facilities and 56 unconvicted youth in Indian country facilities.

At the time of the survey, 6,995 youth in juvenile facilities were detained awaiting either adjudication, criminal court hearing, or transfer hearing (essentially, they were being held before being found delinquent or guilty). This figure does not include the 2,558 youth detained for technical violations, status offenses, “other drug offenses,” or “other public order offenses” while they awaited these hearings, because we already included them in the roughly 13,500 youth held for low-level offenses that could be released.

Jails in Indian Country, 2016 reports at least 56 unconvicted youth in facilities holding only people age 17 or younger. This may slightly underreport the unconvicted population, because the conviction status of youth in combined adult and juvenile Indian country facilities was not reported separately from the adults, and one juvenile facility did not report conviction status.

Youths held in adult prisons and jails were not included in this estimate because conviction status was not reported for these youth. However *Jail Inmates in 2017* notes that jails “may hold juveniles before or after they are adjudicated.”

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About the Prison Policy Initiative

The non-profit non-partisan Prison Policy Initiative was founded in 2001 to expose the broader harm of mass criminalization and spark advocacy campaigns to create a more just society. The organization is most well-known for its big-picture publication Mass Incarceration: The Whole Pie that helps the public more fully engage in criminal justice reform. This report builds upon that work and the analysis of women's incarceration, Women's Mass Incarceration: The Whole Pie.

About the author

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The Atlantic

How America Outlawed Adolescence

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Story by Amanda Ripley

NOVEMBER 2016 ISSUE

| EDUCATION

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ONE MONDAY MORNING LAST FALL, at Spring Valley High School in Columbia, South Carolina, a 16-year-old girl refused to hand over her cellphone to her algebra teacher. After multiple requests, the teacher called an administrator, who eventually summoned a sheriff's deputy who was stationed at the school. The deputy walked over to the girl's desk. "Are you going to come with me," he said, "or am I going to make you?"

Niya Kenny, a student sitting nearby, did not know the name of the girl who was in trouble. That girl was new to class and rarely spoke. But Kenny had heard stories about the deputy, Ben Fields, who also coached football at the school, and she had a feeling he might do something extreme. "Take out your phones," she whispered to the boys sitting next to her, and she did the same. The girl still hadn't moved. While Kenny watched, recording with her iPhone, Fields wrenched the girl's right arm behind her and grabbed her left leg. The girl flailed a fist in his direction. As he tried to wrestle her out of her chair, the desk it was attached to flipped over, slamming the girl backwards. Then he reached for her again, extracting her this time, and hurled her across the classroom floor.

The other kids sat unmoving, hunched over their desks. The teacher and the administrator stood in silence. As Fields crouched over the girl to handcuff her, Kenny tried to hold her phone steady. Her legs were shaking and her heart was hammering in her chest. If this was really happening, she thought, someone needed to know about it—someone, apparently, outside that room. "Put your hands behind your back," Fields ordered the girl, sounding excited, out of breath. "Gimme your hands! Gimme your hands!"

Finally, in an unnaturally high voice, Kenny blurted: "Ain't nobody gonna put this shit on Snapchat?" The administrator tried to quiet her down, saying her name over and over, but she would not be silenced.

“What the fuck?” she said, her voice rising further. “What the fuck?” Then she hit the Post button on her phone’s Snapchat app.

As Deputy Fields crouched over the girl to handcuff her, Kenny tried to hold her phone steady.

Videos taken by Kenny and other students ended up online, and the story went viral that night. The girl who was thrown was black, like Kenny, and the footage of her being flung across the classroom by a white police officer inflamed debates about race and law enforcement. Hillary Clinton tweeted that there was “no excuse” for such violence, while the singer Ted Nugent praised Fields for teaching a lesson to “a spoiled, undisciplined brat.”

After Fields handcuffed the girl, another deputy arrived to escort her out of the classroom. She would be released to her guardian later that day. Then, according to Kenny, Fields turned to her. “You got so much to say?,” Fields asked. “Come on.”

Kenny did not speak. She got up and put her hands behind her back.

THE NEXT DAY, the principal called the incident “horrific,” and the school-board chair said it represented an “outrageous exception to the culture, conduct, and standards in which we so strongly believe.” Richland County Sheriff Leon Lott, who oversees the officers at Spring Valley, said he was sickened by the videos and was investigating his deputy’s actions. He added in passing that Niya Kenny had been arrested for “contributing to the chaos.” None of the other officials mentioned her name.

Kenny’s case did not receive much attention from officials because it was not unusual. Her arrest was based on a law against “disturbing school,” a mysterious offense that is routinely levied against South Carolina

students. Each year, about 1,200 kids are charged with disturbing school in the state—some for yelling and shoving, others for cursing. (In fact, the girl who was thrown from her desk was charged with disturbing school too, though the public uproar focused on the use of force.) State law makes it a crime to “disturb in any way or in any place the students or teachers of any school” or “to act in an obnoxious manner.” The charge, which has been filed against kids as young as 7, according to the American Civil Liberties Union, is punishable by up to 90 days in jail or a \$1,000 fine.



Niya Kenny and her mother, Doris Ballard-Kenny, in Columbia, South Carolina, August 2, 2016 (André Chung)

At least 22 states and dozens of cities and towns currently outlaw school disturbances in one way or another. South Dakota prohibits “boisterous” behavior at school, while Arkansas bans “annoying conduct.” Florida makes it a crime to “interfere with the lawful administration or functions of any educational institution”—or to “advise” another student to do so. In Maine, merely interrupting a

teacher by speaking loudly is a civil offense, punishable by up to a \$500 fine.

In some states, like Washington and Delaware, disturbing-school laws are on the books but used relatively rarely or not at all. In others, they have become a standard classroom-management tool. Last year, disturbing school was the second-most-common accusation leveled against juveniles in South Carolina, after misdemeanor assault. An average of seven kids were charged every day that schools were in session.

Each year in Maryland, Florida, and Kentucky, about 1,000 students face the charge. In North Carolina, the number is closer to 2,000. Nationwide, good data are hard to come by. Some states, like Nevada and Arizona, do not track how many times juveniles are charged with this offense. (In Arizona, a court official would tell me only that the number is somewhere between zero and 5,375 arrests a year.) But figures collected by *The Atlantic* suggest that authorities charge juveniles with some version of disturbing school more than 10,000 times a year. This number does not even include older teenagers who are charged as adults.

Over the years, judges around the country have landed on various definitions of *disturbance*. In Georgia, a court concluded, a fight qualifies as disturbing school if it attracts student spectators. But a Maryland court found that attracting an audience does not create a disturbance unless normal school activities are delayed or canceled. In Alabama, a court found that a student had disturbed school because his principal had had to meet with him to discuss his behavior; an appeals court overturned the ruling on the grounds that talking with students was part of a principal's job.

Maryland lawmakers worried that the state's disturbing-school law "could be applied to a kindergarten pupil throwing a temper tantrum."

Just this summer in New Mexico, a federal appeals court upheld a school police officer's decision to arrest and handcuff a 13-year-old who had repeatedly burped in gym class, ruling that "burping, laughing, and leaning into the classroom stopped the flow of student educational activities, thereby injecting disorder into the learning environment." The decision reads like an *Onion* article, albeit one that goes on for 94 pages.

When teenagers talk back, scream obscenities, or otherwise behave badly, adults must call them out and hold them accountable. That's how kids learn. In time, most kids outgrow their delinquent ways. Police and policy makers who defend these laws say they make classrooms safer. But the laws have also been used to punish behavior that few reasonable people would consider criminal. Defiance is a typical part of adolescence, so putting teenagers in jail for swearing or refusing to follow an order is akin to arresting a 2-year-old for having a meltdown at the grocery store. It essentially outlaws the human condition. And the vagueness of the laws means they are inevitably applied unevenly, depending on the moods and biases of the adults enforcing them. In South Carolina, black students like Kenny are nearly four times as likely as their white peers to be charged with disturbing school.

THE ORIGINAL SCHOOL "DISTURBANCE" in South Carolina, the one that started it all, was flirting.

During the Progressive era, with women beginning to vote and race riots breaking out across growing urban centers, lawmakers seized on flirting as a menace to social order. New York City police set up flirting dragnets, using "pretty blonde girls as bait," according to a

syndicated newspaper column from June 1920. “The enormous recent growth of the crime of flirting ... must be ascribed to a growing laxity of conduct in general, and also to the rise of the short skirt,” the article continued. “It should be promptly and drastically suppressed.”

In 1919, a South Carolina state lawmaker and attorney named John Ratchford Hart, distressed by incidents of men flirting with students at the all-white women’s college in his district, proposed a law to prohibit any “obnoxious” behavior or “loiter[ing]” at any girls’ school or college in the state. Violators would face up to a \$100 fine or 30 days in jail.

From the beginning, the disturbing-school law was intended to keep young people in their place. But it would evolve with threats to the status quo. Forty-eight years later, after black students organized a series of nonviolent marches against segregation in the rural enclave of Orangeburg, South Carolina, the county’s representative in the statehouse—a former teacher named F. Hall Yarborough—proposed a bill to broaden the law to criminalize obnoxious behavior at all schools, single-sex and coed. Yarborough was alarmed not only by the uprisings in his own district but by civil-rights and antiwar protests on campuses across the country. He spoke obliquely of the activists he hoped to fend off with the expanded law. “I’m interested in keeping outside agitators off campus,” he told the Associated Press. The bill sailed through the statehouse. No hearings were held.

Not long after that, black students from South Carolina State College led a multiday protest against a segregated bowling alley in Orangeburg. One night, after the protesters had returned to campus, someone threw a banister that hit a state trooper in the head. Police opened fire, shooting 30 unarmed students and killing three black teenagers, in what would become known as the Orangeburg Massacre. The governor signed South Carolina’s newly expanded disturbing-school bill into law three weeks later.



A student-led civil-rights protest in Orangeburg, South Carolina, in 1968, during which police killed three black teenagers. An expanded disturbing-school bill was signed into law soon after. (Associated Press)

It's hard to overstate the tension that crackled through the country back then. Peaceful protests far outnumbered violent ones, but it did not necessarily feel that way. From January 1969 to April 1970, more than 8,200 bomb threats, attempted bombings, and actual bombings were attributed to student protests. "These are not just college students out on a panty raid," a Texas legislator warned his colleagues. "These are revolutionaries dedicated to destroying our system."

In the midst of the turmoil, the U.S. Supreme Court ruled in 1969 against a Des Moines, Iowa, school district, finding that students had a

right to protest peacefully on school grounds. In this case, the Court said, the teenage plaintiffs could wear black armbands in protest of the Vietnam War, as long as they did so without “materially and substantially” disturbing class. Justice Hugo Black issued an ominous dissent. “It is the beginning of a new revolutionary era of permissiveness in this country,” he wrote. “Groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins.”

Following the federal ruling, state and local officials passed a flurry of laws that would punish students who *were* disturbing class, anywhere from universities to elementary schools. At the time, it’s worth remembering, black students weren’t just protesting; they were also integrating white classrooms, backed by the federal government. “As soon as we started introducing black bodies into white schools, we got these laws,” says Jenny Egan, a public defender for juveniles in Maryland who regularly represents clients charged with disturbing school. “That’s not a coincidence.”

The maneuvering was part of a broader legislative cold war: As Michelle Alexander documents in her book, *The New Jim Crow*, after the Civil Rights Act dismantled formal segregation, politicians stopped demanding “segregation forever” and began calling for “law and order.”

In New Mexico, a federal appeals court upheld a police officer’s decision to arrest and handcuff a 13-year-old who had repeatedly burped in gym class.

In September 1970, President Richard Nixon’s Commission on Campus Unrest reported that more than 30 states had passed nearly 80 laws to counter student unrest. It warned that “legislators in a majority of states have passed antistudent and antiuniversity laws that range from the

unnecessary and ill-directed to the purely vindictive.” Amid the hysteria, some legislators proposed laws that were already on the books: In Kansas City, Missouri, police came out against a new disturbing-school statute because it would have duplicated not one but five existing city laws. Maryland lawmakers worried that the state’s disturbing-school law “could be applied to a kindergarten pupil throwing a temper tantrum.”

Still, the laws did not become integral to school discipline until the 1990s, when fears of rising gang- and drug-related violence—followed by a series of high-profile school shootings—led to the widespread installation of police officers in school hallways. By 1998, more than 100 South Carolina school districts, including Niya Kenny’s, had brought in police, formally known as “school resource officers.” After the Columbine High School shootings in Colorado the next year, South Carolina’s Safe Schools Task Force recommended increasing the number of officers, and the state’s Department of Education requested \$14 million to pay for them—double the previous year’s budget. (The fact that a full-time officer was employed at Columbine but was unable to stop the shooters did not seem to discourage hiring in other districts.)

By the early ’90s, America’s juvenile crime rate had begun to drop, a trend that would continue for the next two decades. It would be logical to assume that school police officers contributed to this decline. But there is little reliable evidence to support or refute that theory. What we do know is that the drop in crime began before police arrived in most schools. And once police were in place, they tended to keep busy. According to an analysis of 2,650 schools published in the *Washington University Law Review* earlier this year, students at schools with police officers were significantly more likely to be reported to law enforcement for low-level offenses than students at schools without police, even after controlling for the neighborhood crime rate, the demographics of the schools, and a host of other variables.

Sheriff Leon Lott, who oversees the officers at Spring Valley High School, has criticized South Carolina's disturbing-school law. "You could chew gum and be arrested," he says. (André Chung)

Previously, principals had needed to call the police to make an arrest; by the late '90s, in many schools, the police were already there. And while they were not technically supposed to get involved in workaday school-discipline issues, the disturbing-school laws rendered all manner of common misbehavior illegal. Some officers worked hard to build relationships with students and resolve problems before they escalated. But most did not have adequate training to manage adolescents, who are wired to proclaim their independence. "Most law-enforcement officers are trained to assert authority, to take control of the situation," says Mark Soler, the executive director of the Center for Children's Law and Policy, who has trained school police officers. "In a school context, that's bad advice." From 2000 to 2016, according to South Carolina's data, the disturbing-school charge was filed against students in the state 33,304 times.

THE HANDCUFFS DEPUTY FIELDS used on Kenny were tight, pressing against her skin. “I just had this one tiny hope,” she told me later, “that he might just try to scare me and let me go.”

This was Kenny’s second time taking Algebra I. She’d failed it as a freshman, too busy socializing to do math. But as a senior, she was more focused: She had to pass the class in order to graduate. Until that morning, everything had been going according to plan. She had an A, and the teacher seemed to like her. If, for example, she took out her phone in class, he would give her a look, and she’d put it away.

Fields took her to another room, where Kenny says he and the administrator started yelling at her. “What did you think you were doing in there?” Fields asked. Kenny started to wonder whether she had misjudged the situation. If the deputy’s actions were so wrong, why was she the only one saying so? “I started thinking I was the bad guy,” Kenny told me. “Like maybe I’d done the wrong thing.” Suddenly she thought of what her mother would say about her arrest. She started crying, and Fields asked for her phone. She handed it over but admitted that she’d already posted the video.

Around 12:30 in the afternoon, another deputy led Kenny outside—still in handcuffs—to meet a police van. (Officers at Spring Valley can decide to release a student to a guardian after an arrest, as they had done with the girl who was thrown, but not with Kenny.) Standing there, in front of her school on Sparkleberry Lane, where she'd run cross-country and sung in the gospel choir, she started sobbing. The handcuffs were not a prop. She was going to jail. That's when she decided she would never come back to Spring Valley High School. As with many kids who get arrested at school, something shifted in her head, and she concluded that she did not belong there anymore.

Kenny climbed into the police van, which took her to the Alvin S. Glenn Detention Center, in Columbia. She had recently celebrated her 18th birthday, and would be processed as an adult. Inside the facility, an officer ordered her to take off her boots so they could be searched. Then she was fingerprinted, photographed, and led into a holding room with about 20 other detainees. The room was frigid, and she crossed her arms to keep warm. Someone asked her why she was there, and she said that

she'd yelled at a police officer in school. "Yelling?" a correctional officer said. "And they booked you in here for that?"

After a bond hearing, where she was told she would be let go until her court date, Kenny was sent back to the holding room to wait for release. With nothing else to do, she watched a TV mounted in the corner, which was playing the evening news on mute. That's when Kenny saw a video of her Algebra I classroom flash across the screen. "Did you see that?," Kenny shouted. "That's my classroom! That is why I am in here!" The other detainees looked over to watch. "Everybody was like, 'Are you serious? You don't need to be in here,' " she told me. "I was like, 'All right, I'm not going to get in trouble with my mom.' "

Shortly after 8 o'clock in the evening, about nine hours after her arrest, Kenny was released. Her mother, Doris Ballard-Kenny, hugged her in the parking lot. "I saw the video," Ballard-Kenny said. "I am proud of you." Standing outside the jail's barbed-wire fence, Kenny looked tired but resolute as she spoke to a TV reporter. "I had never seen nothing like that in my life, a man use that much force on a little girl," she said, shaking her head back and forth. "A big man, like 300 pounds of full muscle. It was like, no way, no way. You can't do nothing like that to a little girl."

That night, Kenny couldn't sleep. She had a crushing headache, the kind that comes from crying for too long. In the morning, she asked her mother to take the day off work to be with her. For the first time since elementary school, she was scared to be home by herself.

"Before this, I had a sense of pride for Spring Valley High School," Kenny's mother told me later. "It's one of the better schools in Columbia. A lot of the affluent kids go there." Spring Valley regularly makes *The Washington Post's* list of America's "most challenging" high schools, based on the number of advanced tests taken by students. It is not a violent school or a destitute one. But in the course of a single day,

it had unraveled some of the most important lessons she had instilled in her daughter. “She has always been taught to speak up for people. If you see an injustice being done, help the person,” Ballard-Kenny said. “That’s what she was doing. And it’s almost like it’s making what I taught her obsolete.”

The gym at Spring Valley High School (André Chung)

Kenny’s arrest was not the first disciplinary controversy in her school district; in fact, a group of black parents had already created an association to help students who felt they’d been unfairly disciplined under the disturbing-school law and district policies. In the year leading up to the incident, the district had set up task forces on diversity and discipline, and hired a chief diversity officer to help address these concerns.

But the law-and-order culture remained powerful at Spring Valley—as it does across the state. Although Ben Fields was fired two days after the

incident, he was not accused of committing any crime. Nor was the teacher or the administrator, both of whom kept their jobs (the administrator has since transferred to a school about an hour north of Spring Valley). None responded to requests for comment. In a survey of South Carolinians conducted by Public Policy Polling shortly after the videos went viral, almost half of the respondents said they opposed the decision to fire Fields. Only a third supported the decision. About 100 Spring Valley students—some of them football players who had been coached by Fields—walked out of class in protest of his dismissal. No one was arrested. An email from the school-board chair, released to *The Atlantic* in response to a Freedom of Information Act request, shows that administrators knew about the protest in advance but felt that stopping it would have caused “more disruption of school” than allowing it.

“We were just upset,” says Caleb, a black student who helped organize the walkout. (He requested that I use only his first name.) He acknowledged that Fields had used “definitely, probably, too much force—a little bit,” but, he said, “we didn’t think he deserved to be fired.” Caleb did not know Kenny, but he had seen the video from the classroom, featuring her yelling “What the fuck?,” and he had little sympathy for her. “I wouldn’t have been surprised if someone had said, like, ‘Man, this isn’t right,’ ” he says. “But cursing, yelling, screaming like that definitely was not necessary.” Like other students I met, Caleb seemed to expect more self-control from a teenage girl than from a sheriff’s deputy.

As a society, our understanding of teenagers has not caught up to the science. In the past 15 years, neuroscientists have discovered that a teenager’s brain is different in important ways from an adult’s brain. It is more receptive to rewards than to punishment, and the parts that control impulses and judgment are still under construction. Which

means that back talk and fake burps are predictable teenage acts—to be corrected, not prosecuted.

In September, almost a year after the arrests, the local solicitor, Dan Johnson, dropped the disturbing-school charge against the girl who had been thrown. The girl had indeed disturbed school, Johnson wrote in a 12-page explanation of his decision, but the case had been “compromised” by the firing of Fields—a punishment that might prejudice “prospective jurors” against the deputy’s side of the story. (The fact that this girl was underage and therefore would have faced a judge, not a jury, went unmentioned.) He also noted that hospital X-rays taken after the arrest suggested that the girl’s wrist had been fractured, but he declined to charge Fields, citing insufficient proof of a crime. (His report included a statement from Fields claiming that the girl had resisted arrest and punched him twice during the encounter, and that her desk had fallen over “because of the momentum that [her] movements had created.”)

Johnson also dismissed the disturbing-school charge against Kenny. “There is simply not enough evidence to prove each and every element” of the alleged offense, he wrote. Kenny’s attorney had expected such a dismissal, which happens in about one-fifth of juvenile arrests in South Carolina. But damage had already been done. Regardless of GPA, race, or prior offenses, students who have been arrested are nearly twice as likely as their peers to drop out of high school, even if they never go to court, according to a 2006 study by the criminologist Gary Sweeten. “Just being arrested can have long-term consequences,” says Josh Gupta-Kagan, an assistant professor specializing in juvenile justice at the University of South Carolina School of Law. “Teenagers start to see the school as out to get them.”

“America generally loves crime and punishment—this idea that punishment somehow corrects behavior, that it teaches kids a lesson,”

says Jenny Egan, the Maryland public defender. In reality, the more involvement kids have with the legal system, the worse their behavior gets. Kids who get arrested *and* appear in court are nearly four times as likely to drop out of high school, Gary Sweeten found. But most people in the chain of decision making—from the state lawmaker to the teacher to the principal to the school police officer to the prosecutor—do not realize how much damage their actions can do, Egan says: “I don’t think a majority of people in the system understand what it does to a child to put him in handcuffs and take him to court—at the very moment when he is trying to figure out who he is in the world.”

Kids facing disturbing-school charges in South Carolina are typically offered punishment outside the court system, such as community service. If they’ve already taken this option in the past—or if they’ve been convicted of other charges on top of disturbing school—they can be incarcerated or placed on probation, a layer of surveillance that boosts their chances of getting re-arrested for things as trivial as missing a day of school. In many juvenile cases, judges will make parents a party to the case, meaning that they are legally bound to report a child who comes home after a court-ordered curfew or violates any other probation condition.

Aleksandra Chauhan, a public defender in South Carolina, says that classroom arrests should not serve as ejection buttons for educators who run out of patience. (André Chung)

“It’s so easy to get into the system and so hard to get out,” says Aleksandra Chauhan, a public defender for juveniles in Columbia. The system clings to kids. Which is why advocates like Chauhan argue that arrests should be a last resort, the nuclear option reserved for truly dangerous cases, not ejection buttons pressed whenever adults run out of patience. “We criminalize juvenile behavior that is considered normal by psychologists,” she says. “We are creating criminals. I really believe that.”

THE UNEXPECTED STANDOUT in reforming disturbing-school laws is the state of Texas. Until recently, Texas had one of the worst records in the country on juvenile justice. Police were charging 275,000 kids a year with “disrupting class” and other low-level offenses. Nearly three in five students were suspended or expelled at least once between seventh and 12th grade, according to an in-depth analysis of nearly 1 million Texas students that came out in 2011. Over time, the Texas school system had become a quasi-authoritarian state, one that punished some kids far more than others.

When it came to clear-cut offenses, like using a weapon, African American students were no more likely than other students to get in trouble in Texas. But they were far more likely to be disciplined for *subjective* violations like disrupting class. Even after controlling for more than 80 variables, including family income, students’ academic performance, and past disciplinary incidents, the report found that race was a reliable predictor of which kids got disciplined.

Then, five years ago, a juvenile-court judge invited Wallace B. Jefferson, the chief justice of the Texas Supreme Court, to spend a day observing her courtroom. Jefferson watched in silence as parents and children, most without lawyers, stutter-stumbled through formal legal rituals many of them did not seem to understand. He was startled not just by

the power imbalance but by the fact that he hadn't known about it before.

The first African American on the state's Supreme Court, Jefferson had spent most of his career defending organizations and corporations, not children. He'd never realized how the legal system was funneling kids from schools to detention centers. "These are families in distress—very often uneducated parents trying to deal with troubled youth, many of whom have mental-health issues," he told me. "If it were my kid, I would be in that courtroom filing pleadings to dismiss. But many of the kids were from broken homes and very modest financial means." After his day in juvenile court, Jefferson met with Texas legislators to see what could be done. It turned out that many were as disgusted by the status quo as he was. They were tired of reading news stories about kids getting charged with disrupting class for spraying perfume or throwing paper airplanes. It was a waste of taxpayer dollars, not to mention embarrassing.

Students at schools with police officers were significantly more likely to be reported to law enforcement.

"I guess it made some people feel good, like they were tough," John Whitmire, a state senator who joined forces with Jefferson, told me. He had chaired the Texas legislature's criminal-justice committee for almost two decades, and no one would have called him soft on crime. "I'm as tough as anybody there is on adults and on juveniles who will cut your throat and hurt you violently," he said. "But the screwups, whether adult or juvenile, I believe we have better results if we work with 'em." Like other lawmakers I interviewed, Whitmire made a point of mentioning that he himself may have been charged with disrupting school if the law had been enforced during his own childhood.

It took a lot of “talk, talk, talk,” as Whitmire put it, but lawmakers on the left and the right answered Jefferson’s call. Among other changes, they reined in the state’s law against disrupting class. Texas students could no longer be charged with this offense at their own schools. Nor could students younger than 12 be charged with any low-level misdemeanor at school. Before charging older kids, officers had to write up formal complaints with sworn statements from witnesses—and some schools were required to try common-sense interventions (like writing a letter to parents or referring the student to counseling) before resorting to a legal charge.

The reforms took effect on September 1, 2013, the beginning of a new school year. Two months later, David Slayton, the head of the Texas Office of Court Administration, checked the charging data for juveniles. “I was floored,” he told me. “It had dropped like a rock.” He asked his staff to send him the data each subsequent month to make sure the numbers weren’t a fluke. They weren’t. That year, the number of charges filed for minor offenses like disrupting class dropped 61 percent. Thanks to the reforms, some 40,000 charges were *not* filed against kids. And there was no evidence that school safety suffered as a result. The number of juvenile arrests for violent crimes, which had been declining before the reforms, continued to fall, as did the number of expulsions and other serious disciplinary actions in schools. “It’s been a remarkable achievement for our state,” Slayton said. “The pendulum has swung back a little bit.”

Over the years, South Carolina lawmakers have tried to do what Texas has done. After Kenny’s arrest, several told me they were hopeful that reforms would finally happen, given all the bad press that the viral videos had brought to the state. Even Sheriff Lott, the official in charge of the officers in Kenny’s district, has called for changes. “You could chew gum and be arrested, technically, for disturbing school,” he told me. “There’s too much discretion.”

In April, a bill that would have eliminated the charge for students at their own school, like the one Texas had passed, came up for a subcommittee hearing in the South Carolina legislature. A solicitor and former teacher named Barry Barnette testified against the proposal. “There’s kids that will not obey the rules. And you’ve got to have discretion for that officer,” he said. “I wish it was a perfect world where the students were always well behaved and everything. It’s not that way.” A representative of the South Carolina Sheriffs’ Association issued a statement arguing that the disturbing-school law should stay in place because without it, officers might be forced to charge students with more-serious offenses—like disorderly conduct or assault and battery.

This argument sounds sensible, but in fact both of those charges can carry less serious penalties under South Carolina code than the disturbing-school charge—a point that was not made at the hearing. Chauhan, the public defender in Columbia, testified in favor of the bill, as did an ACLU lawyer. In the end, it never made it past the subcommittee.

This year, lawmakers in Massachusetts and Virginia also tried to reform their disturbing-school laws. In each case, critics repeated the same essential objection: Police need to have this tool in their toolkit. It didn’t seem to matter that police have access to hundreds of other tools, from disorderly conduct to disturbing the peace to a variety of other catchall charges.

In August, frustrated by a lack of action, ACLU lawyers filed a federal lawsuit against the state of South Carolina, alleging that the disturbing-school law is overly vague and violates due-process rights guaranteed under the Fourteenth Amendment. “The Disturbing Schools statute creates an impossible standard for school children to follow and for police to enforce with consistency and fairness,” the complaint said. The lead plaintiff is Niya Kenny.

WHEN I LAST SAW KENNY, in March, over dinner at a Red Lobster near Spring Valley High School, she was wearing oversize glasses, a knit cardigan, and purple Puma sneakers.

Her mother sat next to her, wearing an #EveryBlackGirl T-shirt. Kenny ordered raspberry lemonade and seafood pasta, apologizing for how tired she was. She hadn't slept the night before. A childhood friend had been robbed and shot to death a few days earlier, and she'd come directly from the funeral.

After dropping out of high school, Kenny had started taking classes four days a week at a continuing-education center for adults. Getting a GED had seemed like the fastest way to move on with her life. Still, she was aware that she was missing out. "I should be prom-dress shopping," she told me. "Paying my senior fees to get my cap and gown." Instead, she was spending most of her time outside of her GED classes working at a fast-food restaurant a mile from the high school. Every week or two, a stranger would recognize her: "Are you the girl from the news?" Sometimes, depending on her mood, she'd say, "No, that's not me."

Kenny said she was thinking about joining the military. Her arrest record should be expunged under South Carolina law, now that the charges have been dropped, but she will still have to disclose the arrest before she can enlist.

This is not the first time someone in her family has been accused of disturbing school, as it turns out. In 1968, the year South Carolina enacted the expanded disturbing-school law, Kenny's great-great-granduncle, the Reverend H. H. Singleton II, sent his children to a white school for the first time. Someone burned a cross on his lawn and another outside the church where he preached. Twenty years later, Singleton was fired from his job as a middle-school teacher, accused of causing a "disruption"—through his involvement in the local NAACP chapter, he had supported a group of black high-school football players

who were protesting a coach's decision to bench a black quarterback. It took two years, but a court eventually ruled that he'd been wrongfully terminated, and he returned to school. Now Kenny and her mother are hoping the ACLU lawsuit will interrupt this pattern. "I'm looking at it long-term," Kenny's mother said. "Ten years from now, when kids are reading their South Carolina history, they will read the name Niya Kenny."

Protesters at the Columbia courthouse ask for disturbing-school charges to be dropped against Kenny and the girl who was thrown. (Jeffrey Collins / AP)

When I asked Kenny what else lawmakers should do to fix the system, besides changing the law, she answered without hesitation. Take police officers out of schools, she said, and replace them with counselors. It sounds sensible, particularly in schools, like Spring Valley, that have relatively few violent incidents. Starting this school year, the U.S. Department of Justice, which helps fund the officers in Richland County schools, is requiring more outside oversight and training to ensure that they are not involved in enforcing classroom discipline in the future—the result of an audit that began before Kenny's arrest. (The

department is also conducting a civil-rights review of what happened at Spring Valley.) But the idea of removing officers altogether is not being considered in her district or across most of the country.

Once police are invited into the schoolhouse, they're rarely asked to leave. Debbie Hamm, the superintendent of Kenny's district, is quick to note that Spring Valley is a "very orderly school." But she would not recommend removing the officers: "The safety and security—and the feeling of safety and security—in our schools is really, really important."

Sheriff Lott says he has never considered removing the officers from any Richland County schools. "That one incident doesn't define our program," he told me. "Every day, we have 87 school resource officers who are doing a great job. Our focus is not on how many kids we arrest but on how many problems we prevent." Last school year, according to the sheriff's department, deputies "successfully resolved" 6,251 conflicts. Lieutenant Curtis Wilson, a spokesperson for the department, told me that a successful resolution includes a range of outcomes, from counseling students to arresting them. "Let's say you have a victim," says Wilson, "and we are able to successfully identify the [perpetrator] and remove him from the school. Now school can continue. So that is a successful resolution."

In September, Kenny moved to New York City for an internship at the African American Policy Forum, a think tank. After moving her into a Brooklyn apartment, she and her mother went to a nearby Chipotle. Kenny, social as always, chatted easily with one of the employees. The woman suggested that Kenny come work there for extra spending money, and they set up an interview for the next day. "They didn't even know who she was," Kenny's mother told me happily.

