JUVENILE COURT EXISTS FOR A REASON: AN ARGUMENT IN SUPPORT OF RECOGNIZING A CONSTITUTIONAL RIGHT FOR THOSE UNDER THE AGE OF MAJORITY TO BE TRIED IN JUVENILE COURT

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The United States Supreme Court has never acknowledged a constitutional right for those under the age of majority to be tried in juvenile court. The Supreme Court held in Kent v. United States *that, if the State provides a hearing before a juvenile is transferred to adult court, the hearing must comport with due process. However, the Constitution does not prevent a state from charging a juvenile directly in adult court without a transfer hearing. The Supreme Court has not yet set forth any criteria that must be met in order to satisfy the Constitution before a youth is transferred to adult criminal court. Because the Supreme Court has not held that juveniles have a constitutional right to be tried in juvenile court, due process challenges to the concept of direct file have failed. Recent Supreme Court case law recognizing the neuroscience of developing brains supports a constitutional right for those under the age of majority to be tried in juvenile court.*

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INTRODUCTION

When people think about juvenile delinquency court, many think that the offenses are minor; the record of the charges is confidential and is automatically expunged at eighteen; a juvenile record can have no effect on a child's future; and that the focus of juvenile delinquency court is entirely rehabilitative with minimal, if any, punitive components. Not even one of these facts is true. Cases in juvenile court range from minor offenses like shoplifting to the most serious offenses including armed carjacking, serious sex offenses and homicide. When a child commits a very serious offense, they can be charged as an adult. The process for charging a child as an adult varies by jurisdiction and is discussed below. Most people are surprised to learn that children can be charged as an adult without any type of hearing or judicial involvement through a process known as direct file which allows the state to file a criminal information against a child in adult court without any type of hearing. Children can also be indicted by a grand jury in adult criminal court in many states. The lack of protections for children facing potential transfer to adult court stems from the fact that the United States Supreme Court has never acknowledged a Constitutional right for a child to be charged in juvenile court.[1] This article will advocate for that right, drawing upon the Court's acknowledgement of the fundamental concept that "kids are different" in a series of cases that relied, in part, on the science of juvenile brain development.[2] As discussed more fully below, in these cases, the Court required

1. *See* Woodard v. Wainwright, 556 F.2d 781, 785-86 (5th Cir. 1977), *cert. denied,* 434 U.S. 1088 (1978) (stating that the United States Supreme Court has never recognized a right for juveniles to be tried in juvenile court).

2. *See* Eddings v. Oklahoma, 455 U.S. 104, 116 (1982) (finding that youth is critical mitigating evidence in capital sentencing); Roper v. Simmons, 543 U.S. 551, 575 (2005) (holding that the death penalty for those under eighteen violates the Eighth Amendment); Miller v. Alabama, 567 U.S. 460, 474 (2012) (Mandatory sentence of life without the possibility of parole violates the Eighth Amendment: "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

age to be considered in capital sentencing, banned the death penalty for those under the age of eighteen, banned life without parole sentences for juveniles for non-homicides and banned mandatory life without parole sentences for juveniles even in the case of homicide.[3]

Justice Kavanaugh's recent majority opinion in *Jones v Mississippi* makes any extension of the "kids are different" line of cases unlikely given the current composition of the Supreme Court.[4] The majority opinion in *Jones* rests on an assumption that state trial court judges will take a child's age and unique life circumstances into account in determining the child's sentence.[5] In contrast, acknowledging a constitutional right to be tried as a juvenile would require courts to consider the child's age and individual circumstances before transferring the child to adult court. This would prevent the state from charging a child as an adult and subjecting them to a sentencing proceeding where a sentence of life without parole will be deemed constitutional simply because the sentencing judge recognized their discretion to impose a sentence other than life without parole. This right could be acknowledged in state courts either under the applicable state constitution or under the state's interpretation of the federal constitution.

Through the 1980s and 1990s, most state legislatures expanded transfer laws that allowed or required the prosecution of children in adult criminal court.[6] The Supreme Court held in *Kent v. United States* that, if a state provides a hearing before a juvenile is transferred to adult court, the hearing must comport with due process.[7] However, the Constitution does not prevent a state from charging a juvenile directly in adult court without a transfer hearing. The Court has held that

Roper's) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."); Montgomery v. Louisiana, 577 U.S. 190, 210-11 (2016) (applying *Miller* retroactively to cases on collateral review, holding that sentencing children to a sentence of life without the possibility of parole for a non-homicide offense violates the Eighth Amendment, and reaffirming that "*Miller* requires a sentencer to consider a juvenile offender's youth and attendant characteristics before determining that life without parole is a proportionate sentence.").

3. *See supra* note 2.

4. 141 S. Ct. 1307 (2021) (holding that a sentencing judge must simply have the opportunity to consider a defendant's age before sentencing him to life without the possibility of parole; a sentencing court is not required to make a separate finding that a child is permanently incorrigible for sentencing him to die in prison for a crime committed at the age of fifteen).

5. *Id*. at 1319 ("If the sentencer has discretion to consider the defendant's youth, the sentencer necessarily *will* consider the defendant's youth, especially if defense counsel advances an argument based on the defendant's youth. Faced with a convicted murderer who was under 18 at the time of the offense and with defense arguments focused on the defendant's youth, it would be all but impossible for a sentencer to avoid considering that mitigating factor.").

6. PATRICK GRIFFIN ET AL., U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 1 (2011), https://perma.cc/M5W6-JQKK.

7. 383 U.S. 541, 562 (1966).

the right to be tried in juvenile court is a right that is granted by the state legislature.[8] As such, the legislature may dictate the procedures and rights of juvenile defendants, if the legislature does so in a manner that comports with due process.[9] "[T]he Court has never attempted to prescribe criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court."[10]

While the Supreme Court has not yet set forth any criteria that must be met in order to satisfy the Constitution before a youth is transferred to adult criminal court, the Court has shed light on what factors should be considered in its cases excluding juveniles from certain penalties.[11] Each of these cases relied upon the fundamental principle that "children are constitutionally different from adults for purposes of sentencing."[12] In *Roper* and *Graham*, the Court relied on "three significant gaps between juveniles and adults" in holding that children are "less deserving of the most severe punishments:"[13]

> First, children have a lack of maturity and an underdeveloped sense of responsibility, leading to recklessness, impulsivity, and heedless risk-taking. Second, children are more vulnerable ... to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as well formed as an adult's; his traits are less fixed and his actions less likely to be evidence of irretrievable depravity.[14]

The *Miller* Court also pointed to *Graham's* conclusion that "likened life without parole for juveniles to the death penalty itself."[15] The Court's jurisprudence addressing capital sentencing schemes struck down mandatory death sentences because they deprived the defendant of the individualized consideration

8. *See, e.g.*, W.M.F. v. State, 723 P.2d 1298, 1300 (Alaska 1986) (noting that juvenile courts are a creature of statute and, as such, the legislature can prescribe procedures for those courts within constitutional boundaries).

9. *Id.*

10. Breed v. Jones, 421 U.S. 519, 537 (1975); *see also* Stokes v. Fair, 581 F.2d 287, 289 (1st Cir. 1978), *cert. denied,* 439 U.S. 1078 (1979).

11. Roper v. Simmons, 543 U.S. 551 (2005) (holding that the death penalty for those under eighteen violates the Eighth Amendment); Graham v. Florida, 560 U.S. 48 (2010) (holding that life without the possibility of parole for non-homicide offenses for those under eighteen violates the Eighth Amendment); Miller v. Alabama, 567 U.S. 460 (2012) (holding that mandatory sentences of life without the possibility of parole are unconstitutional for juveniles even for a homicide).

12. Miller, 567 U.S. at 471.

13. *Id.* (quoting Graham, 560 U.S. at 68).

14. *Id.* (internal quotations and citations omitted).

15. *Id.* at 470.

the Eighth Amendment requires before a death sentence can be imposed.[16] The "confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment."[17]

Graham, Roper, and *Miller* addressed the constitutionality of the application of the death penalty and sentences of life-without-parole to juveniles. In each of these cases, the child defendant had been charged as an adult under relevant state law in order to be eligible for those penalties. Despite the Court's recognition of the fact that children are constitutionally different for purposes of sentencing, the Court has never addressed what factors the Constitution requires before a child is transferred to adult criminal court – without such transfer, the child would not be exposed to the most extreme sentences in the law because no state allows the imposition of these sentences in juvenile court.

This article advocates that, following the Court's jurisprudence recognizing that "kids are different" for purposes of sentencing and analogizing the imposition of the most severe punishments on children to the death penalty, the Court should recognize that every child has a constitutional right to be tried in juvenile court. This would require the Court to then set forth what standards must be considered before the child is transferred to adult court to face the most severe penalties. The current state of Supreme Court jurisprudence addresses the imposition of extreme sentences on children in adult criminal court, yet the Court has never addressed the process through which children end up in adult court in the first place. Even if a child is not facing one of the most extreme sentences, the Court's reasoning in *Graham, Roper* and *Miller*, requires an individualized transfer hearing given the enormous disparity between the maximum sentences available in juvenile and adult court.[18]

I. HISTORY OF JUVENILE COURT

Delinquency proceedings are proceedings in juvenile court in which children are charged with "delinquent acts"—the juvenile equivalent of an adult crime. In most states, the law provides that delinquent acts are not crimes.[19] While every

16. *Id*.; Woodson v. North Carolina, 428 U.S. 280 (1976) (holding that mandatory death penalty violates the Eighth Amendment by depriving defendants of the individualized consideration of the defendant's unique characteristics and background as well as the details of the offense); Lockett v. Ohio, 438 U.S. 586 (1978) (holding that the sentencer in a capital case must be able to consider all evidence that the defendant proffers as a basis for a sentence less than death; mitigating evidence cannot be limited by statute).

17. *Id*.

18. *See, e.g.*, FLA. STAT. ANN. § 985.0301(5)(B)(1)-(2) (juvenile court retains jurisdiction over a child on probation until their 19th birthday and over a child committed to a residential program until their 21st birthday). These jurisdictional restrictions apply to all juvenile cases, no matter the crime at issue.

19. *See, e.g.*, FLA. STAT. ANN. § 985.35(6) (West 2007); GA. CODE ANN. § 15-11-606 (West 2014); N.Y. FAM. CT. ACT § 380.1 (McKinney 2007).

state has a juvenile court system today, the role of juvenile court has changed over time; "[a]t the dawn of the twentieth century, progressive reformers applied the new theories of social control to the new ideas about childhood and created a social welfare alternative to criminal courts to treat criminal and noncriminal misconduct by youth."[20] After several decades of reform, delinquency courts now closely resemble adult criminal courts.[21] Barry Feld has identified three types of reform affecting the juvenile court system: jurisdictional, jurisprudential, and procedural.[22] Recent years have seen an increase in society's desire to criminalize the conduct of children. While penalties have become harsher and juvenile sanctions have become more like criminal sanctions, juvenile courts are not required to provide children with the same protections afforded to adult defendants. According to Feld, "[a]lthough theoretically, juvenile courts' procedural safeguards closely resemble those of criminal courts, in reality, the justice routinely afforded to juveniles is lower than the minimum insisted upon for adults."[23] Feld argues:

> The substantive and procedural convergence between juvenile and criminal courts eliminates virtually all of the differences in strategies of social control between youths and adults. As a result, no reason remains to maintain a separate juvenile court whose only distinction is its persisting procedural deficiencies. Yet, even with the juvenile court's transformation from an informal, rehabilitative agency into a scaled-down criminal court, it continues to operate virtually unreformed. The juvenile court's continued existence despite these changes reflects an ambivalence about children and their control, and provides an opportunity to re-examine basic assumptions about the nature and competence of young people.[24]

Historically, youth in delinquency court were not afforded all of the protections given to adults facing criminal charges.[25] This was because juvenile court

20. Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 691 (1991).

21. *Id*. at 692.

22. *Id*.

23. *Id*.

24. *Id*. at 692-93.

25. *See* In re Gault, 387 U.S. 1, 14 (1967):

> The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. They were profoundly convinced that society's duty to the child could not be confined by the concept of justice alone. They believed that society's role was not to ascertain whether the child was "guilty" or "innocent," but "What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career." The

was seen as a way for the state to step in where children were engaging in socially unacceptable behavior, often due to lack of supervision at home.[26] Some have noted a distinct class element to early juvenile courts, arguing that such courts were a way for society to exercise control over "lower-class" youth.[27] A report submitted by the Cook County (Illinois) Bar Association to the Illinois state legislature in support of the creation of the first juvenile court stated that:

> The fundamental idea of the Juvenile Court Law is that the State must step in and exercise guardianship over a child found under such adverse social or individual conditions as develop crime . . . . It proposes a plan whereby he may be treated, not as a criminal, or legally charged with a crime, but as a ward of the state.[28]

Over time, however, the courts, including the United States Supreme Court, began to recognize that the ideal of kindly juvenile judges who used their wide discretion to help at-risk children was far from the reality faced every day by children in delinquency court.[29] In the seminal case of *In re Gault*, the Court stated:

> Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. In 1937, Dean Pound wrote: 'The powers of the Star Chamber were a trifle in comparison with those of our juve-

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> child—essentially good, as they saw it—was to be made "to feel that he is the object of (the state's) care and solicitude," not that he was under arrest or on trial. The rules of criminal procedure were therefore altogether inapplicable.

26. *History and Philosophy of the Juvenile Court*, FLA. JUV. LAW AND PRACTICE 1-6 (11th ed. 2009).

27. *Id.*:

> Early juvenile law generally grew from citizen concern for children who, lacking parental control, discipline, and supervision, were coming before the criminal court for truancy, begging, homelessness, and petty criminal activity. There were distinct social phenomena that contributed to these problems, including a large population of children from broken families in the aftermath of the Civil War, latchkey children of parents who were unable to provide supervision during long work hours, lack of child care, and lack of free or compulsory education for children.

28. *History and Philosophy of the Juvenile Court*, FLA. JUV. LAW AND PRACTICE 1-3 (11th ed. 2009).

29. *See* In re Gault, 387 U.S. at 13-18 (tracing the historical development of juvenile delinquency court and demonstrating that, as the consequences of a juvenile adjudication of delinquency became more severe, procedures similar to those used in adult criminal court were required by the Due Process Clause).

> nile courts' . . . . The absence of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness.[30]

The facts of *Gault* demonstrate just how dangerous giving any judge unbridled discretion can be. One afternoon in 1964, a fifteen-year-old named Gerald Francis Gault and a friend purportedly made a prank phone call.[31] As eloquently described by Justice Fortas, the calls "were of the irritatingly offensive, adolescent, sex variety."[32] At the time of the "offense," Gerald was on probation because he had been caught in the company of another teenager who stole a wallet.[33] Gerald was taken into custody while both of his parents were at work.[34] No notice was left for the parents, and no attempt was made to contact them to let them know that their son was in custody.[35] Upon learning of her son's whereabouts from a neighbor, Gerald's mother went to the detention home, where Gerald's probation officer told her of her son's alleged acts and informed her that there would be a hearing the next day.[36] The probation officer filed a petition in juvenile court that Gerald's parents did not see until a federal habeas proceeding was brought.[37] The petition did not allege any factual basis for the court proceeding.[38] At the "hearing" the next day, the complainant was not present, and no transcript or written memorandum of the proceedings was created.[39] Gerald was questioned by the judge but was not told that he had a right to remain silent.[40] A few days later, without explanation, Gerald was released.[41] Shortly thereafter, his parents were notified simply that there would be another hearing.[42] Once again, the complainant was not present, and Gerald testified without having been advised of his constitutional rights.[43] Gerald's mother specifically requested the presence of the complainant so that she could identify which of the two boys had

30. *Id*. at 18.
31. *Id*. at 4.
32. *Id*.
33. *Id*.
34. *Id*. at 5.
35. *Id*.
36. *Id*.
37. *Id*.
38. *Id*.
39. *Id*.
40. *Id*. at 6.
41. *Id*.
42. *Id*.
43. *Id*. at 43-44 ("Neither Gerald nor his parents were advised that he did not have to testify or make a statement, or that an incriminating statement might result in his commitment as a 'delinquent.'").

actually made the lewd remarks.[44] At the hearing, a referral report was sent to the court by the probation officers, but was not sent to Gerald or his parents.[45] At the conclusion of the hearing, the judge committed Gerald to the State Industrial School as a juvenile delinquent until his twenty-first birthday, "unless sooner discharged by due process of law."[46] At no point were Gerald or his parents advised that he had a right to counsel.[47] In essence, Gerald was sentenced to six years in juvenile prison for a prank phone call without any notice of the charges, without having been able to cross-examine the complainant, without knowledge that he could remain silent, and without the advice of counsel.

In *Gault*, the Court reevaluated the juvenile justice system and held that many of the fundamental protections afforded to criminal defendants must be afforded to children facing charges in delinquency court. The Court noted the severe consequences of a juvenile adjudication of delinquency, and stated that "it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court."[48]

The Court held that due process requires that children be given notice of the charges against them,[49] that the Sixth and Fourteenth Amendments require that children be advised of their right to counsel, that they be provided with counsel if they cannot afford counsel, that the Fifth, Sixth, and Fourteenth Amendments require that children be able to confront and cross-examine the witnesses against them, and that children may invoke the right against self-incrimination.[50] The Court specifically rejected the argument that this right should not apply to children because confession is therapeutic.[51] A few years later, the Court held that

44. *Id*. at 43.

45. *Id*.

46. *Id*. at 7-8.

47. *Id*. at 34 ("[T]he Court did not advise either Gerald or his parents of their right to counsel, and proceeded with the hearing, the adjudication of delinquency and the order of commitment in the absence of counsel for the child and his parents or an express waiver of the right thereto.").

48. *Id*. at 27-28.

49. *Id*. at 33-34 ("Due process of law requires notice of the sort we have described—that is, notice which would be deemed constitutionally adequate in a civil or criminal proceeding. It does not allow a hearing to be held in which a youth's freedom and his parents' right to his custody are at stake without giving them timely notice, in advance of the hearing, of the specific issues that they must meet.").

50. *Id*. at 47-58 ("It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals but not to children."). While the Court declined to rule on the child's argument that the Constitution requires appellate review of juvenile delinquency proceedings and the right to a transcript of such proceedings, most states provide for transcription of delinquency proceedings and appellate review of these proceedings. *See, e.g*., FLA. STAT. ANN. § 985.534 (West 2007) (providing a right to appeal from an adjudication of delinquency); FLA. R. JUV. P. 8.830 (providing for written transcripts of all proceedings in delinquency court).

51. *Gault*, 387 U.S. at 51-52:

every element of the offense charged in a petition for delinquency must be proven to the trier of fact beyond a reasonable doubt.[52] However, a year later, the Court held that children are not entitled to a jury in delinquency proceedings.[53] In most states, a judge assigned to the juvenile division presides over all pretrial proceedings and the adjudicatory hearing.

The Court's rationale in holding that children are not entitled to a jury in delinquency proceedings was based upon the notion that juvenile proceedings are supposed to be rehabilitative rather than punitive. The standard of due process required in juvenile delinquency proceedings, as developed in *Gault* and *Winship*, is "fundamental fairness."[54] Despite acknowledging the many flaws in the juvenile system as it existed at the time—and acknowledging that the juvenile system could impose the functional equivalent of prison on children—the Court held that a jury is not required in a delinquency proceeding. The Court explained:

> Concern about the inapplicability of exclusionary and other rules of evidence, about the juvenile court judge's possible awareness of the juvenile's prior record and of the contents of the social file; about repeated appearances of the same familiar witnesses in the persons of juvenile and probation officers and social workers—all to the effect that this will create the likelihood of pre-judgment—chooses to ignore it seems to us, every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates.[55]

> It is also urged . . . that the juvenile and presumably his parents should not be advised of the juvenile's right to silence because confession is good for the child as the commencement of the assumed therapy of the juvenile court process, and he should be encouraged to assume an attitude of trust and confidence toward the officials of the juvenile process. This proposition has been subjected to widespread challenge on the basis of current reappraisals of the rhetoric and realities of the handling of juvenile offenders. In fact, evidence is accumulating that confessions by juveniles do not aid in 'individualized treatment,' as the court below put it, and that compelling the child to answer questions, without warning or advice as to his right to remain silent, does not serve this or any other good purpose . . . . [I]t seems probable that where children are induced to confess by 'paternal' urgings on the part of officials and the confession is then followed by disciplinary action, the child's reaction is likely to be hostile and adverse—the child may well feel that he has been led or tricked into confession and that despite his confession, he is being punished.

52. In re Winship, 397 U.S. 358, 364, 368 (1970) (noting that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged" and that such a right is applicable to children "during the adjudicatory stage of a delinquency proceeding").

53. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 550-51 (1971) (holding that a jury is not constitutionally required in juvenile delinquency proceedings).

54. *See id.* at 543.

55. *Id.* at 550.

While the primary purpose of juvenile court may at one point have been rehabilitation, that is no longer the case today.[56] The legislative intent for the juvenile justice system in most states is to protect the public from acts of delinquency.[57] Preventing delinquency, strengthening the family, early intervention, and rehabilitation are often listed as secondary goals of the juvenile justice system.[58] It appears that Justice Fortas' warning in *Kent* over forty years ago is more applicable today than ever: "[T]here may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[59]

II. HISTORY OF TRANSFERRING YOUTH TO ADULT CRIMINAL COURT

As noted, the Supreme Court has never acknowledged a constitutional right to be tried in juvenile court.[60] In upholding transfer statutes, courts have relied on the fact that the right to be tried in juvenile court is a right that is granted by the state legislature.[61] As such, the legislature may dictate the procedures and rights of juvenile defendants, as long as the legislature does so in a manner that comports with due process.[62] The Supreme Court has not yet set forth any criteria that must be met in order to satisfy the Constitution before a youth is transferred

56. *See generally* Feld, *supra* note 21.

57. *See, e.g.*, COLO. REV. STAT. ANN. § 19-2.5-101 (West 2021) ("[T]he intent of this article is to protect, restore and improve the public safety by creating a system of juvenile justice that will appropriately sanction juveniles who violate the law and, in certain cases, will also provide the opportunity to bring together affected victims, the community and the juvenile offenders for restorative purposes."); FLA. STAT. ANN. § 985.02(3) (West 1997) (stating that legislative intent of the juvenile justice system is "to first protect the public from acts of delinquency"); VT. STAT. ANN. tit. 3, § 3085c(c)(1)(A) (2013) (stating that a juvenile justice system should "[h]old juveniles accountable for their unlawful conduct"); WIS. STAT. ANN. § 938.01 (West 2009) ("It is the intent of the legislature to promote a juvenile justice system capable of dealing with the problem of juvenile delinquency, a system which will protect the community, impose accountability for violations of law and equip juvenile offenders with competencies to live responsibly and productively."). A few states, however, still prioritize the rehabilitation and care of the child. *See, e.g.*, LA. CHILD. CODE ANN. art. 801 (1992) (providing that each child facing delinquency proceedings receive the "care, guidance and control that will be conducive to his welfare"); NEB. REV. STAT. § 43-402 (West 1994) (providing for "individualized accountability and individualized treatment" in the delinquency system).

58. *See* FLA. STAT. ANN. § 985.02(3)(a)-(d) (West 2014).

59. Kent v. United States, 383 U.S. 541, 556 (1966).

60. *See* Woodard v. Wainwright, 556 F.2d. 781, 785-86 (5th Cir. 1977), *cert. denied*, 434 U.S. 1088 (1978).

61. *See, e.g.*, W.M.F. v. State, 723 P.2d 1298, 1300 (Alaska Ct. App. 1986) (noting that juvenile courts are a creature of statute and, as such, the legislature can prescribe procedures for those courts within constitutional boundaries).

62. *Id.*

to adult criminal court.[63]

In *Kent*, the Supreme Court addressed the constitutionality of the transfer statute then in effect in the District of Columbia.[64] The statute allowed a juvenile court judge to transfer a case for prosecution to the adult criminal system without holding a hearing and without giving any reasons for her decision.[65] The Court held that this transfer procedure did not comport with the fundamental fairness required by the Due Process Clause, noting:

> [A]s a condition to a valid waiver order, petitioner was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision. We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel.[66]

After *Kent*, many states reassessed their transfer statutes and procedures, purportedly to comply with the Court's ruling. The result, however, was that many of these new statutes in effect made it easier for the state to transfer juveniles to adult court and significantly limited—or, in some cases, eliminated completely—the role of the juvenile judge and the child's counsel in juvenile court. A study of state transfer laws revealed that, "[i]n the 1980s and 1990s, legislatures in nearly every state expanded transfer laws that allowed or required the prosecution of juveniles in adult criminal courts."[67]

Courts have found that mandatory waiver and direct file statutes do not implicate the procedures mandated by *Kent* because they bypass a hearing in juvenile court entirely. For example, a Virginia appellate court upheld a mandatory transfer statute against a challenge by a youth on the grounds that, under *Kent*, he was not constitutionally entitled to a transfer hearing in juvenile court.[68] The statute at issue provided for automatic transfer to adult court where the juvenile court found probable cause to believe that the youth was at least fourteen and had committed the offense of murder.[69] The youth argued that, pursuant to *Kent*, "he had a constitutional right to a transfer hearing and to representation by counsel at that hearing before being stripped of his juvenile status and being tried as

63. *See* Breed v. Jones, 421 U.S. 519, 537 (1975) ("[T]he Court has never attempted to prescribe criteria for, or the nature and quantum of evidence that must support, a decision to transfer a juvenile for trial in adult court."); *see also* Stokes v. Fair, 581 F.2d 287, 289 (1st Cir. 1978).

64. 383 U.S. 541 (1966).

65. *Id*. at 552-54.

66. *Id*. at 557.

67. Griffin, *supra* note 6, at 2.

68. *See* Rodriguez v. Commonwealth, 578 S.E.2d 78, 82-83 (Va. Ct. App. 2003).

69. VA. CODE ANN. § 16.1-269.1 (West 2012).

an adult."[70] The Virginia court distinguished *Kent* on the ground that the youth in that case had a statutory right to be tried in juvenile court, whereas the Virginia statute mandated that the youth be charged as an adult under the circumstances.[71] The court found no constitutional right to a transfer hearing, and limited *Kent* to its construction of the particular statute at issue.[72] Essentially, the Virginia court found that, if a statute provides for a transfer hearing, such a hearing must comport with due process, but that the Constitution does not prevent a state from charging a juvenile directly in adult court without a transfer hearing.[73]

Youths can be transferred to adult court in several ways. Judicial waiver laws "allow juvenile courts to waive jurisdiction on a case-by-case basis."[74] There are three types of judicial waiver: discretionary, presumptive, and mandatory.[75] Typically, these statutes set forth standards to guide the judge's discretion.[76] Some judicial waiver statutes, however, make waiver into the adult system presumptive in certain cases and put the burden on the defense to demonstrate why the case should remain in juvenile court.[77] Some states go so far as to *mandate* judicial transfer in certain cases.[78] Many states leave the decision to transfer a youth to

70. *Rodriguez*, 578 S.E.2d at 81.

71. *Id*. at 81-82 (internal quotation marks and citations omitted):

> [T]he Court's references to Kent's constitutional rights to due process and counsel arose in the context of the hearing and other procedures expressly provided for by the transfer statute at issue in that case . . . . Appellant has cited no controlling legal authority providing that a juvenile defendant has a constitutional right to a transfer hearing before being treated as an adult. The cases he cites provide, at most, that juvenile proceedings, including transfer proceedings, when provided for by statute, must measure up to the essentials of due process and fair treatment.

72. *Id*. at 81-83.

73. *Id*. at 81.

74. GRIFFIN ET AL., *supra* note 6, at 2.

75. *Id*.

76. *Id*.

77. *Id*.

78. *Id*. at 3 (noting that forty-five states have discretionary judicial waiver statutes: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Fifteen states have presumptive judicial transfer statutes: Alaska, California, Colorado, District of Columbia, Illinois, Kansas, Maine, Minnesota, Nevada, New Hampshire, New Jersey, North Dakota, Pennsylvania, Rhode Island and Utah. Fifteen states have mandatory judicial transfer statutes: Connecticut, Delaware, Georgia, Illinois, Indiana, Kentucky, Louisiana, New Jersey, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, Virginia, and West Virginia).

the adult system solely in the hands of the prosecution.[79] The prosecutor is allowed to determine whether charges will be filed in juvenile or adult court.[80] Such statutes are commonly known as "direct file" statutes.[81] A typical direct file statute provides criteria for discretionary and mandatory direct file of a criminal information in adult criminal court.[82] Fifteen states give the prosecutor complete discretion to charge a youth directly in adult criminal court, thereby bypassing a judicial hearing in juvenile court.[83] Finally, statutory exclusion laws give adult criminal courts exclusive jurisdiction over certain classes of cases involving juvenile offenders.[84]

III. THE SUPREME COURT'S 'KIDS ARE DIFFERENT' JURISPRUDENCE

The Supreme Court's evolving application of the Eighth Amendment to juvenile punishments—which has been informed by developmental neuroscience—provides a basis for the Court to hold that minors have a right to be tried in juvenile court which would then require courts to hold transfer hearings before depriving a child this right.

The Supreme Court has long recognized that teenagers are not "little adults."[85] In 1982, the Court decided *Eddings v. Oklahoma*, which held that youth is critical mitigating evidence that must be considered by a capital sentencing jury.[86]

79. *Id.*

80. *Id.*

81. *Id.* at 12; *see also,* CAMPAIGN FOR YOUTH JUSTICE, DIRECT FILE FACT SHEET at 1, https://perma.cc/3SQ7-ETVW.

82. GRIFFIN ET AL., *supra* note 6, at 2. A criminal information is defined as "[a] formal criminal charge made by a prosecutor without a grand-jury indictment." BLACK'S LAW DICTIONARY at 932 (11th ed. 2019).

83. *Id.* at 3-5.

84. *Id.* at 3 (noting the twenty-nine states that have statutory exclusion laws: Alabama, Alaska, Arizona, California, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Utah, Vermont, Washington and Wisconsin).

85. Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982) (internal citation omitted):

> [Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults.

86. *Id.* at 115.

> Even the normal 16-year-old customarily lacks the maturity of an adult. In this case, Eddings was not a normal 16-year-old; he had been deprived of the care, concern, and paternal attention that children deserve. On the contrary, it is not disputed that he was a juvenile with serious emotional problems, and had been raised in a neglectful, sometimes even violent, family background. In addition, there was testimony that Eddings' mental and emotional development were at a level several years below his chronological age.[87]

"[D]ifferences [between adults and juveniles] render suspect any conclusion that a juvenile falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'"[88] The Court has opined that youth are more susceptible to rehabilitation than adults. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside."[89]

In 1989, in *Penry v. Lynaugh* ("Penry I"), the Supreme Court reversed a death sentence because the then-applicable jury instructions did not allow the jury to give effect to the compelling mitigating evidence presented of childhood trauma and intellectual disability.[90] The Court explained the concept of mitigation: "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."[91] The Court held that "the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime."[92]

In *Atkins*, the court followed its reasoning in *Penry I*, and held that the Eighth Amendment precluded the imposition of the ultimate penalty on the intellectually disabled. "Because of their disabilities in areas of reasoning, judgment, and control of their impulses, however, they do not act with the level of moral culpability that characterizes the most serious adult criminal conduct."[93] In language directly applicable to the argument that juvenile offenses should be expunged if they were

87. *Id*. at 116.

88. Roper v. Simmons, 543 U.S. 551, 570 (2005) (citing Thompson v. Oklahoma, 487 U.S. 815, 835 (1988)).

89. Johnson v. Texas, 509 U.S. 350, 368 (1993).

90. Penry v. Lynaugh, 492 U.S. 302, 307 (1989), *overruled on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002).

91. *Id*., at 319 (citing California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

92. *Atkins*, 536 U.S. at 319.

93. *Id*., at 306.

the result of compelling mitigating circumstances, the Court stated in *Roper* that "[juveniles'] own vulnerability and comparative lack of control over their immediate surroundings *mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment*."[94] The Court specifically noted that "[f]or most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood."[95]

In 2010, the Supreme Court decided that juvenile offenders cannot be sentenced to life without the possibility of parole for a non-homicide.[96] The Court further elaborated on the difference between the culpability of juvenile and adult offenders:

> *Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments. As compared to adults, juveniles have a "'lack of maturity and an underdeveloped sense of responsibility'"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed."[97]

In 2012, the Court continued this line of cases when it held that juvenile offenders cannot be subject to mandatory life without parole even for a homicide.[98] "*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes."[99] In *Montgomery v. Louisiana*, the Court held that its holding in *Miller* was retroactive to cases in which the conviction and sentence had become final before *Miller* was decided.[100] The *Montgomery* Court recognized that "*Miller* . . . did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of 'the distinctive attributes of youth.'"[101]

In 2021, in *Jones v. Mississippi*, Justice Kavanaugh joined by Justices Roberts, Alito, Gorsuch, Barrett and Thomas upheld a sentence of life without the

94. Roper v. Simmons, 543 U.S. 551, 570 (2005).

95. *Id.* (quoting Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)).

96. Graham v. Florida, 560 U.S. 48, 82 (2010).

97. *Id.* at 68 (quoting *Roper*, 543 U.S. at 569-70).

98. Miller v. Alabama, 567 U.S. 460, 465 (2012).

99. *Id.* at 472.

100. Montgomery v. Louisiana, 577 U.S. 190, 208 (2016).

101. *Id.* at 208 (quoting *Miller*, 567 U.S. at 472).

possibility of parole for a 15-year-old convicted of homicide where the sentencer acknowledged its discretion under *Miller* yet imposed a sentence of life without parole without finding that the defendant could not be rehabilitated.[102]

Jones's case was remanded for re-sentencing after the Court's decision in *Miller*:

> At the resentencing, Jones's attorney argued that Jones's "chronological age and its hallmark features" diminished the "penological justifications for imposing the harshest sentences." Jones's attorney added that "nothing in this record . . . would support a finding that the offense reflects irreparable corruption." At the end of the hearing, the sentencing judge acknowledged that he had discretion under *Miller* to impose a sentence less than life without parole. But after considering the factors "relevant to the child's culpability," the judge determined that life without parole remained the appropriate sentence for Jones.[103]

Jones argued the lack of specific findings of fact regarding his youth and prospects for rehabilitation violated *Miller* and *Montgomery*.[104] Jones's argument was supported by the clear language of *Montgomery*, which held that *Miller* allows life-without-parole sentences only for "those [youth] whose crimes reflect permanent incorrigibility," rather than "transient immaturity."[105]

In an opinion that has been called "dishonest and barbaric,"[106] the *Jones* Court, concluded that *Miller* and *Montgomery* do not require a specific finding of incorrigibility before a sentencing court can impose a life sentence on a child.[107] The *Jones* majority placed significant weight on the statement in *Montgomery* that "'a finding of fact regarding a child's incorrigibility . . . is not required.'"[108] The *Jones* Court rejected Jones's argument that *Miller* and *Montgomery* require either an explicit or implicit finding of incorrigibility on the record before a child can be sentenced to life without parole.[109] The crux of Justice Kavanaugh's reasoning is summed up by the following statement:

102. Jones v. Mississippi, 141 S. Ct. 1307, 1311 (2021).

103. *Id*. at 1313 (internal citations omitted).

104. *Id*. ("In Jones's view, a sentencer who imposes a life-without-parole sentence must *also* either (i) make a separate factual finding of permanent incorrigibility, or (ii) at least provide an on-the-record sentencing explanation with an 'implicit finding' of permanent incorrigibility" (internal citation omitted)).

105. *Montgomery*, 577 U.S. at 209.

106. Mark Joseph Stern, *Brett Kavanaugh's Opinion Restoring Juvenile Life Without Parole is Dishonest and Barbaric*, SLATE (Apr. 22, 2021), https://perma.cc/LK7Q-M5DG.

107. *Jones*, 141 S. Ct. at 1317.

108. *Id*. (quoting *Montgomery*, 577 U.S. at 211).

109. *Id*. at 1319.

> [I]f the sentencer has discretion to consider the defendant's youth, the sentencer necessarily *will* consider the defendant's youth, especially if defense counsel advances an argument based on the defendant's youth. Faced with a convicted murderer who was under 18 at the time of the offense and with defense arguments focused on the defendant's youth, it would be all but impossible for a sentencer to avoid considering that mitigating factor.[110]

The Jones opinion rests on the assumption that, in every case where a child faced a possible sentence of life without parole, the state-court trial judge will consider the child's youth (and all the evidence stemming from youth) even if the judge has made no such finding on the record. Jones assumes that if the judge states on the record that she has the discretion to impose a lesser sentence that she has, in fact, considered everything that Miller cited as a basis for finding mandatory juvenile life without parole unconstitutional.

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.[111]

The *Jones* dissent argued that the majority ignored the command of *Miller* to "require sentencers to distinguish "between the juvenile offender whose crime reflects unfortunate and transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[112] Jones allows an unsupported assumption to replace the specific, detailed analysis required by Miller. In so doing, Jones effectively stripped Miller and Montgomery of all meaning.

The cases cited above address sentencing youth to the most extreme sentences in the law—life, life without parole, and the death penalty—sentences that are only applicable once a child has been charged as an adult under relevant state law. The cases do not address the question of how children become subject to adult sentencing procedures in the first place. If a child had a Constitutional right to be tried in juvenile court, then factors addressed at sentencing in an adult criminal proceeding could be addressed initially at a juvenile transfer hearing at

110. *Id*.

111. *Miller*, 567 U.S. 477-78.

112. *Id*. at 1329 (Sotomayor, J., dissenting) (quoting Miller v. Alabama, 567 U.S. 460, 479-80 (2012)).

which the court would determine whether the child before it should be transferred to adult court and subjected to adult punishments.

IV. OVERVIEW OF JUVENILE BRAIN DEVELOPMENT

An *amicus* brief relied upon by the *Graham* court explains succinctly how the still-developing brains of children are so far from those of adults that children are constitutionally different for sentencing purposes.[113] For example, even older adolescents "are less able to restrain their impulses and exercise self-control; less capable than adults of considering alternative courses of action and maturely weighing risks and rewards; and less oriented to the future and thus less capable of apprehending the consequences of their often-impulsive actions."[114] Teenagers are much more likely to be influenced by negative peers and, because they are not adults, lack the autonomy to escape such influences even if they desire to do so.[115] Because a significant amount of juvenile criminal behavior is attributable to the transient characteristics of youth, research has shown that the vast majority of youthful offenders do not continue to engage in criminal behavior as adults.[116]

Below is a copy of a series of MRI images that demonstrate the structural changes that take place in the brain from ages five to twenty.[117] Researchers at the National Institutes of Health, the National Institute of Mental Health, and the University of California at Los Angeles conducted a decade-long study using magnetic resonance imaging to track the development of the brain.[118] The study documented the process is known as pruning. "Pruning of gray matter improves the functioning of the brain's reasoning centers by establishing some pathways while extinguishing others, thereby enhancing brain functioning."[119] In the MRI

113. Brief for the American Psychological Ass'n, American Psychiatric Ass'n, National Ass'n of Social Workers, and Mental Health America as Amici Curiae Supporting Petitioners at 3-4, Graham v. Florida, 540 U.S. 48 (2010) (No. 08-7412), 2009 WL 2236778, at *4 (internal quotations omitted).

114. *Id*. at *3-4.

115. *Id*.

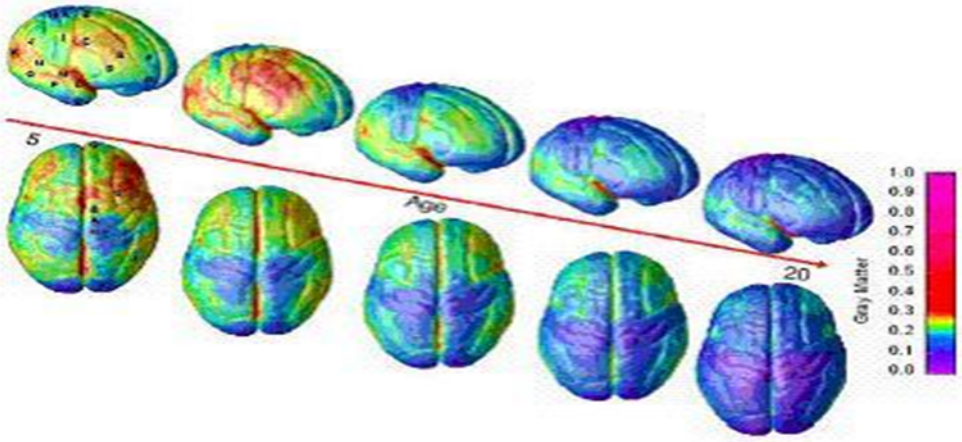
116. *Id*.

117. *The Adolescent Brain—Why Teenagers Think and Act Differently*, EDINFORMATICS, https://perma.cc/F6D5-ASZ6 (last visited Apr. 11, 2023) [hereinafter Thompson MRI Study].).

118. *Id*.

119. Brief of the American Medical Ass'n, American Psychiatric Ass'n, American Society for Adolescent Psychiatry, American Academy of Child & Adolescent Psychiatry, American Academy of Psychiatry and the Law, National Ass'n of Social Workers, Missouri Chapter of the National Ass'n of Social Workers, and National Mental Health Ass'n as Amici Curiae in Support of Respondent at 4, Roper v. Simmons 543 U.S. 551 (2004) (No. 03-633), 2004 WL 1633549, at *18-20 [hereinafter *Roper* Brief].

scans below, red indicates more grey matter and blue indicates less grey matter.[120] As any adult can attest, teenagers lack the "brakes" that keep them from



engaging in impulsive and reckless activities.[121] The "brakes" are located in the frontal lobe—one of the last parts of the brain to develop.[122] Many other changes take place in the brain between birth and adulthood.[123]

Scientists confirm that "[a]dolescents' behavioral immaturity mirrors the anatomical immaturity of their brains."[124] Studies have shown that adolescents rely more than adults on the amygdala, the area of the brain associated with the primitive impulses of anger, aggression, and fear.[125] In contrast, adults tend to process similar information through the frontal cortex, a cerebral area associated with

120. Thompson MRI Study.
121. *Id*.
122. *See Roper* Brief at *16.
123. *Id*. at *15-17:

> [T]he limbic system is more active in adolescent brains than adult brains, particularly in the region of the amygdala and . . . the frontal lobes of the adolescent brain are less active . . . [A]s teenagers grow into adults, they increasingly shift the overall focus of brain activity to the frontal lobes . . . [T]he brain's frontal lobes are still structurally immature well into late adolescence. The prefrontal cortex (which . . . is associated with impulse control, risk assessment and moral reasoning) is 'one of the last brain regions to mature' . . . [Additionally,] [m]yelination is the process by which the brain's axons are coated with a fatty white substance called myelin . . . . 'The presence of myelin makes communication between different parts of the brain faster and more reliable.' Myelination . . . continues through adolescence and into adulthood.

124. *Id*. at *10.
125. *Id*. at *11.

impulse control and good judgment.[126] It is well established that the brain undergoes a "rewiring" process that is not complete until approximately 25 years of age.[127] The frontal and pre-frontal cortex, critical areas of the brain that control impulse, judgment, risk-taking, and weighing consequences, are among the last to develop and, often, are not fully developed until the mid-twenties.[128]

The *amicus* brief in *Roper* detailed the ways in which the brains of youth differ in structure and functioning from those of adults. The authors explained that the regions of the brain associated with impulse control, regulation of emotions, risk assessment, and moral reasoning are among the last to develop, and often are not fully developed until the early to mid-twenties.[129] The authors also found that "[p]sychosocial maturity is incomplete until age 19."[130] In a finding of particular relevance to youth involved in the juvenile justice system, the authors cited studies showing that "[t]he deficiencies in the adolescent mind and emotional and social development are especially pronounced when other factors such as stress, emotions, and peer pressure enter the equation. These factors operate on an adolescent's mind differently and with special force."[131]

V. JUVENILE BRAIN DEVELOPMENT AND CRIMINAL INTENT

There is no requirement in the law that courts evaluate a child's ability to form criminal intent before the child is transferred to adult court. Youth prosecuted in juvenile court are not charged with crimes—they are accused of having committed "delinquent acts."[132] While children are not charged with crimes, they

126. *Id*.

127. Mariam Arain et al., *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE AND TREATMENT, 449, 451 (2013) (citing LORRIE GAVIN ET AL., CENTERS FOR DISEASE CONTROL AND PREVENTION, SEXUAL AND REPRODUCTIVE HEALTH OF PERSONS AGED 10-24 YEARS — UNITED STATES 2022-2007 (2009).

128. *See* NAT'L INSTITUTE OF MENTAL HEALTH, *The Teen Brain: 7 Things to Know*, at https://perma.cc/E5FL-7MQN (last visited Apr. 18, 2023).

129. *See Roper* Brief, *supra* note 123, at *4 (noting that the tests that formed the basis of its conclusions were performed on healthy adolescents and that those in the criminal justice system often "suffer from serious psychological disturbances that substantially exacerbate the already existing vulnerabilities of youth, [such that] they can be expected to function at substandard levels").

130. *Id*., at *7 ("Adolescents 'score lower on measures of self-reliance and other aspects of personal responsibility, they have more difficulty seeing things in long-term perspective, they are less likely to look at things from the perspective of others and they have more difficulty restraining their aggressive impulses.'").

131. *Id*., at *7-8 ("Stress affects cognitive abilities, including the ability to weigh costs and benefits and to override impulses with rational thought. But adolescents are more susceptible to stress from daily events than adults, which translates into a further distortion of the already skewed cost-benefit analysis.").

132. In most states, the law provides that delinquent acts are not crimes. *See e.g*., FLA. STAT. ANN. § 985.35(6) (West 2019); GA. CODE ANN. § 15-11-606 (2014); N.Y. FAM. CT. ACT § 380.1 (McKinney 2016).

are prosecuted under the same criminal statutes as adults.[133] Therefore, defenses applicable to adults are the only defenses available to children. Over time, the juvenile system has become increasingly punitive and less rehabilitative.[134] While every state has a juvenile court system today, the role of juvenile court has changed over time. "At the dawn of the twentieth century, Progressive reformers applied the new theories of social control to the new ideas about childhood and created a social welfare alternative to criminal courts to treat criminal and non-criminal misconduct by youth.[135] After several decades of reform, delinquency courts now closely resemble adult criminal courts.[136] "Although theoretically, juvenile courts' procedural safeguards closely resemble those of criminal courts, in reality, the justice routinely afforded juveniles is lower than the minimum insisted upon for adults."[137] Despite this, in every state, children are prosecuted under the same criminal statutes as adults with no allowance made for the fact that children's brains are still developing and, by definition, cannot for intent in the same way as an adult.

In criminal law, the law not only punishes the alleged act, but also the state of mind, or intent, of the defendant. For example, in Florida, a premeditated murder committed in the course of certain enumerated felonies is a capital crime.[138] By contrast, a homicide that occurs during one of the enumerated felonies "without any design to effect death" is a second-degree felony with a maximum fifteen-year sentence.[139]

133. *See, e.g.*, Fl. St. § 985.0301 ("The circuit court has exclusive original jurisdiction of proceedings in which a child is alleged to have committed: (a) A delinquent act or violation of law."). The Statute, like all other state statutes, only provides one set of criminal offenses under which both children and adults are prosecuted. *See also*, Justia, Juvenile Crimes, https://perma.cc/UWT8-BTE7 ("Minors may be charged with the same offenses as adults. . . .") (Oct. 2022).

134. *See supra* note 58 (listing examples of state statutes setting forth that the main purpose of the juvenile justice system is to protect the public and decrease acts of delinquency).

135. Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 691 (1991).

136. *See id*. at 691-92.

137. *Id*. at 692. *See also id*. at 692-93:

> The substantive and procedural convergence between juvenile and criminal courts eliminates virtually all of the differences in strategies of social control between youths and adults. As a result, no reason remains to maintain a separate juvenile court whose only distinction is its persisting procedural deficiencies. Yet, even with the juvenile court's transformation from an informal, rehabilitative agency into a scaled-down criminal court, it continues to operate virtually unreformed. The juvenile court's continued existence despite these changes reflects an ambivalence about children and their control, and provides an opportunity to re-examine basic assumptions about the nature and competence of young people.

138. *See* FLA. STAT. ANN. § 782.04(1)(a) (West 2022).

139. FLA. STAT. ANN. § 782.04(4) (West 2022); FLA. STAT. ANN. § 775.082(6)(d) (West 2019).

Dr. Marty Beyer is a psychologist who is well-known for her work about juvenile brain development, mental health issues effecting teenagers and the juvenile justice system. Dr. Beyer explained: "[f]rom a psychological perspective, intention in children is a complex area, particularly considering their limited capacity to think ahead to the unforeseen long-term consequences of their immediate action."[140] Critically, Dr. Beyer concluded "that from the standpoint of cognitive development, young people have diminished capacity to intend harm to others or anticipate harm as an unintended outcome of their actions."[141] Teenagers often demonstrate a disconnect between their actions and the resulting consequence.[142]

These conclusions were drawn from studies performed on the brains of normal adolescents. Many of the youth facing charges in delinquency court are at-risk youth who are either in foster care or unstable, often violent homes; if they attend school at all, they attend alternative schools.[143] Studies have documented that "the majority of children in the juvenile delinquency system are children with education-related disabilities."[144] In vastly disproportionate numbers, children who are poor and who are members of racial and ethnic minority groups populate the delinquency system. "The disproportionate numbers, moreover, reflect the harsh reality that society imposes unequal and discriminatory treatment

140. Marty Beyer, *Recognizing the Child in the Delinquent*, 7 KY. CHILD. RTS. J. 16, 18 (1999) ("Carrying a weapon and even using a weapon does not mean a child had adult intent to harm.").

141. *Id*. at 18.

142. *See id*.

143. The term "alternative school" is used to describe schools where students are transferred for disciplinary reasons or because they have been suspended or expelled from mainstream schools. *See* Maureen Carroll, *Racialized Assumptions and Constitutional Harm: Claims of Injury Based on Public School Assignment*, 83 TEMP. L. REV. 903, 904 (2011) ("In a typical disciplinary transfer case, the student has been involuntary [sic] transferred from a mainstream school to an alternative program without the procedural safeguards that accompany formal expulsions. Many alternative schools used for this purpose have limited classroom instruction, strict disciplinary procedures, and no extracurricular activities. Often, the only students attending an alternative school are those placed involuntarily for disciplinary or remedial reasons. Students attending disciplinary programs face a dramatically higher risk of violence than those attending mainstream schools. Moreover, because of curricular differences, students returning to a mainstream school from an alternative program may be unable to advance to the next grade or to graduate with their peers.").

144. Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth with Education-Related Disabilities Leads to Their Disproportionate Representation in the Delinquency System*, 3 WHITTIER J. CHILD. & FAM. ADVOC. 3, 4 (2003):

> The delinquency system disproportionately attracts children with education-related disabilities both because those children are more likely to engage in delinquent conduct than their non-disabled peers and because the adults responsible for educational and delinquency systems are more likely to label and treat children with education-related disabilities as delinquent.

upon poor children of color."[145] It is also well documented that poor and minority children are substantially over-represented in the delinquency population.[146]

These pervasive, systemic inequalities render the most vulnerable children the most likely to be transferred to adult court. These children are sent to face the same consequences as an adult without any consideration of how virulent, systemic racism and a failing education system impacted the most fundamental element of criminal responsibility – the ability to form intent.

A. Trauma significantly impacts a child's ability to form intent

Many children facing charges in delinquency court are also in dependency proceedings, meaning that they have been abused, abandoned, or neglected by their parent(s).[147] Many other juvenile defendants have been victims of serious—often violent—physical, sexual, and emotional abuse.[148] This type of abuse has a direct impact on the functioning of the areas of the brain that control impulsive, risky, and unlawful behavior.[149]

Abuse, trauma, and neglect further impact a young person's ability to form intent, as these factors can significantly alter brain development.[150] This abuse includes psychological abuse.[151] Dr. Martin Teicher is the Director of the Developmental Biopsychiatry Research Program at McClean Hospital and a faculty member at Harvard Medical School. He has done extensive research over several decades and has concluded that "early maltreatment, even exclusively psychological abuse, has enduring negative effects on brain development."[152] In an observation particularly relevant to the appropriate punishment for young offenders, Dr. Teicher explained:

> Physical, sexual, and psychological trauma in childhood may lead to psychiatric difficulties that show up in childhood, adolescence, or

145. *Id*. at 5.

146. *See* J. ROBERT FLORES, *Forward* to U.S. DEP'T OF JUST. ET AL., DISPROPORTIONATE MINORITY CONFINEMENT 2002 UPDATE iii (2004) ("Although minority youth account for about one-third of the U.S. juvenile population, they comprise two-thirds of the juvenile detention/corrections population."); *see also* CARL E. POPE ET AL., DISPROPORTIONATE MINORITY CONFINEMENT: A REVIEW OF THE RESEARCH LITERATURE FROM 1989 THROUGH 2001 1 (2002).

147. *See generally* Denise C. Herz et. al., *Challenges Facing Crossover Youth: An Examination of Juvenile-Justice Decision Making and Recidivism*, 48 FAM. CT. REV. 305 (2010).

148. *Id*.; *see also* MALIKA SAADA SAAR ET AL., THE SEXUAL ABUSE TO PRISON PIPELINE: THE GIRLS' STORY, https://perma.cc/NCQ5-B5K4.

149. *See* CHILD WELFARE INFO. GATEWAY, UNDERSTANDING THE EFFECTS OF MALTREATMENT ON BRAIN DEVELOPMENT 9 (2015), https://perma.cc/V9A4-GCXY.

150. *See* Martin H. Teicher, *Wounds that Time Won't Heal: The Neurobiology of Child Abuse*, DANA FOUND.: CEREBRUM (Oct. 10, 2000). https://perma.cc/66XF-BLC9.

151. *See id*.

152. *Id*.

> adulthood. The victim's anger, shame, and despair can be directed inward to spawn symptoms such as depression, anxiety, suicidal ideation, and post-traumatic stress, or directed outward as aggression, impulsiveness, delinquency, hyperactivity, and substance abuse.[153]

Some of the disorders strongly associated with child abuse are those that may cause unlawful behavior, such as borderline personality disorder or dissociative identity disorder.[154] Similarly, victims of child abuse may suffer from post-traumatic stress disorder ("PTSD"), the symptoms of which include "irritability or outbursts of anger" and "an exaggerated startle response."[155] Dr. Teicher argues that "the trauma of abuse induces a cascade of effects, including changes in hormones and neurotransmitters that mediate development of vulnerable brain regions."[156] Dr. Teicher and other scientists have identified "a constellation of brain abnormalities associated with child abuse," including limbic irritability, deficient development and differentiation of the left hemisphere, deficient left-right hemisphere interaction, and "abnormal activity in the cerebellar vermis (the

153. *Id*.

154. The impact of abuse on the brain is extraordinarily complex and can differ from one child to another. Without a constitutional right to be tried in juvenile court, a child can be transferred to adult court without a hearing and, therefore, without an analysis of the interaction between abuse and the ability to form intent in their specific case. For example, "[t]he essential feature of oppositional defiant disorder is a frequent and persistent pattern of angry/irritable mood, argumentative/defiant behavior, or vindictiveness." Diagnostic and Statistical Manual V-TR 524 (5th ed. 2022). "[C]hildren with oppositional defiant disorder may have experienced a history of hostile parenting, and it is often impossible to determine if the child's behavior caused the parents to act in a more hostile manner toward the child, if the parents' hostility led to the child's problematic behavior, or if there was some combination of both." *Id*. at 524-35. "Children with oppositional defiant disorder influence their environments, which in turn can influence them. For example, harsh, inconsistent, or neglectful child-rearing practices predict increases in symptoms, and oppositional symptoms predict increases in harsh and inconsistent parenting. In children and adolescents, oppositional defiant disorder is more prevalent in families in which childcare is disrupted by a succession of different caregivers. Children with oppositional defiant disorder are also at greater risk for both bullying peers and being bullied by peers." *Id*. at 524-25. Similarly, many children in the juvenile justice system are diagnosed with Conduct Disorder which is defined as "A repetitive and persistent pattern of behavior in which the basic rights of others or major age-appropriate societal norms or rules are violated." *Id*. at 531. The risk factors for Conduct Disorder could describe the living situations of many children facing charges in juvenile court. The risk factors for Conduct Disorder are described as follows: "[f]amily-level risk factors include parental rejection and neglect, inconsistent child-rearing practices, harsh discipline, physical or sexual abuse, lack of supervision, early institutional living, frequent changes of caregivers, large family size, parental criminality, and certain kinds of familial psychopathology (e.g., substance-related disorders). Community-level risk factors include peer rejection, association with a delinquent peer group, neighborhood disadvantage, and exposure to violence. Both types of risk factors tend to be more common and severe among individuals with the childhood-onset subtype of conduct disorder." *Id*. at 535-36.

155. *See* Teicher, *supra* note 153.

156. *Id*.

middle strip between the two hemispheres of the brain)."[157] Of particular relevance here are the effects of abuse on the development of the hippocampus, which is involved in regulating memory and emotion.[158] Dr. Teicher's findings demonstrate that child abuse has a direct impact on the ability of a youthful offender to form intent:

> To be convicted of a crime in the United States, one supposedly must have the capacity to both know right from wrong and to control one's behavior. Those with a history of childhood abuse may know right from wrong, but their brains may be so irritable and the connections from the logical, rational hemispheres so weak that intense negative (right-hemisphere) emotions may incapacitate their use of logic and reason to control their aggressive impulses. Is it just to hold people criminally responsible for acts they lack the neurological capacity to control?[159]

Other experts have documented the impact of toxic stress on the developing brain.[160] "Early experiences determine whether a child's developing brain architecture provides a strong or weak foundation for all future learning, behavior, and health."[161] Exposure to what experts describe as "toxic stress" often associated with abuse and socio-economic deprivation can "disrupt the architecture and

157. *Id*. The biological markers of the four abnormalities are as follows:

> *Limbic irritability* [is] manifested by markedly increased prevalence of symptoms suggestive of temporal lobe epilepsy (TLE) and by an increased incidence of clinically significant EEG (brain wave) abnormalities.
> *Deficient development and differentiation of the left hemisphere* [is] manifested throughout the cerebral cortex and the hippocampus, which is involved in memory retrieval.
> *Deficient left-right hemisphere integration* [is] indicated by marked shifts in hemispheric activity during memory recall and by underdevelopment of the middle portions of the corpus callosum, the primary pathway connecting the two hemispheres.
> *[T]he cerebellar vermis* . . . appears to play an important role in emotional and attentional balance and regulates electrical activity within the limbic system.

158. *See id*. ("Cells in the hippocampus have an unusually large number of receptors that respond to the stress hormone cortisol. Since animal studies show that exposure to high levels of stress hormones like cortisol has toxic effects on the developing hippocampus, this brain region may be adversely affected by severe stress in childhood.").

159. *Id*.

160. *See* HARV. UNIV. CTR. ON THE DEVELOPING CHILD., A SCIENCE-BASED FRAMEWORK FOR EARLY CHILDHOOD POLICY: USING EVIDENCE TO IMPROVE OUTCOMES IN LEARNING, BEHAVIOR AND HEALTH FOR VULNERABLE CHILDREN 9 (2007), https://perma.cc/XB7V-QAA5.

161. *Id*. at 2.

chemistry of the developing brain."[162] Psychologists describe toxic stress as follows:

> [T]oxic stress[] is associated with strong and prolonged activation of the body's stress response systems in the absence of the buffering protection of adult support. Stressors include recurrent child abuse or neglect, severe maternal depression, parental substance abuse, or family violence. Under such circumstances, persistent elevations of stress hormones and altered levels of key brain chemicals produce an internal physiological state that disrupts the architecture and chemistry of the developing brain.[163]

Studies of at-risk children conclude that "[c]urrent knowledge about brain and child development, as well as empirical data from cost-benefit studies, presents a compelling case for early public investments targeted toward children who are at greatest risk for failure in school, in the workplace, and in society at large."[164]

While studies demonstrate that every child's brain develops differently, and that such development directly impacts the child's ability to form intent and, ultimately, the appropriate punishment for the child's offense, the decision about whether to transfer a case to adult court is often made by a prosecutor who knows only the facts of the crime.

VI. IT IS TIME TO RECOGNIZE A CONSTITUTIONAL RIGHT FOR CHILDREN TO BE TRIED IN JUVENILE COURT

In *Graham*, the Court recognized that "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense."[165] Children transferred to adult court face decades-long sentences without any requirement that the proportionality of the adult sentence to the juvenile's specific life circumstances be considered. In Florida, for example, the state can file an information in adult criminal court without a hearing when a child turns 14 for enumerated offenses and sixteen for any felony.[166] Shockingly, a child "of any age"

162. *Id.* at 9.

163. *Id.*

164. *Id.* at 28.

165. Graham v. Florida, 560 U.S. 48, 71 (2010).

166. *See* FLA. STAT. ANN. § 985.557(1)(a) (West 2019) ("With respect to any child who was 14 or 15 years at the time the alleged offense was committed, the state attorney may file an information when in the state attorney's judgment and discretion the public interest requires that adult sanctions be considered or imposed . . . ."); *id.* § 985.557(1)(b):

> With respect to any child who was 16 or 17 years of age at the time the alleged offense was committed, the state attorney may file an information when in the state attorney's judgment and discretion the public interest requires that adult sanctions

can be indicted by a grand jury in Florida for any offense punishable by death or life in prison.[167] While many children transferred to adult court will not face sentences of life without parole, many will face sentences of life with the possibility of parole or sentences so long that they are *de facto* life sentences. This is especially true in states with conservative supreme courts that have applied *Graham* and *Miller* as narrowly as possible.

For example, in 2016, the Florida Supreme Court held in *Atwell v. State*[168] that a sentence of life with the possibility of review by the Florida parole board

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be considered or imposed. However, the state attorney may not file an information on a child charged with a misdemeanor, unless the child has had at least two previous adjudications or adjudications withheld for delinquent acts, one of which involved an offense classified as a felony under state law.

167. *Id.* § 985.56(1):

A child of any age who is charged with a violation of state law punishable by death or by life imprisonment is subject to the jurisdiction of the [juvenile] court as set forth in § 985.0301(2) unless and until an indictment on the charge is returned by the grand jury. When such indictment is returned, the petition for delinquency, if any, must be dismissed and the child must be tried and handled in every respect as an adult . . . .

see also Graham, 560 U.S. at 67 (referring to a prior version of the Florida statute, "[t]he State acknowledged at oral argument that even a 5-year-old, theoretically, could receive [a sentence of life without parole] under the letter of the law.").

168. 197 So.3d 1040 (Fla. 2016). It is important to note that the cases discussed in this section apply to those sentenced for crimes committed before the age of eighteen prior to Florida's enactment of Statue 921.1401 entitled "Sentence of life imprisonment for persons who are under the age of 18 years at the time of the offense; sentencing proceedings." This statute applies to anyone sentenced for an offense eligible for a life without parole sentence after July 1, 2014. The statute codifies the *Graham* and *Miller* factors:

(2) In determining whether life imprisonment or a term of years equal to life imprisonment is an appropriate sentence, the court shall consider factors relevant to the offense and the defendant's youth and attendant circumstances, including, but not limited to:

(a) The nature and circumstances of the offense committed by the defendant.
(b) The effect of the crime on the victim's family and on the community.
(c) The defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense.
(d) The defendant's background, including his or her family, home, and community environment.
(e) The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant's participation in the offense.
(f) The extent of the defendant's participation in the offense.
(g) The effect, if any, of familial pressure or peer pressure on the defendant's actions.
(h) The nature and extent of the defendant's prior criminal history.
(i) The effect, if any, of characteristics attributable to the defendant's youth on the defendant's judgment.
(j) The possibility of rehabilitating the defendant.

(as opposed to judicial review) after twenty-five years violated *Graham*'s requirement that children sentenced as adults for non-homicides have a meaningful opportunity for release.[169] After Atwell served twenty-five years in prison, the parole board calculated his presumptive release date as 2130, well after his life expectancy.[170] "Thus, while technically Atwell is parole-eligible, it is a virtual certainty that Atwell will spend the rest of his life in prison."[171]

Prior to *Atwell,* and in response to *Graham* and *Miller*, the Florida legislature passed new statutes codifying the factors those cases held must be considered in determining if a sentence of life without parole is appropriate for a specific juvenile.[172] Like many serving life without parole for a homicide committed as a juvenile, the crime for which Atwell was convicted and sentenced occurred before both *Graham/Miller* and before the new statute was enacted.[173] In assessing the constitutionality of sentencing a juvenile to life with review by a parole board after twenty-five years, the *Atwell* Court placed significant weight on the new statute as it evidenced the legislature's intent as to how to respond to *Graham/Miller*.[174] The *Atwell* Court specifically held that "[p]arole is, simply put, 'patently inconsistent with the legislative intent' as to how to comply with *Graham* and *Miller*."[175] The *Atwell* Court also based its reasoning on a Florida Statute specifying that "the decision to parole an inmate

169. 197 So.3d 1040, 1050 (Fla. 2016) (holding that a sentence of life with the possibility of parole for a child convicted of first-degree murder violated *Graham* and *Miller* because under Florida's parole system, the sentence was effectively a mandatory life sentence and the child "did not receive the type of individualized sentencing consideration *Miller* requires."); *see also* Henry v. State, 175 So.3d 675, 676 (Fla. 2015).

170. *Id*. ("Under this statutory scheme, twenty-five years after Atwell was sentenced, the Commission on Offender Review conducted a parole hearing and set Atwell's presumptive parole release date, which is the earliest date he may be released from prison as determined by objective parole guidelines, for the year 2130—one hundred and forty years after the crime and far exceeding Atwell's life expectancy.").

171. *Id*.

172. *See* FLA. STAT. 921.1401.

173. *Atwell,* 197 So.3d at 1043 (offense occurred in 1990 when Atwell was sixteen.).

174. The *Atwell* Court did not hold that review by a parole board can never satisfy *Graham and Miller*. *See Atwell,* 197 So.3d at 1049 (noting that California had used its parole review system to comply with *Graham* and *Miller*, but noting the significant differences between Florida's parole review and California's:

> For example, California adopted legislation that provides a mechanism for resentencing juveniles who initially had life without parole sentences, allowing for parole eligibility and review hearings, but this legislation also established that the parole board must use specific criteria when evaluating juveniles and must "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." Cal. Penal Code § 4801(c) (2013).

175. *Atwell*, 197 So.3d at 1049.

from the incarceration portion of the inmate's sentence is an act of grace of the state and shall not be considered a right." The Court concluded that "Florida's existing parole system, as set forth by statute, does not provide for individualized consideration of Atwell's juvenile status at the time of the murder, as required by *Miller,* and that his sentence, which is virtually indistinguishable from a sentence of life without parole, is therefore unconstitutional."[176]

Two years later, Florida's mandatory judicial retirement age and the election of a new governor resulted in a change in the majority of the Florida Supreme Court. The newly composed Florida Supreme Court abrogated *Atwell* in *State v. Michel*.[177] *Michel* held that review by a parole review board satisfies the requirement for individualized sentencing for juveniles.[178] As the dissent noted, "Michel is left with the distinct possibility that he will spend the rest of his life in prison under a parole system that, as we painstakingly explained in *Atwell*, does not take into consideration any of the constitutionally required *Miller* factors when determining whether a juvenile offender should be released from prison."[179] It is entirely possible that, in response to *Michel*, the Florida Legislature will revoke the statute codifying the *Miller* factors and juveniles transferred to adult court will again be sentenced to life with only the possibility of review by a parole board after twenty-five years.[180]

As discussed above, two distinct lines of Supreme Court cases apply to sentencing juveniles in adult court. The first line of cases recognizes that kids are constitutionally different than adults for purposes of sentencing.[181] The second holds that individualized sentencing is required when children face extreme sentences. "*Graham* . . . likened life without parole for juveniles to the death penalty

176. *Id*.

177. *See* No. SC16-2187 (FLA. 2018).

178. *See id*. at 8-9 ("Michel . . . will remain sentenced to life in prison, being entitled to review of his sentence after twenty-five years, at a hearing presided over by the parole commission. He will not have the right to be present, nor will he have the right to be represented by an attorney. The commission will also not be required to consider the Miller factors, nor will Michel have any real opportunity to present evidence in his defense.").

179. *Id*. at 9 (Parriente, J., dissenting).

180. *See also* Jones*,* 141 S. Ct. at 1328 (Sotomayor, J., dissenting) ("Contrary to explicit holdings in [*Miller* and *Montgomery*], the majority claims that the Eighth Amendment permits juvenile offenders convicted of homicide to be sentenced to life without parole (LWOP) as long as 'the sentence is not mandatory and the sentencer therefore has discretion to impose a lesser punishment.'" (quoting *Jones*, 141 S. Ct. at 1311)). Justice Sotomayor's dissent points out that, while the *Jones* majority claimed to follow *Graham*, *Miller* and *Montgomery*, the practical effect of *Jones* is to strip those cases of all meaning. After *Jones*, a judge can sentence a child to die in prison simply by making the perfunctory statement that she is aware she has the discretion to impose a lesser sentence. There is no requirement in *Jones* that the sentencer address the *Miller* factors or make a finding of permanent incorrigibility. *See* Mark Joseph Stern, *Brett Kavanaugh's Opinion Restoring Juvenile Life Without Parole Is Dishonest and Barbaric*, SLATE (Apr. 22, 2021, 12:35 PM), https://perma.cc/4H49-MAP8.

181. Miller v. Alabama, 567 U.S. 460, 471 ("*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing.").

itself, thereby evoking a second line of our precedents . . . requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him . . . ."[182] Despite the holdings of *Roper, Graham*, and *Miller*, a child can be transferred to adult court and face a *de facto* life sentence without a hearing. Children can also face sentences that are decades longer than the child's age at the time of the crime without a hearing.

Recognizing a right to be tried in juvenile court would require a hearing that comports with due process before a child can be deprived of that right. Eliminating discretionary direct file would, hopefully, eliminate some of the wide disparity between states in the number of children who are direct filed into the adult system. At a transfer hearing, each child's unique circumstances should be considered, including mitigation, prospects for rehabilitation in the juvenile versus adult systems, relative recidivism rates between juvenile and adult for the offense at issue, and any other issues raised by the parties. This would allow the juvenile system to focus on its original purpose: helping at-risk youth become the adults they were meant to be rather than another statistic in the pipeline to adult prison.

182. *Id*. at 470.