AMERICAN UNIVERSITY
WASHINGTON COLLEGE OF LAW

Nonprofit Org.
U.S. Postage
PAID
Hagerstown MD
Permit No. 93

Criminal Law Practitioner
American University
Washington College of Law
Capital Hall T-02
4300 Nebraska Avenue NW
Washington DC, 20016

www.crimlawpractitioner.com

AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW

CRIMINAL LAW PRACTITIONER

VOL III, ISSUE IV | FALL 2017

CRIMINAL LAW PRACTITIONER

American University
Washington College of Law
Volume III, Issue IV
Fall 2017

Criminal Law Practitioner
American University Washington College of Law
4300 Nebraska Avenue, NW, Washington, DC 20016
www.crimlawpractitioner.com

FROM THE EDITOR-IN-CHIEF

From the Editor-in-Chief

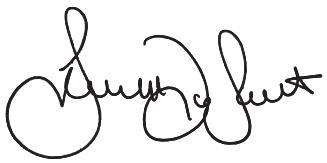
Dear Reader,

Thank you for joining us on another successful edition of the *Criminal Law Practitioner*! The *Criminal Law Practitioner* is the only student-run publication dedicated exclusively to criminal law issues at the American University Washington College of Law. We appreciate your readership and hope that you enjoy the pieces we have selected for this semester's publication.

This edition would not have been possible without the hard work of our Executive Board, senior staffers, and junior staffers. I would like to thank all members of the Executive Board for their commitment to the *Practitioner* this semester. Our Executive Editor Kaitlin Bigger has been essential in both editing pieces for this publication, as well as assisting in scheduling, events, and all aspects of the *Practitioner.* Our Publications Team, Joshua Couce and Ramy Simpson, have been excellent in ensuring that our publication remains on schedule and that our pieces for publication are of the utmost quality. Our Articles Editor, Nicole Navarro, worked tirelessly throughout both the summer and the fall to choose timely publications for this edition. Our Blog Editors, Chelsea Jacobi and Nicholas Ward, kept our website running with new blog posts and SCOTUS updates throughout the year. Finally, a special thank you to our Managing Editor, Dolores Sinistaj, for putting together a thought-provoking and timely Fall Symposium titled "Race and Disability in Policing and Criminal Justice Reform". We would like to once again thank the panelists and moderator of our symposium for their attendance and thoughtful contributions: Dean Camille Nelson, Robert Driscoll, Talila Lewis, Alicia Yass, and Professor Kenneth Troccoli.

In this edition, we have continued the *Practitioner's* tradition of providing a wide variety of relevant topics within the criminal law field. Thank you for reading, and we hope that you enjoy!

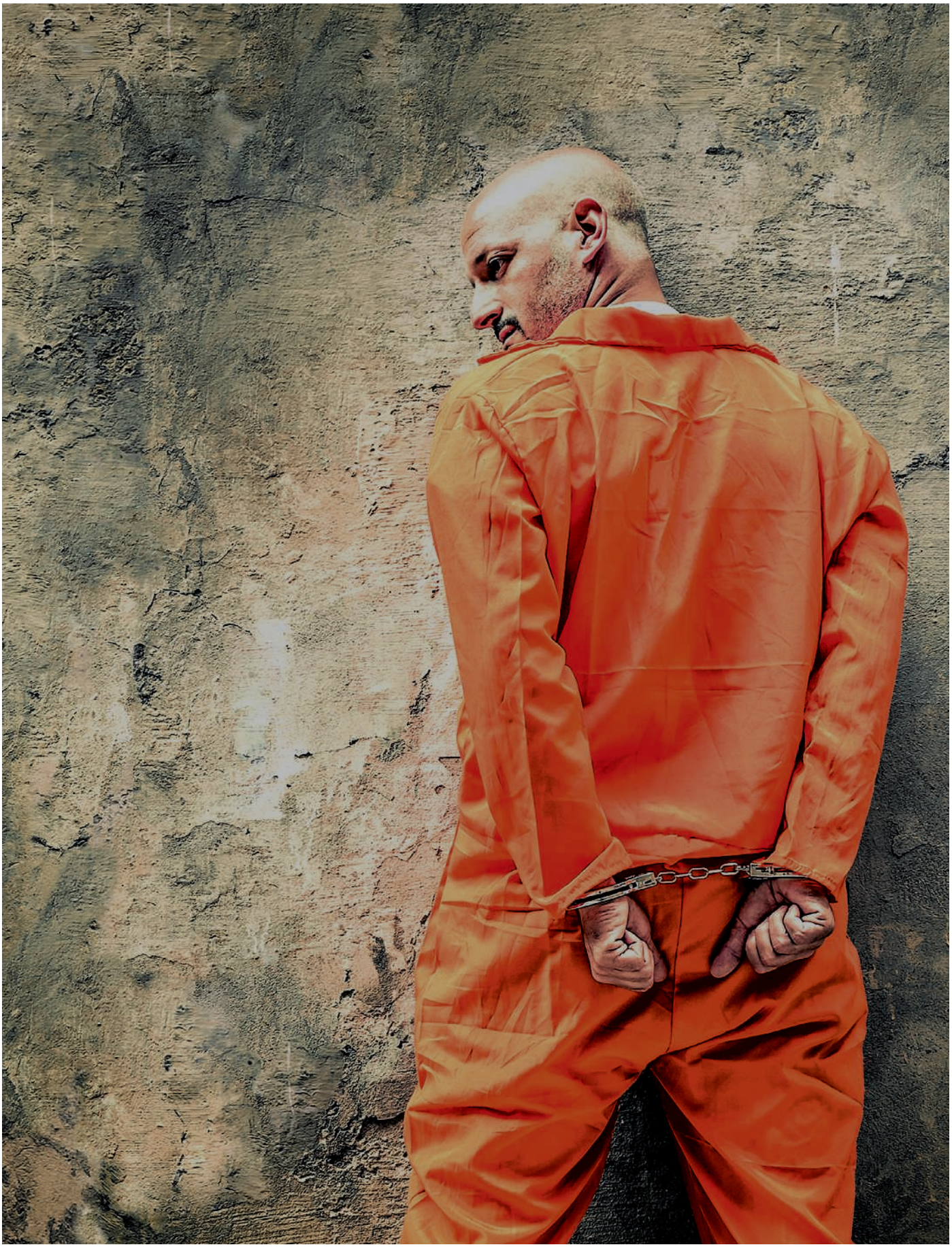
Best,



Editor-in-Chief
Samantha Dos Santos

CONTENTS

Practitioners



Aggravated Disproportionality: The Merger Doctrine, Contemporaneous Felony Aggravators, and Intuitive Fairness

Wes Dutcher-Walls

"Is there not something terribly amiss when such highly-educated jurists spend their time parsing the lexicon of death, arguing over . . . 'aggravating' and 'mitigating' circumstances as human lives—already shattered by abuse, poverty, and the isolation of prison life—literally hang in the balance?"

— John D. Bessler[1]

This article examines two distinct but related forms of disproportionality in the law of capital murder. First, this article will examine what it calls "guilt disproportionality," which stems from the effect of the merger doctrine as an inherent limit on the scope of felony murder liability. By excluding the most *violent* felons who have committed the most *assaultive* acts from felony murder liability – on the grounds that their felonies "merge" with the eventual accidental homicide – the merger doctrine counterintuitively results in felons who are relatively *less* violent being eligible for the death penalty. This article will engage with two scholarly attempts to rationalize and define the merger doctrine: the "redescriptive" test and the "dual culpability" test. As discussed below, the "dual culpability" test is more promising not only as a fairer definition of merger but also because it offers a conceptual framework which can be re-applied at the sentencing phase of capital felony murder trials.

Second, this article will explore the concept of what it calls "sentencing disproportionality," which refers to the higher likelihood that murderers convicted on a felony murder theory will receive the death penalty relative to those convicted on a premeditation theory. This is because of the existence of "contemporaneous felony" aggravating circumstances (the "CF aggravator") in many state capital sentencing statutes. The CF aggravators work by making first-degree murders to be "aggravated" – and therefore eligible for the death penalty – if the murder was committed during any of an enumerated list of felonies. After reviewing examples of Equal Protection Clause challenges to the "contemporaneous felony" aggravator from Florida in the 1980s, this essay will argue that a "duplication" challenge based on *Lowenfield v. Phelps* is a preferable way to understand and challenge the disproportionately adverse effects of this aggravating circumstance on those convicted of first-degree murder on a felony murder theory. Drawing on the dissent of Justices William Brennan and Thurgood Marshall in *Lowenfield*[2] this article re-applies Guyora Binder's "dual culpability" theory in the capital sentencing context to argue that the "contemporaneous felony" aggravator should not apply when a first-degree murder conviction rests solely on a felony murder theory.[3] Throughout, this article uses Florida, its sentencing statute, and its state court jurisprudence to examine these concepts.

---

1 John D. Bessler, Cruel and Unusual: the American Death Penalty and the Founders' Eighth Amendment 256 (2012).

2 *See* Lowenfield v. Phelps, 484 U.S. 231, 255 (1988) (Brennan and Marhsall, JJ., dissenting).

3 *See* Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. Rev. 403, 522 (2011).

I
TWO MEANINGS OF "DISPROPORTIONALITY"

"Disproportionality" takes on two different meanings, each more precise than a general sense of a punishment too severe for the crime, when we identify two separate presumptions about proportional sentencing in the guilt and sentencing phases of a capital trial. In the context of "guilt disproportionality," addressed in Part II, this article uses "disproportionality" to describe the effect of the merger doctrine in excluding what may appear as more *morally* culpable felonies—such as aggravated assault—from the pool of available predicate felonies, while allowing felonies like robbery to be predicates for felony murder. As Finkelstein succinctly notes, the merger doctrine "has the effect of making it easier for prosecutors to prosecute [for felony murder] defendants who have committed less severe crimes, as compared with those who have committed more serious ones."[4] Similarly, Binder suggests that, from the perspective of moral views on fairness and proportionality, the limitation of "assaultive" offences from being predicate felonies becomes less compelling as those offences become more dangerous or violent.[5] The comparison underlying "guilt disproportionality" is amongst defendants who committed felonies in which an accidental killing resulted: those defendants who committed assaultive and therefore "merge-eligible" are one group and those defendants who committed non-assaultive felonies that cannot be merged are the comparator group.

In the context of "sentencing disproportionality," discussed in Part III, this article uses "disproportionality" to describe the adverse effects of the "contemporaneous felony" factor (the "CF aggravator") on offenders convicted of first-degree murder on a felony murder theory. Here, the comparison is amongst a narrower pool of defendants: those *convicted* of first-degree murder—either on a premeditation or felony murder theory—from the perspective of an offender about to enter the sentencing phase of a bifurcated capital trial. Those defendants convicted on a premeditation theory are one group, and those convicted on a felony murder theory are the comparator group.

II
"GUILT" DISPROPORTIONALITY AND THE MERGER DOCTRINE

Felony Murder in the United States

Felony murder in this article refers to the theory upon which a defendant can be convicted of first-degree murder on the basis of even an accidental homicide that took place during a felony, even without a finding of *any* particular *mens rea* towards the resulting death. There are varying requirements as to the degree to which the killing must be related to the felony; for example, it is generally required that the killing be "in furtherance" of the felony.[6] However, with regard to the concept of "guilt disproportionality," the focus here is on the processes by which some felonies may serve as predicates for felony murder convictions and others may not.

[4] Claire Finkelstein, *Merger and Felony Murder*, *in* Defining Crimes: Essays on the Special Part of the Criminal Law 219, 219 (R.A. Duff and Stuart Green eds., 2005).

[5] Binder, *supra* note 3, at 522.

[6] Kimberly Kessler Ferzan, *Murder After the Merger: A Commentary on Finkelstein*, 9 Buff. Crim. L. Rev. 561, 563 (2006); *see also* Binder, *supra* note 3, at 518.

Forty-five states have a felony murder provision in their murder statutes.[7] One reason this essay focuses on Florida as a site of analysis is that its murder statute has a particularly long list of potential predicate felonies for the purposes of the felony murder theory. Florida lists at least nineteen predicates in § 782.04(1)(a)(2), whereas North Carolina, for example, lists only six predicates with a catchall category for other felonies committed with a weapon in its statute.[8] Regardless of its scope, felony murder remains a controversial criminological theory. Guyora Binder suggests that advocates of the felony murder rule see it as "work[ing] in conjunction with other rules of criminal liability to map a particular society's moral intuitions about violence and malice."[9] Similarly, Claire Finkelstein notes that "one of the most common rationales offered for felony murder is the advantage it affords the state in meeting its deterrence goals."[10]

Critics of felony murder often emphasize its incongruity in a modern, rational penal code. For example, Justice William Brennan of the United States Supreme Court, in a dissent to a decision upholding accomplice felony murder, wrote that felony murder is a "living fossil."[11] Sudduth goes further, claiming that it is a "barbaric anachronism."[12] However, more importantly for the purposes of this article, criticisms of the felony murder rule may often be expressed in the terms of proportionality and disproportionality. There is experimental research suggesting that the public views the death penalty as a disproportionate punishment for felony murder.[13] A *Yale Law Journal* editorial comment from 1957 argues that the "indiscriminate grouping of crimes characterized by a specific design to kill with crimes marked by the commission of a felony undermines the principle of culpability based on mental state," and therefore that felony murder should be abolished.[14] Further, major constitutional challenges to the imposition of the death sentence for felony murder center on disproportionality, in some cases with success, as in *Enmund v. Florida*, where the Court reversed a death sentence for a getaway car driver convicted on an accomplice theory of liability for felony murder: "the Court clearly intended to protect a defendant convicted of felony murder from suffering a punishment that was cruel and unusual because of its disproportionality."[15] The California Commission on the Fair Administration of Justice, in its 2008 final report, recommended that first-degree murder on a felony murder theory should no longer result in eligibility for the death penalty.[16] Below, this article will propose the more modest reform of prohibiting the consideration of the CF aggravator when the first-degree murder conviction is based on a felony murder theory, reflecting the ideal of "dual culpability" sentencing. The California Commission has recommended this reform in the alternative for jurisdictions which chose to retain felony murder as a capital crime.[17]

7 Binder, *supra* note 3, at 544.

8 *See* Fla. Stat. Ann. § 782.04(1)(a)(2) (West 2016); N.C. Gen. Stat. Ann. § 14-17(a) (West 2013).

9 Guyora Binder, *The Origins of the American Felony Murder Rule*, 57 Stan. L. Rev. 59, 207 (2004).

10 Finkelstein, *supra* note 4, at 228.

11 Norman J. Finkel and Stefanie F. Smith, *Principals and Accessories in Capital Felony-Murder: the Proportionality Principle Reigns Supreme*, 27 L. & Soc'y Rev. 129, 132 (1993).

12 Tamu Sudduth, *The Dillon Dilemma: Finding Proportionate Felony-Murder Punishments*, 27 Cal. L. Rev. 1299, 1326 (1984).

13 Finkel and Smith, *supra* note 11, at 134.

14 Case Comment, *Felony Murder as a First Degree Offence: An Anachronism Retained*, 66 Yale L.J. 427, 433 (1957).

15 Douglas W. Schwartz, *Imposing the Death Sentence for Felony Murder on a Non-Triggerman*, 105 Stan. L. Rev. 857, 866 (1985); *see also* Enmund v. Florida, 458 U.S. 782 (1982).

16 Cal. Comm. on the Fair Admin. of Just., Final Report at 138-39 (2008).

17 *Id.* at 139.

The merger doctrine

Given the concerns over the potential disproportionality caused by the felony murder rule, scholarship has focused on its structural and theoretical limits. The merger doctrine is an important example of these limits.[18] It operates by disqualifying felonies such as aggravated assault or manslaughter from being felony murder predicates because they are too similar to the accidental killing itself. This principle extends back to the "intellectual birth" of the felony murder doctrine.[19] A merger doctrine of some kind is generally seen as necessary for preserving the integrity of a graded homicide scheme: without it, all homicidal felonies including manslaughter would become murder,[20] and prosecutors could uniformly bring first-degree murder charges on a felony murder theory to sidestep the question of *mens rea* and preclude the defendant from using defenses such as provocation.[21]

The "redescriptive" test

Some scholars have attempted to articulate rationales for the merger doctrine or reformulate the doctrine itself to satisfy *post hoc* justifications for it. The prescriptive or normative disagreement over the value of the doctrine is tied up with a descriptive or analytical disagreement over what the doctrine actually is, and how it does or should operate. For example, Claire Finkelstein sees the merger doctrine as a requirement that the offender engage in two separate "acts" in order to be liable for felony murder.[22] Accordingly, in articulating her own concept of the merger doctrine, she rejects the prevailing "independent felonious purpose" test and puts forward what she calls the "redescriptive" test.[23] Under this formulation of merger, a predicate felony will merge only when the "act in virtue of which the defendant satisfies the offence definition for the predicate felony can itself be *redescribed* in terms of the resulting death," therefore failing felony murder's two-act requirement.[24] [Emphasis added.] To provide a limiting principle,[25] Finkelstein suggests that the causal relationship needed to satisfy the "redescriptive" test is broken by "unusual interventions" such as another person's actions.[26]

Importantly, Finkelstein presents the "redescriptive" test in the language of intuitive conceptions of fairness: the test will produce "fairly intuitive results for a range of cases."[27] She goes on to suggest that there should be "no objection to allowing lesser felonies to serve as the predicate [for felony murder]" as long as they cannot be redescribed as the killing itself, *even if they are not inherently dangerous*. In light of these statements, Finkelstein lays out a striking sampling of the results of her "redescriptive" test: both assaulting and starving a child to death could be "redescribed" as—and merged into—the ultimate killing, but entering a home with the intent to assault could not be "redescribed" as a resulting accidental death, and thus could result in felony murder liability.[28]

Finkelstein's attempt to justify the merger doctrine as she defines it through an appeal to intuitive senses of proportionality appears less than completely successful. Ferzan and

[18] David Crump & Susan Waite Crump, *In Defence of the Felony Murder Doctrine*, 8 Harv. J. L. & Pub. Pol'y Rev. 359, 377 (1985); *see also* Binder, *supra* note 9, at 186.
[19] Binder, *supra* note 9, at 90.
[20] Crump & Crump, *supra* note 17, at 378.
[21] Finkelstein, *supra* note 4, at 227.
[22] Finkelstein, *supra* note 4, at 229.
[23] *Id.* at 223, 229.
[24] *Id.* at 230.
[25] *See id.* at 231; *see also* Ferzan, *supra* note 6, at 565.
[26] Finkelstein, *supra* note 4, at 234.
[27] *Id.* at 230.
[28] *Id.* at 236.

Binder criticize Finkelstein for what Ferzan calls the "false conceptual premise" that felony murder requires two acts.[29] Further, both note how Finkelstein's test could exclude paradigmatic felony murder predicates such as robbery and rape,[30] or even arson.[31] Disputing Finkelstein's claim to intuitive fairness, Ferzan suggests that the "redescriptive" test would in fact result in "counterintuitive results in paradigmatic cases."[32]

A unifying theory: dual culpability

A preferable test for the merger doctrine is the "independent culpability" or "dual culpability" test set out by Binder.[33] In brief, Binder's test requires either an independent culpable purpose—that is, a purpose of harming some interest other than physical integrity of the eventual victim—or simply a knowing acceptance of or reckless indifference towards an independent harm.[34] Whereas Finkelstein's merger doctrine requires two *acts* for felony murder, Binder's merger doctrine requires two *forms of culpability*.[35] In most cases of felony murder, these two culpabilities are an indifference to the risk of death and an intent towards the felony.[36] As a preliminary matter, this emphasis on individual culpability seems to align more comfortably with the emphasis on moral blameworthiness in seeking proportionality than Finkelstein's ontological-linguistic parsing of the defendant's outward actions.

One of the strongest arguments Binder offers in favour of his "dual culpability" theory of merger is that it is already implicitly at work in a majority of felony murder statutes in the United States through the explicit enumeration of felonies.[37] Binder writes that legislatures use what he terms a "covert merger limitation" in enumerating only predicates "requiring sufficient culpability to satisfy the principle of dual culpability."[38] Twenty-five of the forty-five felony murder jurisdictions enumerate predicate felonies exhaustively, and of these twenty-five only two allow assault of the victim to serve as a predicates.[39] In this way, Binder's concept of "dual culpability" provides a compelling theoretical rationalization of existing state legislative frameworks.

Guilt disproportionality

Regardless of the philosophical justifications or rationalizations for the merger doctrine, the result is still that the more violent and assaultive felonies become, the more likely it is that they will merge with the homicide and preclude the offender from being convicted of first-degree murder on a felony murder theory. This means that a hypothetical offender who was committing a felony which does not inherently involve violence, such as burglary, and whose only homicidal act was accidental (for example, through the unintended discharge of his or her firearm) could be convicted in a state such as Florida of first-degree murder. At the same time, any number of more *intuitively* morally blameworthy offenders such as one who beats a child to death,[40] could escape first-degree murder liability, depending on the exact parameters of the merger limitation used.

[29] Ferzan, *supra* note 6, at 562; Binder, *supra* note 3, at 522.
[30] Binder, *supra* note 3, at 522.
[31] Ferzan, *supra* note 6, at 567.
[32] *Id.* at 576.
[33] Binder, *supra* note 3, at 521.
[34] *Id.* at 519-20.
[35] *See* Finkelstein, *supra* note 4, at 229; Binder, *supra* note 3, at 521.
[36] Binder, *supra* note 3, at 522.
[37] *Id.* at 543.
[38] *Id.* at 550.
[39] *Id.* at 544. The two states are Wisconsin and Ohio.
[40] *See* Finkelstein, *supra* note 4, at 236.

Under a literal application of Finkelstein's "redescriptive" merger test, it is possible that even the paradigmatic predicate of arson, itself an intuitively blameworthy act, could "merge" out of the scope of felony murder.[41] Even leaving aside the question of what proportional punishment for each of these offences would be, from the perspective of relative culpability the criminological framework set out by felony murder and merger theories may result in relatively more frequent first-degree murder convictions for offenders who have committed less serious predicate felonies, as compared with those who have committed more serious ones.[42]

Ferzan writes that it is "perfectly legitimate" to limit the scope of felony murder liability to predicates such as rape and robbery which are inherently dangerous.[43] Without challenging the validity of this statement, it can nonetheless be said that felony murder, as moderated by the merger doctrine (however defined), does exclude felonies that are not only inherently dangerous but *violent* and *assaultive* by definition. The necessity of some form of merger doctrine in maintaining a graded homicide system is obvious;[44] however, the ostensible price to be paid is that *some* accidental homicides result in death penalty liability while others do not. More worrisome is that this distinction does not always correspond with the intuitive moral blameworthiness of the underlying felony.

[41] Ferzan, *supra* note 6, at 567.
[42] *See* Finkelstein, *supra* note 4, at 219.
[43] Ferzan, *supra* note 6, at 569.
[44] *See* Finkelstein, *supra* note 4, at 227; *see also* Crump & Crump, *supra* note 17, at 378.

III
SENTENCING DISPROPORTIONALITY

Contemporaneous Felony Aggravators

The primary legislative response to the United States Supreme Court's invalidation of existing capital sentencing statutes in *Furman v. Georgia* was the creation of lists of "statutory aggravators," usually numbering between six and twelve in most states.[45] Contemporaneous felony aggravators ("CF aggravators") are aggravating factors contained in sentencing statutes that allow the fact that a first-degree murder took place during a felony to weigh against the defendant for sentencing purposes, both as the one required minimum "gateway" aggravator and when the jury is weighing aggravating and mitigating factors.[46] The CF aggravator, along with the "vile murder" aggravator,[47] leads to more defendants becoming death-eligible and to more carried-out death sentences than all other statutory aggravators.[48]

[45] David C. Baldus, George Woodworth, & Charles A. Pulaski, Jr., Equal Justice and the Death Penalty: A Legal and Empirical Analysis 22 (1990).
[46] In Florida's sentencing statute, the CF aggravator is phrased as follows: "Aggravating factors shall be limited to the following [. . .] (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnapping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb" (§ 921.141(6)(d)).
[47] Allowing death penalty eligibility if it is established that the murder was uniquely depraved in some way, variously defined.
[48] Baldus, Woodworth & Pulaski, *supra* note 44, at 22. *See also* Cathleen Burnett, Wrongful Death Sentences: Rethinking Justice in Capital Cases 86 (2010).

The central problem this article seeks to identify and explore is that the CF aggravator may be considered during sentencing for first-degree murder convictions on a felony murder theory, including ones that may be examples of "guilt disproportionality" due to the merger doctrine (see above). The most obvious objection to this—and one that has reached the Supreme Court in *Lowenfield* regarding another statutory aggravator—is that the CF aggravator refers to the same factual matter as the crime of first-degree murder itself when proven on a felony murder theory.[49] The fact of the predicate felony appears, and can be dispositive, at both guilt and sentencing phases. The operation of the CF aggravator in felony murder sentencing bypasses the jury's initial role of finding the minimum "gateway" aggravator, while at the same time potentially creating a reverse onus for the convicted felony murderers to adduce mitigating circumstances in order to avoid death.[50]

Purpose Confusion: Defining the "Target" of the CF Aggravator

In the context of felony murder, one example of the "dual culpability" theory of merger is the felony of burglary, for the purpose of assaulting someone within the domicile. Here, an assaultive or homicidal intention motivates the felony of burglary in the first place. Under both Finkelstein's more permissive "redescriptive" test and Binder's "dual culpability" test, described above, this is a paradigmatic example of a non-merged felony.[51] Though from a historical perspective, burglary is well-established as a predicate felony,[52] it nonetheless is useful to inquire as to what the penological or punitive rationale is for allowing burglary to serve as a predicate for the elevated crime of felony murder. Binder notes that one Oregon court stated that the purpose of felony murder liability in cases of burglary-assault leading to homicide is to provide added protection for people in dwelling places, presumably through general deterrence.[53] Similarly, the New York Court of Appeals cited deterrence-based reasoning about the particular vulnerability of victims in homes.[54] Similarly, in the context of homicidal child abuse, the predicate felony *seems* like assault and therefore a prime candidate for merger. However, it is not merged, a result that Binder's "dual culpability" analysis rationalizes not in terms of independent felonious *purpose* but rather independently culpable *attitudes*: the necessity for punishing the indifference or hostility towards the interests of a vulnerable individual such as a child.[55] Thus, the predicate felonies

[49] *See* Lowenfield v. Phelps, 484 U.S. 232, 232 (1988).

[50] *See* White v. State, 403 So.2d 331, 335 (Fla. 1981). *See also* Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983). The habit of some scholars and even judges to refer to the CF aggravator simply as "felony murder" contributes to the sense that statutes such as Florida's create an automatic death penalty for first-degree murder convictions on a felony murder theory. *See, e.g.*, Sara Colón, *Capital Crime: How California's Administration of the Death Penalty Violates the Eighth Amendment*, 97 Cal. L. Rev. 1377, 1413 (2009); Binder, *supra* note 3, at 519; Burnett, *supra* note 47, at 95. In its decision in *Lukehart v. State*, the Florida Supreme Court makes reference to the "felony murder aggravator." 776 So.2d 906, 925 (Fla. 2000). To a layperson—or to a capital defendant—this may well lead to the not-entirely-mistaken understanding that a conviction for felony murder leads inexorably to the death penalty.

[51] *See* Finkelstein, *supra* note 4, at 236; Binder, *supra* note 3, at 537.

[52] Binder, *supra* note 9, at 190.

[53] Binder, *supra* note 3, at 537.

[54] *See* Finkelstein, *supra* note 4, at 226; Crump & Crump, *supra* note 18, at 380.

[55] Binder, *supra* note 3, at 524.

of child abuse and burglary can be understood not simply as separate acts apart from the accidental homicide, but as proxies, respectively, for other forms of culpability.

The question of the "target" of the punitive and deterrent effects of felony murder sentences raises important and troubling concerns about the operation of the CF aggravator in capital felony murder cases. What *specifically is* the added capital liability created by the aggravator meant to punish, or deter, apart from the elements of felony murder itself *already considered at the guilt stage?* In *Carter v. State*, the Florida Supreme Court suggested that a jury could give additional weight to the CF aggravator for the appellant's burglary when deciding on the appropriate sentence for the two intentional murders he committed within, but *not* when deciding on the appropriate sentence for the accidental killing of his intended victims' daughter when his gun unexpectedly discharged.[56] According to the court, the reason for this is that assaulting them was Carter's goal in unlawfully entering the home in the first place.[57] However, in a hypothetical situation in which the sole homicide was the accidental death of the daughter, this description of the valid "target" of the deterrent effect of the CF aggravator—Carter's unlawful entry into the home in the first place—is less compelling. In other words, a defense of the CF aggravator that relies specifically on connecting the *motive* of a (premeditated) murderer in committing a felony to the eventual homicide may falter when called upon to justify the use of the CF aggravator for felony murderers. These could include offenders who either cannot be said to have had the necessary *mens rea* for premeditation due to lack of necessary evidence, as in *Menendez v. State*,[58] or for whom the evidence strongly suggests a mere accident, as in *Rembert v. State*.[59]

This concern over the intended "target" of deterrence or punishment exists for other statutory aggravators as well. Garnett argues that the additional deterrent effect of the "heinous, cruel, and depraved" aggravator, as opposed to that of a non-aggravated first-degree murder conviction, is questionable because its "target" is the would-be-murderer's conscience.[60] The content of what this aggravator communicates about a first-degree murder is simply that it is "bad"—a normative statement that one would expect to be a given if the case has reached capital sentencing, and therefore of questionable value as a "discretion-narrowing device" required by post-*Furman* sentencing statutes.[61] Garnett contrasts this with the common aggravator that the murder victim was a police officer.[62] Garnett suggests that this aggravator *does* succeed in communicating something discrete about the crime distinct from a mere description of the underlying offence to "filter through to the consciousness of a prospective killer in a way that might make him think twice" about committing specific acts.[63] For example, the po-

[56] *Carter v. State*, 980 So.2d 473, 483 (Fla. 2008).
[57] *Id.*
[58] *Menendez v. State*, 419 So.2d 312, 314 (Fla. 1982). An eyewitness saw Menendez emptying a safe in a jewelry store, but there was no direct evidence of Menendez having killed anyone in the robbery. The store clerk's body was later discovered and police retrieved items from the store in Menendez's apartment.
[59] *Rembert v. State,* 445 So.2d 337, 338 (Fla. 1984). Rembert entered a fishing supply store and hit the elderly shop owner once on the head in order to gain access to the till. The victim died hours later from gradual blood loss.
[60] Richard W. Garnett, *Depravity Thrice Removed: Using the 'Heinous, Cruel, or Depraved" Factor to Aggravate Convictions of Nontriggermen Accomplices in Capital Cases*, 103 Yale L.J. 2471, 2495-96 (1994).
[61] *Id.* at 2482; *See also Lowenfield v. Phelps*, 484 U.S. 231, 232 (1988).
[62] Garnett, *supra* note 60, at 2495-96.
[63] *Id.*

lice victim aggravator may indeed cause a would-be capital defendant to think twice before firing a weapon in the direction of a police officer as part of an attempt to avoid arrest during a felony gone wrong, if we are to assume that this would-be murderer is familiar with the state's capital sentencing statute.

Just as the "heinous, cruel, and depraved" aggravator is broad enough to be merely a normative restatement of the wrongfulness of first-degree murder as such,[64] the CF aggravator is simply a repackaging of the factual matter underlying a felony murder conviction in the first place. Arguably, there is nothing the CF aggravator could deter or punish apart from that which is already deterred or punished by the operation of the felony murder rule at the guilt phase of the trial. Returning to the burglary-homicides at issue in *Carter v. State*, the guilt-phase jury had already "used" the discrete form of culpability based on Carter's violation of the interest in property and the security of his victims' domicile as a basis for singling out the accidental killing of his victims' daughter from the pool of all accidental homicides to receive the additional symbolic and penal opprobrium of a first-degree murder conviction on a felony murder theory. From the perspective of the scholarly accounts here, *this much* is legitimate.[65] However, it is less easy to justify the *second* use of the discrete form of culpability reflected in the act of burglary to single out for capital punishment this (accidental) first-degree murder, this time from the complete pool of all first-degree murders, including premeditated murders. As Binder suggests, felony murder is *itself* an "aggravator," increasing liability for an unintended killing to liability for first-degree murder on the basis of a felony.[66] Accordingly, *Lowenfield* presents compelling arguments that the same factual matter should not be permitted to "aggravate" an accidental homicide to murder and then "aggravate" that murder to death-eligible murder.

Equal Protection Challenges

The jurisprudence of the Supreme Court of Florida provides examples of cases in which capital defendants have attempted to mount constitutional challenges to the sentencing statute under the Equal Protection Clause of the Fourteenth Amendment. An early example of this is *White v. State*. The defendant in that case was one of a group of men who shot and killed six individuals during a home invasion-style robbery.[67] On appeal to the Florida Supreme Court, the defendant claimed that the CF aggravator violated equal protection rights for defendants who were convicted on a felony murder theory of first-degree murder. This was because the factual matter underlying a felony murder conviction would almost always engage the CF aggravator automatically: "the [felony murderer] enters the sentencing hearing with one aggravating circumstance already in existence . . . while in contrast the individual who has committed murder with a premeditated design to take the life of his victim has no such aggravating circumstance held against him."[68] The effect of this, according to White, was that the state paradoxically had to prove *more* against a premeditated murderer at the sentencing phase than against a felony murderer. Put another way, the felony murderer carries a heavier evidentiary burden of adducing evidence of mitigating circumstances relative to the premeditated murderer. The Florida

[64] *Id.* at 2482.

[65] *See* Crump & Crump, *supra* note 18, at 379-80; Finkelstein, *supra* note 4, at 226; Binder, *supra* note 3, at 537.

[66] Binder, *supra* note 3, at 519.

[67] White v. State, 403 So.2d 331, 332 (Fla. 1981).

[68] *Id.* at 335.

Supreme Court responded to White's equal protection claim with an argument founded on the internal logic of the state's capital sentencing statute: "the fact that the mitigating circumstances listed in section § 921.141(6) are not exclusive removes much of the force of the defendant's equal protection argument [. . .] a defendant remains free to argue as a mitigating circumstance that he did not intend to kill the victim [. . .] the mere existence of an aggravating circumstance does not mandate imposition of the death sentence." [69]

This is an unsatisfying response to a compelling constitutional claim identifying a real concern about Florida's capital sentencing statute. Indeed, a felony murderer is as free as a premeditated murderer to adduce mitigating circumstances at sentencing. In addition, it is true that the mitigating circumstance of lack of intent to kill is available to felony murderers but not to premeditated murderers.[70] However, the fact remains that in the unlikely but reasonable hypothetical case in which there are no aggravating or mitigating circumstances other than the CF aggravator, the premeditated murderer could potentially avoid the death penalty altogether whereas the felony murderer could potentially face death. Further, the conceptual uncertainty as to the "target" of the deterrent effects of the CF aggravator, discussed above, raises concerns about whether this weighting of the scales against felony murderers at sentencing is actually *worth* anything in the pursuit of a state's legitimate penological goals.

Admittedly, it is not clear that the Equal Protection Clause was the appropriate vehicle for developing a constitutional challenge to the CF aggravator. The first hurdle that White would have faced, had the Florida Supreme Court engaged substantively with the merits of his equal protection claim, would have been establishing Fourteenth Amendment protection in the first place under the strict "disparate impacts" standard set out in *Washington v. Davis*.[71] Without going too far into the Fourteenth Amendment jurisprudence at issue, if the Supreme Court was willing to reject a "disparate effects" claim relating to a class (African-Americans) putatively at the core of Fourteenth Amendment protection[72] it is hard to imagine that a court would be willing to entertain a challenge to the use of the CF aggravator at felony murder sentencing on the basis of disparate effects alone. Had White somehow established that the Equal Protection Clause *was* engaged by the CF aggravator's disparate adverse impacts on felony murderers, he would still have had to establish that this discriminatory effect was not justified, which would almost certainly have been decided under the state-friendly "rational relations" standard of scrutiny. It is easy to imagine a state attorney general constructing an argument based on an appeal to the state's legitimate interest of deterring the commission of dangerous felonies.

In *Mills v. State*, the Florida Supreme Court responded in greater depth to the appellant's constitutional challenge to the CF aggravator in a felony murder case.[73] Interestingly, the court rejects Mills' equal protection claim in the rhetoric of deference to legislative decision-making reminiscent of the paradigmatic rational relations cases: "[t]he legislative determination that a first-degree murder that occurs in the course of another dangerous felony is an aggravated capital felony is reasonable."[74] This

[69] *Id.* at 336.
[70] *Id.*
[71] *See generally* Washington v. Davis, 426 U.S. 229 (1976).
[72] *Id.* at 239.
[73] *See* Mills v. State, 476 So.2d 172 (Fla. 1985).
[74] *Id.* at 178.

deference to legislative wisdom about felony murder's seriousness is problematic. Even academic authors defending the continued existence of felony murder present their defenses in terms of the *comparability* of felony murder with premeditated murder, not the relatively *greater* seriousness or moral blameworthiness of felony murder. As Crump and Crump write, felony murder reflects the "widespread public perception that a [felony] resulting in death is not simply a more serious version of the underlying felony, but is a qualitatively different crime, comparable in seriousness to other murders."[75] In this formulation, the fact that felony murder involves the death of the victim of a felony (or a third party during a felony) distinguishes it in terms of moral blameworthiness from non-homicidal felonies; it does *not* distinguish it in terms of moral blameworthiness from premeditated murder in a way that justifies a more onerous sentencing procedure for felony murderers.

Lowenfield Challenges and Duplication

A challenge to the operation of statutory aggravators, which is related to but distinct from equal protection claims, reached the Supreme Court of the United States in and *Lowenfield v. Phelps*.[76] In *Lowenfield*, the Court held that a death sentence does not violate the Eighth Amendment simply because the one statutory aggravator found "duplicates" an element of the underlying conviction.[77] In this case, the defendant had killed five people, and challenged his death sentence in Louisiana on the grounds that the "multiple victim" aggravator simply duplicated a factual element of the underlying offence of quintuple murder. The majority opinion of Chief Justice Rehnquist rejected this appeal, holding that aggravating circumstances are not an end in themselves, but instead "a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion," as required by *Zant v. Stephens*.[78] Chief Justice Rehnquist held that the required narrowing took place at the guilt phase when the defendant was found guilty of the particular crime of murder with "specific intent to ill or to inflict great bodily harm on more than one person."[79]

Unsurprisingly, Justices Marshall and Brennan offered a strong dissent in *Lowenfield*, and a number of the criticisms they articulate there in reference to the "multiple victim" aggravator are equally applicable in the context of the CF aggravator. Marshall and Brennan began by arguing that, contrary to the majority's opinions, the Court's previous cases *did* in fact reflect the principle that the sole aggravator cannot duplicate an element of the underlying offence and still make the offender death-eligible.[80] The dissenters then stated the obvious: due the "complete overlap" of the factual matter contemplated by an element of a crime with that contemplated by a statutory aggravator, the sentencing hearing inevitably tilts towards the imposition of the death penalty.[81] Marshall and Brennan sought to show specifically how commonly-duplicative aggravating circumstances such as the "multiple victim," "vile murder," and CF aggravators prejudice the defendant at sentencing. The state "enters the sentencing hearing with the jury already across the threshold of death eligibility"—by virtue of the elements of the crime itself—"without any awareness on the jury's part that it had crossed that

[75] *Supra* note 18, at 396.
[76] *See* Lowenfield v. Phelps, 484 U.S. 231, 232 (1988).
[77] *Id.*
[78] *Id.* at 244.
[79] *Id.*
[80] *Id.* at 255 (Brennan and Marshall, JJ., dissenting.)
[81] *Id.* at 258.

line."[82] At sentencing, the state will then face less resistance in arguing for death because it can remind the jury that it already found an aggravator by convicting the defendant at the guilt phase.[83] Even worse, aggravator "duplication" affects the guilt phase of the trial too: as a matter of human psychology, the prosecution will have an easier time convincing the jury of guilt beyond a reasonable doubt if the jury remains unaware that finding that element will automatically make the defendant death-eligible at sentencing.[84]

Lowenfield-type "duplication" claims represent a preferable basis on which to challenge the consideration of the CF aggravator in felony murder cases; unlike Fourteenth Amendment challenges, they do not chance the United States Supreme Court's state-friendly equal protection jurisprudence. Whereas equal protection challenges might fail by basing their claims on a comparison of felony murderers and premeditated murderers, *Lowenfield* "duplication" challenges make an appeal to the core concern of post-*Furman* capital sentencing, the jury as "the guardian and articulator of society's moral code and conscience in the criminal trial."[85] In fact, Marshall and Brennan seem to express their point in explaining how duplicative aggravators bring the unwitting jury "across the threshold of death eligibility" as much in terms of institutional respect for the jury as of fairness to the defendant.[86] Perhaps this represents a strategy of "calling the bluff" of death penalty advocates who defend capital sentencing by pointing to the process of guided jury discretion as a bulwark against arbitrariness.

The CF aggravator is troubling precisely because of its mechanical, *non*-discretionary operation in felony murder cases. Garnett argues that the "heinous, cruel, and depraved," aggravator "is so emotionally loaded and conceptually amorphous that it may fail as a check on arbitrary sentencing."[87] Thus, whereas criticism of "vile murder" aggravators focuses on their potential for abuse of discretion and arbitrariness, the criticism of the CF aggravator could be stated as the inverse: for felony murderers, the CF aggravator operates too "automatically" and mechanically, making a defendant eligible for the death penalty by virtue of the underlying elements of his crime proved at the guilt phase. In fact, the danger of "automatic" death penalty eligibility caused by the CF aggravator in felony murder cases may actually be greater in real terms than the danger of "arbitrary" death penalty eligibility caused by the "heinous, cruel, and depraved" aggravator. While trial courts could potentially mitigate the amorphousness and over-inclusiveness of the "heinous, cruel and depraved" aggravator by statutory interpretation,[88] this "reading down" logic simply does not apply to the CF aggravator. As a simple matter of logic, the aggravator is engaged whenever the first-degree murder conviction rests of a felony murder theory. Barring some procedural limit to the availability of the CF aggravator when the first-degree murder conviction rests on felony murder theory (see below), it is possible that the aggravator will act as the "gateway" circumstance (the minimum of one aggravator required for all death eligibility) and permit the jury to proceed to the more opaque process of weighing aggravating and mitigating circumstances.

[82] *Id.*

[83] *Id*. at 257-58 (discussing that the prosecutor at trial *twice* reminded the sentencing jury of precisely this fact.

[84] *Id.* at 247.

[85] Schwartz, *supra* note 15, at 867.

[86] *See* Lowenfield, 484 U.S. at 258.

[87] Garnett, *supra* note 60, at 2480.

[88] *See* David Pannick, Judicial Review of the Death Penalty 97 (1982).

Again, the felony murderer is always free to adduce a lack of intent to kill as a mitigating circumstance,[89] which may well be compelling to a jury alongside other mitigating circumstances. However, regardless of whether felony murderers in fact do receive death sentences primarily because of the CF aggravator, it exposes them to the greater *possibility* of a death sentence, and to the contingencies and vicissitudes of jurors' subjective views on the weight of aggravating and mitigating circumstances, all of this in effect because of their lack of premeditation. This is "sentencing disproportionality" at work.

IV
REFORM: "DUAL CULPABILITY SENTENCING"

In light of the proportionality concerns related to felony murder as a theory of first-degree murder, perhaps the most obvious possible reform is to eliminate the death penalty as a punishment for those convicted of first-degree murder on a felony murder theory. This reform would exclude felony murder from the scope of what constitutes a capital offence, continuing on the trajectory of the Court decision in *Coker v. Georgia*, which excluded rape from the category of capital offences.[90] As noted above, the California Commission on the Fair Administration of Justice, in its 2008 final report, recommended taking a step further along this path by excluding felony murder from eligibility for the death penalty.[91]

However, this essay proposes the more modest reform of prohibiting the consideration of the CF aggravator when the first-degree murder conviction is based on a felony murder theory, in keeping with the ideal of "dual culpability" sentencing. In effect, this reform would separate out the respective lists of available aggravating circumstances in sentencing statutes depending on whether the first-degree murder conviction rested on a premeditation or felony murder theory, creating two parallel tracks for capital sentencing. Just as Binder's "dual culpability" formulation of the merger doctrine requires a discrete type of culpability aside from violating the victim's interest in physical integrity,[92] "dual culpability" sentencing would require a felony murderer to have demonstrated culpability in more than the way captured by the felony murder conviction itself. Under Florida's sentencing statute, this required second form of culpability could take a variety of forms: that the defendant is a gang member, that the victim was a police officer, child, person with a disability, or public official, that the murder was committed to avoid arrest, or any other form of culpability encapsulated by the other remaining available aggravators.[93]

If applied in a state such as Florida, this sentencing scheme would prevent juries from considering the CF aggravator at the sentencing stage in any cases where there is a possibility that the jury found a capital defendant guilty of first-degree murder solely on a felony murder theory—in other words, whenever there is not the "separate" culpability of premeditation in addition to the culpability related to the felonious purpose. If applied in Florida, this category would include cases in which the conviction rested solely on a felony murder theory such as *Menendez*[94] or *Rembert* [95]or cases

[89] *See, e.g.,* White v. State, 403 So.2d 331, 336 (Fla. 1981).
[90] Coker v. Georgia, 433 US 584, 598-560 (1977).
[91] Cal. Comm. on the Fair Admin. of Just., *supra* note 16, at 138-39.
[92] *See* Binder, *supra* note 3, at 519.
[93] Fla. Stat. Ann. § 921.141(6) (West 2017).
[94] *See* Menendez v. State, 419 So.2d 312, 314 (Fla. 1982).
[95] *See* Rembert v. State, 445 So.2d 337, 337 (Fla. 1984).

in which the jury returned a general verdict at the guilt phase and did not specify whether the first-degree murder conviction rested on a premeditation theory or a felony murder theory, such as *Hurst v. Florida*.[96]

As Colón notes, restricting the array of statutory aggravators with an eye to reducing the overall number of death sentences "could result in a statutory policy which would not necessarily reflect the values of the community."[97] However, prohibiting the consideration of the CF aggravator in felony murder cases would be only a continuation along the states' progress on legislative reform in the post-*Furman* era, rather than a change in kind. The Supreme Court has rejected the categorical approach to capital sentencing, which would automatically inflict the death penalty on certain categories of crimes, such as the murder of children or police officers.[98] As suggested by Koch et al., as a matter of state-level political debate on criminal sentencing, advocates of the death penalty are able to leverage the legislative efforts to restrict death penalty liability to "the most despised offenders" to counter the rhetorical advantage of pro-abolition advocates in calling the penalty uncivilized or random.[99] However, the legislative narrowing of death penalty liability through statutory aggravator requirements *also* increases the gulf between inchoate public sentiment on the moral blameworthiness of particular offenders and the eventual results in capital trials. Put simply, laypersons reading about a capital case in the newspaper—and the pro-death penalty state legislator—are not constitutionally obligated to consider and weigh mitigating circumstances, unlike the post-*Furman* capital juror. Outside the capital sentencing process, laypersons can ignore mitigating circumstances at will, focusing on the most provocative and disturbing elements of the crime. Seen this way, post-*Furman* capital statutes, including aggravating and mitigating factors, are at the same time an attempt to channel and control the public's inchoate and visceral intuitions on who deserves the death penalty and therefore *also* a negation of the value of those intuitions as legitimate determinants of actual sentences.[100]

As capital sentencing stands now, a juror's own views about the proportionality of death as punishment are relevant only insofar as they fit into the process of guided discretion. Courts no longer look to the rationality and even-handedness of sentencing decisions themselves, but only to their procedures.[101] In the post-*Furman* era, the results-oriented inquiry into proportionality, if it ever existed, has been transformed into an ongoing assessment of procedure.[102] As Baldus et al. note, and as the compounding of guilt disproportionality and sentencing disproportionality demonstrates, seeing sound procedure as coextensive with fair and proportional sentencing requires a leap of faith not always justified empirically.[103]

Though it would have a disproportionate impact on the number of death sentences imposed,[104] the modest reform of excluding the CF aggravator from capital sentencing of felony murderers' cases would simply be an extension of the logic of guided sentencing that would not

[96] *See* Hurst v. Florida, 136 S.Ct. 616, 620 (2016).
[97] Colón, *supra* note 50, at 1413.
[98] Larry W. Koch, Colin Wark & John F. Galliher, The Death of the American Death Penalty: States Still Leading the Way 167 (2012).
[99] *Id.*
[100] *See Lowenfield v. Phelps*, 484 U.S. 231, 257; *See also* Bessler, *supra* note 1, at 283.
[101] Baldus, *supra* note 44, at 26.
[102] *Id.*
[103] *Id.* at 27.
[104] *See* Franklin E. Zimring, *The Unexamined Death Penalty: Capital Punishment and the Reform of the Model Penal Code*, 105 Colum. L. Rev. 1396, 1403 (2005); Baldus, *supra* note 44, at 22.

fundamentally change the relationship of state legislatures to the capital jury in exercising its discretion. The epochal change has already taken place, in the *Furman* shift to guided discretion and automatic appellate review.[105] The moral impulse of just deserts has been eclipsed by procedure as a concrete manifestation of the goals of morality and proportionality.[106] As Garnett writes, "[a]ggravating factors, properly applied, should and can insure that only the most blameworthy defendants are sentenced to death."[107] Denying a "death-qualified" jury and the state the expedience of the CF aggravator when sentencing a felony murderer could help to make this ideal a reality.

[105] *See* Bessler, *supra* note 1, at 283, 326; Baldus, *supra* note 44, at 26.
[106] Baldus, *supra* note 44, at 26.
[107] Garnett, *supra* note 59, at 2493.

CASES CITED

Carter v. State, 980 So.2d 473 (Fla. 2008)

Coker v. Georgia, 433 US 584 (1977)

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

Hurst v. Florida, 136 S.Ct. 616 (2016)

Lowenfield v. Phelps, 484 U.S. 231 (1988)

Menendez v. State, 419 So.2d 312 (Fla. 1982)

Mills v. State, 476 So.2d 172 (Fla. 1985)

Rembert v. State, 445 So.2d 337 (Fla. 1984)

Teffeteller v. State, 439 So.2d 840 (Fla. 1983)

Washington v. Davis, 426 US 229 (1976)

White v. State, 403 So.2d 331 (Fla. 1981)

Zant v. Stephens, 462 U.S. 862 (1983)

WORKS CITED

Baldus, David C., George Woodworth, and Charles A. Pulaski, Jr. *Equal Justice and the Death Penalty: A Legal and Empirical Analysis*. Boston: Northeastern University Press, 1990.

Bessler, John D. *Cruel and Unusual: The American Death Penalty and the Founders' Eighth Amendment.* Boston: Northeastern University Press, 2012.

Binder, Guyora. "The Origins of American Felony Murder Rule." *Stanford Law Review* 57.1 (2004): 59-208

Binder, Guyora. "Making the Best of Felony Murder." *Boston University Law Review* 91 (2011): 403-559.

Burnett, Cathleen. *Wrongful Death Sentences: Rethinking Justice in Capital Cases*. Boulder, CO. Lynne Rienner Publishers, 2010.

California Commission on the Fair Administration of Justice. *California Commission on the Fair Administration of Justice Final Report*. Palo Alto, CA: Threestory Studio, 2008.

Colón, Sara. "Capital Crime: How California's Administration of the Death Penalty Violates the Eighth Amendment." *California Law Review* 97.5 (2009): 1377-1417.

Crump, David and Susan Waite Crump. "In Defence of the Felony Murder Doctrine." *Harvard Journal of Law and Public Policy* 8.2 (1985): 359-398.

"Felony Murder as a First Degree Offence: An Anachronism Retained." Editorial. *Yale Law Journal* 66.3 (1957): 427-435.

Ferzan, Kimberley Kessler. "Murder After the Merger: A Commentary on Finkelstein." *Buffalo Criminal Law Review* 9.2 (2006): 561-575.

Finkel, Norman J. and Stefanie F. Smith. "Principals and Accessories in Capital Felony-Murder: The Proportionality Principle Reigns Supreme." *Law & Society Review* 27.1 (1993): 129-156.

Finkelstein, Claire. "Merger and Felony Murder." *Defining Crimes: Essays on The Special Part of the Criminal Law*. Ed. R.A. Duff and Stuart Green. Oxford: Oxford University Press, 2005.

Garnett, Richard W. "Depravity Thrice Removed: Using the 'Heinous, Cruel, or Depraved" Factor to Aggravate Convictions of Nontriggermen Accomplices in Capital Cases." *Yale Law Journal* 103.8 (1994): 2471-2501.

Koch, Larry W., Colin Wark, and John F. Galliher. *The Death of the American Death Penalty: States Still Leading the Way*. Boston: Northeastern University Press, 2012.

Pannick, David. *Judicial Review of the Death Penalty*. London: Duckworth & Company, 1982.

Sudduth, Tamu. "The Dillon Dilemma: Finding Proportionate Felony-Murder Punishments." *California Law Review* 72.6 (1984): 1299-1327.

Schwartz, Douglas W. "Imposing the Death Sentence for Felony Murder on a Non-Triggerman." *Stanford Law Review* 37.3 (1985): 857-888.

Zimring, Franklin E. "The Unexamined Death Penalty: Capital Punishment and Reform of the Model Penal Code." *Columbia Law Review* 105.4 (2005): 1396-1416.

About the AUTHOR

Wes Dutcher-Walls is a third-year student at the University of Toronto Faculty of Law in Toronto, Ontario. He has also studied at the University of California, Berkeley, School of Law where he won the American Jurisprudence award in constitutional law. He received his undergraduate degree in Political Science and American Studies from the University of Toronto and is an alumnus of the Hertog Fellowship in Washington, D.C. Prior to law school, Wes was a policy advisor in the Ontario provincial government.

As a law student, Wes is interested in criminal law, with a particular interest in sentencing and capital punishment in the United States. In his second year, he competed in the Wilson Moot, a national moot competition focused on equality issues. He is currently a member of the Faculty of Law's Criminal Appellate Externship program. After law school, he will be pursuing a career in litigation.

We "Kent" Keep Transferring Kids Without a Hearing: Using Recent Supreme Court Jurisprudence to Revive *Kent v. United States* and End Mandatory Transfer for Juveniles

Summer Woods

Table of Contents

Introduction

When it comes to voting, drinking, marrying, serving on a jury, or even watching movies, society recognizes that kids are different. We restrict their privileges, we withhold certain rights, and we require their parents to consent for certain activities. When kids on the playground bully each other we say it's just "kids being kids," or when an adult is stressed and needs to lighten up, we tell them to "embrace their inner child" to do something crazy or reckless. Despite all these societal differences, however, nearly 200,000 children encounter the adult criminal justice system each year.[1] Somehow, we forget about all of these important distinctions when a child commits a crime—as if they went through every stage of puberty and grew up instantly in the five seconds it takes to snap handcuffs on their wrists.

The Supreme Court, through a series of recent cases, has recognized that children are constitutionally and fundamentally different than adults and therefore are more adept to rehabilitation than adults accused of the same crimes. Starting in 2005, with *Roper v. Simmons*,[2] the Court ruled that the death penalty for juveniles was unconstitutional. In 2010, *Graham v. Florida*[3] established that a sentence of life without the possibility of parole for juveniles accused of non-homicide crimes was unconstitutional and later expanded its ruling to all crimes including homicide in 2012 with Miller v. Alabama.[4] Despite these landmark rulings, however, children are still treated as adults in the criminal system under transfer statutes that either force their cases to be originally filed in adult criminal court or quickly move them out of the juvenile system, often without a hearing. While they can no longer be sentenced to death or sentenced to life in prison, children transferred to adult court are still exposed to harsh punishments, considered adults for sentencing purposes, and not afforded the individualized considerations laid out by the Supreme Court in its recent cases.

---

1 Carmen E. Daugherty, Zero Tolerance: How States Comply with PREA's Youthful Inmate Standard, Campaign for Youth Justice, (Nov. 19, 2015), http://www.campaignforyouthjustice.org/news/blog/item/zero-tolerance-how-states-comply-with-prea-s-youthful-inmate-standard.

2 543 U.S. 551 (2005).

3 560 U.S. 48 (2010).

4 567 U.S. 460 (2012).

A transfer statute is a "provision that allows or mandates the trial of a juvenile as an adult in criminal court for a criminal act."[5] All states currently have transfer laws that allow or mandate certain youth to be transferred to adult court, even though their age places them in the category of juvenile jurisdiction.[6] Even worse, many states still have mandatory transfer provisions—a type of automatic transfer requiring juveniles to be tried in adult criminal court for certain offenses. These provisions are codified and require a child of a certain age or who has committed a certain offense to be tried in adult court through either mandatory waiver to adult court or through statutory exclusion.[7] Such transfer laws are largely a result of a myth propagated in the 1990s of the juvenile "super predator," which resulted in the adultification of youth and an increased criminalization of youthful behavior.[8]

The Supreme Court has not ruled on the constitutionality of the transfer of juveniles to adult court since it first did in 1966. In Kent v. United States,[9] a sixteen-year-old was transferred to adult court without a hearing or any indication of the reasons for his transfer. The Supreme Court ruled that the waiver was invalid, that juveniles have a right to a formal hearing that "must measure up to the essentials of due process and fair treatment."[10] Since Kent, legislatures and state courts have continued to transfer children, often without a hearing.[11]

This Comment will highlight the 50th anniversary of the Kent decision and argue that this decision, along with the Court's decision in Roper, Graham, and Miller, illustrate that mandatory transfer mechanisms that do not require a court to hold a hearing prior to transferring youth are in violation of the Eighth Amendment to the United States Constitution.[12] The Supreme Court has recognized that children are categorically less culpable than adults for their conduct, and this difference is not based on the crime they are charged with, or the punishment they face. This Comment will also argue that all states should repeal mandatory transfer statutes and, regardless of the crime the youth is accused of, should only be able to transfer youth through judicial waiver after a hearing in which the court considers a standardized set of factors. This Comment will propose the factors that courts should be required to consider, based on the original factors outlined in the Kent decision but revised to reflect recent jurisprudence, legislative trends, and understanding of adolescent development, and biology.

5 *Transfer Statute*, Black's Law Dictionary (10th ed. 2004).
6 *See infra* Appendix A.
7 There are several different methods of mandatory transfer: mandatory waiver, statutory exclusion, direct file, and once an adult, always an adult provision. For the purpose of this comment, "mandatory transfer" includes all of these methods.
8 Clyde Haberman, *When Youth Violence Spurred 'Superpredator' Fear*, N.Y. Times (Apr. 16, 2015).
9 383 U.S. 541 (1966).
10 *Id*. at 556.
11 *See infra* Appendix B.
12 U.S. Const. amend. VIII.

I. Background

A. Purpose and Evolution of the Juvenile System

During the nineteenth century, the treatment of juveniles in the United States started to change as social reformers began to create special facilities for "troubled juveniles."[13] The first juvenile court was established in Illinois in 1899, seeking to further create a separate system for juvenile offenders that insulated children from the adult criminal system and focused on age-appropriate treatment.[14] One of the first judges on this court, Judge Julian Mack, believed that "the child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude."[15] This idea of special treatment for children caught on and within twenty-five years most states had their own separate juvenile systems.[16] These early courts were focused on rehabilitation, not punishment, and emphasized informal and nonadversarial approaches to cases which were civil actions, based on the doctrine *parens patriae*, which gave the state the power to serve as the guardian of juveniles.[17] However, during the twentieth century, these proceedings became increasingly punitive as judges steadily began to impose harsher sentences on children.[18]

The Supreme Court, recognizing this shift, began to move juvenile courts toward a more paternalistic structure through a series of cases that gave juveniles many of the procedural safeguards associated with the adult criminal justice system.[19] The peak of this "due process era" of juvenile justice was the Supreme Court's decision In re Gault,[20] where it held that juveniles had the right to counsel during delinquency proceedings in order to protect against misuse of judicial authority.[21] The Court expressed concerns that the juvenile courts were not living up to their promise of a focus on treatment and rehabilitation, either because of misplaced judicial discretion or lack of resources.[22] If a ju-

[13] ABA Div. for Pub. Educ., *The History of Juvenile Justice* (2016), http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf.

[14] *See* Eric K. Klein, Note, *Dennis the Menace or Billy the Kid: An Analysis of the Role of Transfer to Criminal Court in Juvenile Justice*, 35 Am. Crim. L. Rev. 371, 376-77 (1998). For example, to protect children from the stigma of adult prosecutions, juveniles were not charged, instead a petition was filed; juveniles were not called "defendants," instead they were called "respondents;" juveniles were not found guilty, instead they were adjudicated delinquent; and juveniles were not sentenced, instead they were committed. *Id.*

[15] Julian W. Mack, *The Juvenile Court*, 23 Harvard L. Rev. 104 (1909).

[16] *See The History of Juvenile Justice*, *supra* note 13.

[17] *Id.* During this time period, cases were treated as civil actions and courts could even order juveniles to be removed from their homes in order to learn how to be a responsible, law-abiding young adult.

[18] *See The History of Juvenile Justice*, *supra* note 16.

[19] Ralph A. Weisheit, *Philosophy and the Demise of Parens Patriae*, 52 Fed. Probation 56 (1988) ("Paternalism implies no firm commitment to rehabilitation but suggests a general attitude of protectiveness from which either gentle or harsh treatment might be justified.")

[20] 387 U.S. 1 (1967).

[21] *Id.* at 18 (noting "that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure"). However, some academics have suggested that juvenile defendants have fared worse in the post-Gault era. *See* Franklin E. Zimring & David S. Tanenhaus, *On Strategy and Tactics for Contemporary Reforms, in Choosing the Future for American Juvenile Justice*, 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).

[22] In re Gault, 387 U.S. at 13 (finding that a judge abused his discretion and had too much unfettered power when he sentenced a fifteen-year-old boy to a reform school until he was twenty-one for a prank phone call); *See also* Kent v. United States, 383 U.S. 541, 556 (1966) (noting that because some courts lack the re-

venile's loss of liberty during confinement in a juvenile training school would be comparable to the punishment of imprisonment faced by adults, the Court felt that they were entitled to at least some due process protections in juvenile hearings to ensure fairness.[23] While recognizing that the state has a responsibility to help children in jeopardy, the Court noted that "good intentions [of judges] do not themselves obviate the need for criminal due process safeguards in juvenile courts."[24]

The juvenile justice system underwent a rapid shift, however, in the 1990s with the rise of the myth of the juvenile "superpredator."[25] Even though these sensationalized claims of criminologists turned out to be false,[26] politicians seized on this idea and campaigned for harsher treatment of juvenile offenders.[27] As a result of this trend, laws shifted to expose children to even harsher procedures and punishments.[28] By the beginning of the twenty-first century, the United States was an international outlier in its harsh treatment of juvenile defendants—until 2005, the United States was the only developed country that subjected children to the death penalty.[29]

However, even before the rise of the "superpredator" myth, general tough-on-crime approaches had begun to make it easier for children to be removed from the protections of the juvenile system and transferred to adult criminal court.[30] Prior to the 1970s, juvenile

sources to perform in a *parens patriae* capacity and "that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children").

[23] Based on this understanding, the Court also extended several other rights to juveniles under due process. *See* In re Gault, 387 U.S. 1, 18 (1967) (notice of the charges against them, the right against self-incrimination, and the right to confront witnesses); In re Winship, 397 U.S. 358 (1970) (raising the standard of proof from "preponderance of the evidence" to "beyond a reasonable doubt"). *But see* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (declining to extend the due process rights of a trial by jury to juvenile court proceedings).

[24] In re Winship, 397 U.S. at 365.

[25] This term was coined by John Delulio, then a Princeton professor, who wrote that "America is now home to thickening ranks of juvenile 'superpredators' – radically impulsive, brutally remorseless youngsters, including ever more preteenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs and create serious communal disorders." Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. Times (Feb. 9, 2001).

[26] *See* Kevin Drum, *The New York Times Fails to Explain Why "Super Predators" Turned Out to be a Myth*, Mother Jones (Apr. 7, 2014), http://www.motherjones.com/kevin-drum/2014/04/new-york-times-fails-explain-why-super-predators-turned-out-be-myth (outlining how juvenile crime and specifically violent crime, actually decreased in the United States following this era).

[27] *See* John Kelly, *Juvenile Transfers to Adult Court: A Lingering Outcome of the Super-Predator Craze*, The Chronicle of Social Change (Sept. 28, 2016), https://chronicleofsocialchange.org/juvenile-justice-2/juvenile-transfers-adult-court-lingering-outcome-super-predator-craze/21635 (highlighting then-First Lady Hillary Clinton's statements about kids called "super-predators, saying that "[these kinds of kids have] no conscience, no empathy, we can talk about why they ended up that way, but first we have to bring them to heel."

[28] As reported in the New York Times, politicians believed that crime would continue to increase and continued to foster an environment that demonized youth. Some experts claimed that we would soon see "radically impulsive, brutally remorseless" kids, many "who pack guns instead of lunches" and "have absolutely no respect for human life." *See* Haberman, *supra* note 8. For more information, *see generally* Franklin E. Zimring, *American Youth Violence: A Cautionary Tale, in* Choosing the Future for American Juvenile Justice (2014).

[29] 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."). *See also* Brief for the Juvenile Law Center et. al. as Amicus Curiae, Roper v. Simmons, 543 U.S. 551 (2005).

[30] *See* Cara H. Drinan, *The Miller Revolution*, 101 Iowa L. Rev. 1787, 1790-95 (2016) (discussing how a parallel trend of transfer statutes and the trend toward determinate sentencing schemes were the "perfect storm" to create extreme and mandatory sentences for youth).

transfer to adult court was not common—it was the exception. However, in the 1970s, even before the "superpredator" phenomenon, states changed their laws in a number of significant ways that make it easier for children to be tried as adults.[31] These changes ranged from lowering the age at which a judge was authorized to allow a transfer to the imposition of statutory exclusion laws that automatically excluded children from adult court, to laws that gave prosecutors more control over where they decided to initially file the charges.[32] This get-tough on crime legislation that continued into 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."[33]

B. Kent v. United States

While the current state of juvenile transfer laws are slowly and methodically moving away from an approach that over-criminalizes juvenile offenders and towards treating juveniles as children instead of sentencing them as adults, that discussion actually began fifty years ago with a child named Morris A. Kent, Jr. in 1961.[34] This case, *Kent v. United States*, remains the only case that the Supreme Court has heard on the issue of juvenile transfer.[35] The defendant was sixteen years old, already on probation, and was arrested for housebreaking, rape, and robbery.[36] Anticipating that he would be transferred to adult court by the District of Columbia, Kent's attorney filed a motion requesting a hearing on the issue of jurisdiction.[37] He also ordered a psychological evaluation to be conducted, which indicated that Kent suffered from a mental illness.[38] The juvenile judge did not rule on this motion, but instead filed an order waiving jurisdiction after a "full investigation."[39] However, the judge failed to describe the investigation or the grounds for the waiver.[40] Kent's lawyer moved to dismiss the criminal indictment, arguing that the juvenile court's waiver had been invalid.[41] His motion was overruled and Kent was found guilty on six counts of housebreaking and robbery. He was sentenced to thirty to ninety years in prison.[42] His conviction was appealed up to the Supreme Court, which ruled the juvenile waiver of jurisdiction was invalid.[43]

Writing for the majority, Justice Fortas stated 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."[44] Under the statute that granted original jurisdiction to the juvenile court, Kent was entitled to a presumption of treatment as a juvenile. To overcome that, a child is entitled to a hearing, which must "satisfy the basic requirements of due process and fairness."[45] The court listed several specific factors that must be considered to satisfy this requirement.

31 Aaron Kupchik, *Judging Juveniles: Prosecuting Adolescents in Adult and Juvenile Courts*, (2006).
32 *Id*.
33 *See* Zimring, *supra* note 27.
34 *See* Kent v. United States, 383 U.S. 541 (1966).
35 *Id*.
36 *Id*.
37 *Id*.
38 Laurie Sansbury, *The 50th Anniversary of Kent: The Decision that Sparked the Transformation of Juvenile Defense*, Nat'l Assoc. for Pub. Def. (March 21, 2016), http://www-old.publicdefenders.us/?q=node/1026.
39 *Kent*, 383 U.S. at 541.
40 *Id*.
41 *Id*.
42 *Id*. at 553.
43 *Id*.
44 *Id*.
45 *Kent*, 383 U.S. at 553.

The determinative factors are the following:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver;
2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted;
4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the [prosecuting attorney]);
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in [criminal court];
6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude, and pattern of living;
7. The record and previous history of the juvenile, including previous contacts with [social service agencies], other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to [the court], or prior commitments to juvenile institutions;
8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.[46]

These principles still resonate fifty years later with even greater weight considering psychological developments and subsequent juvenile justice jurisprudence. While Kent did not make any judgments about whether or not waiver is constitutional, the case "forcefully establishes that children facing trial as adults need procedural protections—effective counsel, access to and the ability to challenge court documents, and findings as to why waiver is proper."[47]

In subsequent cases, courts declined to follow Kent by finding that the protections were limited to judicial waiver laws and did not apply to statutory exclusion or direct file statutes.[48] Transfer laws remain largely out of the reach of courts and most courts have been deferential to the decisions of legislatures.[49] Additionally, because the Court in Kent detailed that an offense falling within the statutory limitations will be waived if "it is heinous or of an aggravated character or if it represents a pattern of repeated offenses which indicate that

[46] *Id*.

[47] Laurie Sansbury, *supra* note 38.

[48] *See e.g.* State v. Angel C., 715 A.2d 652, 656 (Conn. 1998) (holding that absence of a pre-waiver hearing did not violate any of the defendants' constitutional rights when defendant was transferred under a statutory exclusion provision). In *Angel C*., the court further noted that there was no inherent or constitutional right to the special treatment of a juvenile, and that any special treatment afforded juveniles by the legislature could be reasonably withdrawn or limited. *Id*. at 660.

[49] *See* Jeremy D. Ball et. al., *Predicting Public Opinion About Juvenile Waivers*, 19 Criminal Justice Policy Review 285 (2008).

the juvenile may be beyond rehabilitation," all jurisdictions read this to mean that waiver laws for violent offenses did not have to adhere to the standards in Kent.[50]

C. Supreme Court Juvenile Justice Jurisprudence

Prior to the landmark *Roper v. Simmons*[51] decision in 2005, the Supreme Court had noted the important pertinence of youth in several cases. In *Johnson v. Texas*,[52] the Court insisted that sentences consider the "mitigating qualities of youth."[53] The Court also observed that "youth is more than a chronological fact"[54] and is instead a time of immaturity, irresponsibly, impetuousness, and recklessness.[55] In *Eddings v. Oklahoma*,[56] a sixteen-year-old shot and killed a police officer.[57] The Supreme Court invalidated his death sentence because the judge did not consider evidence of his background of neglect and family violence.[58] The Court found that this evidence was "particularly relevant"—more so than it would have been in the case of an adult offender.[59] The Court specifically noted that youth is a moment and "condition of life when a person may be most susceptible to influence and to psychological damage,"[60] and "just 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.[61]

These cases, however, did not establish any significant reform, but they did build up to a landmark shift in juvenile justice that occurred with the Supreme Court's decisions in *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama*.[62] The Supreme Court, through this series of cases, has recognized that children are constitutionally and fundamentally different than adults and are more capable of change than adults accused of the same crimes.

1. Roper v. Simmons

The Supreme Court's shift in perception of juvenile offenders was most significantly marked by its decision in *Roper v. Simmons*, where it held that sentencing individuals to death for crimes committed before the age of eighteen was unconstitutional.[63] In *Roper*, a seventeen-year-old was convicted of burglary, kidnapping, and first-degree murder while he was still a junior in high school.[64] Based on his age at the time, Simmons was outside of the

50 *Kent*, 383 U.S. at 553.
51 *Roper*, 543 U.S. at 551.
52 Johnson v. Texas, 509 U.S. 350 (1994).
53 *Id*.
54 Eddings v. Oklahoma, 455 U.S. 104 (1982).
55 *Johnson*, 509 U.S. at 350.
56 *Eddings*, 455 U.S. at 115.
57 *Id*.
58 *Id*.
59 *Id*.
60 *Id*.
61 *Id*. at 116.

62 This groundbreaking reform also included *J.D.B. v. North Carolina*, which expanded the concept of special protection for kids beyond the Eighth Amendment when the Court held that a juvenile's age is a proper consideration in the *Miranda* custody analysis. 564 U.S. 261 (2011).

For a discussion of whether the Supreme Court can actually generate social change or whether it merely responds to social change that has already occurred, *see generally* Gerald N. Rosenberg, "The Hollow Hope: 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) (stating that despite judicial constraints, it is possible for courts to 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).

63 543 U.S. 551 (2005).

64 *Id*. at 555. In this case Simmons, along with a friend, entered the home of the victim, kidnapped her, and then drowned her in a river.

juvenile jurisdiction of Missouri and charged initially in adult court.[65] During closing arguments, both the prosecutor and defense counsel addressed Simmons' age – the defense described it as a mitigating factor, to which the state responded "Age he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."[66] The defense also put on experts and evidence of Simmons's troubled background, but he was still sentenced to the death penalty by the jury.[67]

The Supreme Court reversed and its holding was based on a longstanding question applied to capital crimes: if juveniles are examined as a group, is the use of the death penalty proportionate under Eighth Amendment given their diminished capacity?[68] To answer this question of 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."[69] The Court held that under this criteria, the Eighth Amendment forbade the death penalty for juveniles based on the following findings: (1) evolving standards of decency and moral conceptions of juveniles disallowed for capital punishment in the majority of states; (2) it was rarely executed in states that permitted it; (3) and that national trends were moving away from the use of the practice for juveniles.[70]

The Court did not end its analysis with the Eighth Amendment violation, however, and rendered its own judgement about states executing children.[71] Justice Kennedy, writing for the majority, noted that based on recent social and neuroscience research, there were three general reasons why juveniles were categorically different than adults in terms of capital punishment.[72] These characteristics were: (1) juveniles lack maturity and have an underdeveloped sense of responsibility, resulting in impulsive decision-making; (2) juveniles are more susceptible to negative influences and outside pressures; and (3) a juvenile's character is not as well formed as an adults and therefore juveniles have more of a possibility of rehabilitation.[73]

2. Graham v. Florida

Five years after *Roper*, the Court took up the question of proportionate juvenile punishment again in *Graham v. Florida*.[74] In *Graham*, a sixteen-year-old was arrested for an attempted robbery.[75] Under Florida statute, a prosecutor may elect to charge sixteen-year-olds and seventeen-year-olds as adults for most felony crimes.[76] Graham was charged as an adult and, under a plea deal, sentenced to probation and withheld adjudication of guilt.[77] However, when he subsequently violated the terms of his parole and was accused of another armed robbery, the trial court found him guilty of the

65 *See* Mo. Rev. Stat. §§ 211.021 (2000).
66 *Roper*, 543 U.S. at 559.
67 *Id.* The defense put on evidence that Simmons was "very immature," "very impulsive," and "very susceptible to being manipulated or influenced." Testimony included information about a difficult home environment, dramatic changes in behavior, drug abuse, and poor performance in school.
68 *Id.* at 564.
69 *Id.*
70 *Id.* at 567–68.
71 *Id.* at 563.
72 *Id.*
73 *Id.*
74 560 U.S. 48 (2010).
75 *Id.* at 53.
76 *See* Fla. Stat. § 985.557(1)(b).
77 *Graham*, 560 U.S. at 48.

earlier armed burglary and other charges and sentenced him to life without parole.[78]

Building on *Roper*, the Court found that Graham's sentence was unconstitutional as it was in violation of the Eighth Amendment and held that a life without parole sentence was constitutional for a juvenile offender accused of a crime other than homicide.[79] Once again, the Court found that categorically this punishment was unconstitutional for juvenile offenders.[80] Like *Roper*, the Court found the punishment here was not proportional to the crime, given a juvenile's diminished moral culpability and greater capacity for reform.[81] Justice Kennedy, for the majority, began his analysis by stating that the Eighth Amendment bars both "barbaric" punishments and punishments that are disproportionate to the crime committed.[82] 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.[83] 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.[84]

The Court also focused on the non-homicide aspect of the case, and that historically, homicide is treated significantly different than other crimes, even though the Court would reject this argument in *Miller*.[85] After *Graham*, a child could only receive a sentence of life-without-parole for murder. However, based on mandatory waiver statutes, this sentence could be imposed on a child without weighing his or her maturity, culpability, or potential for rehabilitation.[86]

3. Miller v. Alabama

The Court did not take long to take up the question of homicide offenses—two years later, the Court took up the question in *Miller v. Alabama*.[87] The *Miller* case involved two juveniles who were transferred to adult court through state transfer laws in Arkansas and Alabama. Kuntrell Jackson, then fourteen years old, was charged with capital felony murder and aggravated robbery.[88] As discussed below, Arkansas law gives prosecutors the discretion to charge fourteen-year-olds as adults through direct file when they are alleged to have committed certain offenses, including capital felony murder.[89] Jackson moved to transfer the case to juvenile court, but the court denied the motion based on the alleged facts of the time, a psychiatrist's examination, and his juvenile arrest history.[90] A

[78] *Id*. at 57. Because Florida had abolished its parole system, a life sentence meant that Graham and other defendants had no possibility of release unless granted executive clemency. *See* Fla. Stat. § 921.002(1)(e).
[79] *Graham*, 560 U.S. at 52-53.
[80] *Id*. at 79.
[81] *Id*. at 68–69.
[82] *Id*. at 59.
[83] *Id*. at 59-61.
[84] *Id*. at 61-62.
[85] *Id*.
[86] Matt Ford, *A Retroactive Break for Juvenile Offenders*, The Atlantic (Jan. 26, 2016), https://www.theatlantic.com/politics/archive/2016/01/montgomery-alabama-supreme-court/426897/.
[87] 567 U.S. 460 (2012).
[88] *See* Jackson v. State, 194 S.W. 3d 757 (Ark. 2004). The facts of the incident, which occurred on November 18, 1999, are as follows. Kuntrell Jackson, a fourteen-year-old, was with his older friends who decided to rob a video store. Jackson remained outside while his two friends went in. One friend pointed a gun at the clerk and demanded money. Jackson entered the store as the victim threatened to call the police and his friend shot her in the face. All three boys fled the scene and the victim died of her injuries.
[89] *See* Ark. Code Ann. § 9-27-318(c)(2).
[90] *See* Jackson v. State, 194 S.W. 3d 757 (Ark. 2004); Ark. Code Ann. §§ 9-27-318(d), (e).

jury convicted Jackson on both counts, and the judge was only able to impose one verdict due to mandatory minimums: life without parole.[91] Similarly, fourteen-year-old Evan Miller was also tried and convicted as an adult for murder in the court of arson – a crime that, like capital felony murder in Arkansas, carries a mandatory minimum punishment of life without parole.[92] In Miller's case, Alabama law required that he initially be charged as a juvenile, but allowed for transfer through judicial waiver on the motion of the prosecutor.[93] The juvenile court agreed to the transfer after a hearing, citing the nature of the crime, Miller's "mental maturity," and his prior juvenile offenses of truancy and "criminal mischief."[94]

In a 5-4 decision, the Court found sentencing schemes that prescribe mandatory life without parole for juveniles to be unconstitutional, regardless of the crime they are accused of.[95] Citing its decisions in *Roper* and *Graham*, it held that imposing mandatory life-without-parole sentences on children "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"[96] This decision was based on the Court's belief that children "are constitutionally different from adults for sentencing purposes. Their lack of maturity and underdeveloped sense of responsibility lead to recklessness, impulsivity, and heedless risk-taking," therefore acknowledging that regardless of the crime committed, being a child matters.[97]

The Court specifically noted how both juveniles in the companion cases illustrated the precise problem behind mandatory sentencing schemes.[98] In the first case, Jackson was charged through felony murder after he went along with some of his friends who he knew intended to rob a video store.[99] He did not fire the bullet that killed the victim, nor did the State even argue that he meant to kill her, only that he was an accomplice.[100] He was convicted solely because he was aware that his accomplice had a gun and because when he entered the store, he told the victim "[w]e ain't playin'."[101] The Court noted that Jackson's age was important for his culpability for the offense – including the calculation of the risk imposed by his friend having a gun and his willingness to walk away.[102] Additionally, Jackson's violent family background and history of neglect was also relevant to the sentencing decision, yet his background was not even considered before the lower court sentenced him to a life in prison.[103] In Miller's case, he and a friend killed the adult victim after he had provided them with drugs and alcohol.[104] The Court noted that "if

[91] Miller v. Alabama, 564 U.S. 460, 467 (2012).
[92] *See* Miller v. State, 63 So. 3d 676 (Ala. 2010). In Miller's case, then fourteen-year-old Miller and his sixteen-year-old friend robbed and beat a neighbor to death. The victim was an adult and Miller's mother's drug dealer. He brought the boys back to his trailer, where all three drank and did drugs. The boys tried to rob the victim, who then became violent and grabbed Miller by the throat. A physical altercation ensued, and the boys struck the victim with a bat several times. After, the boys set fire to the trailer to cover up the evidence and the victim died of smoke inhalation.
[93] *Miller*, 564 U.S. at 465 (2012). *See* Ala. Code §§ 13A-5-40(9), 13A-6-2(c).
[94] E.J.M. v. State, No. CR–03–0915, pp. 5–7 (Aug. 27, 2004) (unpublished memorandum).
[95] *Miller*, 564 U.S. at 465.
[96] *Id*. at 466.
[97] *Id*.
[98] *Id*. at 467.
[99] Jackson v. State, 194 S.W. 3d 757, 760 (Ark. 2004).
[100] *Miller*, 564 U.S. at 465.
[101] *Id*.
[102] *Id*.; *see also* Graham v. United States, 560 U.S. 48, 52 (2010) ("[W]hen compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability").
[103] *Miller*, 564 U.S. 470. Both Jackson's mother and his grandmother had previously shot other individuals.
[104] *Id.*

ever a pathological background might have contributed to a 14–year–old's commission of a crime, it is here," referring to a lifetime of physical abuse and suicidal tendencies.[105] Despite the severe crime with which both juveniles were charged, the Court once again stated that youth mattered at sentencing.[106]

The Supreme Court also noted that transfer statutes like those at issue in Miller were not outliers[107] and that many 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."[108]

D. Psychological Frameworks

One of the most significant components of the Court's reasoning in these three cases was its acceptance and recognition of the role of science and adolescent development in sentencing decisions. This is significantly based on the increase of research and findings that allow scientists to understand the human brain better and how it functions.[109] Kent was decided during a time when it was assumed that adolescent development was completed by age eighteen, but emerging research shows that the brain—especially the prefrontal cortex, which controls decision-making, risk management, and impulse control—does not finish developing until one's mid-twenties.[110] Furthermore, after a certain age, the likelihood of committing another violent offense dramatically lessens.[111]

New discoveries have provided scientific confirmation that adolescent years are a significant time of transition and that adolescents have significant neurological deficiencies that result in stark limitations of judgement.[112] For example, the frontal lobe, which is responsible for impulse control, judgement, and decision making, develops slowly until the early twenties.[113] This makes adolescents especially prone to risk-taking.[114] They are also more susceptible to stress, which further distorts already poor cost-benefit analysis, and trauma often makes youth hypervigilant in response to threats.[115] Normal adolescents cannot be expected to operate with maturity, judgment, risk aversion, or impulse control of an adult – especially teens who have suffered brain trauma, dysfunctional family, abuse, or violence.[116] Additionally, most adolescent delinquent behavior occurs on a social stage where immediate pressure of peers is the main motivation.[117] When a child is transferred to adult

[105] Miller had been in and out of foster care his entire life because his mother suffered from alcoholism and drug-addiction, his stepfather abused him, and he had tried to kill himself four times – the first time when he was only six. *See* E.J.M. v. State, 928 So. 2d 1077, 1081 (Ala. Crim. App. 2004) (Cobb, J., concurring in result). The Court also noted that, despite such a difficult background, Miller did not have a significant criminal history; there were only two instances of truancy and one instance of second-degree criminal mischief.

[106] *Miller*, 564 U.S. at 468.

[107] At the time Miller was decided, twenty-eight states and the Federal Government imposed mandatory life without parole on some juveniles convicted of murder in adult court. *Id*.

[108] *Id*.

[109] For an overview of new technology and discoveries, *see* Elkhonon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* (2001).

[110] Young Adult Development Project, Brain Changes, http://hrweb.mit.edu/worklife/youngadult/brain.html.

[111] Nat'l Institute of Justice, "From Juvenile Delinquency to Young Adult Offending", https://www.nij.gov/topics/crime/Pages/delinquency-to-adult-offending.aspx.

[112] *Id*.

[113] *Id*.

[114] Francine Sherman, *Juvenile Justice: Advancing Research, Policy, and Practice* (2011).

[115] *Id*.

[116] Chris Mallet, *Socio-Historical Analysis of Juvenile Offenders on Death Row*, 3 Juv. Corr. Mental Health Report 65 (2003).

[117] Marty Beyer, *Recognizing the Child in the Delinquent*, Ky. Children's Rights J., 1999. Dr. Beyer, a child welfare and juvenile justice consultant, has created a framework

court, none of these important scientific factors are taken in to consideration, as a child is being evaluated as if they were an adult.

E. Impact and Consequences of Juveniles Tried in Adult Court

There are various detrimental immediate and long term effects on juveniles who are transferred to adult court. Transferred children are exposed to longer and harsher sentences than if they remained in the juvenile system, and these punishments are often mandatory sentences.[118] Most states permit or require that youth charged as adults be placed in adult institutions as they are pending trial.[119] On any given day, nearly 7,500 young people are locked up in adult jails.[120] The number in adult prison is even higher – on any given day, approximately 2,700 young people are locked up in adult prisons.[121] There is a higher risk of harm for youth in adult facilities than in juvenile institutions: youth sentenced to adult facilities are thirty-six times more likely to commit suicide.[122] They are also at the highest risk for rape and other forms of sexual abuse.[123] According to a survey by the Department of Justice, "1.8 percent of 16- and 17- year-olds imprisoned with adults report being sexually abused by other inmates," and of these cases, 75 percent of children report being repeatedly victimized by staff.[124] But, because of the imbalance of power of children and the adult staff, most juveniles fail to report their abuse.[125] In addition to the immediate physical and psychological consequences of incarceration in adult facilities, transferred children are also at risk to harmful disruptions to their development.[126]

Transfer also has a long-term effect on youth. When they leave jail or prison, they still carry the stigma of an adult criminal conviction. A felony conviction can make it harder to find a job, find housing, get a college degree, or any other means to turn their lives around.[127] Additionally, transfer policies actually increase the likelihood that the youth will reoffend and youth prosecuted as adults are also have a high-

for juvenile courts to use when assessing children. She believes that juvenile cases should be seen through three separate frameworks: immaturity, disability, and trauma. *Id*. When looking at the immaturity of juveniles, she notes that juveniles are susceptible to immature thinking, which leads to impulsive crimes such as having a weapon without a plan to use it or talking to police without a lawyer. *Id*. They also have immature identities, which leads them to such things as being susceptible to peer pressure or wrongly trusting police. *Id*. Kids also have immature moral development which can lead to consequences as committing an act because they believed they were righting a wrong, not realizing there would be a victim or refusing to cooperate with police to get a friend in trouble. *Id*. She also notes the prevalence of disabilities among youth, which can lead to problems such as processing issues, difficulties understanding Miranda warnings, or problems communicating. *Id*. Finally, she suggests that youth should be viewed through their trauma, which can cause delayed development, high anxiety, and depression. *Id.* It can also lead youth to numb their feelings with substance abuse. *Id.*

[118] Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, *Trying Juveniles As Adults: An Analysis of State Transfer Laws and Reporting* (2011), https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf.

[119] *Id*.

[120] *Jailing Juveniles: The Dangers of Incarcerating Youth in Adult Jails in America*, Campaign for Youth Justice, (2007), http://www.campaignforyouthjustice.org/Downloads/NationalReportsArticles/CFYJ-Jailing_Juveniles_Report_2007-11-15.pdf.

[121] Heather C. West, *Prison Inmates at Midyear 2009*, U.S. Dep't of Justice (2010), https://www.bjs.gov/content/pub/pdf/pim09st.pdf.

[122] *See Jailing Juveniles*, *supra* note 120; *See also* Ford, *supra* note 86.

[123] Nat'l Criminal Justice Reference Servs, *Nat'l Prison Rape Elimination Comm'n Report* (2009), https://www.ncjrs.gov/pdffiles1/226680.pdf.

[124] *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011–12*, U.S. Dep't of Justice, https://www.bjs.gov/content/pub/pdf/svpjri1112.pdf.

[125] *See* Ford, *supra* note 86.

[126] *Id*.

[127] *After Prison, Roadblocks to Reentry: A Report on State Legal Barriers Facing People with Criminal Records*, Legal Action Ctr. (2004).

er recidivism rate than youth who remain in juvenile court.[128] A Center for Disease Control and Prevention Task Force report found that transferring youth to the adult criminal system increases violence, causes harm to juveniles, and threatens public safety.[129]

F. Current Methods of Transfer by State

A transfer statute is a "provision that allows or mandates the trial of a juvenile as an adult in criminal court for a criminal act."[130] All states[131] currently still have transfer laws that allow or mandate some youth to be transferred to adult court, even though their age places them in the category of juvenile jurisdiction.[132] Current transfer laws vary considerably in specificity of statutory language, application, as well as flexibility and breadth of coverage, but all states have at least one of the three broad categories of transfer law: judicial waiver, statutory exclusion, and direct file.[133] Many states also have "once an adult, always an adult" provisions, which mean that a child who has been transferred will permanently be charged as an adult for all future offenses.[134]

Thirty-one states specify a minimum age a child must reach before the child can be considered for transfer to adult court by any method of transfer, including judicial waiver, statutory exclusion, and direct file.[135] Twelve states do not set an age limitation for certain enumerated offenses, typically violent felonies.[136] Eight states have no statutory minimum age requirement for a child to be tried in adult

[128] Youth prosecuted as adults are 34% more likely to recidivate with more violent offenses. *See Jailing Juveniles*, *supra* note 120.

[129] *Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services*, Ctrs. for Disease Control & Prevention (2007), http://www.cdc.gov/mmwr/pdf/rr/rr5609.pdf.

[130] *Transfer Statute*, Black's Law Dictionary (10th ed. 2014).

[131] For the purposes of this comment, the District of Columbia is counted as a state.

[132] *See infra* Appendix A (summarizing the authors' findings of each state's codified transfer provisions). This data was compiled by the author while working as a law clerk at the National Juvenile Defender Center. Unless otherwise indicated, all information in this section comes from the statutes listed in Appendix A. For the purpose of this Comment, which seeks to give a sense of juvenile transfer nationwide, the information has been placed into generalized categories. Each state has a different system for transfer with state-specific nuances; consult each state's statutes for further information.

[133] *See id.* Several states also have mandatory waiver provisions, which are not discussed in the scope of this comment as its effect is the same as statutory exclusion. It can be distinguished from statutory exclusion, however, as under mandatory waiver, proceedings against a child initiate in juvenile court. However, unlike judicial waiver, the court has no other role than to determine that there is probable cause to believe a juvenile of the requisite age committed an offense falling within the mandatory waiver law. Once the court has done so, the juvenile is automatically transferred to adult court.

For more information, *see Trying Juveniles As Adults: An Analysis of State Transfer Laws and Reporting*, Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice (2011). Several states also have reverse waiver statutes, which are also not discussed in the scope of this comment. Reverse waiver statutes allow a juvenile who is charged as an adult to petition to have the case transferred back to juvenile court. For more information, *see* Jason Zeidenburg, *You're An Adult Now: Youth in Adult Criminal Justice Systems*, U.S. Dep't of Justice Nat'l Institute of Corrections (2011), http://cfyj.org/documents/FR_NIC_YAAN_2012.pdf.

[134] *See infra* Appendix A.

[135] The following states have specified minimum age limits: fifteen years old in Connecticut, New Jersey, and New Mexico; fourteen years old in Alabama, Alaska, Arizona, Arkansas, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, North Dakota, Ohio, Texas, and Utah; thirteen years old in Georgia, Illinois, Mississippi, New York, and Wyoming; twelve years old in Colorado, Indiana, Missouri, Montana, and Vermont; eleven years old in New Hampshire; and ten years old in Iowa and Wisconsin.

[136] States that do not set an age limit for certain enumerated offenses: These states are Delaware, the District of Columbia, Florida, Hawaii, Idaho, Maryland, Nevada, Oregon, Pennsylvania, Rhode Island, South Carolina, and Tennessee.

court, meaning that under the state statute a child of any age can be tried in adult court.[137]

1. Judicial waiver

Judicial waiver is the most common transfer mechanism—forty-six states allow some form of judicial waiver.[138] If the youth meets statutory age and offense requirements and the proper motion for transfer is filed, if required, a court will hold a transfer hearing to determine if the child should be transferred to adult court.[139] Prior to the hearing, sixteen states require that the youth be evaluated to make findings on the factors the court must consider as delineated in the statute, if necessary, to be considered on whether or not the court should retain jurisdiction over the youth.[140] This includes evaluations by professionals and by the youth's probation officer, if applicable. These findings range from evaluating whether or not the child has developmental or mental disabilities to school records and evaluations of the child's living situation and family support.

i. Transfer hearing

States vary as to the party that can motion for transfer, but the majority of states with judicial waiver, thirty-two states, allow the prosecutor to motion for transfer of a youth.[141] Of these thirty-two states, the prosecutor is the only party who can motion for transfer in twenty-three states, two states allow either the prosecutor or the defense to motion for transfer, four states hold a hearing on either the motion of the court or the prosecutor, and three states hold a hearing on the motion of either party or the court.[142] The other fourteen states with judicial waiver only hold a transfer hearing upon the motion of the court.[143] In nine states, a transfer hearing is automatically required regardless of whether a motion from any party was filed for any minor accused of certain offenses.[144] In five states, a hearing is not required for minors of a certain age accused of certain offenses, and the minor will be automatically transferred to adult court if a motion is filed by the state.[145]

Twenty-five states require a finding that there is probable cause that the child committed the alleged act before the child can be considered for transfer.[146] Typically, the burden of proof that the juvenile is not amenable to treatment and that the protection of the community requires transfer of the juvenile to adult court is on the state. However, fourteen states have presumptive waiver provisions where the burden of proof au-

[137] States with no statutory minimum age requirement: Maine, Nebraska, Oklahoma, Rhode Island, South Dakota, Washington, and West Virginia.
[138] *See infra* Appendix A (listing judicial waiver statutes by state).
[139] *See infra* Appendix B (outlining the authors' findings of transfer hearing requirements by state). For the purpose of this Comment, these findings were generalized into categories; for specific requirements by state, consult the state statute.
[140] *See infra* Appendix B.
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] The following states have such requirements: Delaware, Connecticut, Mississippi, Ohio, Florida, Georgia, Iowa, Kentucky, Louisiana.
[145] The following states do not require a hearing for transfer if a minor is a certain age and accused of an enumerated offense: Connecticut (15), Delaware (15), Indiana (16), North Dakota (14), and South Carolina (16).
[146] *See infra* Appendix B (listing requirements for judicial waiver hearings by state).

tomatically shifts from the state to the defendant if the youth is of a certain age, accused of certain offenses, or has a prior record.[147]

ii. Factors considered

Every state besides Indiana, South Carolina, and Washington has enumerated factors that a judge is required to consider at the transfer hearing.[148] These factors are specified in Appendix C but are outlined here. Twenty-one states require judges to consider all of the enumerated factors, twelve states only require the court to consider some of the factors, and ten states allow the court to consider other factors not listed in the statute.[149] With the exception of Ohio, state statutes do not give an indication on how these factors should weigh for or against transfer.[150] While seven states only consider the seriousness of the offense and the juvenile's prior record when determining waiver of jurisdiction, the other states require a more individualized assessment of the youth based on the following factors.[151]

Forty-one states consider the offense itself.[152] This factor refers to additional consideration of the offense outside of minimum offense requirements for the child to be eligible for judicial waiver. These considerations are composed of the following: (1) seriousness of the alleged offense; (2) whether the alleged felony offense was committed in an aggressive, violent, premeditated, or willful manner; and (3) whether the offense was against persons or property with greater weight to offenses against persons. Forty states consider the juvenile's prior record; this includes the extent and nature of the child's prior delinquency record and response to any prior treatment.[153] Thirty-five states consider the juvenile's mental condition, which includes the psychological development and emotional state of the minor, including any documented mental illness or developmental issues, and whether or not they receive any special education services.[154] Thirty-four states consider the protection of the community, or whether the protection of the community requires isolation of the minor beyond the capacity of juvenile facilities.[155] Thirty-two states consider whether or not the juvenile can be rehabilitated within the time frame of the juvenile court jurisdiction, utilizing all resources currently available to the jurisdiction.[156] Twenty-three states consider the child's maturity as related to the child's age, outside of statutorily imposed limitations.[157] Eighteen states consider the juvenile's pattern of living or family environment, including the effect that familial, adult, or peer pressure may have had on the child's alleged actions in question.[158] Fourteen states consider the culpability of the juvenile, which includes the level of planning and participation involved and the circumstances in which the offense was allegedly committed.[159] Eleven states consider the impact on the victim, which may include victim testimony at

147 *Id*. For specific offenses and ages that require the burden to shift, consult each state's judicial waiver statute, listed in Appendix A.
148 *See infra* Appendix C.
149 *Id*.
150 Ohio lists what factors the court should consider in favor of transfer, such as the victim suffered serious physical harm, connection to gang activity, or the child was awaiting adjudication at the time of the act. The statute separately lists what factors the court should consider against transfer, such as the victim induced the act, the child was provoked, or the child did not have reasonable cause to believe harm would occur.
151 *See infra* Appendix C.
152 *Id*.
153 *Id*.
154 *See infra* Appendix C.
155 *Id*.
156 *Id*.
157 *Id*.
158 *Id*.
159 *See infra* Appendix C.

the hearing.[160] Nine states consider whether or not there are co-defendants charged in adult court, which would make it more convenient for the juvenile's case to also be charged in adult court.[161] Six states consider whether or not the offense was committed in connection with gang activity.[162] Finally, six states consider whether or not the offense specifically involved a weapon.[163]

2. Statutory exclusion

Thirty-six states have statutory exclusion provisions.[164] Almost every state that has statutory exclusion also has judicial waiver, with the exception of Massachusetts, Montana, New Mexico, and New York. Generally, these states simply exclude any minor fitting into the specified age and offense categories as being defined as a "child" for juvenile court jurisdictional purposes. A minor who meets the requirements is proceeded against as an adult from the beginning of the proceedings, and therefore no transfer hearing is held. In the majority of states, statutory exclusion only applies to youth sixteen or older. The youngest age that qualifies for statutory exclusion is thirteen,[165] with the exception of states that do not have a specified youngest age for murder, as outlined above. Murder is the most common offense to qualify for statutory exclusion. Other common offenses include drug trafficking, arson, sexual assault, armed robbery, aggravated assault, use of a fire arm, theft of a motor vehicle, and conviction of prior felonies.

3. Direct file

Eleven states have direct file provisions.[166] Typically, these direct file provisions give both juvenile and criminal courts the jurisdiction to hear cases involving certain offenses or minors falling into certain age categories, and it is left up to the prosecutor to decide where to file the charges.[167] As with other transfer mechanisms, there is a wide variation among states regarding the criteria for direct file. Generally, the minimum level of offense necessary to qualify appears to be lower than statutory exclusion. For example, in Arkansas, a minor can be considered for direct file for a large number of offenses that do not qualify for statutory exclusion, such as soliciting a minor to join a street gang. Or, in Florida, misdemeanors can be filed by the prosecutor in criminal court if the minor involved is at least sixteen and has a sufficiently serious prior record. Nebraska is the only state with direct file as the only method of transferring youth to criminal court and the prosecutor must consider a series of factors similar to those considered in judicial waiver before filing charges against a minor in adult court.[168] However, there is no system of accountability for the prosecutor that

[160] *Id.*
[161] *Id.*
[162] *See infra* Appendix C.
[163] *Id.*
[164] *See infra* Appendix A (listing statutory exclusion statutes by state).
[165] New York allows youth aged thirteen or older to be transferred through statutory exclusion.
[166] *See infra* Appendix A (listing direct file provisions by state).
[167] For a discussion of the issues with direct file in a state specific context in Colorado, *see* Natasha Gardner, *Direct Fail*, 5280 (Dec. 2011), http://www.5280.com/magazine/2011/12/direct-fail?page=full. The Southern Poverty Law Center has also published a report on the extent of mistreatment that direct file has generated in New Orleans. *See More Harm Than Good: How Children Are Unjustly Tried in New Orleans*, S. Poverty Law Ctr. (2016), https://www.splcenter.org/20160217/more-harm-good-how-children-are-unjustly-tried-adults-new-orleans.
[168] These factors are the type of treatment the minor would be amenable to, if the offense was violent, motivation for offense, age of juvenile and age of others involved in the offense, best interests of the juvenile, public safety, if the juvenile has the ability to appreciate the nature and seriousness of the offense, if the victim agrees to participate in the proceedings, and if the minor was involved in a gang.

requires them to make a showing that all the factors have been considered. Of all of the transfer methods, direct file has come under the most scrutiny in recent years.[169]

4. Once an adult, always an adult

Twenty-nine states have "once an adult, always an adult" provisions, which require any minor who has been previously charged as an adult to continue to be charged as an adult for all future offenses, regardless of whether the youth would have been eligible for transfer for the present offense.[170] Most states with this provision simply require criminal prosecution of all subsequent offenses, either by a blanket exclusion or an automatic waiver, without consideration of any mitigating factors pertaining to the child's development.[171] Although support for transfers is largely predicated on sending violent career offenders to adult court, in reality more than half of transfers affect juveniles who have committed nonviolent property, drug, or public order offenses through this mechanism.[172]

G. National Trends Regarding Juvenile Transfer

While every state has a transfer mechanism, there is a significant trend throughout the country towards a preference to keep children in juvenile court. Several states have eliminated mandatory transfer provisions. Missouri recently changed its "once an adult, always an adult" provisions to allow a young person to return to the juvenile system if he or she was found "not guilty" in adult court.[173] Utah has also passed significant reforms, limiting the number of felonies that can be transferred to adult court from sixteen to ten and allowing the judge, not the prosecutor, to exercise judgment on transfer based on the interests of the minor.[174] Texas legislators also recently passed laws that give youth the right to an immediate appeal if they are transferred to adult court.[175] Previously, youth could not appeal their transfer to adult court after they had been convicted or deferred.[176] This new legislation restores the right to an immediate appeal and mandates that the Supreme Court take up standards to accelerate the disposition of these appeals.[177] In 2014, the Iowa Supreme Court struck down mandatory minimum sentences for juveniles as unconstitutional, stating that ""[t]here is no other area of the law in which our laws write off children based only on a category of conduct without considering all background facts and circumstances."[178]

Several states have also enacted laws that increase the minimum age that youth can be transferred. In 2015, Illinois eliminated the automatic transfer of youth under the age of sixteen.[179] In 2015, New Jersey passed legislation that increased the minimum age at which a youth can be tried as an adult from fourteen

[169] *See* Jean Trounstine, *Trial by Fire: Prosecutors Sending Juveniles to Adult Courts*, Truthout (Feb. 29, 2016), http://www.truth-out.org/news/item/35017-trial-by-fire-prosecutors-sending-juveniles-to-adult-courts.
[170] *See infra* Appendix A (listing transfer provisions by state).
[171] *Trying Juveniles As Adults: An Analysis of State Transfer Laws and Reporting*, U.S. Dep't of Justice Office of Juvenile Justice and Delinquency Prevention (2011).
[172] *See generally* G. Larry Mays & Rick Ruddell, *Do the Crime Do the Time: Juvenile Criminals and Adult Justice in the American Court System* (2012).
[173] S. 36, 97th Leg., Reg. Sess. (Mo. 2013).
[174] S. 167, 2015 Reg. Sess. (Utah 2015).
[175] S.B., 2015 Reg. Sess. (Tex. 2015).
[176] *Id.*
[177] *Id.*
[178] State v. Lyle, 854 N.W. 2d 378, 401 (Iowa 2014). The Iowa Supreme Court noted that the for the Supreme Court in *Miller*, the "heart of the constitutional infirmity" was that the punishment was mandatory, not the length of the sentence.
[179] H.B. 3718, 98th Leg., Reg. Sess. (Ill. 2015).

to fifteen.[180] It also makes it more difficult to initiate transfer of youth, as prosecutors must submit a written analysis on the reasons for transfer, which is then only granted at the discretion of the judge.[181] Additionally, the New Jersey Supreme Court recently held in *State in the Interest of N.H.*, that youth threatened with adult prosecution have the right to full discovery at the waiver stage of juvenile proceedings, which helps defense counsel make a more complete argument at a transfer hearing.[182] In its decision, the court noted that waiver of a juvenile to adult court is the "single most serious act that the court can perform."[183]

There is also a slow shift nationally towards enacting judicial waiver laws that take into account the arguments made in *Roper*, *Graham*, and *Miller*. In Texas, the Criminal Court of Appeals ruled that a court must make an individualized assessment of youth before transferring him to adult court, regardless of the offense.[184] In 2014, California and Maryland enacted laws that require juvenile court judges to take into account factors such as age, physical and mental health, and the possibility of rehabilitation, when considering transfer.[185] Additionally, California legislation updated their criteria to consider the factors required by the U.S. Supreme Court in *Miller v. Alabama*.[186] In Illinois, new legislation requires juvenile judges to review transfers to determine the proper court for the child, taking in to account the child's age, background, and individual circumstances.[187]

Oregon is one of the first states to have a decision reflecting the importance of evaluating children for transfer in the context of adolescent development.[188] In Oregon, statutory law gives the juvenile court the discretion to waive jurisdiction and transfer a youth to adult court if it finds the youth to be of "sufficient sophistication and maturity to appreciate the nature and quality of the conduct involved."[189] In the case of *In the Matter of J.C.N.-V,* the Supreme Court of Oregon reversed a decision to transfer a youth under this criteria, holding that the legislature did not intend for a child's "sophistication and maturity" to be evaluated by the same standards as adults.[190] Instead, the court must "take measure of a youth and reach an overall determination as to whether the youth's capacities are, on the whole, sufficiently adult-like to justify a conclusion that the youth was capable of appreciating, on an intellectual and emotional level, the significance and consequences of his conduct."[191]

Finally, and most significantly, the Ohio Supreme Court recently ruled that the mandatory transfer of juveniles violates juveniles' right to due process as guaranteed by the Ohio Constitution.[192] In this case, the prosecutor filed a motion to transfer a sixteen-year-old to be tried as an adult based on Ohio statute.[193] After conducting a hearing, the juvenile court found probable cause and the case was consequently transferred. In ruling that the transfer was unconstitutional, the court stated that that:

[180] S. 2003, 2014 Reg. Sess. (N.J. 2015);
[181] *Id*.
[182] State in the Interest of N.H., 441 N.J. Super. 347 (2015).
[183] *Id.*
[184] Moon v. State, 451 S.W.3d 28 (Tex. Crim. App. 2014).
[185] S. 382, 2014 Reg. Sess. (Cal. 2014); H.B. 618, 2014 Reg. Sess. (Md. 2014).
[186] S. 382, 2014 Reg. Sess. (Cal. 2014).
[187] H.B. 3718, 98th Leg., Reg. Sess. (Ill. 2015).
[188] In the Matter of J.C.N.-V, 359 Or. 559 (2016).
[189] Or. Rev. Stat. §§ 419c.340, 419c.349, 419c.352, 419c.355.
[190] *In the Matter of J.C.N.-V*, 359 Or. at 559.
[191] *Id.*
[192] Ohio v. Aalim, No. 2015-0677, 2016 WL 7449237, *1 (Ohio, Dec. 22, 2016); *See* Carol Taylor, *Mandatory Transfer of Juveniles to Adult Courts is Unconstitutional*, Court News Ohio (Dec. 22, 2016), http://www.courtnewsohio.gov/cases/2016/SCO/1222/150677.asp#.WKy36xIrKmk.
[193] *Id*.

The legislative decision to create a juvenile court system, along with our cases addressing due-process protections for juveniles, have made clear that Ohio juveniles have been given a special status. This special status accords with recent United States Supreme Court decisions indicating that even when they are tried as adults, juveniles receive special consideration.[194]

The court maintained however, that the "discretionary-transfer process satisfies fundamental fairness under the Ohio Constitution."[195]

II. Analysis

A. The Rationale Behind the *Roper*, *Graham*, and *Miller* Decisions, in Combination with the *Kent* Decision, Should be Applied to Juvenile Transfer

Mandatory transfer statutes do not allow judicial discretion and prohibit individual consideration of the youth or the circumstances surrounding the offense. This mandatory consequence is what was at the core of the Supreme Court's recent decisions, and in light of further recognition about the importance of youth in criminal matters, the *Kent* decision should be revaluated based on the holdings in *Roper*, *Graham*, and *Miller*.[196] Fifty years ago, the *Kent* Court concluded that a transfer to adult court could be considered invalid because for some kids accused of certain crimes, having a meaningful chance for their youth mattered in the transfer consideration.[197] However, this holding had its limitations–the Court in Kent specifically noted that a juvenile was not entitled to a hearing if accused of committing an offense that was of "heinous or aggravated character."[198] Furthermore, most states currently allow juveniles to be transferred for non-violent offenses, often without a hearing.[199] Yet, the recent Supreme Court decisions together represent several important propositions that should be applicable to mandatory transfer laws, if taken in combination with *Kent*: (1) given all that is known in terms of adolescent development, biology, and scientific evidence, children are "categorically less culpable" than adults for their conduct; (2) youth is a relevant feature in procedure and sentencing decisions; (3) mandatory sentences fail to appropriately account for factors such as age, maturity, environment, susceptibility, and rehabilitative potential; (4) life without parole and other extreme sentences function like a death sentence when it comes to their application to children because children cannot view the future in the same way as adults do; and (5) children should be given "meaningful" opportunities to earn their release based on demonstrated maturity and rehabilitation.[200]

The juveniles whose cases were brought before the Supreme Court in *Roper*, *Graham*, and *Miller*, all ended up in adult court through

[194] Ohio v. Aalim, No. 2015-0677, 2016 WL 7449237, at *5 (Ohio, Dec. 22, 2016).
[195] *Id*.
[196] *See* Laurie Sansbury, *supra* note 38.
[197] Kent v. United States, 383 U.S. 541 (1966).
[198] *Id*. at 556.
[199] For example, of the approximately four thousand youth committed to State adult prisons in 1999, 23% were convicted of property offenses, 9% for drug offenses, and 5% for public order offenses. Snyder, H.N., and Sickmund, *Juvenile Offenders and Victims: 2006 National Report*, U.S. Dep't of Justice (2006), https://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf.
[200] *Miller*, 567 U.S. at 461; Graham v. United States, 560 U.S. 48, 72 (2010) (noting that the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment); *Roper*, 543 U.S. at 571 ("the case for retribution is not as strong with a minor as with an adult"); *Kent*, 383 U.S. at 556 (holding that "it is clear beyond dispute that the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile").

the transfer system.[201] The various state laws in each case made it easy for a child to be tried in adult court, where the juveniles were then exposed to mandatory minimum sentences of the death penalty and life without parole.

1. Death is not different.

The *Kent* decision indicated that while children have a right to a hearing, the most heinous offenses such as murder excluded children from juvenile jurisdiction.[202] In *Miller*, however, the Supreme Court accepted the idea that, as proven by neuroscience and behavioral research, that "children who commit even heinous crimes are capable of change" and further noted that the Court's previous holding in *Roper* and *Graham* were not crime specific.[203] Additionally, the *Miller* Court looked to the context in which a child is accused of murder, and found that the state must give the juvenile a meaningful opportunity to explain the context around the crime, noting that "just 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."[204] Looking at the context of the crime was a significant shift from the *Kent* Court, which waived a hearing for offenses of "heinous" character.[205] Instead, the Court in *Miller* believed that there are still levels of culpability when a child is accused of the gravest offense:

> 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. And still worse, each juvenile (including these two 14–year–olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses.[206]

Therefore, under *Miller*, a kid who commits murder is still a kid and even children charged with serious offenses deserve a fair hearing and opportunity to grow as an adult outside of the walls of incarceration.[207] A fair hearing would allow the Court to consider the circumstances of the juvenile, outside of the offense that he or she committed, in terms of his or her immaturity, impetuosity, and inability to appreciate risk based on chronological age.[208] Furthermore, at a hearing, the juvenile's act will be considered in the context of the juvenile's history and family environment.[209] Finally, if a juvenile is convicted of murder but remains in juvenile court, it is still possible that the court could charge and convict him or her of a lesser offense based on the limitations or disabilities associated with youth.[210]

[201] *See supra* Part II.a.
[202] *Kent*, 383 U.S. at 564.
[203] *Miller*, 567 U.S. at 463 ("none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific"
[204] *Id*. at 2466.
[205] *Kent*, 383 U.S. at 564.
[206] *Id*. at 2467–86.
[207] *See* Simon Waxman, *A Child Who Kills is Still a Child* (Jan. 2, 2014), http://www.wbur.org/cognoscenti/2014/01/02/philip-chism-simon-waxman (discussing how statutory exclusion for homicide offenses plays out in Massachusetts).
[208] *See Miller*, 567 U.S. at 471.
[209] *Id.* (mandatory sentencing schemes prevent courts from 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").
[210] *Id*.

2. Transfer to adult court exposes youth to mandatory minimums that do not take into account their chronological age.

The age of the defendant in all criminal proceedings is relevant because kids are categorically less capable and more susceptible to change based on modern scientific studies.[211] Mandatory transfer mechanisms ultimately place children, if convicted, in the realm of mandatory transfer schemes that prevent judges from taking account of the central considerations of youth.[212] Even though the Supreme Court has ruled that juveniles cannot be sentenced to death or life without parole, there are still a large amount of mandatory sentences that still involve significant amounts of incarceration that children would not be exposed to in juvenile court.[213] Mandatory minimums, by definition, do not allow judges to take individualized factors into account even if they wanted to, and juveniles tried in adult criminal court are subject to the same mandatory minimum sentences as their adult counterparts for nearly all offenses, without consideration of their inherent diminished culpability.[214]

The Court's discussion of the unique attributes of children was anchored in social science work, documenting the inchoate nature of the adolescent brain.[215] Current structures that allow for children to be transferred this way do not take age into consideration, which is therefore in direct opposition to the Court's holding in *Roper*, *Graham*, and *Miller*.[216] By removing youth from the balance—by subjecting a juvenile to the mandatory minimum sentence applicable to an adult—these laws still prohibit a sentencing authority from assessing whether the law's minimum term of imprisonment proportionately punishes a juvenile offender.[217] Adolescents develop gradually and unevenly, and chronological age and physical maturity are not reliable indicators of development. Although their offenses can be serious, much of the behavior surrounding delinquency is not abnormal during adolescence as under stress, adolescents typically cannot use their most advanced judgment and decision-making skills. A judge's ability to consider these key factors should not be constrained by any mandatorily imposed sentences, no matter how short.

3. The Supreme Court intended Miller *to be read broadly.*

The *Miller* opinion states that a child's developmental environment matters at sentencing and thus, context matters when sentencing juveniles outside of life without parole

[211] *See supra* Part II.

[212] *See* Drinan, *supra* note 30.

[213] *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).

[214] *See, e.g.,* James Orlando, *Automatic Transfer of Juveniles from Juvenile to Criminal Court*, Office of Leg. Research (2016), https://www.cga.ct.gov/2016/rpt/pdf/2016-R-0214.pdf (outlining the mandatory minimums juveniles are exposed to under Connecticut's current transfer laws); Rachael Frumin Eisenberg, *As Though They Are Children: Replacing Mandatory Minimums with Individualized Sentencing Determinations for Juveniles in Pennslyvania Criminal Court after Miller v. Alabama*, 86 Temp. L. Rev. 215 (2013) (advocating for individualized sentencing schemes in Pennsylvania based on juveniles continued exposure to mandatory minimums).

[215] Roper v. Simmons, 543 U.S. 551, 569–70 (2005) (discussing the lack of maturity and recklessness, susceptibility to negative outside influences, and transient character of youth, citing the science behind each point).

[216] *Miller*, 567 U.S. at 465 ("'An offender's age,' we made clear in *Graham*, 'is relevant to the Eighth Amendment,' and so 'criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.'") (quoting Graham v. United States, 560 U.S. 48, 56 (2010).

[217] *Miller*, 567 U.S. at 467.

to any kind of mandatory minimum sentence.[218] The *Miller* Court even suggested in dicta, that it was concerned with juvenile justice practices on a broader scope than the life sentences that were at issue in the case.[219] The Court spent a significant amount of its opinion responding to the State's assertion that youth was already taken into consideration at the transfer hearing and therefore did not need to be considered at a sentencing hearing.[220] The Court rejected this notion entirely because even though the youth in *Miller* was given a transfer hearing, many states use mandatory transfer systems or direct file statutes, which place any discretion solely in the hands of the prosecutor and do not provide a mechanism for a judicial revaluation.[221] Additionally, the Court criticized judicial waiver statutes as being too general and ambiguous.[222] Furthermore, the purpose of a transfer hearing is dramatically different than that of a sentencing hearing and judges are faced with an extreme choice: giving a lenient sentence in juvenile court or an extreme one in adult court.[223] Therefore, any statute that does not even give youth a meaningful opportunity to be heard at a transfer hearing does not comply with the standard outlined in *Miller*, and it is possible that even youth transferred through judicial waiver may not have a significant opportunity to be evaluated as a child. By discussing the limitations of this system, the majority indicated that its decision was not limited to this particular sentence, but that it was an indictment of broader juvenile justice practices and criticizing the kind of general hearing provisions outlined in *Kent*.[224]

4. Mandatory Transfer Violates a Juvenile's Eighth Amendment Rights

The sentences in *Roper*, *Graham*, and *Miller* were ultimately deemed to violate the principle of proportionality, and therefore the Eighth Amendment's ban on cruel and unusual punishment.[225] *Miller* and *Graham* represented an enormous break from Eighth Amendment precedent dealing with non-death sentences because children were at issue.[226] The Supreme Court previously set the bar for a challenge to sentencing very high: "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.'"[227]

Therefore, based on this shift in understanding of an Eighth Amendment violation, mandatory waiver provisions violate the individualized requirements of the Eighth Amendment as they deny juveniles any opportunity to

[218] *Id*. ("the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations.")
[219] *Id*.
[220] *Id*. at 468.
[221] *Id*.
[222] *Id*. at 469 (noting that such laws are "usually silent regarding standards, protocols, or appropriate considerations for decisionmaking" and when states give power to the judges, it "has limited utility," as judges have limited information and juveniles have limited protections).
[223] *Id*.
[224] Additionally, the four dissenting judges in *Miller* were even concerned that the majority's opinion would be read too broadly. *See id*. 471 (Roberts, C.J., dissenting) ("the principle behind today's decision seems to be only that because juveniles are different from adults, they must be sentenced differently," and that such a principle and the process the majority employed in applying it "has no discernible end point."); *See also id.* at 478 (Thomas, J., dissenting) ("[Miller] lays the groundwork for future incursions on the States' authority to sentence criminals.").
[225] *Miller*, 567 U.S. at 460.
[226] *Id*.
[227] Solem v. Helm, 463 U.S. 277 (1983) (finding a life without parole sentence unconstitutional under a South Dakota recidivist statute for a defendant who passed a bad check).

have their age and diminished capacity considered by any decision-maker at any stage of the proceedings against them.

5. Like the death penalty in Roper and life without parole in Graham and Miller, there is indicia of national consensus moving against transferring juveniles without a hearing.

Finally, when finding mandatory practices to be unconstitutional, the Court in *Roper* and *Graham* looked to the current national consensus on the death penalty and life without parole, respectively. While the Court heavily focused on an analysis of legislative trends moving towards outlawing the death penalty in *Roper*, it also noted that the United States is the only country in the world that gives "official sanction" to the juvenile death penalty.[228] In *Graham*, the Court noted that while thirty-seven states, the District of Columbia, and the federal government permitted life without parole sentences for non-homicide juvenile offenders, the actual sentencing practices of those jurisdictions indicated that most states were hesitant to sentence a juvenile to such a sentence.[229] At the time of the decision, there were only 123 non-homicide juvenile offenders serving life without parole sentences throughout the entire country—and seventy-seven of them were in Florida prisons.[230] 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 non-homicide juvenile offenders.[231].[232]

As discussed in Part I, like life without parole, there are similar trends throughout the country that show there is a national consensus that children should not be transferred to adult court without a hearing.[233]

B. All States Should be Required to Make an Individualized Assessment of Each Youth Based on Certain/Specific Factors Before Transferring the Youth

Based on the holdings in *Kent*, *Roper*, *Miller*, and *Graham*, this precedent, states should only be allowed to transfer youth following a transfer hearing in which a court individually assesses a juvenile defendant and encompasses the diminished culpability of juveniles and their capacity for change. States, therefore, should only transfer juveniles through the process of judicial waiver as statutory exclusion and direct file are unconstitutional under *Miller*. Only fifteen states now rely solely on traditional hearing-based, judicially controlled forms of transfer as contemplated in *Kent*.[234] In these states, all cases against juvenile-age offenders begin in juvenile court and must be literally transferred, by individual court order, to courts with crimi-

[228] *Roper*, 543 U.S. at 575.
[229] *Graham*, 560 U.S. at 61-63.
[230] *Id*. at 64.
[231] *Id*. at 67.
[232] *See* Liz Ryan, *With Juveniles, the World Should Not Follow Our Lead*, The Chronicle of Social Change (Dec. 11, 2014), https://chronicleofsocialchange.org/opinion/with-juveniles-the-world-should-not-follow-our-lead/8926.

[233] Juvenile transfer in the United States is also disproportionate to the rest of the world—the American criminal justice system leads the word in incarcerating children and no other county routinely processes youth in adult criminal court compared to an estimated 250,000 in the U.S. annually. *See id*. Furthermore, the United States is violating provisions of international human rights conventions. For example, Article 37 of the United Nations Convention on the Rights of the Child (CRC) states that children who are detained should be separated from adults and that they should not be subject to 'torture' or other inhumane forms of punishment. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. The United States is one of the few countries that has not adopted the CRC. However, laws across the United States allow for children charged as adults to be placed in adult jails without any separation from adults, and less than half of these states provide any measure of safety for children.
[234] *Kent*, 383 U.S. at 541.

nal jurisdiction, unless the state has a provision keeping children who have already been prosecuted once out of the juvenile jurisdiction permanent. While, based on the purpose of the juvenile justice system, it is preferable for all children to stay in juvenile court, courts at the very least should be required to give children a meaningful hearing where they are considered under factors that are consistent with Supreme Court jurisprudence that recognize their status as a child before exposing them to adult sentencing laws and prisons.

First, cases involving children should originate in juvenile court, regardless of the alleged offense on their prior record. If they are then eligible for hearing based on a state's judicial waiver statutes, only the court should be able to motion for a transfer hearing in order to remove any discretionary power from the prosecutor. The juvenile should be represented by counsel at the waiver hearing, and the juvenile should have at least five days notice in order to provide an adequate representation of the child's emotional, physical, and educational history.[235] Furthermore, the juvenile should have access to an expert if necessary, and should have access to all evidence available to the court to either support or contest the motion.[236] Any evidence presented should be under oath and subject to cross-examination. At the hearing, the prosecuting attorney should always bear the burden of proving that probable cause exists to believe not only that the juvenile has committed the offense, but that the juvenile cannot be rehabilitated within the juvenile court. The juvenile may remain silent at the waiver hearing, and additionally no admission by the juvenile during the waiver hearing should be admissible in subsequent proceedings.

Second, at this hearing, courts must individually assess each juvenile as contemplated in *Kent*, but based on factors that incorporate modern scientific studies of adolescence as well as recent Supreme Court jurisprudence that recognizes that kids are different. Courts should be required to consider all the same specific set of factors, as outlined here, and should be unable to transfer a child unless they have made a finding on the record that the conditions have been met.

Most states already consider the nature of the offense when evaluating a child for transfer.[237] In *Kent*, the Court stated that the following should be considered: "the seriousness of the alleged offense to the community and whether the protection of the community requires waiver," "whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner," and "whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted."[238] Forty-one states currently consider the offense committed in a juvenile waiver hearing.[239] However, the Supreme Court has indicated that the focus should not be on the offense itself, but that children are categorically different. Furthermore, as the juvenile system is supposedly rehabilitative instead of punitive, the offense itself should not carry much weight. The offense itself should not matter in terms of what it looks like on paper, but should only be analyzed in context, not as an isolated act. Courts should not determine "premeditation, willful, or other similar words," but should

[235] ABA Standards for Juvenile Justice, *Standards Relating to Transfers Between Courts* (1979).
[236] *Id.*
[237] *See infra* Appendix C.
[238] *Kent*, 383 U.S. at 567.
[239] *See infra* Appendix C.

analyze the offense with more adolescent appropriate standards in light of what personal facts led up to the commission of the offense. Based on this, courts should also not be able to consider the prior record of the child without context and without also considering why the child was not fully rehabilitated by the system, especially if it was based on a lack of rehabilitative resources or a mental condition that remained untreated since the previous offense was committed.

The *Kent* Court instructed that whether or not the juvenile had associates in adult court should be a consideration in the transfer decision, and nine courts currently consider this factor.[240] However, convenience should not be a consideration in juvenile transfer. Juveniles should not be held to the same level of culpability as their adult co-defendants, as often those co-defendants are the very individuals suscepting the juveniles to the peer pressure that *Roper* indicated contributed to a juvenile's responsibility.[241]

In terms of maturity, both the *Kent* Court and thirty-five states consider the sophistication and maturity of the juvenile.[242] Some states have expanded on this, and consider the psychological development and emotional state of the minor, including any documented mental illness or developmental issues.[243] However, none of these transfer statutes state at what maturity level a child becomes eligible for transfer. A child, therefore, should only be eligible for transfer if they are deemed to have the emotionally maturity and decision-making capability of an adult. Otherwise, their mental status as children should keep them in juvenile court. As far as physical maturity, there should be a minimum age imposed on when a child can be eligible for transfer based for all offenses. A child should then be evaluated to see if they developmentally meet the standards of other youth their age, or if there are any mental disabilities or lingering traumatic experiences that would preclude them for developing at the appropriate rate.

Next, *Kent* instructed courts to consider "[t]he sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude, and pattern of living."[244] Twenty-three states currently consider the juvenile's home or family environment, including the effect that familial, adult, or peer pressure may have had on the child's alleged actions in question.[245] This should be a required factor in all jurisdictions and should be expanded to include new research based on trauma and the susceptibilities of children to peer pressure.

Kent, as well as thirty-four states, considered the prospects for adequate protection of the community.[246] If this factor is even to be considered, there should be set criteria and reasons that would allow a court to find that the community cannot be protected by isolating the minor in a juvenile setting; this should not be an arbitrary statement. However, the decision on whether or not to hold a juvenile should only be considered when evaluating their release pre-trial and should not be a factor in a transfer hearing. Additionally, while *Kent* and thirty-two states consider whether

[240] *Kent*, 383 U.S. at 567; *see infra* Appendix C.
[241] *Roper*, 543 U.S. at 569 (juveniles "are more vulnerable ... to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings.)
[242] *Kent*, 383 U.S. at 567; *see infra* Appendix C.
[243] *See infra* Appendix C.
[244] *Kent*, 383 U.S. at 567.
[245] *See infra* Appendix C.
[246] *Kent*, 383 U.S. at 567; *see infra* Appendix C.

the juvenile can be rehabilitated within the time frame of juvenile court jurisdiction, and if the juvenile court has facilities available that would address the child's individual needs,[247] the Court should not be able to forego rehabilitation solely based on the likelihood that it is unlikely to occur. There should be a presumptive burden that the child can be rehabilitated, and it should be a large burden on the government to prove otherwise.

Only fourteen states currently consider the culpability of juvenile when assessing them for transfer, and this factor was not even considered in *Kent*.[248] Given that the lessened culpability of children is at the heart of the *Roper*, *Graham*, and *Miller* cases, this should be a mandatory consideration when attempting to transfer a child. *Kent* and eleven states consider the impact on the victim when deciding whether to transfer a child. Such a consideration should only be considered at sentencing, as the injury suffered by a person does not have any impact on the finding that an individual committed an offense. As the child has not yet been found guilty of the offense he or she is being transferred for, the victim impact should only be considered at sentencing if the child is eventually adjudicated or found guilty. Finally, six states consider whether the offense was committed as part of gang activity, even though this factor was not originally proposed in *Kent*.[249] Contrary to current statutory requirements, gang involvement should actually make it less likely that the juvenile is transferred, instead of an aggravating factor. In *Miller*, the Court explained that juvenile offenders are less culpable than adults because they are less able to assess risk; they are more susceptible to outside influences; and they do not have a fully developed character.[250] The gang setting magnifies all of these concerns.

Conclusion

Based on the Supreme Court's decision in *Kent* as well as its recent jurisprudence, states should repeal all mandatory transfer statutes. Mandatory transfer directly contradicts the Supreme Court's recognition that individualized review of a youth's history, the circumstances of the offense, and a youth's ability to charge are critical to determining a youth's sentence. Mandatory transfer statutes take away a court's ability to make this individualized, appropriate assessment of youth as juvenile courts, not adult courts, were specifically created to address the individualized needs of youth. Finally, mandatory transfer statutes are not necessary to ensure youth who commit serious offense are held accountable – repealing mandatory transfer does not limit a state's ability to try a youth as an adult, it merely means that the child will first have an appropriate hearing.

[247] *Kent*, 383 U.S. at 567; *see infra* Appendix C.
[248] *See infra* Appendix C.
[249] *Id.*
[250] *Miller*, 567 U.S. at 465.

APPENDIX A

Methods of Transfer by State

State	Judicial Waiver	Statutory Exclusion	Direct File	Once an Adult, Always an Adult
Alabama	Ala. Code § 12-15-203	Ala. Code § 12-15-204		Ala. Code § 12-15-203(i)
Alaska	Alaska Stat. § 47.12.100	Alaska Stat. § 47.12.030		
Arizona	Ariz. Rev. Stat. Ann. § 8-327	Ariz. Rev. Stat. Ann. § 13-501(a)	Ariz. Rev. Stat. Ann. § 13-501(b)	Ariz. Rev. Stat. Ann. § 13-501
Arkansas	Ark. Code Ann. § 9-27-318		Ark. Code Ann. § 9-27-318	
California	Cal. Welf. & Inst. Code § 707	Cal. Welf. & Inst. Code § 602(b)		Cal. Welf. & Inst. Code § 707
Colorado	Colo. Rev. Stat. § 19-2-518		Colo. Rev. Stat. § 19-2-517	
Connecticut	Conn. Gen. Stat. 53a-54d			
Delaware	Del. Code Ann. § 1010	10 Del. Code Ann. § 92		Del. Code Ann. §§ 1010, 1011
D.C.	D.C. Code § 16-2307	D.C. Code § 16-2301		D.C. Code § 16-2307(h)
Florida	Fla. Stat. § 985.556	Fla. Stat. § 985.557	Fla. Stat. § 985.557(1)	Fla. Stat. § 985.227
Georgia	Ga. Code § 15-11-562	Ga. Code § 15-11-560		
Hawaii	Haw. Rev. Stat. § 571-22			
Idaho	Idaho Code Ann. § 20-508	Idaho Code Ann. § 20-509		Idaho Code Ann. § 20-509
Illinois	705 Ill. Comp. Stat. 405/5-805	705 Ill. Comp. Stat. 405/5-130		
Indiana	Ind. Code Ann. §§ 31-30-3-2, 3-3, 4-4, 3-5, 3-6	Ind. Code Ann. § 31-30-1-4		Ind. Code Ann. § 31-30-3-6
Iowa	Iowa Code § 232.45	Iowa Code § 232.8(c)		Iowa Code § 232.45(a)
Kansas	Kan. Stat. Ann. § 38-2347			
Kentucky	Ky. Rev. Stat. §§ 635.10, 635.020			
Louisiana	La. Child Code Ann. art. 857, 859, 862	La. Child Code Ann. art. 305	La. Child Code Ann. art. 305	
Maine	Me. Rev. Stat. Ann. § 3101			
Maryland	Md. Code Ann., Cts. & Jud. Proc. § 3-8A-06	Md. Code Ann., Cts. & Jud. Proc. § 3-8A-03(d)		Md. Code Ann., Cts. & Jud. Proc. §

State	Judicial Waiver	Statutory Exclusion	Direct File	Once an Adult, Always an Adult
Massachusetts	Mass. Gen. Laws Ann. ch. 119, § 72B			
Michigan	Mich. Comp. Laws. § 712A.4		Mich. Comp. Laws. § 600.606	Mich. Comp. Laws. § 712A.4(5)
Minnesota	Minn. Stat. Ann. § 260B.125	Minn. Stat. Ann. § 260B/007(6)(b)		Minn. Stat. Ann. § 260.125
Mississippi	Miss. Code Ann. § 43-21-157(1)	Miss. Code Ann. § 43-21-151(1)		
Missouri	Mo. Rev. Stat. § 211.071			
Montana		Mont. Code. Ann. § 41-5-206(2)	Mont. Code. Ann. § 41-5-206(1)	
Nebraska			Neb. Rev. Stat. § 43-276	
Nevada	Nev. Rev. Stat. § 62B.390	Nev. Rev. Stat. § 62B.330(3)		Nev. Rev. Stat. § 62.040(2)(d)
New Hampshire	N.H. Rev. Stat. § 169-B:24			N.H. Rev. Stat. § 169-B:27
New Jersey	N.J. Stat. § 2A:4A-26.1			
New Mexico		N.M. Stat. Ann. § 32A-2-3		
New York		N.Y. Fam. Ct. Act § 301.2(8)		
North Carolina	N.C. Gen. Stat. Ann. § 7B-2203			
North Dakota	N.D. Cent. Code § 27-20-34			N.D. Cent. Code § 27-20-34(4)
Ohio	Ohio Rev. Code § 2152.12			Ohio Rev. Code § 2151.011(B)(6)
Oklahoma	Okla. Stat. Ann. tit. 10A § 2-2-403	Okla. Stat. Ann. tit. 10A § 2-5-101	Okla. Stat. Ann. tit. 10A § 2-5-205	
Oregon	Or. Rev. Stat. §§ 419c.340, 419c.349, 419c.352, 419c.355	Or. Rev. Stat. § 137.707		Or. Rev. Stat. §§ 419c.364, 419c.367
Pennsylvania	42 Pa. Cons. Stat. Ann. § 6355(a)	42 Pa. Cons. Stat. Ann. § 6355(e)		42 Pa. Cons. Stat. Ann. § 6302
Rhode Island	R.I. Gen. Laws § 14-1-7(a), (b)			R.I. Gen. Laws § 14-1-7.1
South Carolina	S.C. Code Ann. § 63-19-1210	S.C. Code Ann. § 63-19-20		
South Dakota	S.D. Codified Laws § 26-11-4	S.D. Codified Laws § 26-11-3.1		S.D. Codified Laws § 26-11-4

State	Judicial Waiver	Statutory Exclusion	Direct File	Once an Adult, Always an Adult
Tennessee	Tenn. Code § 37-1-134			Tenn. Code § 37-1-134
Texas	Tex. Fam. Code § 54.02			Tex. Fam. Code § 54.02(m)(1)
Utah	Utah Code Ann. § 78A-6-703	Utah Code Ann. § 78A-6-701		Utah Code Ann. § 78-3a-603
Vermont	Vt. Stat. Ann. tit. 33 § 5204	Vt. Stat. Ann. tit. 33 §§ 5201(c), 5103, 5204		
Virginia	Va. Code Ann. § 16.1-269.1			Va. Code Ann. § 16.1-271
Washington	Wash. Rev. Stat. § 13.40.110	Wash. Rev. Stat. § 13.04.030		Wash. Rev. Stat. § 13.40.020(15)
West Virginia	Wash. Rev. Stat. § 49-4-710			
Wisconsin	Wis. Stat. § 938.18	Wis. Stat. § 938.183		Wis. Stat. § 938.183
Wyoming	Wyo. Stat. Ann. § 14-6-237	Wyo. Stat. Ann. § 14-6-203		

APPENDIX B

Judicial Waiver – Statutory Requirements for Hearings[251]

State	Evaluation Required	Probable Cause Required	Party that Can Motion for Transfer	Burden Shift to Defendant
Alabama	Yes	Yes	State	No
Alaska	No	No[252]	Court	Offense
Arizona	If requested	Yes	State	No
Arkansas	Yes	No	Any	No
California	Yes	No	State	Offense
Colorado	If requested	Yes	State	Prior Record
Connecticut	No	Yes	State	No
Delaware	No	No	State or Court	No
D.C.	No	No[253]	State	Offense
Florida	Yes	No[254]	State	No
Georgia	Yes	Yes	State	No
Hawaii	Yes	No	Court	No
Idaho	No	No	Any	No
Illinois	No	Yes	State	Age
Indiana	No	Yes[255]	State	Age & Offense
Iowa	Yes	Yes	Any	No
Kansas	No	No	State	No
Kentucky	No	Yes	State	No
Louisiana	Yes	Yes	State or Court	No
Maine	If requested	Yes	State	Offense
Maryland	No	No[256]	Court	No
Massachusetts				
Michigan	No	Yes	State	No
Minnesota	No	Yes	State	Age & Offense
Mississippi	Unless waived	Yes	Court	No
Missouri	No	No	State or Defense	No
Montana				
Nebraska				

[251] *See supra* Appendix A (listing all judicial waiver statutes by state).
[252] In Alaska, probable cause is a factor to be considered, but is not required before a juvenile is transferred.
[253] In D.C., for the purpose of the transfer hearing it is assumed that the child committed the delinquent act.
[254] In Florida, probable cause is a factor to be considered, but is not required.
[255] In Indiana, probable cause is required unless the minor is accused of a felony and has previously been charged with a felony.
[256] In Maryland, for the purpose of the transfer hearing, it is assumed that the child committed the delinquent act.

State	Evaluation Required	Probable Cause Required	Party that Can Motion for Transfer	Burden Shift to Defendant
Nevada	Yes	No	State	Always
New Hampshire	No	No[257]	Court	Age & Offense
New Jersey	No	No	State	No
New Mexico				
New York				
North Carolina	No	Yes	Court	No
North Dakota	No	Reasonable Grounds	Court	Offense
Ohio	Yes	Yes	Court	No
Oklahoma	Yes	Prospective Merit	State or Court	No
Oregon	No	No[258]	Court	No
Pennsylvania	No	Prima Facie Case	Court	Age & Offense
Rhode Island	No	Yes	State	Prior Record
South Carolina	No	No[259]	State or Court	No
South Dakota	No	No	Court	Age
Tennessee	No	Yes	Court	No
Texas	Yes	Yes	Court	No
Utah	If requested	Yes	State	Offense
Vermont	No	Yes	State	No
Virginia	Yes	Yes	State	Always
Washington	No	No	Any	No
West Virginia	No	No	State	No
Wisconsin	No	No	State or Defense	No
Wyoming	No	No	Any	No

[257] In New Hampshire, courts only must consider the prospective merit of the complaint as a factor in the transfer decision.
[258] In Oregon, courts only must consider the prospective merit of the complaint as a factor in the transfer decision.
[259] In South Carolina, a minor can only be transferred after a "full investigation" has been made, but a probable cause requirement is not specified.

APPENDIX C

Judicial Waiver – Factors Considered at Transfer Hearing[260]

State	Consideration of Factors	Offense	Prior Record	Mental Condition	Protection of Community	Possibility of Rehabilitation	Age	Pattern of Living	Culpability	Victim Impact	Co-Defendants in Adult Court	Gang Involvement	Use of Weapon
Alabama	All	X	X	X	X	X	X						
Alaska	Some	X	X			X			X		X		
Arizona	Any	X	X	X		X			X	X		X	
Arkansas	Other	X	X	X[261]	X	X	X	X	X				
California	Any	X	X	X		X	X	X					
Colorado	Any	X	X	X	X	X	X	X		X			X
Connecticut	All	X	X			X							
Delaware	Any	X	X	X	X	X	X			X	X		X
DC	All	X	X	X	X	X[262]	X						
Florida	Any	X	X	X	X	X	X				X		
Georgia	Other	X	X	X	X	X	X	X	X	X			
Hawaii	All	X	X	X	X	X		X			X		
Idaho	Some	X		X	X			X					
Illinois	All	X	X	X	X	X	X		X	X			X
Indiana	Some	X	X		X	X							
Iowa	Other	X	X		X	X			X				
Kansas	All	X	X	X	X	X		X					
Kentucky	2+	X	X	X	X	X		X				X	
Louisiana	All	X	X	X	X	X	X						
Maine	All	X	X	X	X	X	X	X					
Maryland	All	X		X	X	X	X		X	X			
Massachusetts	N/A												
Michigan	All	X	X		X	X			X	X			
Minnesota	All	X	X		X	X			X	X			X
Mississippi	All	X[263]	X	X	X	X	X	X					
Missouri[264]	Other	X	X	X	X	X	X	X					

[260] *See supra* Appendix A (listing all judicial waiver statutes by state).
[261] Arkansas requires courts to specifically consider the juvenile's social and educational history.
[262] D.C. considers if whether or not family counseling would increase the potential rehabilitation of the juvenile.
[263] Mississippi requires courts to consider if the offense occurred on school property or put any other students in danger.
[264] Missouri requires courts to be mindful of racial disparities in certification of juveniles as adults.

State	Consideration of Factors	Offense	Prior Record	Mental Condition	Protection of Community	Possibility of Rehabilitation	Age	Pattern of Living	Culpability	Victim Impact	Co-Defendants in Adult Court	Gang Involvement	Use of Weapon
Montana	N/A												
Nebraska	N/A												
Nevada	All			X			X	X					
New Hampshire	Other	X	X	X	X	X					X		
New Jersey	All	X	X	X			X		X				
New Mexico													
New York													
North Carolina	All	X	X	X	X	X	X						
North Dakota	Other	X	X	X	X	X		X	X				
Ohio	Other	X	X	X	X	X	X		X[265]	X		X	X
Oklahoma	All	X[266]	X	X	X	X		X					
Oregon	All	X	X	X	X	X					X		
Pennsylvania	All	X	X	X	X	X	X		X	X			
Rhode Island	All	X	X		X								
South Carolina	NS[267]												
South Dakota	Some	X	X		X	X					X		
Tennessee	Some	X	X			X						X	
Texas	Other	X	X	X	X	X							
Utah	Some	X	X	X	X	X		X			X	X	X
Vermont	Some	X	X	X	X	X	X	X		X			
Virginia	Other	X[268]	X	X		X	X		X				
Washington	NS[269]												
West Virginia	All			X			X	X					
Wisconsin	All	X*	X	X		X	X	X				X	
Wyoming	All	X	X	X	X	X		X			X		

[265] Ohio gives more guidance on what makes a juvenile "culpable," and requires a court to consider if defendant was provoked and if the defendant knew actions would cause the harm that occurred.
[266] Oklahoma additionally requires courts to consider if the offense was committed while escaping or attempting to escape from an institution for delinquent children.
[267] South Carolina does not specify any specific factors for courts to consider.
[268] Virginia is the only state that allows the judge to consider the potential sentence if the juvenile is convicted as an adult; specifically, if the maximum sentence for the crime if committed by an adult would exceed 20 years.
[269] Washington does not list any specific factors for courts to consider.

About the AUTHOR

Summer Woods is a Public Interest/Public Service Scholar at American University Washington College of Law. Summer is an aspiring career public defender who worked as a student-attorney in AUWCL's Criminal Justice Clinic in the fall of 2017. Summer also worked at the National Juvenile Defender Center researching and writing on juvenile transfer laws in 2016. Throughout law school, Summer worked at the Public Defender Service for the District of Columbia and the Charleston County Public Defender's Office on criminal defense trial practice, where she wrote motions, researched discrete Fourth and Fifth Amendment legal issues, and met with clients. In 2014, Ms. Woods served with AmeriCorps working with middle school students in an under-resourced neighborhood in Queens, New York. Summer obtained her B.A. from Furman University with a degree in History and English, and she will receive her J.D. in May 2018. Summer will be a Public Defender in Colorado after graduation.


ICE

Body Worn Cameras with Facial Recognition Technology: When It Constitutes a Search

Kelly Blount

Hadi Partovi, a board member at Taser recently told *Bloomberg Business Week* that "Taser wants to be the Tesla or Apple of law enforcement."[1] The switch to a more technology-oriented product base was developed in response to public outcry over a series of deaths resulting from the electrical impulses emitted by the 'taser."[2] Subsequently, Taser released a camera that switched on when a police officer activated his taser. In creating a record of any interaction where the taser is used, officers are accountable for their actions as well as protected against any accusations of misconduct where fallacious. In addition to the practical consequences of camera technology, Taser has reported that in the first quarter of 2016 the company's revenue was higher for camera and cloud services than for weaponry for the first time ever.[3]

Similarly, after a series of fatal police shootings of unarmed African American men across the United States, the Department of Justice funded a program that subsidized body worn police cameras for police officers. A recent survey found that as of 2014, twenty-five percent of the nation's police officers were already wearing the body cameras.[4] The body cameras were being used in addition to squad car-mounted cameras. The purpose of body cameras is to hold police officers accountable for any acts of misconduct. Similarly, the cameras are meant to protect the officer and in theory should encourage both parties to a police-citizen interaction to behave in accordance with the knowledge they will be held accountable.[5] Though little research exists on the subject to date, some studies have suggested that body worn cameras decrease excessive force by police officers and decrease altercations with citizens.[6]

There have been legal arguments both for and against the widespread use of body cameras, including the effect that they may have on First Amendment rights and personal privacy. However, on the whole, they have been considered a positive development in policing by both police departments and the public.[7] As the technology continues to advance and companies continue to compete for top selling iterations of the product, constitutional issues have begun to emerge. This paper will specifically discuss the development of body cameras equipped with facial recognition

1 Karen Weise, *Will a Camera on Every Cop Make Everyone Safer? Taser Thinks So*, Bloomberg Business Week (July 12, 2016).

2 *See id*.

3 *See id.* (noting that the company reported that for cameras and cloud services reached $52 million in bookings for future revenue).

4 *See* Michael D. White, *Police Officer Body-Worn Cameras; Assessing the Evidence,* Washington D.C. Office of Community Oriented Policing Services (2014).

5 *See* Jonathan Young, *Local Law Enforcement Plans for Body Cameras*, Stillwater Gazette (Dec. 16, 2016). In addition to causing fallacious complaints against officers to go down, may also encourage more positive interactions generally. One police officer in Oak Park Heights, Minnesota reported that once a citizen learned the officer had recorded their interaction, he subsequently dropped a complaint against him.

6 *See* Scientific Am., *Cities Want Cops to Wear Cameras, but Technology Could Heighten Distrust if Not Carefully Used,* Scientific Am. (Dec. 1, 2014).

7 *See* Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win For All American Civil Liberties Union* (Mar. 2015).

technology. Facial recognition technology is a frequently used and generally accepted technology; however, the implications of applying it to real-time police work by linking the capability to body worn cameras has sparked debate over possible violations of the Fourth Amendment. Because this combined technology is still in its nascent stages, this paper will suggest various ways in which this technology may be constitutionally permissible, as well as applications that may render its use unconstitutional.

The paper will begin with a brief survey of the technological landscape, namely the company players and their progress in developing this combination of technologies. The discussion will broadly explain the function and process of facial recognition technology and how it may be used in conjunction with body worn cameras. This section will also outline the process by which a facial scan is searched against a database.

Next, the paper will investigate policies that are currently in place regarding the use of body worn cameras as well as scant regulations regarding facial recognition technology. The section will suggest that the lack of stand-alone regulation of these two products leaves a large space for abuse and misuse of the technologies if combined. The paper will argue that lack of regulation at the federal level requires the judicial system to set the standard by which constitutional issues that arise with the use of enhanced law enforcement technology will be evaluated. Further, the generally unregulated nature of the products also de-centralizes the means by which processes are developed and gathered information is maintained. The discussion will suggest that the technology will remain governed by local and state policy, which could result in the application of dispersed legal frameworks.

The third section of the paper will suggest ways in which integrating body worn cameras and facial recognition technology might be used under the auspices of a Fourth Amendment legal search. Because the technology is still being developed, the discussion will address different uses of the technology that may affect its legality or may constitute a search. In recent years, the scope of Fourth Amendment analysis has been slowly transitioning from the physical world to the more technologically networked world. This section will argue that such a product will link the physical and theoretical spaces of property, and significantly complicate the way that courts will rule on these issues in the future. This section then applies several standards which courts may use to evaluate the use of the technology.

Lastly, the paper will make recommendations on the potential benefits and drawbacks of linking facial recognition technology to body worn police cameras. While regulation will likely remain fractured by jurisdiction for the foreseeable future, it is still imperative that the constitutional bounds of the technology are established. Not only will this be necessary in crafting policy surrounding its use, it is also likely to be the subject of future litigation and relevant to countless searches and arrests.

TECHNOLOGY

Paris 1887: Social anthropologist Mr. Alphonse Bertillon developed a facial recognition methodology, the same procedure which constitutes the basis for our current technology, now digitized and automated.[8] Mr. Bertillon catalogued arrested criminals by taking precise measurements of a person's standard features such as ears, nose and mouth, and documenting any distinctive features such as scars and birthmarks.[9] Next, the collected data with the arrestee's name and charges was noted on a card with a photo, giving rise to the mug shot.[10] The cards were often circulated among cities where the person may wander, giving police a veritable, albeit physical, database of locally known criminals.[11] Aside from the mug shot of a falsely accused person who was arrested and booked, there is no evidence to suggest that law enforcement was maintaining a record of persons who committed no crime or ever encountered a police officer. In addition, the mug shots were ostensibly used only after a crime had been committed. Courts in the early twentieth century held that it was a responsible police technique to utilize photographic technologies to prevent recidivism and hasten enforcement capabilities.[12]

Fast forward to the current day, in which we keep digital records of arrested individuals.[13] Today law enforcement relies increasingly more on digital databases that include photographs captured by police surveillance cameras monitoring public places.[14] As will be discussed below, the future of this technology is to combine body-worn cameras with facial recognition capability. It has been reported that at least five police departments in the country have the ability to live-stream[15] footage back to a central server where facial recognition technology is used to identify an individual in real time.[16] As stated above, the traditional use of body-worn cameras thus far has been for accountability, so as to settle accusations of misconduct by police after the fact. Facial recognition technology software will enhance the technology by adding the ability to theoretically identify anyone an officer encounters. This capability creates an active use of records or databases that traditional mug shots did not. In its original iteration, the Bertillon measurements were utilized to catalogue charged suspects after the fact. Facial recognition technology gives police officers the ability

[8] *See* U.S. Nat'l Library of Medicine, https://www.nlm.nih.gov/visibleproofs/galleries/biographies/bertillon.html (last accessed Apr. 30, 2017).

[9] *See id*.

[10] *See* Defense of the Bertillon System, *New York Times*, (Jan. 20, 1896); *Maryland v. King*, 133 S.Ct. 1958 (2013) (holding that DNA samples taken incident to arrest is not a violation of the Fourth Amendment.).

[11] *See* Jennifer Tucker, *How Facial Recognition Technology Came To Be; The FBI's Astonishing New Identification System is the Product of 175 years of Innovation – and Paranoia. A Visual History*, The Boston Globe (Nov. 23, 2014). Tucker recounts how during a time that some believed criminals could be typified by his characteristics; this type of profiling allowed each person to be represented by a unique record.

[12] *See Hodgeman v. Olsen*, 86 Wash. 615 (1915); *Shaffer v. United States*, 24 App. D.C. 417, 426 (1904).

[13] Inmate Identification Photographs (Mugshots)," N.Y. State Corrections and Community Supervision Directive. No. 4038 (Feb. 26, 2015), http://www.doccs.ny.gov/Directives/4038.pdf.>.

[14] *See* Clare Garvie, Alvaro M. Bedoya, & Jonathan Frankle, *The Perpetual Line-Up; Unregulated Police Face Recognition in America,* Geo. L. Ctr. on Privacy & Tech. (Oct. 18, 2016), https://www.perpetuallineup.org/sites/default/files/2016-12/The%20Perpetual%20Line-Up%20-%20Center%20on%20Privacy%20and%20Technology%20at%20Georgetown%20Law%20-%20121616.pdf.

[15] This paper uses the term live-stream to describe the temporal aspect of the technology in question. Live-stream refers to the real-time transmission of a video as it occurs, allowing identification to happen while the person may still be in the police officer's vicinity.

[16] *See id*.

to capture the photographic images of anyone that passes the screen of their cameras whether they have been accused of a crime or not. In addition, this feature essentially creates a geographical tagging of a person, essentially creating a record of where that image was taken.

In the wake of numerous instances of fatal and egregious police brutality body-worn cameras have been considered an important method to ensure accountability of police officers and restore public trust in local police.[17] In addition to addressing issues of police misconduct, the cameras also help police departments to address systemic issues within their officer corps.[18] Some civil rights groups though have warned that the ability of police to record interactions with private citizens could also have a myriad of negative consequences.[19] Some of the most touted fears of police body cameras include the threat of a chilling effect that recording may have on First Amendment rights, which could compromise any legitimizing effects.[20] For instance, footage could be leaked to stigmatize the subjects of the video.[21] In fact, in a claimed effort to ensure unconditional accountability, some police departments have already made it policy to publish captured video footage, excepting particularly sensitive footage such as sexual assault.[22]

The concerns of body-worn cameras is further complicated by the potentially imminent combined technology of facial recognition.[23] Several companies, including the giant Taser, are actively developing software capability that will link real time footage collected by body cameras to cloud technologies using data analytics.[24] The importance of this technology cannot be understated. From a legal standpoint capturing and analyzing any person's face may imply that probable cause is no longer necessary for a stop and search to occur.[25] More specifically, if a police officer is able to identify you by use of his body-worn camera, now linked to a facial recognition database just by passing you on the street, it may qualify as a search.[26]

It is important to also note that there are benefits to the technology as well. Proponents of this combined technology claim that facial recognition technology in public places may help locate missing persons or to satisfy a warrant.[27] In 2014, the United States Department of State successfully located a suspect who had disappeared after a warrant was issued for his arrest on charges of child abuse and kidnap-

17 *See* Jessica Tolliver, et al., *Implementing a Body-Worn Camera Program: Recommendations and Lessons Learned*, Washington, D.C. Office of Community Oriented Policing Services (2014).

18 *See id*.

19 *See* Jay Stanley, *Body Cameras Should Not Be Live-*Streamed, Am. Civil Liberties Union (Jan. 29, 2016), https://www.aclu.org/blog/privacy-technology/surveillance-technologies/body-cameras-should-not-be-live-streamed.

20 *See* Larry Greenemeier, *Police Body Camera Use – Not a Pretty Picture*, Scientific Am. (Aug. 4, 2016), https://www.scientificamerican.com/article/police-body-camera-use-not-a-pretty-picture/.

21 *See* Timothy Williams, *Downside of Police Body Cameras: Your Arrest Hits YouTube,* N.Y. Times (Apr. 26, 2015), https://www.nytimes.com/2015/04/27/us/downside-of-police-body-cameras-your-arrest-hits-youtube.html. Seattle now has its own YouTube channel on which they post all of their body camera feeds (it does blur faces).

22 *See id*.

23 *See* Press Release, *Leadership Conference on Civil and Human Rights, Civil Rights, Privacy, and Media Rights Groups Release Principles for Law Enforcement Body Worn Cameras* (May 15, 2015), https://civilrights.org/civil-rights-privacy-and-media-rights-groups-release-principles-for-law-enforcement-body-worn-cameras/.

24 *See* Matt Stroud, *Taser Plans to Livestream Police Body Camera Footage to the Cloud by 2017*, VICE (July 18, 2016), https://motherboard.vice.com/en_us/article/4xa43g/taser-axon-police-body-camera-livestream.

25 *See id*.

26 *See id*.

27 *See* Garvie, *supra* note 14.

ping.[28] By running a facial scan of the suspect through a database used to detect passport fraud, officials located him living in Nepal under an alias.[29] There are also ways in which the technology may potentially resolve issues that have not yet been widely addressed. Not very long ago, the general guidance to law enforcement officers was to remain in place during an active shooter situation until reinforcements arrived.[30] Today, police protocol in the United States is transitioning toward instructions that dictate arriving officers immediately enter the scene of the shooting and work to mitigate casualties and collateral.[31] Using real-time technologies in such situations may open up the ways in which active shooter or hostage scenarios may be handled. In fact, similar guidance is now also given to first responders and emergency medical personnel, possibly hinting at the future expansion of live feed video technology.[32] Tragedies such as the 2016 shooting at an Orlando nightclub offers an insight into which having a remotely accessible view of the field is critical for effective decision making in real time. Though responding officers wore body cameras, the footage has since been released and it is apparent that the inability of the video to be live-streamed at the time of the shooting was a critical missed opportunity.[33] These types of realizations may lead the technology toward more robust and diverse uses.

The remainder of this paper will focus on the legal implications of advances in body camera technology that employs live stream video footage and advanced facial recognition technology. Because the technology is still being developed, the paper will suggest potential uses and outcomes. For instance, such a capability could mean that anyone passing a police officer equipped with the technology may be scanned, identified, and catalogued in the facial recognition database, even without officer interaction and in the absence of an alleged crime.[34] As many civil liberties groups have maintained, this turns walking down the street into a potential police interaction.[35] In fact, it has recently been found that several cities used body cameras to gather information on Black Lives Matter protestors in order to create a "watch-list."[36] Short of the severe implications of the First Amendment, as in the Black Lives Matter allegations, the ability of law enforcement to image and identify an innocent civilian presents the potential for a Fourth Amendment

[28] *See Long-Time Fugitive Captured: Juggler Was on the Run for 14 Years,* Fed. Bureau of Investigation (Aug. 12, 2014), https://fbi.gov/news/stories/2014/august/long-time-fugitive-neil-stammer-captured/./>.

[29] *See id*.

[30] On September 23, 2016 several speakers, including Paige Schilling of the New Jersey Office of Homeland Security and Preparedness, at the Rutgers Institute for Emergency Preparedness and Homeland Security colloquium entitled, "Homeland Security and Intelligence for the Healthcare and Public Health Sector," spoke on this subject in New Brunswick.

[31] *See* Police Executive Research Forum, Critical Issues in Policing Series: The Police Response to Active Shooter Incidents (Mar. 2014), http://www.policeforum.org/assets/docs/Critical_Issues_Series/the%20police%20response%20to%20active%20shooter%20incidents%202014.pdf.

[32] *See supra* note 30.

[33] *See* Christopher Hayers, David Harris & Gal Tziperman Lotan, *Deputies Release Body Cam Footage From Inside Pulse*, Orlando Sentinel (Nov. 10, 2016), http://www.orlandosentinel.com/news/pulse-orlando-nightclub-shooting/os-pulse-ocso-bodycam-20161110-story.html.

[34] *See* Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. Pa. L. Rev. 327 (2014).

[35] *See* Ava Kofman, *Real-time Face Recognition Threatens to Turn Cops' Body Cameras Into Surveillance Machines*, The Intercept, https://theintercept.com/2017/03/22/real-time-face-recognition-threatens-to-turn-cops-body-cameras-into-surveillance-machines/ (last accessed on Apr. 30, 2017).

[36] *See* Associated Press, *5 Black Lives Matter Protesters Claim Bias, Sue Memphis, Graceland*, New Haven Register 3 (Jan. 19, 2017), http://www.nhregister.com/nation-world/article/5-Black-Lives-Matter-protesters-claim-bias-sue-11315533.php.

search. Courts have yet to analyze the constitutionality of this nascent technology, largely because it is not yet widely used, but courts have traditionally grappled with how changing technology affects expectations of privacy under the Constitution.[37]

Modern facial recognition technology is an advanced adaptation of the Bertillon model, and uses facial characteristics such as the eyes, chin, cheekbones and nose to correlate what are termed nodal points on a face.[38] Over time the identifying characteristics constituting nodal points are becoming more complex and numerous. For instance, the New York State Department of Motor Vehicles reported that after increasing the number of facial recognition points used in license imaging from 64 to 128 points, the system has assisted in identifying one hundred persons guilty of identification fraud.[39] Mapping out the face in nodal points, called Principle Components Analysis, or aka "Eigenfaces," is one of the more commonly used methods of facial recognition technology.[40] In this analysis, the component extracts are reduced to finite data points that are then put into a template.[41] This template can then be used to search a database for a matching template or face.[42] There are countless databases that may be utilized for this purpose, including those developed by individual police departments and state motor vehicle departments.[43] In March, 2017, the federal government reported that approximately one half of Americans' facial data are stored in some facial recognition database.[44] The FBI has reportedly run facial recognition searches against sixteen state drivers' license databases, building a biometric network that includes a myriad of non-criminal entries.[45] In addition, police officers may request a search of the Federal Bureau of Investigation's Next Generation Identification database, which as of 2014, by itself contained approximately 400 million facial images.[46] At this time, it is unclear whether a profile or record is created for each searched individual (or created template), regardless of whether a match is found. Such a use could essentially create a footprint cataloging an individual's movements and whereabouts over time based on search records.[47] Policy in this area has been slow to follow the technology. Currently, there is no state with comprehensive regulations on how law enforcement can use facial recognition technology and the data that it compiles.[48] For instance, the Maricopa County Sheriff's Office has entered all the drivers licenses and mug shots of locally registered Honduran persons into its database.[49] Similarly, its been recorded that the Pinellas County Sheriff's Office in Florida runs 8,000 monthly searches of the state's drivers' license database, absent any reasonable suspicion.[50] These frightening an-

[37] *See States v. Knotts*, 460 U.S. 276, 285 (1983) (holding that law enforcement tactics must be able to advance with technology in order to prevent circumvention of the law).

[38] *See* Kimberly N. Brown, *Anonymity, Faceprints, and the Constitution,* 21 George Mason L. Rev. 15 (2014).

[39] *See* David Kravets, *Enhanced DMV Facial Recognition Technology Helps NY Nab 100 ID Thieves*, Ars Technical (Aug. 31, 2016).

[40] *See* John D. Woodward, Jr., *Biometrics: A Look at Facial Recognition,* Va. State Crime Comm'n & Rand Corp., 8-9 (2003).

[41] *See Id.*

[42] *See Id.*

[43] *See* Garvie, *supra* note 14.

[44] *See* U.S. House of Representatives Committee on Oversight and Government Reform, Committee to Review Law Enforcement's Policies on Facial Recognition Technology, 2 (Mar. 22, 2017), https://oversight.house.gov/hearing/law-enforcements-use-facial-recognition-technology/.

[45] *See* Clare Garvie, *supra* note. 14.

[46] *See* Kimberly N. Brown, *supra* note 38 at 188.

[47] *See* Jay Stanley, *supra* note 19.

[48] *See* Clare Garvie, *supra* note 14.

[49] *Id.* at 4.

[50] *Id*. at 4.

ecdotes may be a small glimpse into a larger misuse of public records.

Since 9/11, the desire to create and utilize this technology has been growing and has already played a large role in United States military operations abroad. In 2012, the Department of Homeland Security issued an assessment update on a facial recognition technology being developed as a stand-alone recognition system for federal biometric cataloguing.[51] The stated purpose of the research was categorized as "advantageous technology to develop and implement for national security purposes."[52] The operative functioning component of the technology exists in many places already, such as social media platforms including Facebook and Snapchat, which utilize nodal point recognition to recognize faces.[53] The images that may be found in the databases accessed by law enforcement using this technology also includes images obtained of persons at United States border crossings, i.e. by Customs and Border Protection.[54] Ultimately this assessment found that the use of facial recognition technology for large crowds produces a number of flawed readings and matches, such as in a stadium or Times Square.[55] As will be addressed below, this finding means that in order to capture a "useable" image for the purposes of facial recognition scans, it is necessary to strategically pair camera capability with compatible location. This spatial strategizing may also hold clues as to the constitutionality of capturing and logging identities without cause.

Private companies are developing cameras that will allow police to both transmit live feed video and run it through facial recognition software almost instantaneously.[56] In addition, a survey conducted by Johns Hopkins University has found that at least nine of the 38 companies manufacturing body cameras already have the facial recognition technology available in their cameras.[57] One company has begun to work with local police on a pilot basis of its live stream capabilities.[58] Another company based in Arizona, called Iveda, owns a video surveillance platform aptly titled Sentir.[59] The Sentir platform allows almost any network connected technology, as elementary as a smartphone, to stream live feed video to a number of locations at once.[60] Similarly, Taser International has been publicly heralding its plans to manufacture facial imaging technology for nearly a decade, and has previously announced it will have the ability to live-stream body camera footage to the cloud this year.[61] Numerous companies have advertised their work on this technology

[51] *See* U.S. Dep't of Homeland Security, *Privacy Impact Assessment Update for the Standoff Technology Integration and Demonstration Program: Biometric Optical Surveillance System Tests*, 2 (Dec.17, 2012).

[52] *Id.*

[53] *See id.* at 3.

[54] *See id*.

[55] *See* U.S. House of Representatives Committee on Oversight and Government Reform, *supra* note 44.

[56] *See* Ava Koffman, *Real-time Face Recognition Threatens to Turn Cops' Body Cameras Into Surveillance Machines*, The Intercept (Mar. 22, 2017), https://theintercept.com/2017/03/22/real-time-face-recognition-threatens-to-turn-cops-body-cameras-into-surveillance-machines/.

[57] *See* Vivian Hung, Jacqueline Coberly, & Steven Babin, *A Market Survey on Body Worn Camera Technologies, Nat'l*, Nat'l Institute of Justice. Doc. No. 250381 (Nov. 2016).

[58] *See* Matt Stroud, *The Company That's Livestreaming Police Body Camera Footage Right Now*, VICE Motherboard (July 27, 2016), https://motherboard.vice.com/en_us/article/9a3ddv/visual-labs-police-body-camera-livestream.

[59] *See* Sentir Cloud Video Surveillance Management Platform, Iveda, https://www.iveda.com/sentir/ (last accessed Mar. 15, 2017).

[60] The term virtually indestructible comes from the Iveda website. The website states that once the video is captured it is immediately transferred to the cloud and the loss/destruction of the camera will not compromise the video content.

[61] *See* Stroud, *supra* note 58.

and will likely hasten the entrance of this product to police departments across the country.[62]

There are also many prohibitive factors to this technology spreading too quickly, including financing, connectivity and transmission speeds, body camera battery life, and data storage capability.[63] For instance, the platform "Evidence.com" which houses and manages footage generated by Taser body cameras currently holds an amount of data reported to be comparable to the whole of Netflix's streaming catalog.[64] Further, footage must be maintained to meet the standards for admissible evidence, which further increases the price and need for sizable data storage.[65] In 2015 San Diego paid roughly $500 per camera to outfit its officers with body-worn cameras, but must pay $1,495 per camera per year to simply house the footage.[66] Similarly, Los Angeles pledged $57.6 million dollars to outfit its 7,000 officers with body cameras; however, due to the prohibitive price, they still had not received the cameras as of 2016.[67]

EXISTING POLICY

Body worn cameras, even without the facial recognition add-on, have dismally low levels of regulation.[68] In a Brennan Center for Justice study, researchers found that Baltimore is the only city police department that has a policy on the biometric search of footage collected by body cameras.[69] The same study found that about half of the departments surveyed have no policy on the ability of police to record First Amendment activity, with a handful prohibiting recording for uses of surveillance or identification.[70] Though the technology is widely used, states are only beginning to require that regulations govern body camera use. Interestingly, some states, such as Minnesota, have legislated that local police departments must develop individual policies, rather than legislate a state-wide policy.[71] Similarly, New Jersey has adopted standards which require that police departments using body cameras have a policy in place, but regard more details beyond foundational state guidelines to be the purview of the department itself.[72] In fact, New Jersey awarded police departments across the state with $2.5 million in grants for the purchase of 5,000

[62] Companies which has also recently publicized their research include Digital Ally, www.digitalallyinc.com,> and WatchGuard, www.watchguard.com; *See also* Weisse, *supra* note 12.

[63] *See* Eric Markowitz, *Police Departments Face A Crucial Question: How To Pay For Body Cameras?,* International Business Times (May 12, 2016), http://www.ibtimes.com/police-departments-face-crucial-question-how-pay-body-cameras-2366968. Markowitz reports that police body cameras can range from $300 to $800 per officer (before storage and streaming). It's indicated that Los Angeles negotiated a contract for cameras for 7,000 officers at a price of $57.6 million – over five years. The mayor of Philadelphia has enacted a sugary drink tax to defray costs.

[64] *See* Weise, *supra* note 12.

[65] *See id*.

[66] *See* Eric Markowitz, *supra* note 63.

[67] *See id.*

[68] *See* Greenemeier, *supra* note 20.

[69] Brennan Ctr. Center for Justice. *Privacy and First. Amendment Protections* (July 8, 2016), https://www.brennancenter.org/analysis/police-body-camera-policies-privacy-and-first-amendment-protections. In a study of 23 police departments, Brennan Center used a scorecard of four factors to rate the regulations of body worn cameras. The study also then matched policies against model policies.

[70] *Id*.

[71] Jonathan Young, *Local Law Enforcement Plans For Body Cameras*, Stillwater Gazette (Dec. 16, 2016), https://www.hometownsource.com/stillwater_gazette/news/government/local-law-enforcement-plans-for-body-cameras/article_e42ee484-d2c5-5049-b457-4ddb-1de55884.html.

[72] *See* Directive No. 2015-1 from N.J. Office of Atty Gen. (July 28, 2015).

body worn cameras.[73] This brought the number of departments in New Jersey using cameras up from 50 departments to 200 departments.[74] Ostensibly, one may presume that the result is nearly 200 different sets of departmental policies and protocol on the use of body-worn cameras. Where policies exist, they include the amount of time footage can be held, how it is stored, and protocols to obtain footage for legal purposes.[75] As of the end of 2016, no state had passed a law that places comprehensive limits on the use of facial recognition technology by law enforcement.[76] The piecemeal approach has led to loopholes in policy and a lack of clarity on what police officers may and may not do in regards to facial recognition technology. As the next section will address, this may leave the courts as the final arbiter of setting a Fourth Amendment standard over the use of real time facial recognition searches.

In addition to camera technology, it is also important to have policies in place for the use and maintenance of facial recognition databases. The FBI currently has Memorandums of Agreement with eighteen states on the use of their driver registration databases in order to pursue facial recognition searches.[77] The implications of this type of information sharing arrangement are staggering. While it means that data are being used by entities beyond the original receiver of the information, it also means that non-criminal persons are being searched in connection with potential criminal investigations. The databases held by the FBI are constituted by eighty percent of people with non-criminal records, such as incidentally obtained photos that include work identification photos and drivers license photos.[78] The Georgetown Law Center on Privacy & Technology performed a study of thirty states' drivers license records policies.[79] Its results show that of the 245,273,438 adults in the United States, 117,673,662 adult drivers are in a "law enforcement face recognition network."[80]

Regulation is also necessary to protect the integrity of the data being collected.[81] It has been shown that fingerprints, like any other type of personal, identifiable information can be stolen in electronic hacks.[82] This also applies to facial recognition data.[83] Without the proper regulation of this technology it is easy to imag-

[73] *Attorney General Offers Over Half a Million Dollars in New Grant Funds to Help N.J. Police Dep'ts Buy Body Cameras*, Dep't L. Pub. Safety Off. Att'y Gen. (Sept. 20, 2016), http://www.nj.gov/oag/newsreleases16/pr20160920a.html.

[74] *Id.*

[75] "*Police Body Camera Policies: Privacy and First Amendment Protections*, Brennan Ctr. Just (July 8, 2016.) https://www.brennancenter.org/analysis/police-body-camera-policies-privacy-and-first-amendment-protections. In a study of 23 police departments, Brennan Center used a scorecard of four factors to rate the regulations of body worn cameras. The study also then matched policies against model policies.

[76] Clare Garvie et al., *The Perpetual Line-up: Unregulated Police Face Recognition in America*, Geo. L. Ctr. on Privacy & Tech. 1, 59 (2016).

[77] U.S. House of Representatives Committee on Oversight and Government Reform. *Committee to Review Law Enforcement's Policies on Facial Recognition Technology*, *Before the H. Comm. on Oversight and Gov't Reform*, 115th Cong. 2 (2017) (statement of Jason Chaffetz, Chairman, United States H. Comm. on Oversight and Gov't Reform).

[78] Adrienne Lafrance, *Who Owns Your Face*?, The Atlantic. (Mar. 24, 2017), https://www.theatlantic.com/technology/archive/2017/03/who-owns-your-face/520731/.

[79] Garvie, *supra* note 76 at 3.

[80] *Id.*

[81] *See generally* Clare Garvie & Jonathan Frankle, *Facial Recognition Software Might Have a Racial Bias Problem*, The Atlantic (Apr. 7, 2016).

[82] *See* Kaveh Waddell, *When Fingerprints Are as Easy to Steal as Passwords*, The Atlantic. (Mar. 24, 2017) https://www.theatlantic.com/technology/archive/2017/03/new-biometrics/520695/.

[83] *Id.* Waddell writes that researchers at the University of North Carolina designed a 3D replica of a person's head by inputting their facial recognizable data into a 3D printer. They reported that the model when animated was so accurate that it tricked "four out of five facial recognition tools they tested."

ine that its decentralized storage and usage protocol may make it vulnerable to hacks and theft by foreign agents, criminal enterprises or individual criminals.[84] In addition to the proprietary nature of facial images, it is important that the technology works accurately. In March of 2017, the U.S. Government Accountability Office stated in testimony before congressional committee that the FBI had not taken previous instruction to improve the accuracy of its facial recognition technology.[85] One unheeded recommendation included the need to ensure that external databases used by the FBI were not including the images of innocent persons.[86] Even more troubling, the facial recognition technology available today consistently finds false positives in its searches and matches of African American persons.[87] In 2012 a study in Florida compared several vendors' software and found that the findings were five to ten percent more likely to fail in searches of African American subjects.[88] Though the National Institute of Standards and Technologies has reported that its regular testing every four years has shown rapid advances, any amount of false positives along the lines of a protected group is a problem with massive implications.[89]

FOURTH AMENDMENT USES AND PROHIBITIONS

Existing case law has consistently held that visual surveillance on its face is not a search per the Fourth Amendment.[90] This line of cases builds on the traditional logic that an object easily observed by the naked eye without a physical intrusion into a person's home does not constitute a search. Taken to its logical end this is appropriate. The alternative would be infeasible, for instance banning police officers from observing their surroundings. This was the standard for some time, following Olmstead v. United States.[91] Therefore, if this standard still applied, live streaming alone via a police body camera may not pose any threat of violating the Fourth Amendment. However, the Court later revisited the issue with the advent of more advanced surveillance technology.[92] In Katz v. United States, the court scrapped Olmstead, holding that the Fourth Amendment does not require that a person's property be invaded upon but that the expectation of privacy is connected to the individual.[93] Therefore, the use of a body worn camera able to live-

[84] *Id.*

[85] *Face Recognition Technology, DOJ and FBI Need to Take Additional Actions to Ensure Privacy and Accuracy*, U.S. Gov't Accountability Off. (Mar. 22, 2017), https://www.gao.gov/products/GAO-17-489T.

[86] *Id.*

[87] Garvie, *supra* note 81.

[88] *Id.*

[89] *Id.*

[90] *Florida v. Riley*, 488 U.S. 445 (1989); *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986); *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (holding that it'd be unreasonable to hold out visual observation as a search, which would "require law enforcement officers to shield their eyes when passing by a home on public thoroughfares").

[91] *Olmstead v. United States,* 277 U.S. 438 (1928) (finding that the wiretapping of a man did not violate the Fourth Amendment because no search and seizure occurred, defining a search to have meant his home was entered; instead the information was collected by the listening ear of a police man) (overturned *by Katz v. United States,* 389 U.S. 347 (1967)).

[92] Robert C. Power, *Technology and the Fourth Amendment: A Proposed Formulation for Visual Searches*, 80 J. of Crim. L. and Criminology. 1, 12 (1989.).

[93] *Katz v. United States*, 389 U.S. 347, 352 (1967) (holding that the wire-tapping of a public phone booth used by the petitioner constituted a search under the Fourth Amendment).

stream a person's image without consent or person-to-police interaction may constitute a search under Katz. As will be discussed below, the addition of a facial recognition technology further complicates this analysis.

The Supreme Court has held that a visual search of the exterior of a home is not a violation of the Fourth Amendment protection against privacy. However the use of technology for an external search has been addressed differently.[94] An increase in the use of technology for law enforcement searches has forced judges to discern when technology may change what a visual search looks like in Fourth Amendment analysis. Namely, in 2001 the Supreme Court held that the use of thermal imaging technology constituted a search of a person's home, even when used from the outdoors.[95] The distinction made by the Court hinged on the use of a particular technology by police officers, rather than the information that the technology collected or how it was collected.[96] I will refer to this first approach to a simple visual search as "The Kyllo Test."

In this case police officers suspected defendant Kyllo of growing marijuana in his Oregon home.[97] Police officers used a thermal imaging device to monitor the heat emanating from the exterior of his home, assuming that this may indicate growing lamps for the marijuana plants.[98] The Court held that the thermal imaging information gleaned about a house was a violation of Kyllo's reasonable expectation of privacy.[99] The Court makes clear that this technology did not penetrate the walls or windows of Kyllo's home and was not a search in the traditional sense, however through the use of technology the police were able to learn information about the interior of a protected place.[100] The Court found that because the technology is not in general public use, Kyllo had a reasonable expectation that thermal technology would not be used in monitoring the thermal footprint of his home.[101] Therefore, the Court held that a warrantless use of technology unavailable to the public will likely constitute a search as its unavailability makes it an unexpected intrusion. The holding states that, "the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment "search," and is presumptively unreasonable without a warrant."[102] This approach rests on the Fourth Amendment standard posited by Justice Harlan in his famous concurrence in Katz. He found that in order for a Fourth Amendment protection to exist, a person must have an actual expectation of privacy, and that expectation must be reasonable as viewed in terms of contemporaneous societal standards.[103] Certainly a person has the right to privacy when in his home. Kyllo takes this standard another step to the use of technology for gleaning information from a home without physical entry.[104] The Court reaches the conclusion that if a form of technology is not widely available, using that technology to penetrate the walls of a protected place constitutes an

94 *See also Florida v. Riley*, 488 U.S. 445, 452 (1989) (holding that aerial photographs of a house and surrounding area isn't a search.)
95 *Kyllo v. United States*, 533 U.S. 27, 35 (2001).
96 *Id.*
97 *Id.*
98 *Id.*
99 *Id.*
100 *Id.*
101 *Id.*
102 *Kyllo*, 533 U.S. at 31-41.
103 *See also Bond v. United States*, 529 U.S. 334, 338 (2000) (holding that a person must exhibit an "actual expectation of privacy")").
104 *Kyllo*, 533 U.S. at 31-41.

unconstitutional search even where entry was never physically established. [105]

Applying the Kyllo Test to streaming live video of a private citizen's face on the street, it is unclear how courts may come down on Fourth Amendment searches. Applying the first requirement of the test, that a person can be easily viewed when on a public street is obvious and it is clear they have no general expectation of privacy. Courts have held that some risk to privacy is assumed when persons subjects themselves to public scrutiny. [106] If courts apply only the first part of the test, the live stream feature of body cameras to facial recognition may not be considered a Fourth Amendment violation. However in using the court's logic in Kyllo, one may argue that the addition of facial recognition technology in real time may constitute a search due to the advanced technology inherent in its use. While passing through an airport may negate the expectation of privacy of identity, when walking down the street the average person does not have the expectation that their identity is being registered in real time. As suggested in Kyllo, the average person does not have access to this technology and therefore would not assume that their neighbors and other passers-by do either. Therefore, as long as the technology remains relatively apart from general consumption, the average citizen may make the argument they have an expectation of privacy in their facial identity.

In looking at the airport caveat to privacy, the concept of public spaces has been generally blurred. If we accept a theory of "private spatialization," in which a location may confer a "sphere" or "zone" of privacy, the next step is to evaluate if and how privacy may exist in public.[107] For instance, if a parking garage has 24-hour surveillance, a person utilizing the garage for parking understands they are being filmed, but they do not expect that the tapes serve any purpose other than the real-time monitoring of potential crime. They may further assume that after a reasonable period the tapes are destroyed if no incident requires their extended retention. However if the tapes are used to monitor and identify an individual who is not committing a crime, it is no longer a legal use of surveillance under the Fourth Amendment. The spatialization of privacy requires that the Fourth Amendment analysis compare the use and context of a search, and properly frame the reasonability of an expectation of privacy in public. Though not explored in this paper, the dichotomy of self-exposure and privacy in online public forums requires a similarly specific analysis.[108] This nuance also applies to facial recognition technology's use in public. The Supreme Court has addressed private spatialization tangentially. The Supreme Court held in 2013 that "the scope of a license – express or implied – is limited not only to a particular area but also to a specific purpose."[109] Though

[105] Ian Hardy, *How Thermal Imaging Tech is About to Become Hot Stuff*, BBC Bus. (Dec. 11, 2015) ("As technology becomes more affordable and subsequently more accessible, courts will be required to look at the Kyllo Rule for the reasonableness of its continuation and make distinctions about how accessible negates an expectation of privacy.").

[106] *See United States v. White*, 401 U.S. 745 (1971) (holding that an undercover informant using a concealed wire did not constitute a search, as the person assumes the risk that his conversant will share the information); *see also California v. Greenwood*, 486 U.S. 35, 40 (1988) (holding that the search of a person's trash once discarded is not a search).

[107] Julie E. Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 U. Chi. L. Rev. 181, 190-92 (2008).

[108] *Id.* at 197-98. ("using the analogy of online presence and the ability to expose herself to certain forums, but also expect differing levels of privacy depending on the forum to explain "networked space.").

[109] *Florida v. Jardines*, 133 S. Ct. 1409, 1416 (2013) (holding that a police officer's use of a sniffing canine on the porch of a person's house was a trespass of their

relying on the traditional concept of a search as a physical intrusion, the Court is maintaining that there is a societal expectation that there is a limit to how far a search may be extended. This is illustrated in the parking garage example. Rather than address the physical, Kyllo distinguishes known technology from unknown, or unavailable technology, drawing the veil of privacy at the borders of public awareness and accessibility. The idea that a person may expose herself to public scrutiny, but not to unknown forms of surveillance, is an important distinction. The Court has held that physical features or characteristics that a person knowingly exposes to the public, including facial and vocal features, are not protected under the Fourth Amendment.[110] Therefore, in combining these standards, courts may hold that body-worn cameras are not a search, but that transmitting images for unexpected facial identification is unconstitutional.

Kyllo distinguishes public visual surveillance from the added use of technology. Academics further suggest that a particular public context may govern whether the use of known technology violates a reasonable expectation of privacy. For instance, the use of a legal facial recognition apparatus often relies on what is termed a "face trap."[111] Practitioners and experts of the technology consider a face trap to be the circumvention of a recognized inability of cameras to align with lighting and the angle of a person's face in certain instances. Therefore, by controlling the conditions of the 'face trap' and manipulating the camera, the ability of the camera to capture an accurate image increases.[112] An example of this is surveillance cameras placed at the top of escalators where people are statistically most likely to be looking while riding. By aligning the camera with the escalator's angle and overhead lighting, it is statistically more likely a usable image will be captured. Applying the above contextualization argument of public settings to technology per Kyllo standards, live streaming of images into a facial recognition software may at times constitute a search. It should be noted, the constant advances in technological innovations require that the Kyllo standard be fluid. Public places are increasingly more "wired" with security technology and this causes the argument for an expectation of privacy to fade proportionately.[113]

The Mosaic Theory

In recent years courts have begun to apply the "Mosaic Theory" to Fourth Amendment challenges of technology and surveillance. This section will describe the underlying reasoning behind the Mosaic Theory and apply it to the use of live-stream facial recognition technology in the context of policing. Distinguished from the Kyllo Test, the Mosaic Theory posits that it is not the context and technology of the search, but the aggregation of its findings that may constitute an unconstitutional search. While the use of a body-worn camera itself may be legal, and possibly even the identification feature of facial

property, though external to the dwelling, as it exceed the reasonable expectations of what a search entails).

110 *United States v. Dionisio*, 410 U.S. 1, 14 (1973) (holding that a person does not have a reasonable expectation of privacy in those physical characteristics that are constantly exposed to the public, such as one's facial characteristics, voice, and handwriting.); *see also United States v. Miller*, 425 U.S. 435 (1976).

111 Woodward, *supra* note 40, at 14. (describing inadequacies of facial recognition technology such as poor lighting or a face being held at an angle that don't allow for an accurate scan).

112 *Id.*

113 Lauren Young, *The Hidden Security Bugs in Architecture That You Never Noticed*, Atlas Obscura (June 24, 2016), https://www.atlasobscura.com/articles/the-hidden-security-bugs-in-architecture-that-you-never-knew-about details (detailing the way in which many public places are built to be advantageous for security and surveillance collection).

recognition technology under the Mosaic Theory, it is the use and storage of the data that creates an illegal search. As previously discussed, if body-worn cameras may transmit images that are searched in real time, the storage of that data is capturing distinct individual movements that aggregate into a broader record of movements. For instance, if a person passes a police officer every Thursday on her way to the doctor, and we are assuming that the officer is scanning her image in a facial recognition database causing a record to be made of each search, there is then too a record of her Thursday trips to the doctor. This type of tracking may constitute a search. Because actual protocol is not available, it is conceivable that if no record is created, and perhaps she is not surveilled in the way the Mosaic Theory posits. This section will ultimately argue that while facial recognition technology as applied to police body-worn cameras even if itself constitutional under the Fourth Amendment, the effect of the data collected may constitute a search under the Mosaic Theory.

The Mosaic Theory was initially posited by the D.C. District Court in U.S. v. Maynard. The Maynard Court held that searches may be analyzed "as a collective sequence of steps rather than as individual steps."[114] This would apply to the accumulation of data, such as making a record of a person's weekly trip to the doctor. The Supreme Court subsequently addressed the issue of aggregate data as a trespass. In Justice Sotomayor's concurrence to Justice Alito's majority opinion in U.S. v. Jones, she coins the aggregation of data a mosaic of data aggregation.[115] The Court's holding in Jones declined to follow an earlier decision that held the use of a radio tracking devices attached to a car was not a search if transmissions were only utilized by police while the car was on public thoroughfares.[116] Instead, Justice Sotomayor argued that the use of a GPS device affixed to Jones' car for the tracking of his movements amounts to a search specifically due to the length of time and sophistication of the data, versus the more remedial technology as was used in Knotts.[117]

Justice Sotomayor further elaborated that the ability of a police officer to observe the movement of a car at any given isolated point is different than the police monitoring where the person travels at all times, potentially in real time.[118] In the lower court, D.C. Circuit Judge Ginsburg held that while a single movement within the period of the car's tracking may be observable to the public, it is unlikely that any individual observing the car in public will observe the entirety of its travels for an extended period, creating a reasonable expectation of privacy in consecutive travels.[119] Therefore, while traveling on public roads is not private information per se, the accumulation of data on an individual gathered by a constant monitor violates the expectation of privacy of that person.[120] The Court went so far as to call the four week tracking of Jones' car as a "dragnet."[121] In dicta, Justice Alito stated that even without the act of trespass, the sum of the data collection may amount to an intrusion on a person's privacy even if the constituent aspects of the search

[114] Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 Mich. L. Rev. 311, 313 (2012) (quoting *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010)).
[115] *United States v. Jones*, 132 S. Ct. 945, 953 (2012) (holding that people have an expectation that their public movements on a street remain private).
[116] *United States v. Knotts*, 460 U.S. 276, 281-82 (1983) (holding that while use of a [GPS] by police was valid when the car was on public roads still made transmissions from within the plaintiff's home a search).
[117] *See United States v. Maynard*, 615 F.3d 544, 568 (D.C. Cir. 2010).
[118] *United States v. Jones*, 132 S. Ct. 945 (2012).
[119] *Maynard*, 615 F.3d at 560.
[120] *United States v. Jones*, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring) (citation omitted).
[121] *Id.* at 412, 409 (citations omitted).

itself do not.[122] Justice Sotomayor's concurrence stated that the accumulation of private information about a person, such as tracking a person for an extended amount of time, will inherently reveal personal and private information such as "familial, political, professional, religious and sexual associations."[123]

In 2014 the Supreme Court seemingly adopted and applied the Mosaic Theory in Riley v. California.[124] Though the theory was not invoked by name, the Court used a similar analysis to come to a conclusion on the aggregation of private data and found that the accumulation determines what will constitute a search. The Court held that the general tenets of the theory apply based on the specific items to be searched incident to an arrest, specifically a cell phone on which large quantities of data are deposited. Justice Roberts stated that police may search a cigarette box in an arrested individual's pocket,[125] however it would be a violation of the Fourth Amendment to search that person's cell phone.[126] The Court's argument rests on the distinction that the amount of private data that a phone may hold about a person will nearly always be incriminating in some way.[127] The opinion states that the "privacies" of a person's life are carried around with him on his cell phone but that makes them no less private or deserving of protection than physical records.[128] Though the Court takes the approach that a case-by-case analysis is necessary when determining whether a cell phone search is proper, it is clear that the Court's approach toward the protection of aggregated material is shifting toward a more mosaic-like understanding. If this approach continues to near the spatialization theory, the Court may bridge the gap from private aspects of the physical world to private nontangible items within the Fourth Amendment context.

Analogizing the data accumulated by facial recognition technology to the use of a GPS device on a car reaches the same conclusion. Though a person may expect to be seen when walking down the street and potentially recognized, his expectation is likely that law enforcement will not identify and record his image. Further, if the technology is applied in this manner, it is wholly unlikely a person expects the cumulative collection of data captured by facial recognition to create a record of his movements. Therefore, courts applying the Mosaic Theory will likely find the use of facial recognition technology of persons in public who are not interacting with the police, to constitute a search.[129] The use of facial recognition technology is further complicated by the fact that under the Mosaic Theory we must distinguish between matters of depth and matters of breadth. The distinction is between large amounts of information on an individual or a small amount of information on many people. With such advanced technology it is feasible that both forms of data collection are

[122] Miriam H. Baer, *Secrecy, Intimacy, and Workable Rules: Justice Sotomayor Stakes Out the Middle Ground in United States v. Jones*, 123 Yale L.J. F. 393, 394–95 (Mar. 24, 2014).
[123] *Jones*, 565 U.S. at 415.
[124] *Riley v. California*, 134 S. Ct. 2473, 2493–94 (2014).
[125] *Id.* at 2483 (citing *United States v. Robinson*, 414 U.S. 218, 234-35 (1973) (distinguishing the Court's holding that the context for a search weighed against the police officer's safety is a case by case analysis and is less compatible with cell phone searches).
[126] *Riley*, 134 S. Ct. at 2493.
[127] *Id.* at 2492.
[128] *Id*. at 2494–95.
[129] *United States v. Skinner*, 690 F.3d 772, 780 (2012) (holding that "situations where police, using otherwise legal methods, so comprehensively track a person's activities that the very comprehensiveness of the tracking is unreasonable for Fourth Amendment purposes").

present in this type of surveillance.[130] Scholars have described this phenomenon as an "aggregation effect," which relies on a massive amount of information about a person or persons to piece together a larger and more broad set of information.[131] Though the public understands law enforcement's ability to conduct limited searches under reasonable conditions, the accumulation of personal data that in essence forms a record of a person's movements outside a criminal investigation would be unreasonable by current standards.[132] Despite developing technology, the public trend has been moving toward an expectation that a person's movements over time are private and considered highly personal.[133]

Because facial recognition technology is still in its infancy it is hard to know how exactly a facial scan and search will be obtained, used, stored and handled. In addition and as previously discussed, regulation of this technology is based on scant law and policy, which exists entirely at the state and municipality level. Therefore, it is not known whether a camera will constantly be filming and identifying or whether it will be used for specific persons or searches. Likely this will vary across departments. As argued above, for police officers to actively scan anyone they encounter on the street without reasonable suspicion or initiating a conversation, will likely be held as a violation of privacy under the Fourth Amendment. However under the Mosaic Theory, such a finding requires broad generalizations about the processing of data and assumes that it will be compiled into a record and accessed at will. It is feasible that the proper use and regulation of facial recognition databases may protect the use of live-stream technology against violations of privacy.

The most obvious counterargument to a violation of the Fourth Amendment found under the Mosaic Theory relies on the Third Party Doctrine. The Third Party Doctrine posits that when a third party maintains information as a result of a business transaction, it can keep the information as long as it is private and not used for another purpose.[134] In order to apply this argument to the discussion of facial recognition technologies, we must assume that the databases are managed by third parties and that the public is put on notice that their images are being collected.[135] At this point in the development of pairing live-stream body cameras with facial recognition technology, there is a two-step process. The first step requires that the video be live-streamed to *somewhere*.[136] As of right now, the

[130] *Id.* at 787. Baer posits that there are two types of data collection: one in which a huge amount of data is collected on one person (such as Jones), and the other in which a lesser amount of data is collected on a large number of people; Baer, *supra* note 122, at 396.

[131] Daniel J. Solove, The Digital Person: Technology and Privacy in the Information Age 44 (2004). In this piece Solove compares the finite pieces of data collected by technology to the pointillism style of a Seurat painting – contributing to a larger picture.

[132] *See Oliver v. United States,* 466 U.S. 170, 177–78 (1984) (citation omitted) (holding that the limit to searches under the Fourth Amendment must be linked to what society "understand[s]" to be the bounds of its privacy).

[133] Hanni Fakhoury, Hanni and & Jennifer Lynch, *EFF Fights Government's Effort to Get Cell Location Records Without a Warrant*, Elec. Frontier Found Deeplinks (Nov. 18, 2014), https://www.eff.org/deeplinks/2014/11/new-eff-brief-explains-why-cell-phone-location-records-are-private-and-government (citing a Pew Research Center study published in 2014 that stated "82% of Americans consider the details of their physical location over time to be sensitive information – more sensitive than their relationship history, religious or political views, or the content of their text messages.").

[134] Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 Mich. L. Rev. 561 (2009).

[135] *Id.*

[136] Brennan Center for Justice. "*Police Body Camera Policies: Retention and Release*, N.Y. Univ. Sch. of L. (Aug. 3, 2016), https://www.brennancenter.org/analysis/police-body-camera-policies-retention-and-release> (last visited on Apr. 30, 2017).

majority of technologies are developing streaming capabilities to the cloud.[137] Assuming this is the case, the images captured are transmitted in real time to a location that may be maintained by the software company.[138] The second step requires that the image be run through the facial recognition database of choice against existing records for a match.[139] Law enforcement maintains their own databases but also pulls in records from external databases.[140] As discussed above, some databases, such as that maintained by the FBI and state departments of motor vehicles, are external parties that require a request by the police department.[141] Matches in the external database will trigger notification to the police department.[142] It is possible protective measures such as warrant requirements may be implemented to further bolster the constitutionality of this type of information sharing. For the Third Party Doctrine to apply, this would require that the database of images is not held by the police department and requires formal requests for access to records. Though not yet decided in connection with live-stream, facial recognition searches, there is analogous precedent in the courts. According to a Fifth Circuit Court of Appeals case decided in 2013, the Third Party Doctrine allows for extended record keeping when a third party retains the information for a business purposes and does not share it with other parties.[143] Specifically, the court held that cell phone records retained by the cellular provider are akin to business records, and as such the cell provider is the possessor of the records with the blessing of the cell phone user.[144] Therefore, the court concluded that it was not a violation of the Fourth Amendment for agents to obtain court orders for records under the Stored Communications Act.[145] Though the case was later overturned on procedural grounds, it laid the groundwork for issues of cellular data under the Fourth Amendment, and for applications of the Third Party Doctrine.[146]

The Third Party Doctrine nearly saves the constitutionality of this type of surveillance. However the court goes on to specify that the Third Party Doctrine does not apply when a

[137] Weise, Karen, *Will a Camera on Every Cop Make Everyone Safer? Taser Thinks So*, Bloomberg Business Week (July 12, 2016) https://www.bloomberg.com/news/articles/2016-07-12/will-a-camera-on-every-cop-make-everyone-safer-taser-thinks-so.

[138] Also possible that it could be the police department, but as previously stated the expense of maintaining footage is exorbitant

[139] Garvie, *supra* note 76.

[140] *Id.*

[141] Karen Weise, *Will a Camera on Every Cop Make Everyone Safer? Taser Thinks So*, Bloomberg Business Week (July 12, 2016), https://www.bloomberg.com/news/articles/2016-07-12/will-a-camera-on-every-cop-make-everyone-safer-taser-thinks-so (currently some third parties provide storage platforms, albeit with a hefty price tag. For instance, vendors such as Taser utilize a platform called Evidence.com, to store the information collected by body worn cameras).

[142] This paper does not consider the circumstances by which a warrant would be necessary for these records, and assumes that based on agreements with the database holder and the level of probable cause necessary, it will vary by circumstance. For instance, the *New York Times* reported in "Downside of Police Body Cameras: Your Arrest Hits YouTube," previously cited, that one of the bigger issues with footage retention is the cost and availability of subpoenaed records – the ACLU tried to get footage from the Sarasota PD and they claimed it'd cost $18,000 for 84 hours of film

[143] *See In Re: Application of the United States of America for Historical Cell Site Data*, No.724 F.3d 600 at 15 (5th Cir. 2013) (overturned on procedural grounds) (holding that "where a third party collects information in the first instance for its own purposes," the government can later obtain that information for law enforcement purposes if a subpoena or appropriate order is used); *See also Oregon Prescription Drug Monitoring Program v. DEA*, 998 F. Supp. 2d 957 (D. Ore. 2014) (holding that a patient's prescription records are stored by the store, a third party, when held in a database).

[144] *Id.*

[145] *Id.*

[146] Somini Sengupta, *Warrantless Cellphone Tracking is Upheld*, N.Y. Times (Jul. 30, 2013), http://www.nytimes.com/2013/07/31/technology/warrantless-cell-phone-tracking-is-upheld.html.

person is not knowingly giving that information to a third party.[147] Therefore the issue remains as to whether a person may be expected to retain privacy of their face against identification and tracking when in public. The Sixth Circuit has held that when a person is engaged with a business, for instance a financial institution, those records are the property of the bank as a party to the transaction and are obtainable by a third party. (CITE) This is distinguished by a situation such as letter carried by the postman; though the post office has temporary possession of the letter, the contents of the letter only concern the sender and the receiver and the post office is not a party to the transaction.[148] Applying this standard, a court may find that an individual having a conversation with a police officer may be subject to legal facial recognition scanning, whereas a person walking down the street alone and never encountering the officer may have a reasonable expectation of privacy.[149] Courts have not addressed whether an interaction with a police officer makes the expectation of privacy against a facial recognition search constitutional. However, facial recognition technology has already been employed in stationary surveillance cameras in some cities.[150] Applying the logic in Kyllo, if the technology becomes ubiquitous in public places and a person's ability to walk down the street anonymously is no longer a reasonable expectation, it is foreseeable that the Third Party Doctrine could save the constitutionality of the live-stream facial recognition and storage of that information. Another approach may be that used by Moscow's law enforcement, which pairs facial recognition technology with the100,000 public CCTV cameras around the city.[151] However Moscow scans only databases that include criminals and missing persons, unlike the civilian records searched by FBI and local law enforcement in the United States.[152] Obviously, it is hard to know whether additional data is mined for the Russian program, but if it does in fact utilize only criminal databases, it may lessen the impact of such a search and provide a model to replicate.

RECOMMENDATIONS

The practical and important uses of facial recognition technology are obvious. The ability to link an officer's position in a high risk situation with a live feed to a secure location would be an incredible benefit to public and officer safety, such as an active shooter or hostage situations. Further, uses such as the ability to locate missing persons and children will bolster the legitimate use of a constant stream-

147 *In Re: Application of the United States of America for Historical Cell Site Data*, 724 F.3d 600 (2013) (citing *Reporters Comm. for Freedom of Press v. Am. Tel. & Tel. Co.*, 593 F.2d 1030, 1043 (D.C. Cir. 1978)); distinguished by *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984) (holding that "when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities.").

148 *See United States v. Warshak,* 631 F.3d 266, 288 (6th Cir. 2010) (distinguishing an "intermediary" between a party to the transaction).

149 *See also United States v. Forrester,* 512 F.3d 500, 511 (9th Cir. 2008); *United States v. Phibbs*, 999 F.2d 1053 (6th Cir. 1993) (holding that the manner in which information is obtained by law enforcement informs whether or not it was obtained by illegal search).

150 Karen Weise, *Will a Camera on Every Cop Make Everyone Safer? Taser Thinks So*, Bloomberg Business Week, (July 12, 2016), https://www.bloomberg.com/news/articles/2016-07-12/will-a-camera-on-every-cop-make-everyone-safer-taser-thinks-so (this report details the program used by the Los Angeles Police Department as the only department actively using this technology. However, the authors further hint to the use of this technology by undisclosed departments, evidenced by contracts made with certain manufacturers of the technology).

151 *Id.*

152 *Id.*

ing feature. However as discussed above there are multiple hurdles to the constitutional use of this technology. This section will briefly list some recommendations for the proper and legal use of live-stream facial recognition technology paired with police body cameras.

First and foremost, policies need to be in place governing the use of this technology. There is a worrying lack of regulation on the use of body cameras alone, before even adding the ability to live-stream the footage. This must be remedied before the technology is advanced any further. The need to protect citizens' rights is as important as keeping officers safe and accountable, and to allow the technology to exceed its value is extremely dangerous. While it appears unlikely that a uniform structure of regulation will occur nationally, state laws will provide ample notice to police departments on rights of citizens captured by the body-worn cameras. Further, while federal regulation may be unlikely, there is little chance that federal courts will not rule on matters of Fourth Amendment rights as they apply to body cameras. Therefore, courts will need to begin work on a legal standard that can help to create a more uniform set of guidelines as a way to inform state and local policies on developing surveillance technology.

Second, law enforcement and technology providers must come together to determine if live-streamed images will be catalogued, where they will be held, and the proper procedure for accessing the data. Similar to the way in which the FBI has Memorandums of Understanding with state and local partners around the sharing of databases, law enforcement should be transparent about the use of shared databases.[153] In addition, private companies developing this technology may be critical in informing the public as to the capabilities of the technology, as well as the contracts it creates with law enforcement entities. As discussed above, the accumulation of data secured by body-worn cameras may in theory begin to construct a digital footprint of anyone whose image is captured by the cameras. To fully protect rights according to the Mosaic Theory, data must be stored in such a way that law enforcement cannot use or access it to violate privacy. Further, it must be protected against unlicensed disclosure.

Lastly, there must be notice to the public that their images may be captured and identified in public. The notice is a requisite to any security against unconstitutionality conferred by the Third Party Doctrine. Further, notice is a necessary requirement to overcoming the reasonable expectation as set out by Katz. This paper has argued the reasons for each of the above recommendations, and now argues further that each of these recommendations provides extra protection for both law enforcement and the public. Through regulation and third party involvement there is added accountability and security for all parties. Further, the notice given to the public not only protects their rights, but adds additional deterrence against potential criminal acts.

CONCLUSION

As discussed above, law enforcement is relying increasingly more on technology. There are clear benefits and needs for policing to keep up with technological developments and to utilize all the tools available. However as with anything, it is necessary to implement regulations and policy on the use of such powerful tools. This is especially true with the unique capabilities of facial recognition technology.

[153] *Id.*

As argued by this paper, facial recognition technology is a critical component of our law enforcement and security apparatus in the United States. But its use by law enforcement in a real time, public setting may also constitute a search. Because public places are less likely to afford an expectation of privacy, courts must look to the technology itself. In looking to the technology, courts must discern the ways in which collecting any private information requires the storage and continued use by law enforcement. It is likely that collecting such myriad information on individual persons will constitute a record of that person and therefore result in a search.

Lastly, law enforcement has the duty to protect this information once collected. As has been recently disclosed by the United States government, most American citizens can be found in at least one of the numerous databases held by government entities. Even further, most of those entries are compiled with non-criminal records. In the context of a criminal search the use of private citizen's information from sources such as drivers license databases highlights the necessity of protecting non-criminal records against incidental searches without proper protective measures.

About the AUTHOR

Kelly Blount is a New Jersey licensed attorney, focusing on national security and criminal law. As a law student, Ms. Blount was a 2016 Rutgers Homeland Security Fellow and Research Assistant to the Rutgers Institute for Emergency Preparedness and Homeland Security from 2016 to 2017. In this capacity, Ms. Blount served as a researcher on an expert team engaged with the Brussels Police Department to adopt progressive strategies in police-community relations. In addition, Ms. Blount was a student intern for the Department of Homeland Security Immigration and Customs Enforcement, as well as the Department of Justice Executive Office for Immigration Review, in New York City. Prior to law school Ms. Blount served in several public policy offices, including in the role of Constituent Liaison for Immigrant and Foreign Affairs in the United States Senate. Ms. Blount is a graduate of Rutgers University School of Law and holds a Masters Degree in Middle East Studies from the City University of New York.

COPYRIGHT NOTICE

MISSION STATEMENT

The *Criminal Law Practitioner*, formerly the *Criminal Law Brief*, is dedicated to providing practice-oriented articles on highly litigated and prevalent topics in criminal justice. Our publication identifies key issues and recent developments in criminal law and also provides guidance on how to address these issues in practice. The *Criminal Law Practitioner*, published biannually, promotes the scholarship of criminal practitioners and current students at American University, Washington College of Law.

SUBMISSION GUIDELINES

The *Criminal Law Practitioner* is published for all busy practitioners in the field, including but not limited to: prosecutors, public defenders, judges, private criminal law attorneys, and lawmakers. Successful articles translate pressing issues in criminal law into practical guidance. To submit an article, please refer to our website (www.crimlawpractitioner.com) for our style guide and topic proposal form and send the final version to crimlawpractitioner@gmail.com with "Article Submission" as the subject of your email.

SUBSCRIPTION INFORMATION

If you are interested in subscribing to the *Criminal Law Practitioner*, please send an email to crimlawpractitioner@gmail.com with "Subscribe" as the subject and include your name and mailing address. Copies are complementary, and once on our subscription list, we will notify you as soon as the next publication is available. If you prefer to receive an electronic copy, one may be provided if you include your email address.

NOTES