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The Importance of an Expansive Deference to Miller v. Alabama

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THE IMPORTANCE OF AN EXPANSIVE DEFERENCE TO *MILLER V. ALABAMA*

ALEXANDER L. NOSTRO*

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I. INTRODUCTION

When Cristian Fernandez was two-years-old, he was found naked and alone on a dark Miami street, while his grandmother was "holed up with cocaine in a messy motel room."[1] When Cristian was twelve-years-old, school officials sent him to have an eye injury examined, and police visited his home to investigate claims that his stepfather had caused the injuries.[2] When the officers arrived, they found the stepfather dead from a self-inflicted gunshot wound.[3] The Fernandez family later moved to Jacksonville, where Cristian excelled in his sixth grade classes.[4] Just months later, in March 2011, Cristian was accused of killing his two-year-old brother after he slammed his brother's head against a bookshelf.[5] In

1. *See* Tamara Lush, *Police: Florida Teen Killed 2-Year-Old Brother*, USA TODAY (Sept. 16, 2012) (noting that the boy's fourteen-year-old mother was absent).

2. *See* Jeff Brumley, *Father, Former Neighbors Stunned by Murder Charge Against Cristian Fernandez*, FLA. TIMES-UNION (June 11, 2011) (conveying that Cristian had told officers that his step-father punched him in the face).

3. *See id.* (reporting that the step-father shot and killed himself in front of his family to avoid arrest for child abuse).

4. *See id.* (noting that neighbors saw Cristian by himself, shortly after the stepfather's death, removing all of the family's belongings from their apartment in white garbage bags); *see also* Lush, *supra* note 1 (remarking that Cristian had straight As in the sixth grade).

5. *See* Bridget Murphy, *Cristian Fernandez Case: As Someone Surfed Internet, Tot's Life Was Slipping Away*, FLA. TIMES-UNION (Sept. 14, 2012) (explaining that

December 2011, Cristian was charged as an adult with first-degree murder and was facing a life sentence in prison.[6]

The Supreme Court's recent decision in *Miller v. Alabama* precludes Cristian from receiving a mandatory life-without-parole (LWOP) sentence, but the particulars of his case illustrate the importance of the *Miller* holding and the range of consequences involved in the different interpretations of the decision.[7] In *Miller*, the Court held that judges must consider a juvenile offender's age, background, and the circumstances of his crime instead of imposing mandatory LWOP sentences.[8] If Cristian's background is not considered, as *Miller* requires in mandatory LWOP cases, then the judge or jury will not have explored the penological justifications for his sentence and will fail to draw from the background of an offender's upbringing that may have heavily impacted the youth's culpability.[9]

This Comment argues that the Supreme Court's decision in *Miller v. Alabama* applies to juvenile sentencing in all states, not just those that previously had mandatory LWOP sentencing schemes for juveniles. Part II of this Comment examines the Court's recent forays into the juvenile justice system and will contextualize the emerging analyses on the relationship between adolescent development and criminal culpability.[10]

Cristian was accused of slamming his brother's head into a bookshelf when their mother was not home).

6. *See* David Hunt, *Jacksonville 12-Year-Old Charged With First-Degree Murder of Brother*, FLA. TIMES-UNION (June 2, 2011) (noting that Cristian is the youngest person charged with a homicide in Jacksonville's history).

7. *See* Miller v. Alabama, 132 S. Ct. 2455, 2458 (2012) (holding that the Eighth Amendment forbids a sentencing scheme that mandatorily sentences a juvenile to life-without-parole); *see also How Should the Law Respond to Those Who Kill Before They Are Teenagers?*, SEN'G L. & POL'Y (Sept. 17, 2012, 8:47 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2012/09/how-should-the-law-respond-to-those-who-kill-before-they-are-teenagers.html (noting that although the case's prosecutor said she would seek a plea agreement and not pursue a life sentence, if no deal is made, Cristian could face a mandatory life sentence under the current structure).

8. *See Miller*, 132 S. Ct. at 2469 (identifying as noteworthy the abuse one defendant suffered from his step-father and the defendant's subsequent multiple suicide attempts).

9. *See* Daugherty v. State, 96 So. 3d 1076, 1079 (Fla. Dist. Ct. App. 2012) (asserting that even though the juvenile offender's LWOP sentence was not mandatory, the circumstances of his crime and his personal background should be examined in accordance with *Miller*). In February of 2013, Cristian Fernandez accepted a plea agreement and pled guilty as a juvenile to manslaughter and aggravated battery. *See also* Jim Schoettler, *Cristian Fernandez Pleads Guilty to Manslaughter, Gets Juvenile Sanctions*, FLA. TIMES-UNION (Feb. 8, 2013).

10. *See infra* Part II (recounting the basis for the recent Supreme Court decisions

Part III argues that if courts do not interpret *Miller* expansively, juvenile LWOP punishments will still be possible under various sentencing schemes.[11] Part III uses an Eighth Amendment analysis to determine whether a strict interpretation of *Miller* would result in unconstitutional punishments.[12] Under this analysis, a national consensus and Supreme Court precedent require a broad interpretation of *Miller* to apply to all juvenile LWOP sentences.[13] Part IV recommends that states end their practice of sentencing juvenile offenders to multiple mandatory sentences in which the term of years approaches the juvenile's life expectancy.[14] Part V concludes that any punishment that is functionally a life sentence imposed mandatorily on a juvenile offender is a violation of *Miller*.[15]

II. BACKGROUND

A. Overview of Recent Developments in Juvenile Sentencing

The 2002 case of *Atkins v. Virginia* provided a basis for future decisions involving the culpability of juveniles.[16] In *Atkins*, the Court found executions of mentally retarded offenders to be a violation of the Eighth Amendment.[17] The Court reached its decision after assessing whether the execution of mentally retarded offenders conforms with the evolving standards of decency relating to the context of the punishment.[18] In

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that have shaped the present understanding of juvenile culpability).

11. *See infra* Part III (demonstrating the impact a limited interpretation of *Miller* will have on actual practices that mandate LWOP sentences for juveniles).

12. *See infra* Part III (assessing the importance of the main principles used by the Court in its recent decisions on juvenile sentencing).

13. *See infra* Part III (reasoning that the Court's penological justifications outweigh any specific and narrow interpretation of the *Miller* holding).

14. *See infra* Part IV (arguing that this practice fails to consider *Miller*'s prohibition against disproportionate sentences that do not allow the offenders an opportunity at life outside prison).

15. *See infra* Part V (recounting the ways in which a mandatorily-imposed functional-life sentence violates the principles upon which *Miller* was based).

16. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (prohibiting less culpable offenders from receiving excessive punishments).

17. *See id.* at 311-12 (explaining that standards of decency had evolved toward a consensus that such a punishment was excessive).

18. *See id.* (describing the process of assessing the objective indicia of society to satisfy the evolving standards of decency test); *see also* Juvenile Justice Ctr., Am. Bar Ass'n, *Evolving Standards of Decency*, Jan. 2004, http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_EvolvingStandards.authcheckdam.pdf (synthesizing the framework necessary to test whether the standards of decency have sufficiently

looking at the national consensus concerning the punishment of mentally retarded criminals, the Court noted that there was a widespread sentiment that such offenders are categorically less culpable than the average criminal offender.[19] The majority in *Atkins* also noted that defendants with reduced capacity often face certain challenges with the judicial process.[20]

The Court relied on similar arguments when deciding the 2005 case *Roper v. Simmons*, which followed a logic derived from *Trop v. Dulles*.[21] In 1958, the *Trop* majority outlined the importance of using an Eighth Amendment analysis to assess punishment against the standards of a civilized society.[22] In *Roper*, the Court held that the death penalty could not be imposed on offenders who were minors when they committed their crime.[23] The Court previously ruled that the Eighth Amendment prohibited the imposition of the death penalty on offenders younger than sixteen years old, after it found that the standards of decency had evolved to reject such a punishment.[24] In *Roper*, the majority argued that a national consensus developed, favoring greater consideration for the mental capacity of juvenile offenders.[25] In reaching its decision, the Court contemplated the merits of such a punishment under the Eighth Amendment.[26] In measuring whether the standards of decency had evolved, the Court looked to both

evolved).

19. *See Atkins*, 536 U.S. at 314-15 (deriving this position from the number of states that had enacted legislation exempting mentally retarded offenders from the death penalty).

20. *See id.* at 320 (explaining that a mentally retarded defendant could have difficulty giving assistance to her legal counsel and may be more likely to confess falsely).

21. *See* Roper v. Simmons, 543 U.S. 551, 561 (2005) (reaching its decision to exempt juveniles from the death penalty after using the *Trop* test to find the penalty unconstitutional for minors).

22. *See* Trop v. Dulles, 356 U.S. 86, 100 (1958) (characterizing the Eighth Amendment as requiring flexibility for societal standards).

23. *See Roper*, 543 U.S. at 558, 560 (holding that the imposition of the death penalty on juveniles violates the Eighth Amendment).

24. *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 829 (1988) (noting the standards of decency arose from the fact that, of states that specified a minimum age for the death penalty, each of those states set the minimum age at sixteen).

25. *See Roper*, 543 U.S. at 564-65 (devising a national consensus against the juvenile death penalty because only three states had executed a juvenile offender in the previous ten years).

26. *See id.* at 560 (explaining an assessment of the Eighth Amendment must focus on the evolving standards of decency test articulated in Trop v. Dulles, 356 U.S. 86 (1958)).

legislative enactments and state practices.[27] The Court took various characteristics of youth into account as well, explaining that because juveniles are so susceptible to negative influences in their surroundings, their diminished culpability should be factored into their sentencing.[28] The Court distinguished juvenile sentencing from adult sentencing by factoring in the greater likelihood that a minor's character deficiencies could be reformed.[29]

In *Graham v. Florida*, the Court held that juveniles convicted of non-homicidal crimes could not receive an LWOP sentence, thereby furthering the approach that the Eighth Amendment demands consideration of the diminished culpability of juvenile offenders.[30] The Court arrived at this decision by first determining whether there was a national consensus against the sentencing practice; it also used its own judgment to assess whether the punishment was constitutional.[31] The Court's analysis of the standards of decency focused on the rareness of instances in which a juvenile was sentenced to LWOP for a non-homicidal crime.[32] The Court then turned to its independent judgment to evaluate the diminished culpability of juvenile offenders.[33] The majority settled on a proportionality analysis, assessing the harshness of the penalty, as well as measuring the sentences imposed for other criminals in other jurisdictions.[34] The Court included the offender's age in this analysis.[35]

27. *See id.* at 565 (framing the national consensus based on the fact that only three states had executed a juvenile offender in the previous ten years).

28. *See id.* at 569-70 (Brennan, J., dissenting) (citing Stanford v. Kentucky, 492 U.S. 361, 395 (1989)) (distinguishing adult culpability from that of juveniles because the Court argues that the difficult environments of juveniles may give them a greater claim than adults to be forgiven).

29. *See id.* at 570 (asserting that it would be a moral error to equate the failings of a minor with those of an adult).

30. *See* Graham v. Florida, 130 S. Ct. 2011, 2016 (2010) (reasoning that a juvenile offender who did not kill has a twice diminished moral culpability compared to an adult murderer because of the offender's age and the nature of the crime).

31. *See id.* at 2015 (noting that such a two-prong analysis is proper for all Eighth Amendment cases involving categorical rules).

32. *See id.* at 2024 (explaining that a national consensus against sentencing juveniles to LWOP for non-homicidal crimes existed because only eleven states had done so).

33. *See id.* at 2026 (asserting that the Court had the right and responsibility to interpret the Eighth Amendment independently).

34. *See* Harmelin v. Michigan, 501 U.S. 957, 1005 (1991) (describing the test as examining the nature of the offense and the characteristics of the offender).

35. *See Graham*, 130 S. Ct. at 2031 (explaining that a failure to consider the defendant's youth distorts the proportionality analysis).

Yet, because the Court's decision was also aimed at eradicating certain prejudices and difficulties juveniles face in the adult court system, the Court determined that a categorical rule exempting juvenile offenders from a certain punishment would avoid the risk that a court would incorrectly find a juvenile to be "sufficiently culpable."[36] The risk that a juvenile's culpability would not be properly considered, combined with the inherent severity of an LWOP sentence for a juvenile offender, makes such a sentence "cruel and unusual punishment."[37] The Court's use of a categorical ban on a specific punishment to distinguish juveniles from adults marked the first time the Court excluded a class of offenders from a non-capital punishment.[38] The Court's further shift towards distinguishing the culpability of a juvenile offender from that of an adult represented the Court's increasing interest in incorporating psychological differences between the two classes into constitutional analyses.[39]

B. Miller v. Alabama

On June 25, 2012, the Supreme Court announced its decision in *Miller v. Alabama*, holding that juvenile offenders cannot be sentenced to mandatory life imprisonment without parole.[40] The decision was based on a national consensus representing an evolving standard of decency, notwithstanding the fact that the majority of states enforced a mandatory LWOP term for juveniles convicted as adults for murder.[41] The Court was careful to distinguish its analytical framework here from that in *Roper* and *Graham* by pointing out that this decision was not a categorical ban on juvenile

36. *Compare Graham*, 130 S. Ct. at 2032 (discussing the difficulties juveniles have in working with their lawyers, based on a mistrust of the institutional actors in the system), *with* Kristin Henning, *Juvenile Justice After* Graham v. Florida: *Keeping Due Process, Autonomy, and Paternalism in Balance*, 38 WASH. U. J. L. & POL'Y 17, 49 (2012) (explaining that deficiencies in the attorney-child relationship can be traced to inadequate lawyering and limited resources, and not only immaturity).

37. *See Graham*, 130 S. Ct. at 2028-30 (characterizing the longer LWOP sentences juveniles face as unconstitutional because these sentences will not satisfy the penological goals).

38. *See id.* at 2046 (Thomas, J., dissenting) (noting that such a class exemption had only been employed for death penalty cases).

39. *See id.* at 2026 (citing *Roper* as precedent for the less-developed juvenile mind to correlate to a diminished level of criminal culpability).

40. *See* Miller v. Alabama, 132 S. Ct. 2455, 2458 (2012) (contending that *Graham* did not go far enough in distinguishing youth and adult crimes).

41. *See id.* at 2471 (noting that the *Graham* holding was sufficient to warrant this decision, and that *Miller* was different from others where legislative enactments suggested a national consensus).

LWOP.[42] Whereas the Court rested on its own judgment in the previous juvenile culpability cases, in *Miller* it heavily relied on its own precedent.[43] In a consolidated decision, the Court in *Miller* considered mandatory LWOP sentences imposed on Kuntrell Jackson and Evan Miller.[44] Jackson, then fourteen-years-old, took part in an armed robbery of a video store in which another boy shot and killed a store clerk.[45] An Arkansas prosecutor charged Jackson as an adult with capital felony murder and aggravated robbery, and a jury convicted him of both charges.[46] In *Miller*, Miller and a friend drank alcohol and smoked marijuana with a neighbor before the boys stole money from the neighbor's wallet after the neighbor passed out.[47] The neighbor awoke and grabbed Miller by the throat, but Miller's friend was able to free him.[48] Miller then grabbed a baseball bat and beat the neighbor repeatedly with it before the two boys lit the neighbor's trailer home on fire.[49] The Alabama Court of Criminal Appeals, citing Miller's "mental maturity," affirmed the transfer of the case to adult court where Miller was convicted of murder in the course of arson, a crime carrying a mandatory minimum punishment of life in prison.[50]

Just as the Court had done in *Roper* and *Graham*, the majority in *Miller* articulated an evolving standard of decency by referencing a national consensus.[51] The Court then turned to precedent, looking at cases in which culpability correlated with the severity of a penalty and cases prohibiting the mandatory imposition of the death penalty.[52] The *Miller* holding,

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42. *See id.* (explaining that this holding only required courts to follow a certain process rather than strictly forbidding a punishment for a specific class).

43. *See id.* (differentiating the *Miller* analysis from that used in *Roper* and *Graham* because of an emphasis on the youthful characteristics articulated in preceding cases).

44. *See id.* at 2461-63 (describing the extent and makeup of the punishments in each case).

45. *See id.* at 2461 (noting that it was not until Jackson was en route to the store that he learned another boy was carrying a sawed-off shotgun).

46. *See id.* (noting that the mandatory minimum punishment for the capital felony murder charge was LWOP).

47. *See id.* at 2462 (noting that Miller was a regular user of drugs and alcohol and had attempted suicide on four occasions).

48. *See id.* (describing how the friend used a bat to free Miller from the chokehold).

49. *See id.* (stating the neighbor died from his injuries and smoke inhalation).

50. *Id.* at 2462-63.

51. *See id.* at 2470-71 (arguing that even though twenty-nine jurisdictions required mandatory LWOP terms for juveniles convicted of murder as an adult, when given the choice, sentencing officials rarely imposed the penalty).

52. *See id.* at 2463-64 (contending that the confluence of these two strands of precedent structured the justification for a ban of mandatory juvenile LWOP).

which prohibited mandatory juvenile LWOP sentences, served as an extension of the recent Supreme Court decisions that distinguished the diminished culpability of juveniles to categorically exempt minors from certain punishments.[53] In going further than the *Roper* and *Graham* decisions to prohibit all mandatory sentencing schemes that punish juveniles with LWOP sentences, the majority in *Miller* focused on the psychological features of adolescence and importance of closely examining the circumstances of a juvenile offender's crime.[54]

The *Miller* Court's focus on the disproportionate nature of juvenile sentencing in adult courts served as the foundation of its Eighth Amendment argument.[55] The *Miller* Court cited data provided by the Human Rights Watch showing that, of the sixteen states that required discretion when sentencing juveniles to LWOP, the average state had sentenced only seventeen minors to life without parole.[56] The Court singled out mandatory LWOP sentences because of the disproportionate nature of mandatory sentences that do not consider an offender's legitimate culpability and merely extend to the strict definition of the crime.[57] Yet where *Graham* categorically prohibited the imposition of a specific punishment on juveniles, *Miller* only requires that courts first consider the offender's youth and personal circumstances before sentencing.[58] This is based on the Court's recent conclusions that children should be distinguished from adults for the purpose of sentencing and should, thus, be exempted from the most severe punishments in most cases.[59]

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53. *See* Roper v. Simmons, 543 U.S. 551, 568 (2005) (holding that the sentencing of juveniles to the death penalty was unconstitutional); *see also* Graham v. Florida, 130 S. Ct. 2011 (2010) (holding that juveniles could not be sentenced to LWOP for non-homicide crimes).

54. *See Miller*, 132 S. Ct. at 2468 (asserting that mandatory sentences for juveniles fail to consider the offender's age, and factors associated with that age, such as immaturity and failure to appreciate risks and consequences).

55. *See id.* at 2458 (holding that a failure to consider a juvenile offender's youth would deprive the sentencing official of the opportunity to consider whether the sentence is proportional to the offender's culpability).

56. *See State Distribution of Youth Offenders Serving Juvenile Life Without Parole (JLWOP)*, HUMAN RIGHTS WATCH (Oct. 2, 2009), http://www.hrw.org/news/2009/10/02/state-distribution-juvenile-offenders-serving-juvenile-life-without-parole (demonstrating that courts were not especially willing to lock up juveniles for life in discretionary sentencing systems).

57. *See Miller*, 132 S. Ct. at 2466 (noting that the likelihood of imposing a disproportionate punishment is higher when youth is not considered).

58. *See id.* at 2471 (holding that the sentencing official must follow a certain process before imposing an LWOP sentence on juvenile offenders).

59. *See id.* at 2464 (recounting *Roper*'s reliance on the adolescent's lack of

C. The Aftermath of Miller

It is unclear how the states will apply and interpret the *Miller* decision.[60] Among the main issues that states must resolve is whether all situations in which a juvenile is mandatorily sentenced to life can stand under *Miller* and whether non-traditional life sentences derived from multiple convictions can be upheld under *Miller*.[61] Though the Court did not clearly establish a tangible measurement to use when determining whether a lengthy sentence can be considered a life sentence, *Miller* has encouraged many to ask whether a term that approaches life can be classified as a life sentence.[62]

1. A Narrow Interpretation of Miller *Will Continue to Allow the Mandatory Imposition of Life-Without-Parole Sentences on Juveniles as Long as the Punishment Is Portrayed in a Quantifiable Set of Years.*

Sentencing schemes that compound separate mandatory punishments to create a functional-LWOP sentence could also bypass the *Miller* holding.[63] In the immediate aftermath of the *Miller* decision, the Sixth Circuit held that an eighty-nine-year sentence created from multiple convictions was not the same as a life sentence for purposes of requiring consideration of a juvenile offender's age and mitigating factors of youth.[64] In reaching its decision, the Circuit prioritized the *Miller* Court's focus on single-conviction sentencing practices to conclude that the Court did not intend for the punishment to apply to all forms of LWOP sentences.[65]

In *State v. Solis-Diaz*, a Washington teenager was convicted of several

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maturity, vulnerability to outside forces, and "less-fixed" personal character).

60. *See* Erwin Chemerinsky, *Chemerinsky: Juvenile Life-Without-Parole Case Means Courts Must Look at Mandatory Sentences*, ABA JOURNAL (Aug. 8, 2012, 8:30 AM), http://www.abajournal.com/news/article/chemerinsky_(examining whether the *Miller* decision was meant merely to implement a new procedural rule).

61. *E.g.*, Walle v. State, 99 So. 3d 967, 971 (Fla. Dist. Ct. App. 2012) (reasoning that *Miller* should not apply to cases that do not involve an LWOP single sentence).

62. *See* Maggie Lee & Oliver Ortega, *Juvenile Offenders in Limbo under Outdated State Laws*, JUV. JUST. INFO. EXCHANGE (Sept. 25, 2012), http://jjie.org/juvenile-offenders-limbo-under-outdated-state-laws/94610 (explaining the situations that can arise in which a lengthy-sentence forms from a combination of several counts warranting mandatory punishments).

63. *E.g.*, *Walle*, 99 So. 3d at 973 (holding that the compound ninety-two year sentence imposed on a teenage offender was not a violation of *Graham* or *Miller*).

64. *See* Bunch v. Smith, 685 F.3d 546, 553 (6th Cir. 2012) (regarding consecutive fixed-term sentences as being outside the scope of the *Miller* decision).

65. *See id.* (assessing the *Graham* Court's national consensus analysis as narrowly interpreting the *Roper* decision).

counts tracing to a shooting that did not kill or injure anyone, yet his sentence totaled more than ninety-two years.[66] Although, before *Miller*, Washington was one of the states that mandated LWOP sentences for first-degree murder, it is conceivable that a punishment resembling that in *Solis-Diaz* could occur in other states.[67] In a recent Florida case, *Walle v. State*, a defendant was sentenced to a total of ninety-two years in prison after being convicted of eighteen offenses he committed as a thirteen-year-old.[68] A Florida appeals court declined to extend *Graham* and *Miller* to overturn this defendant's sentence because that court believed that the Supreme Court was not referring to sentences derived from several separate convictions, and the multi-jurisdictional nature of this compounded sentence distinguished it from *Graham* and *Miller*.[69]

2. If States Do Not Give Proper Deference to Miller, *States Will Seek to Inhibit* Miller*'s Individualized Sentencing Requirement.*

Courts have considered the extent to which *Miller* requires individualized hearings that consider the juvenile offender's age and accompanying circumstances in two recent cases.[70] In *People v. Caballero*, the California Supreme Court applied the reasoning employed in *Graham* and *Miller* to overturn a 110-year sentence.[71] Because the lengthy sentence assigned to the juvenile offender in *Caballero* was not mandatorily-imposed, *Miller* did not strictly require the court to provide the offender with an opportunity for an eventual parole hearing.[72] California did not

66. *See* State v. Solis-Diaz, No. 37120-1-II, 2009 WL 3261249, at *2-3 (Wash. Ct. App. Oct. 13, 2009) (conveying that the defendant's ninety-two year sentence was derived from six counts of first degree assault, as well charges for drive-by shooting and unlawful possession of a firearm).

67. *See* Brief of Respondent, Miller v. Alabama, 132 S. Ct. 2455 (2012) (No. 10-9646), 2012 WL 588454 at *18 (including Washington in its recitation of states that permitted such a punishment).

68. *See Walle*, 99 So. 3d at 968 (noting that the punishments consisted of sentences imposed by different judges from different jurisdictions for some of the crimes).

69. *See id.* at 971 (holding that the court was unable to expand beyond the *Graham* court's holding which applied solely to a single-sentence).

70. *See* Daugherty v. State, 96 So. 3d 1076, 1079 (Fla. Dist. Ct. App. 2012) (proclaiming that under *Miller* a juvenile offender's age and personal circumstances should be considered even in cases that were not mandatory LWOP); People v. Caballero, 282 P.3d 291, 295 (Cal. 2012) (framing a 110-year sentence as a functional life sentence).

71. *See Caballero*, 282 P.3d at 295 (holding that a juvenile could not be punished with what amounted to a mandatory de-facto life sentence).

72. *See id.* at 293 (explaining that the 110-year sentence was effectively mandatory because it consisted of five separately-mandated sentences deriving from each count in

previously sanction mandatory LWOP for juvenile offenders, as the state allowed such a sentence but strictly on a discretionary basis.[73]

In reversing a juvenile LWOP sentence that was imposed discretionally, a Florida appeals court implemented *Miller*'s reasoning that children should be examined differently and that the attributes of youth should be scrutinized at sentencing.[74] *Daugherty* represents a significant extension of *Miller* because it applies *Miller*'s consideration of the mitigating factors of youth to an LWOP sentence that was nonetheless imposed even after the trial court noted the juvenile offender's background.[75]

In *People v. Hoffman*, the California Court of Appeal's Fifth District wrote in an unpublished opinion that *Miller* expands the need to consider the chief factors of adolescence, even though *Miller* does not directly impact California's sentencing scheme.[76] This decision was partly premised on the notion, advanced in *Miller*, that the insufficient maturity of youth could disrupt the fairness of a juvenile's sentencing.[77]

When the Governor of Iowa commuted the sentences of all state prison inmates who committed first-degree murder as minors to a mandatory sixty years, some in the juvenile justice community wondered whether these sixty-year sentences could be distinguished from life sentences.[78] Yet the implementation of this commutation scheme in Iowa could also be invalidated because it declines to give an individualized hearing, as *Miller* requires.[79]

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the crime).

73. *See* CAL. PENAL CODE § 190.5(b) (West 2012) (conveying that the sentencing official was not mandated to impose such a sentence on juveniles convicted of first-degree murder).

74. *See Daugherty*, 96 So. 3d at 1080 (holding that upon remand, the trial court must consider whether any of attributes of youth diminish the penological justifications of the original sentence).

75. *See id.* (observing that the trial court had already considered the defendant's "horrible and unfortunate upbringing").

76. *See* People v. Hoffman, No. F061127, 2012 Cal. App. Unpub. LEXIS 5574, at *9 (Cal. Ct. App. July 30, 2012) (contending that *Miller* renders an assessment of traditional mitigating factors incomplete in regards to juveniles).

77. *See id.* at *10 (indicating that a juvenile's inability to deal with law enforcement or incapacity to assist with legal counsel could put the juvenile at a disadvantage in court).

78. *See* Office of the Governor of Iowa, *Branstad Moves to Prevent the Release of Dangerous Murderers in Light of Recent U.S. Supreme Court Decision* (July 16, 2012), *available at* https://governor.iowa.gov/2012/07/branstad-moves-to-prevent-the-release-of-dangerous-murderers-in-light-of-recent-u-s-supreme-court-decision (remarking that these offenders will not have the possibility of parole until they serve sixty years).

79. *See* Miller v. Alabama, 132 S. Ct. 2455, 2470 (2012) (outlining the penological

III. ANALYSIS

A. In the Context of the Eighth Amendment, Miller *Should Be Applied Broadly to Prohibit All Mandatory Juvenile Life-Without-Parole Cases, Regardless of Whether the Punishment Is Strictly Constructed.*

The *Miller* court makes clear that its decision will require a change in the sentencing structure of twenty-nine states to eliminate the strict and mandatory imposition of an LWOP sentence on a juvenile.[80] Yet this holding warrants an expansive change in all states because juvenile offenders can still face LWOP sentences in a mandatory imposition.[81] Should the *Miller* decision only apply to the twenty-nine jurisdictions that previously enforced the prohibited punishment, LWOP sentences could still be mandatorily assigned to juveniles in less obvious pathways.[82] An LWOP sentence is the second-most severe penalty that is possible in the United States justice system, and the imposition of such a punishment in defiance of the Supreme Court's recent holdings is a grave matter.[83] A court's decision to permit the imposition of these ambiguously defined LWOP sentences fails to reflect the proper consideration of adolescent psychology and diminished juvenile culpability that the Court used to advance its holding in *Miller.*[84]

1. A Narrow Interpretation of Miller *Will Result in States Sentencing Juveniles to Mandatory Life-Without-Parole Sentences Produced From a Combination of Convictions Carrying Mandatory Minimum Terms.*

A sentencing scheme that allocates a mandatory minimum punishment to a juvenile offender for each count or separate crime can circumvent *Miller*'s prohibition against mandatory LWOP sentences because such a

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reasons under which a mandatory juvenile LWOP sentence is unconstitutional).

80. *See id.* at 2482 (Thomas, J., dissenting) (noting that this holding's impact will be especially significant because it will alter the sentencing schemes of so many jurisdictions).

81. *See* People v. Caballero, 282 P.3d 291, 295 (Cal. 2012) (implying that a combination of minimum charges for crimes can create a mandatory life sentence, even though the defendant did not kill anyone).

82. *See id.* at 298 (stating that such a sentence could be mandatory by dispensing multiple terms amounting to a functional life sentence).

83. *See* People v. Hoffman, No. F061127, 2012 Cal. App. Unpub. LEXIS 5574, at *5 (Cal. App. 5th Dist. July 30, 2012) (framing an LWOP punishment as the second-most severe penalty behind, logically, the death penalty).

84. *See Miller*, 132 S. Ct. at 2469 (concluding that the decision is based on the idea that adolescent culpability must be considered when administering such a strict punishment).

sentence will be decided without a judge or jury first contemplating the juvenile defendant's youthful attributes.[85] Because *Miller* holds that the mitigating factors of a juvenile offender's youth must be considered before the imposition of an LWOP sentence, the mandatory nature of a set of concurring terms-of-years sentences deprives minor offenders the requisite consideration of their circumstances.[86]

Exempting the states that lack mandatory LWOP sentences from the narrow application of *Miller*'s holding could also result in sentences that run afoul of the concerns over proportionality that are central to *Graham* and *Miller*.[87] A juvenile offender will not have his culpability properly assessed if he is sentenced to a mandatory life punishment without first having his distinctive attributes of youth taken into account.[88] A sentencing scheme that combines multiple mandatory terms-of-years sentences to punish a juvenile offender could result in a sentence so disproportionately harsh that it violates the standards of the Eighth Amendment set forth in *Miller*'s prohibition on mandatorily imposing such a sentence upon a juvenile.[89]

In *Bunch v. State*, a case decided less than two weeks after *Miller*, the Sixth Circuit raised concerns that courts may employ a literal interpretation of a life sentence and limit *Miller*'s holding only to strictly juvenile LWOP sentences.[90] The court in *Bunch*, perhaps because of the decision's timing, only offered a marginal assessment of *Miller*.[91] The *Bunch* court's

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85. *See Caballero*, 282 P.3d at 295 (noting that although *Graham* prohibits imposing LWOP sentences for non-homicide crimes, an aggregation of shorter sentences could effectively amount to a life sentence).

86. *See Miller*, 132 S. Ct. at 2475 (asserting that such punishments require that the judge or jury have the opportunity to examine any mitigating aspects of youth).

87. *See id.* at 2466 (contending that mandatory sentencing schemes that fail to consider a juvenile's youth can disproportionately punish a juvenile because youth can reduce culpability); *see also* Graham v. Florida, 130 S. Ct. 2011, 2030 (2010) (maintaining that the penological differences between punishing adults and punishing children render juvenile LWOP sentences disproportionate and in violation of the Eighth Amendment).

88. *See Miller*, 132 S. Ct. at 2460 (citing *Graham*, 130 S. Ct. at 2026-27) (holding that when a mandatory sentence is imposed on a juvenile, the juvenile's lessened culpability and greater capacity for change are not contemplated).

89. *See Graham*, 130 S. Ct. at 2028 (observing that when examining life sentences, a juvenile on average will serve more years and a greater percentage of his life than an adult offender would in a life sentence).

90. *See* Bunch v. Smith, 685 F.3d 546, 553 (6th Cir. 2012) (holding that *Miller*'s focus on life sentences represented a difference between punishments derived from consecutive fixed-term sentences).

91. *See id.* (observing that a description or mention of *Miller* does not occur until

continuous dependence on *Graham*'s construction of strict sentencing schemes results in a holding that fails to contemplate the decision's penological justifications and juvenile justice implications.[92] In distinguishing the imposition of consecutive fixed-term sentences from a standard LWOP punishment, *Bunch* depends on the structure of the punishment without assessing the merits of why the Court in *Graham* and *Miller* ruled against juvenile LWOP.[93]

Despite *Graham*'s thorough breakdown of why juvenile offenders' immaturity and youthful characteristics should preclude them from LWOP sentences for certain crimes, and *Miller*'s requirement that judges consider a juvenile's youth, the court in *Bunch* chooses to focus on a technical quandary that ignored *Miller*'s holding on juvenile culpability.[94] The *Bunch* holding ignores *Miller*'s analytical foundations, such as its finding that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."[95] The majority in *Miller* frames its holding as one that will restrict courts from mandatorily "imposing the harshest possible penalty for juveniles."[96] The *Bunch* holding illustrates the reckless danger of a strict interpretation of *Miller*.[97] In *Bunch*, the Sixth Circuit's adherence to *Miller* was a sham; it could not have perceived an eighty-nine-year prison sentence without parole to be any different from an LWOP sentence.[98] A punishment that effectively incarcerates a juvenile offender for life cannot be deemed to be proportionate when it is imposed without considering mitigating

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the final paragraph of the *Bunch* opinion).

92. *See id.* at 552 (attributing the *Graham* Court's failure to discuss functional life sentences as evidence that the decision must only apply to strict single-sentence LWOP penalties).

93. *See id.* (concluding that because *Graham* did not even consider consecutive fixed-term life sentences, it could not apply to this case).

94. *See* Miller v. Alabama, 132 S. Ct. 2455, 2466 (2012) (requiring a juvenile's youth to be considered before an LWOP punishment in order to assess the proportionality of a sentence); *Graham*, 130 S. Ct. at 2032 (holding that the immaturity of youth can weaken the actual culpability of a juvenile offender); *Bunch*, 685 F.3d at 552 (detailing juvenile offenders' consecutive fixed-term sentences).

95. *See Miller*, 132 S. Ct. at 2469 (holding that the mandatory sentencing of a juvenile under such a scheme makes youth an irrelevant factor in the sentencing).

96. *See id.* at 2475 (declaring that to impose such a sentence without considering a juvenile's mitigating youthful attributes is a violation of the Eighth Amendment).

97. *See Bunch*, 685 F.3d at 552 (noting that the juvenile defendant's sentence will still effectively result in an LWOP sentence).

98. *See id.* (holding that a punishment derived from multiple convictions is different from a single-conviction sentence).

circumstances of that juvenile's youthfulness.[99]

When Florida's Second District Court of Appeals upheld a functional life sentence that punished a thirteen-year-old with ninety-two years in prison, the court argued that the *Miller* decision could not apply because the offender had been sentenced for committing several crimes in separate incidents.[100] The court in *Walle v. State* similarly erred in reaching its understanding that *Miller* would allow such a sentencing scheme because the punishment is proportioned to each individual crime.[101] This contradicts the *Miller* holding, which held that proportionality of the sentencing should be attuned not only to a juvenile offender's crime, but to the offender's background as well.[102]

The Florida court only took note of whether the punishment was proportional to the crime. Although the crimes were horrific and exceedingly severe, the court failed to consider the offender's youth and the related circumstances properly.[103] Because the *Miller* Court did not categorically ban juvenile LWOP sentences and merely required a pre-sentencing consideration of the juvenile's youth, the Florida court erroneously interpreted *Miller* by failing to take the offender's diminished culpability into account for sentencing.[104] Instead, the construction of consecutive mandatory termed-sentences ignores consideration of the offender's youth in a clear repudiation of *Miller*.[105]

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99. *Compare Miller*, 132 S. Ct. at 2471 (prohibiting mandatory juvenile LWOP sentences that are imposed without first considering the offender's youthful circumstances), *with Bunch*, 685 F.3d at 552 (outlining the mandatory composition of the offender's punishment).

100. *See* Walle v. State, 99 So. 3d 967, 973 (Fla. Dist. Ct. App. 2012) (explaining that each conviction warranted a proportionate sentence based on the severity of that offense).

101. *See id.* (arguing that *Miller*'s Eighth Amendment analysis required punishments to be determined by the severity of each crime).

102. *See Miller*, 132 S. Ct. at 2463 (explaining that under the Eighth Amendment, an offender's punishment must be proportionate to the offender and the specific crime).

103. *See Walle*, 99 So. 3d at 972 (failing to discuss why an offender's punishment should be upheld without regard to his youth). *Contra Miller*, 132 S. Ct. at 2466 (reasoning that a mandatory LWOP sentence imposed on a juvenile fails to assess whether the juvenile's sentence proportionately punishes the offender).

104. *See Miller*, 132 S. Ct. at 2466 (framing the central issue of *Miller*, *Roper*, and *Graham* as the necessity of processing juveniles differently when sentencing them to the most severe of penalties).

105. *See id.* (explaining that a mandatory sentence removes any mitigating effects of youth because it is automatically imposed without discretion).

2. Precluding the Application of Miller *in Specific States Would Allow for the Unrestrained Imposition of Long Punishments That Fail to Grant a Meaningful Opportunity for Release on Minors.*

Exceedingly long sentences that do not allow for parole and are the functional equivalent of life sentences cannot be mandatorily imposed on juveniles in light of *Miller*'s requirement that courts consider the attributes of the offender's youth before imposing an LWOP sentence.[106] These sentences, which could be structured from a combination of mandatory minimum punishments for specific counts, would still be the functional equivalent of a mandatory LWOP sentence.[107] The commutation of an LWOP sentence that was mandatorily imposed on a juvenile to instead consist of a mandatory sixty-year sentence before the possibility of parole would still conflict with *Miller* because it would fail to consider the offender's youth, and it would not allow for a realistic opportunity of parole.[108] The Iowa commutation would not allow for the consideration of the mitigating aspects of a juvenile's age, nor would it offer juveniles a realistic opportunity at release.[109] Allowing the Iowa scheme to go forward sets a dangerous precedent that weakens the impact of *Miller*.[110] The proliferation of disproportionately harsh mandatory sentences that fail to consider a juvenile's mitigating circumstances of youth could occur in states that did not previously enforce mandatory LWOP sentences on juveniles, creating an argument for a uniform deference to *Miller*.[111]

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106. *See id.* at 2469 (criticizing the failure to consider a juvenile offender's adolescent mental features as risking a disproportionately harsh sentence).

107. *See* State v. Solis-Diaz, No. 37120-I-II, 2009 WL 3261249, at *2-3 (Wash. Ct. App. Oct. 13, 2009) (noting that the defendant's ninety-two-year sentence resulted from his conviction on eight counts).

108. *Compare Miller*, 132 S. Ct. at 2469 (holding that before such a punishment is imposed on a juvenile, the sentencing official must consider the mitigating circumstances of youth), *with* People v. Caballero, 282 P.3d 291, 295 (Cal. 2012) (holding that a 110-year sentence fails to provide the offender with a realistic opportunity to obtain a release from prison).

109. *See Caballero*, 282 P.3d at 295 (holding that a sentence of 110 years would not allow the defendant the opportunity to demonstrate growth and maturity).

110. *See Miller*, 132 S. Ct. at 2475 (requiring a consideration of a juvenile's adolescent-related culpability in advance of a mandatory sentence).

111. *See id.* at 2469 (holding that the sentencing official is required to consider how children are different when considering an LWOP sentence).

B. To Satisfy the Supreme Court's Constitutional Standards, the Restriction of a Punishment Should Fit Within a National Consensus, and It Must Stem From Court Precedent.

An implementation of the Supreme Court's Eighth Amendment analytical framework of identifying a national consensus against a punishment and assessing Court precedent demonstrates that the Court's decision in *Miller* must be construed broadly to restrict all juvenile LWOP sentences.[112] Because the *Miller* court did not seek to implement a categorical ban on juvenile LWOP punishments, an Eighth Amendment analysis of whether a sentence adheres to the decision requires a different framework than that employed in *Roper* and *Graham*.[113] If a court ascertains a national consensus against the use of mandatory juvenile LWOP sentences, that consensus provides justification for applying *Miller*'s holding broadly to all mandatory juvenile LWOP sentences.[114] The uneven distribution of juvenile LWOP sentences across the states connotes the lack of a national consensus against mandatory juvenile LWOP.[115] Although the Court has been careful to characterize its desire for a national consensus as merely a preference, a finding of common precedent would certainly strengthen the argument in favor of a broader expansion of *Miller*.[116] For *Miller* to be extended, the Court's finding would have to stem from previous precedent, rather than the Court's independent judgment.[117] Because the Court's precedent articulates the priority of exempting juveniles from a mandatory punishment more than it advocates against a specific sentencing scheme, the *Miller* holding should

112. *See Miller*, 132 S. Ct. at 2469 (asserting that the Court's precedent supplants the need for an independent judgment in this case); Graham v. Florida, 130 S. Ct. 2011, 2015 (2010) (explaining the requirement of a national consensus against a punishment for it to be found unconstitutional).

113. *Compare Graham*, 130 S. Ct. at 2015 (outlining that a punishment is unconstitutional when a court shows a national consensus but relies on its independent judgment), *with Miller*, 132 S. Ct. at 2471 (explaining that because the decision only mandates that a sentencing official follow a process, the Court does not need to apply its independent judgment).

114. *See Miller*, 132 S. Ct. at 2470 (illustrating how a national consensus against a sentence for a particular class of offenders could be used to hold a punishment unconstitutional).

115. *See* HUMAN RIGHTS WATCH, *supra* note 56 (noting that Pennsylvania alone had mandatorily imposed such a sentence on 444 juvenile offenders).

116. *See Miller*, 132 S. Ct. at 2469-70 (noting that even though the majority acknowledges that a showing of a national consensus is not necessary, it seeks to prove one).

117. *See id.* at 2471 (clarifying that because the Court is not proposing a categorical ban, the decision must only flow straightforwardly from Court precedent).

not be limited to strict LWOP sentences.[118]

1. A Finding of a National Consensus Against Excessive Punishments of Juveniles Warrants an Extension of Miller *to Encompass All Mandatory Life-Without-Parole Situations.*

When considering whether a punishment is constitutional under the Eighth Amendment, the punishment must be considered against "the evolving standards of decency that mark the progress of a maturing society."[119] In assessing the constitutionality of a juvenile sentencing practice, the Court has examined state-by-state sentencing practices to identify any national consensus in reference to a punishment.[120] To gauge whether *Miller*'s holding prohibits states from enforcing any sentencing scheme that results in the mandatory imposition of an LWOP punishment on a juvenile, a national consensus requires courts to construe *Miller* to forbid any scenario in which a juvenile offender receives a mandatory LWOP sentence.[121]

Although the Court in *Miller* could not attribute its decision to a clear national consensus for the prohibition of mandatory juvenile LWOP, there is no consensus providing a definitive stance against a prohibition of mandatory juvenile LWOP sentencing.[122] Instead of assessing the number of states that employ strict mandatory LWOP sentences on juvenile offenders, the Court has previously identified a national consensus by looking at actual sentencing practices within each state rather than solely in identifying whether a punishment is permitted in a majority of

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118. *See id.* at 2465-66 (construing the role a minor's maturity plays in his culpability as supporting the notion that failing to consider this role results in disproportionate punishments). *But see* Walle v. State, 99 So. 3d 967, 973 (Fla. Dist. Ct. App. 2012) (arguing that an LWOP sentence for a juvenile is proportional if the juvenile commits multiple severe offenses that warrant severe penalties).

119. *See* Roper v. Simmons, 543 U.S. 551, 561 (2005) (citing Trop v. Dulles, 356 U.S. 86, 100-01 (1958)) (describing the Court's method of determining whether a punishment fits within the purpose of the constitutional design).

120. *See* Graham v. Florida, 130 S. Ct. 2011, 2023 (2010) (explaining that the consensus against non-homicide juvenile LWOP is more evident in the scarcity of actual sentences than its statutory permission in most states); *Roper*, 543 U.S. at 564-65 (identifying a consensus based on the fact that of the twenty states whose laws allow for the juvenile death penalty, only three states had executed a minor in the previous ten years).

121. *See* Miller, 132 S. Ct. at 2471 (separating *Miller* from past cases that required a national consensus but still attempting to identify a national consensus to strengthen the argument).

122. *See id.* (acknowledging that the majority of states had statutory schemes that allowed mandatory juvenile LWOP).

jurisdictions.[123] The mandatory nature of this sort of punishment clouds the analysis of whether a national consensus exists by resulting in sentencing numbers that failed to take into account any discretion in their sentencing.[124] In *Miller*, the majority noted that because of this muddled situation, a national consensus could instead be examined through the sentencing practices in states where juvenile LWOP is sanctioned but not mandatory.[125] This allows for a more genuine inspection of the national attitude toward imposing LWOP sentences on juveniles.[126] Human Rights Watch's assessment of the national distribution of juvenile offenders illustrates that of the twenty-seven states that mandatorily imposed LWOP sentences on juveniles, each state, on average, had sentenced more than sixty-three juveniles with LWOP punishments.[127]

This discrepancy in the sentencing numbers between states that mandatorily impose LWOP on juveniles and states that merely have the discretion to enforce such a punishment represents a strong aversion to the concept of sending minors to prison for life.[128] More than half of all juvenile offenders serving an LWOP punishment are clustered in four states, and the relatively low number of juveniles that were dealt LWOP punishments in the discretionary states demonstrates a national consensus against schemes that deprive juveniles of a meaningful opportunity for release.[129] That many states are apparently so hesitant to sentence minors

123. *See Graham*, 130 S. Ct. at 2024 (maintaining that a national consensus was derived from the scarcity of juveniles serving LWOP for non-homicide crimes because the majority of such inmates were in one state alone); *Roper*, 543 U.S. at 567 (associating the lack of instances in which the punishment was imposed with an overall movement away from the death penalty).

124. *See Miller*, 132 S. Ct. at 2467 (observing the automatic triggering of a mandatory LWOP sentence fails to allow any discretion in its application).

125. *See id.* at 2472 (contending that the actual numbers of instances of juvenile LWOP throughout the states is more valuable than the total amount of states that sanction it).

126. *See id.* at 2472 n.10 (explaining that these instances in which discretion exists demonstrate the sentencing official's resistance to imposing LWOP on juveniles).

127. *See* HUMAN RIGHTS WATCH, *supra* note 56 (noting that Louisiana, Michigan, and Pennsylvania had each mandatorily imposed such a sentence on more than 300 juvenile offenders).

128. *See id.* (characterizing the statistics that demonstrate a hesitancy to impose LWOP on juveniles as proof that sentencing officials consider this punishment to be an unattractive last resort).

129. *See Miller*, 132 S. Ct. at 2471 (contending that isolating the discretionary juvenile LWOP states is a more valuable exercise for comprehending the national consensus); HUMAN RIGHTS WATCH, *supra* note 56 (noting that Florida, Louisiana, Michigan, and Pennsylvania account for more than half of the incarcerated juvenile LWOP offenders).

to life in prison is in accordance with a general reluctance to mandatorily impose LWOP sentences, or sentences approaching a life term, on juvenile offenders irrespective of whether the sentence was clearly labeled as an LWOP punishment or whether the punishment instead was derived from multiple terms-of-years sentences.[130]

2. An Analysis of Relevant Supreme Court Precedent Does Not Produce A Precept That Would Allow for the Imposition of Mandatory Life-Without-Parole Punishments Upon Juvenile Offenders.

When analyzing whether a punishment violates the Eighth Amendment, the Supreme Court customarily relies in part on its independent judgment.[131] As the majority in *Miller* noted, when a categorical ban on a punishment is not at issue, the court must instead look to Supreme Court precedent to determine whether a sentencing practice is consistent with the Eighth Amendment.[132] The Court's most relevant cases portray a conclusion that the constitutionality of the punishment is determined by the degree of the culpability of the offender—the more culpable the offender, the more likely the punishment is constitutional.[133]

In contextualizing the development of the Court's position on juvenile punishments and the Eighth Amendment, *Roper* is critical to determining whether *Miller* should be extended to situations in which a juvenile offender faces a mandatory imposition of a sentence that is functionally LWOP.[134] The *Roper* Court reasons that a juvenile offender's youth can be overshadowed in certain cases because of the brutality of a specific crime, a consideration that could be extended in the aftermath of *Miller*.[135] That

130. *See Miller*, 132 S. Ct. at 2472 n.10 (assessing this reluctance to impose LWOP on juveniles as proof of a preference for juvenile proportionality based on the mitigating qualities of youth).

131. *See* Graham v. Florida, 130 S. Ct. 2011, 2024 (2010) (asserting that the Court had the right and responsibility of independently interpreting the Eighth Amendment, in addition to gauging the national consensus).

132. *See Miller*, 132 S. Ct. at 2471 (explaining that because a categorical ban was not sought, the decision would have to flow from Supreme Court precedent).

133. *See id.* at 2465 (discussing the emphasis in *Roper* and *Graham* on how the attributes of youth diminish the penological justifications for severe penalties on juvenile offenders); Roper v. Simmons, 543 U.S. 551, 552 (2005) (recounting the importance of equating a punishment to an offender's culpability, especially in juvenile cases).

134. *See Miller*, 132 S. Ct. at 2465 (holding that juveniles should be entitled to greater leniency because the circumstances of youth do not align with the penological justifications for the death penalty).

135. *See Roper*, 543 U.S. at 573 (recounting that the prosecutor against the defendant Simmons in the lower court cited the defendant's youth as an aggravating

such a concern was expressed in *Roper* would support extending the *Miller* holding to include all instances of juveniles facing mandatory functional LWOP sentences, and not just those that are strictly labeled LWOP.[136]

The holding in *Graham* also suggests that *Miller* is construed so as to apply to all juvenile LWOP scenarios. The Court again makes its decision with the intention of upholding the penological justifications for applying legislation to a class of criminals.[137] Through emphasizing the lack of any retributive qualities in capital punishments, the majority in *Graham* contends that the lack of a retributive foundation in LWOP sentences is not appropriate for the less culpable juvenile offender.[138] This retributive argument, which the *Graham* Court adapted from *Roper*, can also extend to *Miller*'s holding.[139] Because *Miller* removed the possibility of a mandatory single-offense LWOP sentence for juveniles, it follows from *Graham*'s retributive discussion that the severity of a mandatory LWOP punishment cannot be justified with any retributive qualification because of the diminished culpability of juvenile offenders.[140]

Graham additionally held that the justifications of deterrence, incapacitation, and rehabilitation are insufficient to warrant sentencing juveniles to LWOP in non-homicide crimes.[141] In following the logic by which *Graham* questioned a sentencing official's ability to conclude that a juvenile offender would forever be dangerous, a strict interpretation of *Miller* will result in penalties that will mandatorily remove juveniles from society for the rest of their lives.[142] *Graham*'s holding advances the idea

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factor, rather than a mitigating factor).

136. *See Miller*, 132 S. Ct. at 2464 (outlining the reasons for which the consideration of youth can strengthen the proportionality of a punishment).

137. *See* Graham v. Florida, 130 S. Ct. 2011, 2026 (2010) (noting that the Court proceeds to distinguish defendants that are less deserving of punishments because of their age or mental deficiency).

138. *See id* at 2028 (explaining that an LWOP sentence does not directly correlate to the diminished personal culpability of juvenile offenders).

139. *See id.* (arguing that a retributive punishment cannot be justified when it is disproportionately harsh).

140. *See id.* at 2030 (discussing the manner in which parole can allow juvenile offenders the opportunity to gain eventual release and realize the rehabilitative aspect of their punishment).

141. *See id.* at 2028-29 (asserting that juveniles are less susceptible to deterrence because of their immaturity, and that the incapacitation justification rests on a shaky assumption).

142. *See id.* at 2029 (explaining that an LWOP penalty is predicated on the belief that an offender must be removed from society for life); *see also* Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) (holding that a sentencing scheme that mandatorily imposes an LWOP punishment on a juvenile is unconstitutional).

that a juvenile offender is different from an adult offender, and the rationalization for incarcerating a minor for life would require an incapacitation and rehabilitation justification that cannot be linked to the general diminished culpability of juveniles.[143]

If the *Miller* decision is structured only to encompass minors that receive strictly-defined single sentence LWOP punishments, then sentences that are the functional equivalent of juvenile LWOP sentences will not adhere to the incapacitation and rehabilitation justifications that the Court recently advocated.[144] To mandatorily sentence a juvenile offender to the functional equivalent of an LWOP sentence based on concurring punishments for a non-homicide crime violates the Eighth Amendment because such a punishment would be devoid of the penological justifications that were recognized in *Graham*.[145] An LWOP punishment would fail to provide any rehabilitation for the offender; valuable prison classes and programs are often not offered to inmates serving life sentences and, as the *Graham* court contended, such a punishment would still not deter juveniles because they often lack the requisite cognitive maturity.[146] A mandatory juvenile LWOP punishment satisfies the incapacitation theory of punishment in that it permanently removes a criminal from society; yet incapacitation cannot justify such a mandatorily imposed punishment because the juvenile's immaturities would make it difficult for a sentencing official to conclude that a juvenile would forever be a danger to society.[147]

IV. POLICY IMPLICATIONS AND SUGGESTIONS

A sentencing scheme that fails to consider a juvenile offender's potential

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143. *See Graham*, 130 S. Ct. at 2029-30 (maintaining that juvenile LWOP sentences lack incapacitation and rehabilitative justifications because they make a final ruling that the offender has no value in society).

144. *Compare id.* at 2030 (noting that penalties that permanently deny criminals the opportunity to re-enter society must match the offenders' culpability), *with Miller*, 132 S. Ct. at 2466 (articulating the need to consider an offender's youth to ensure a proportionate punishment).

145. *See Miller*, 132 S. Ct. at 2465 (concluding that the penological theories fail to justify imposing juvenile LWOP sentences for non-homicide crimes).

146. *See Graham*, 130 S. Ct. at 2030 (reasoning that punishments that restrict offenders from returning to society effectively establish that the offender cannot be rehabilitated); ASHLEY NELLIS, THE SENTENCING PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 23 (2012), *available at* http://sentencingproject.org/doc/publications/jj_The_Lives_of_Juvenile_Lifers.pdf (reporting that more than sixty percent of juvenile offenders serving LWOP sentences are not engaged in rehabilitative programming).

147. *See Graham*, 130 S. Ct. at 2029 (discussing the difficulty of assessing a juvenile offender's incorrigibility in light of a juvenile's immature characteristics).

for rehabilitation is at odds with the Supreme Court's stance on juvenile culpability.[148] A narrow interpretation of the Court's holding in *Miller* would result in troubling sentencing inconsistencies and a failure to provide systematic proportionality for juveniles. State legislatures should incorporate *Graham* and the expanded interpretation of *Miller* to ban all juvenile LWOP sentences. This would permit states to impose life sentences on the minor offenders who commit the most heinous of crimes, but allowing the opportunity of parole would shift the responsibility of assessing a criminal's rehabilitation to a parole board to better evaluate the effects of incarceration.[149]

The critical implication of foregoing a narrow interpretation of *Miller* is the likelihood that individual states will end up enforcing conflicting punishments.[150] A cohesive adjustment to the interpretation of *Miller* will prevent the sentencing system from being rife with inconsistencies.[151] A lower court's technical construction of the concept of a life sentence could lead to a peculiar dilemma: a minor convicted of a murder and facing a single LWOP sentence must first have his youth and mitigating circumstances assessed, but a minor facing mandatory punishments for multiple crimes totaling a functional life sentence will not have his youth contemplated first.[152] This inconsistency will result in disproportionately harsh juvenile sentences that are at odds with the Eighth Amendment.[153]

To eradicate any concerns that *Miller* will be unevenly enforced at the expense of juvenile justice, the states should discontinue imposing LWOP sentences on minors. Twelve states forbid juvenile LWOP sentences, and those that do so without exceptions should serve as a foundational blueprint

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148. *See Miller*, 132 S. Ct. at 2469 (concluding that the mitigating circumstances of a juvenile's youth must be considered before the imposition of an LWOP sentences so as to maintain the punishment's proportionality).

149. *See Graham*, 130 S. Ct. at 2030 (noting that the LWOP sentences can often fail to satisfy the penological goals of retribution, incapacitation, deterrence, and rehabilitation).

150. *See* Bunch v. Smith, 685 F.3d 546, 553 (6th Cir. 2012) (arguing that *Miller* did not prevent a mandatory eighty-nine-year sentence); *see also Miller*, 132 S. Ct. at 2469 (holding mandatory LWOP sentences to be unconstitutional).

151. *See* Walle v. State, 99 So. 3d 967, 967 (Fla. Dist. Ct. App. 2012) (holding that *Miller*'s ban on mandatory LWOP punishments does not apply when the punishment consists of separate convictions).

152. *E.g.*, *Bunch*, 685 F.3d at 552-53 (concluding that because *Graham* and *Miller* did not consider consecutive fixed-term life sentences, those decisions could not apply to a multiple term eighty-nine year sentence).

153. *See id.* at 553 (punishing a defendant who did not commit murder to a mandatory eighty-nine-year sentence); *see also Miller*, 132 S. Ct. at 2468 (prohibiting mandatory LWOP sentences for minors).

for other states to follow.[154] The most severe penalty in New Mexico, for instance, is life imprisonment, yet all offenders serving life are eligible for a parole hearing after thirty years of incarceration.[155] If the provisions of the New Mexico statute are adopted specifically for juvenile offenders, states would be able to shift the discretion and final judgment of a minor's culpability to the parole board at a later date.

An ideal state provision would also clearly prohibit sentences derived from multiple charges totaling a term sentence approaching life imprisonment. The mandatory inclusion of parole in juvenile life sentences will ultimately prevent the types of punishments of LWOP that can occur.[156] A restriction of all LWOP sentences, including sentences that incarcerate minors for a period of time surpassing the average life expectancy, prohibits judges from shunning the mitigating circumstances of youth that *Miller* requires them to contemplate.[157]

The logical extension of the holdings of *Graham* and *Miller* is the prohibition of all juvenile LWOP punishments.[158] Whereas *Graham* limited LWOP punishments only to juveniles convicted for homicides, and *Miller* prohibited the imposition of mandatory LWOP sentences on juveniles, an elimination of all juvenile LWOP punishments will continue to treat juvenile offenders differently though it will require the parole board to make a final decision on the youth's culpability.[159]

The advantages of a uniform ban of juvenile LWOP will also alleviate the practical difficulties of providing legal representation to youth.[160] Such a restriction would preclude minors from life incarceration resulting from a difficulty in assisting their own attorneys, or communication problems with

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154. *See State-by-State Legal Resource Guide*, UNIV. OF S.F. SCH. OF LAW, http://www.usfca.edu/law/jlwop/resource_guide (providing each state's statutory position on juvenile LWOP sentencing).

155. *See* N.M. STAT. ANN. § 31-21-10 (2012) (including minors in the ban on LWOP sentences and the requirement for parole eligibility, once an offender serves thirty years in prison).

156. *E.g.*, State v. Solis-Diaz, 152 Wash. App. 1038, at *3 (Wash. Ct. App. 2009) (describing the production of a 1,111-month sentence based on multiple non-murder convictions).

157. *See* Miller v. Alabama, 132 S. Ct. 2455, 2465-66 (2012) (holding that a judge's failure to consider a juvenile offender's youth deprives the sentencing official of the opportunity to consider whether the offender's punishment is proportional).

158. *See id.* at 2489-90 (2012) (Alito, J., dissenting) (suggesting that the recent line of cases may soon result in the Court prohibiting all juvenile LWOP sentences).

159. *See id.* at 2478 (Roberts, C.J., dissenting) (articulating the impact of a non-discretionary sentence that does not allow for parole).

160. *See* Graham v. Florida, 130 S. Ct. 2011, 2032 (2010) (describing the extent to which juvenile offenders have difficulty in criminal proceedings).

law enforcement.[161] Shifting the ultimate discretion of a juvenile's culpability to a point later in the offender's life would alleviate the effects of general juvenile mistrust of adults and would allow adults to defend themselves for crimes they committed as minors.[162]

V. CONCLUSION

The ramifications of a literal interpretation of the type of life sentence *Miller* specifically referred to would lead to a justice system that continues to mandatorily incarcerate juveniles for life without first contemplating any mitigating circumstances of their youth.[163] The adolescent culpability standards that the Court advanced in *Roper*, *Graham*, and *Miller* are completely disregarded when a lower court mandatorily sentences a juvenile to a punishment that is effectively for life without the opportunity of parole.[164] Should *Miller* be interpreted to encompass all forms of mandatory punishments that incarcerate juvenile criminals beyond their life expectancy, then *Miller*'s ultimate decision will be properly integrated and this prohibition will reflect the Supreme Court's recent considerations of adolescent culpability and juvenile justice.

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161. *See Miller*, 132 S. Ct. at 2468 (noting that the majority references the disadvantages juveniles face in court).

162. *See id.* (noting that juvenile defendants have difficulty with certain aspects of the legal process); *Graham*, 560 U.S. at 2032 (outlining the manner in which the impulsive and rebellious qualities of youth can lead to juvenile offenders impairing their own legal defense).

163. *See* Bunch v. Smith, 685 F.3d 546, 553 (6th Cir. 2012) (arguing that *Miller* did not prevent a mandatory eighty-nine-year sentence because that punishment derived from separate consecutive sentences).

164. *See Graham*, 130 S. Ct. at 2034 (holding that juveniles could not be sentenced to life-without-parole for non-homicide crimes); Roper v. Simmons, 543 U.S. 551, 578-79 (2005) (holding that sentencing juveniles to death was unconstitutional); *see also Miller*, 132 S. Ct. at 2470 (holding that a judge's failure to consider a juvenile offender's youth deprives the sentencing official of the opportunity to consider whether the punishment is proportional). *Contra Bunch*, 685 F.3d at 552 (holding that the proportionality of a juvenile's crime does not outweigh the Supreme Court's omission of certain sentencing schemes from its analysis in *Miller*).