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JUVENILE OFFENDERS: VICTIMS OF CIRCUMSTANCE WITH A POTENTIAL FOR REHABILITATION

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INTRODUCTION

Over the past fifty years, the United States Supreme Court has examined and reexamined the question of how to treat children[1] in the criminal justice system.[2] The Court has frequently held that children are entitled to many of the same due process rights as adults.[3] Nevertheless, the Court has also opined that, "from a developmental standpoint, [children] are different from adults, which greatly impacts how courts should treat them in a whole host of areas."[4] Although these historical inconsistencies are not easily reconciled, over the past decade, the Supreme Court has acknowledged three fundamental characteristics of youth: (1) lack of maturity, (2) vulnerability to negative influences, and (3) capacity for change.[5] These fundamental characteristics, the Court has explained, make children "constitutionally different" from adults and "less deserving of the most severe punishments."[6] Cumulatively, these cases represent the Court's "kids are different" sentencing jurisprudence.[7]

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1 This Note follows the lead of Justice Kagan in Miller v. Alabama, 132 S. Ct. 2455 (2012), and uses the words "children" and "juvenile" interchangeably. *See, e.g.*, *Miller*, 132 S. Ct. at 2465.

2 United States Supreme Court Juvenile Justice Jurisprudence, NAT'L JUVENILE DEFENDER CTR., http://njdc.info/practice-policy-resources/united-states-supreme-court-juvenile-justice-jurisprudence/ (last visited Nov. 20, 2015) (summarizing the cases that describe the United States Supreme Court's major jurisprudence in the area of juvenile justice).

3 *Id.*

4 *See id.* (For further information on the cases in which the Supreme Court has previously treated juveniles differently regarding their waiver of rights, culpability, and punishment).

5 *See Miller*, 132 S. Ct. at 2458, 2464; *see also* Roper v. Simmons, 543 U.S. 551, 569–70 (2005) (holding the juvenile death penalty violates the Eighth Amendment); Graham v. Florida, 560 U.S. 48, 68 (2010) (holding that life without parole sentences for nonhomicide juvenile offenders violates the Eighth Amendment).

6 *See Miller*, 132 S. Ct. at 2464; *see also Roper*, 543 U.S. at 578 (holding the juvenile death penalty violates the Eighth Amendment); *Graham*, 560 U.S. at 82 (holding that life without parole sentences for nonhomicide juvenile offenders violates the Eighth Amendment).

7 Perry L. Moriearty, Miller v. Alabama *and the Retroactivity of Proportionality Rules*, 17 U. PA. J. CONST. L. 929, 937 (2015).

Recently, in *Miller v. Alabama*, the Supreme Court held that sentencing juvenile offenders to *mandatory* life without the possibility of parole ("LWOP") violates the Eighth Amendment of the United States Constitution.[8] The juvenile justice community praised this decision, characterizing it as a "historic" decision.[9] Although this was a step in the right direction for juvenile offenders, it was, nevertheless, just a step.[10] In *Miller*, the Court squandered a real opportunity;[11] it expressly limited its decision to only prohibiting the *mandatory* imposition of LWOP sentences for juvenile offenders, rather than prohibiting the imposition of *all* LWOP sentences for juvenile offenders.[12] Thus, after *Miller*, it is still constitutionally permissible for juveniles to be sentenced to LWOP so long as the sentencer provides the juvenile with an individualized consideration at sentencing.[13]

This Note will begin with a brief historical overview of the juvenile justice system in the United States. More specifically, this Note will explain the "kids are different" rationale. This Note continues by offering an explanation for the Court's incremental and minimalistic behavior, and argues that although judicial minimalism may be appropriate in some areas, it is not appropriate in the realm of juvenile justice. Accordingly, this Note will use the Court's decision in *Miller v. Alabama* to explain how judicial minimalism serves no purpose in the realm of Eighth Amendment jurisprudence, particularly as it relates to cases involving children. In support of my argument, this Note will provide an analysis of the decision in *Miller v. Alabama*, to establish that although the Court correctly prohibited mandatory LWOP, it erred when it failed to prohibit all LWOP sentences for juvenile offenders. Furthermore, this Note will explain *Miller*'s effect on the juvenile justice system and the importance of resolving the tension that exists between justice, efficiency, and fairness. Specifically, as it relates to the "fundamental disconnect" between how

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8 Miller v. Alabama, 132 S. Ct. 2455 (2012).

9 *See, e.g.*, *U.S. Supreme Court Bans Mandatory Life-Without-Parole Sentences for Children Convicted of Homicide*, EQUAL JUST. INITIATIVE (June 25, 2012), http://eji.org/news/supreme-court-bans-mandatory-life-without-parole-sentences-for-children-miller-v-alabama.

10 Sean Craig, *infra* note 32, at n.195 (explaining how Executive Director Bryan Stevenson of the Equal Justice Institute, who represented both defendants in *Miller*, 132 S. Ct. 2455, hailed the Supreme Court's holding as "an important win for children" and "a significant step forward"); *see also U.S. Supreme Court Bans Mandatory Life-Without-Parole Sentences for Children Convicted of Homicide*, EQUAL JUST. INITIATIVE (June 25, 2012), http://eji.org/node/646.

11 *See* David R. Dow, *Don't Believe the Hype: Supreme Court Decision on Juvenile Life Without Parole is Weak*, DAILY BEAST (June 25, 2012, 5:38 PM), http://www.thedailybeast.com/articles/2012/06/25/don-t-believe-the-hype-supreme-court-decision-on-juvenile-life-without-parole-is-weak.html.

12 *See Miller*, 132 S. Ct. at 2469.

13 *Id.*

"kids are different," and how the juvenile justice system currently functions. This section will explore national and global tensions surrounding sentencing juveniles to LWOP. As to the former, this Note attempts to explain the difficulty lower courts have experienced in attempting to construe the *Miller* decision. As to the latter, this Note highlights the international community's disapproval towards the United States in sentencing juveniles to LWOP.

This Note concludes by explaining how the juvenile justice system is currently facing an opportunity for major reform. This Note proffers that it is in the best interest of our nation, and society as a whole, for this change to take effect. As a result, the Supreme Court must change its approach in deciding cases involving juvenile offenders, especially as it relates to sentencing them. Nevertheless, this Note offers various alternatives that exist in resolving this issue. Moreover, this Note suggests that in order for this reform to take effect, all three branches of the government, as well as school authorities and law enforcement agencies, must come together with one clear focus: rehabilitate juvenile offenders while also ensuring the safety of communities.

THE JUVENILE JUSTICE SYSTEM: A DIZZYING PACE OF REFORM: FROM "INNOCENT CHILDREN" TO "HYPER-VIOLENT, MORALLY-DEPRAVED YOUTH"

The juvenile justice system in the United States has experienced a roller coaster, which has resulted in a dizzying pace of reform.[14] The first juvenile court was established in Chicago, Illinois, in 1899.[15] Since then, the juvenile justice system has been reformed four times; these four periods of reform have been characterized as follows: (1) the rehabilitative model; (2) the due process reforms; (3) getting tough on juvenile offenders; and (4) a window of opportunity for rethinking juvenile justice.[16] This reform is primarily attributable to the significant role that scientific research has played in influencing attitudes and shaping policies and programs.[17] Surprisingly, however, one may wonder how the principle of treating children differently from adults only became relevant to the Supreme Court

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14 Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012); *see also* Marsha Levick, *The Pendulum Swings, Looking Back at More than a Century of Juvenile Justice Reform in the United States*, 296 N.J. LAW. 11 (2015).

15 *See* NAT'L RESEARCH COUNCIL, REFORMING JUVENILE JUSTICE: A DEVELOPMENTAL APPROACH 31 (Richard J. Bonnie, et al. eds., 2013).

16 *See id.* at 31–33.

17 *See id.* at 45.

in the past decade, when this idea predates to the American Revolution.[18] "The political philosopher John Locke argued that children's . . . [inability to reason], [which] disqualifie[s] them from participating in [the] government, also ma[kes] them less culpable for their criminal acts."[19] By the 20th century, this principle was embedded into the foundation of the world's first juvenile courts.[20]

The juvenile justice system was established as an alternative system to the adult criminal system, whereby it focused on individualized rehabilitation and treatment, civil jurisdiction, informal procedure, and separate incapacitation.[21] It was built around an idealized vision of young offenders as "innocent children."[22] Accordingly, the first juvenile courts functioned more like social welfare agencies than institutions of justice, with rehabilitation and youth guidance as their primary objectives.[23] Nevertheless, in the late 1960s, it appeared that the juvenile justice system was too aspirational and was not providing juvenile offenders with sufficient procedural protections.[24] This initiated the second period of reform, where juveniles began receiving more procedural protections.[25] For example, in 1967, the Supreme Court decided in *In re Gault* that juvenile offenders are entitled to the same protections under the due process clause of the Fourteenth Amendment that is given to adult criminal offenders.[26]

However, the third period of reform was triggered in the late 1980s and early 1990s, when juvenile (homicide) crime rates reached a temporary peak, which the media categorized as "hyper-violent, morally-depraved, and criminally-involved youth, who were out to terrorize society."[27]

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18 David S. Tanehaus, Op-Ed., *The Roberts Court's Liberal Turn on Juvenile Justice*, N.Y. TIMES (June 27, 2012), http://www.nytimes.com/2012/06/27/opinion/the-roberts-courts-liberal-turn-on-juvenile-justice.html?_r=0 (noting that individualized justice for children was one of the ideals of juvenile court).

19 *Id.*

20 *Id.*

21 *See* Ioana Tchoukleva, Note, *Children are Different: Bridging the Gap Between Rhetoric and Reality Post* Miller v. Alabama, 4 CALIF. L. REV. CIRCUIT 92, 98 (2013).

22 *See* NAT'L RESEARCH COUNCIL, *supra* note 15, at 136–37.

23 *See generally* JOHN D. AND CATHERINE T. MACARTHUR FOUNDATION RESEARCH NETWORK ON ADOLESCENT DEVELOPMENT AND JUVENILE JUSTICE, YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE, (Thomas Grisso and Robert G. Schwartz eds. 1992) [hereinafter YOUTH ON TRIAL].

24 *See* NAT'L RESEARCH COUNCIL, *supra* note 15, at 35 (explaining that juvenile offenders had no right to an attorney, and the informal hearings in which their guilt was determined lacked the rigorous evidentiary protections of a criminal trial).

25 *See id.*

26 *See id.* (citing *In re* Gault, 387 U.S. 1 (1967)).

27 *See id.* at 38; *see also* Brief for NAACP Legal Defense & Educational Fund, Inc. et al. as Amici Curiae Supporting Petitioners, at 14, Miller v. Alabama, 132 S. Ct. 2455 (2012) (Nos. 10-9646,

Concerns for public safety trumped concerns for due process or the constitutional rights of juvenile offenders.[28] As a result, states began adopting harsher punishments for juvenile offenders.[29] Accordingly, juvenile courts were divested of jurisdiction and punitive sanctions began replacing treatment and rehabilitation.[30] Consequently, the courts began transferring juvenile offenders to the adult criminal court system much more frequently. As a result, these juvenile offenders began facing the full brunt of adult punishment, receiving not only lengthy sentences, but also sentences of LWOP, and even death.[31] This "fast track to [a] states' harshest criminal penalties," barely resembles any remnants from the original juvenile justice system.[32]

In 1996, in an effort to understand this dramatic change, the MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice ("MacArthur Foundation") examined the United States juvenile justice system through the lens of developmental psychology.[33] By carefully reviewing and analyzing both law and science, the MacArthur Foundation demonstrated that a fair and enlightened juvenile justice system must consider the developmental and psychological facts of adolescence.[34] Upon exploring the differences between adults and children, the study concluded that when children serve as criminal defendants, they are at a severe disadvantage because (1) children do not have the same abilities as adults to participate in the trial process, and (2) children should not be held to the same level of accountability as adults when they break the law.[35] As to the former, it is critical that a defendant in a criminal trial not only have the ability to assist his or her legal counsel, but also be able to participate in the decision-making process.[36] This is especially important in making decisions that are crucial to a juvenile offender's defense.[37] However, the study found that children are less likely to trust adults, which makes it more

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10-9647), 2012 WL 135045 [hereinafter Brief for NAACP].

28 Brief for NAACP at 14.

29 *Id.* at 9.

30 *See* Brief for NAACP, *supra* note 27, at 10; *see* Levick, *supra* note 14, at 12.

31 Levick, *supra* note 14, at 12.

32 Sean Craig, *Juvenile Life Without Parole Post*-Miller*: The Long, Treacherous Road Towards a Categorical Rule*, 91 WASH. U. L. REV. 379, 384 (2013); *see also* Graham v. Florida, 560 U.S. 48, 70 (2010) (explaining that LWOP is an especially harsh punishment for a juvenile offenders).

33 *See* YOUTH ON TRIAL, *supra* note 23 (explaining that developmental psychology is a science that challenges the current presumption that children somehow stop being children when they commit crimes).

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

difficult for the attorney representing them to gain their trust.[38]

Moreover, the study discovered that most children do not understand the concept and meaning of a "legal right."[39] The choices children make are all affected by their emotional and cognitive immaturity, susceptibility to peer pressure, and their perceptions and attitudes concerning risk.[40] Accordingly, how juvenile offenders make decisions supports the conclusion that they are less responsible than adult offenders in similar situations.[41] This is primarily because children do not have the same level of competence or culpability as adults, and thus, should be treated accordingly in our juvenile justice system; hence, the notion behind "kids are different."

In 2005, this research took center stage in *Roper v. Simmons*, where the Supreme Court relied on scientific and sociological data, to find it unconstitutional for juvenile offenders to be sentenced to death.[42] In *Roper*, the Court explained that the Eighth Amendment applied to the death penalty with special force because it is the most severe punishment an offender can receive.[43] Five years later, the Court reaffirmed this "kids are different" principle in *Graham v. Florida*, where it found that a LWOP sentence for a juvenile, who did not commit murder is unconstitutional.[44] In *Graham*, the Court reasoned that LWOP "is an especially harsh punishment for a juvenile" because "[u]nder this sentence, a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender."[45] The Court analogized LWOP sentences to death sentences, explaining that in both sentences, the offender will die in prison.[46] Thus, a LWOP sentence imposed on a juvenile, and a LWOP sentence imposed on an adult, is essentially only the same in name.[47] Recently, in *Miller*, the Court held that sentencing juveniles to a mandatory LWOP is unconstitutional.[48] Notably, the juvenile justice system appears to be slowly coming full circle, where we currently find ourselves in the fourth

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38 *Id.*

39 *See* YOUTH ON TRIAL, *supra* note 23.

40 *Id.*

41 *Id.*

42 *See* Roper v. Simmons, 543 U.S. 551, 568–70 (2005).

43 *Id.* at 568.

44 *See* Graham v. Florida, 560 U.S. 48, 70–71 (2010).

45 *Id.* at 70.

46 *See id.*

47 *See id.*

48 *See* Miller v. Alabama, 132 S. Ct. 2455, 2485 (2012); *see also* Montgomery v. Louisiana, 136 S. Ct. 718, 732 (2016) (finding the holding in *Miller* announced a new substantive rule that was retroactive in cases on collateral review).

stage of reform, the "Window of Opportunity for Rethinking the Juvenile Justice System."[49]

THE JUVENILE JUSTICE SYSTEM AND THE EIGHTH AMENDMENT

The Eight Amendment prohibits "cruel and unusual punishments."[50] In these cases, the Justices must figure out how to interpret the meaning of the phrase "cruel and unusual punishment."[51] The issues that arise in this context illustrate how the Court often engages in incremental decision-making, where it tends to limit its ruling only to the circumstances of each case, and one step at a time.[52] Moreover, in these cases, the Court often looks to its decision in *Trop v. Dulles*, which is considered the benchmark case for understanding the phrase "cruel and unusual punishment."[53] According to *Trop*, the Court must decide whether the punishment violates the "evolving standards of decency that mark the progress of a maturing society."[54] Accordingly, since *Trop*, there is a presumption that the meaning of the Eighth Amendment will change over time, "as society's views on different criminal sanctions change."[55] Therefore, in interpreting the Eighth Amendment, the Court looks to see "what people actually think."[56] Thus, in determining society's standards of decency, the Court employs a two-part inquiry. First, the Court consults "the objective indicia" of relevant legislative enactments and sentencing juries to determine whether there is a national consensus against a sentence.[57] Finally, the Court analyzes the penological justifications for the sentence and applies its own independent judgment to decide whether the punishment is cruel and unusual.[58]

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49 *See* NAT'L RESEARCH COUNCIL, *supra* note 15, at 41.

50 U.S. Const. amend. VII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

51 Stephen Wormiel, *SCOTUS for Law Students: Defining the Contours of the Eighth Amendment*, SCOTUSBLOG (Nov. 11, 2011, 4:40 PM), http://www.scotusblog.com/2011/11/scotus-for-law-students-defining-the-contours-of-the-eighth-amendment/ (explaining the important and divisive role Justices play in interpreting, and thus, determining what the phrase "cruel and unusual punishment" means in today's world).

52 *Id.*

53 *Id.*; *see also* Trop v. Dulles, 356 U.S. 86, 100–01 (1958).

54 *Trop*, 356 U.S. at 101.

55 Wormiel, *supra* note 51.

56 *See* Dow, *supra* note 11.

57 *See* Miller v. Alabama, 132 S. Ct. 2455, 2470 (2012).

58 *Id.* at 2466.

THE SUPREME COURT'S INCREMENTAL DECISION-MAKING AND MINIMALISTIC BEHAVIOR

"The nature of injustice is that we may not always see it in our time."[59] As mentioned above, judicial minimalism is prevalent in decisions where the justices engage in incremental decision-making. Although the decision in *Miller* will be discussed more in depth below, this Note uses *Miller* as an example of judicial minimalism. For example, in *Miller*, the Court expressly limited its ruling to only prohibiting the mandatory nature of the sentencing scheme involving juvenile offenders, and intentionally avoided the larger question of whether to prohibit sentencing all juvenile offenders to LWOP.[60]

In analyzing jurisprudential philosophies, justices are usually defined as being one of four varieties: (1) majoritarians,[61] (2) perfectionists,[62] (3) minimalists,[63] or (4) fundamentalists.[64] At this time, the Court is comprised of mostly minimalists.[65] "Minimalists are conservative in the literal sense."[66] They "prefer nudges to earthquakes."[67] With judicial minimalism, the justices prefer to take small steps, and attempt to do only what is "minimally" necessary to resolve the cases before them.[68] Minimalists do not attempt to revolutionize the law by reference to first principles and thus, prefer to avoid radical revisions.[69] Although minimalists may not always

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59 Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015).

60 *See* Cass R. Sunstein, *Minimal Appeal,* NEW REPUBLIC (Aug. 1, 2005), https://newrepublic.com/article/64638/minimal-appeal (explaining that minimalists can either be liberal or conservative because "minimalism is a method and a constraint" rather than a program that produces particular results) [hereinafter Sunstein, *Minimal Appeal*].

61 *Id.* (noting that many of the great social programs of the New Deal era were legitimated as a result of majoritarianism).

62 *Id.* (describing the Warren Court as perfectionists and explaining that in the last decade, perfectionists have sought to use the Constitution to strike down bans on same-sex marriage, to create a right to welfare, and to give people a right to make medical decisions free from governmental intrusion).

63 *Id.* (describing Justices Breyer and Ginsburg as "Judicial Minimalists"); *see also* Mary Berkheiser, *Developmental Detour: How the Minimalism of* Miller v. Alabama *Led the Court's "Kids Are Different" Eighth Amendment Jurisprudence Down a Blind Alley*, 46 AKRON L. REV. 489, 515 (2013) (explaining that on the Roberts Court, all but two of the Court's most conservative jurists have embraced judicial minimalism in one form or another).

64 *See* Sunstein, *Minimal Appeal*, *supra* note 60 (describing Justice Thomas and former Justice Scalia as fundamentalists, who are committed to "originalism").

65 *See* Berkheiser, *supra* note 63, at 515.

66 *See* Sunstein, *Minimal Appeal*, *supra* note 60.

67 *Id.* (describing Justices Frankfurter and Marshall Harlan as the great conservative voices on the Warren Court, and committed minimalists, who often criticized the Court's tendency to "issue sweeping rules"); *see also* Berkheiser, *supra* note 63.

68 *See* Sunstein, *Minimal Appeal*, *supra* note 60.

69 *See id.*

agree with how previous judges have ruled, they nevertheless respect prior rulings "partly because respect promotes stability, and partly because respect makes it unnecessary for judges to fight over the most fundamental questions whenever a new problem arises."[70] Accordingly, minimalists prefer to decide cases rather than adopt theories.[71]

It is often argued that the Supreme Court is a human institution that must adapt to the changing conditions shaped by American society and policy.[72] The Court's role is noteworthy because of the difficult role it assumes in American political life.[73] This is primarily due to the controversial appointments of justices, the justices' struggle for influence, the Court's more bureaucratic structure, and the political controversies that are sparked by the important cases it decides.[74] Generally speaking, the Court's opinions serve as an institutional justification for collective decisions. Today, however, the Court appears to be acting more like a political body, making political decisions, where its power in selecting its cases enables it to assume a "super legislature" role.[75] When the Court is deciding major questions of public policy, it attempts to answer political controversies using the language, structure, and spirit of the Constitution.[76] The Court's power lies in the persuasiveness of its rulings and rests with other political institutions, and public opinion.[77] Therefore, because the Court is comprised of justices with sharp differences in approach, it has a tendency of behaving in a way that is likely due to its need to "muster the five votes," as well as the difficulty in drawing lines.[78]

Accordingly, the Court in *Miller* laid down a minimalistic and incremental decision.[79] Although the majority expressed, and the dissenters acknowledged,[80] the Court's "kids are different" approach,[81] the dissenters were nevertheless adamant about leaving this decision to the legislature and state practice.[82] In response to the majority's observation that discretionary LWOP sentences should be "uncommon," Chief Justice Roberts interpreted

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70 *Id.*

71 *See id.*

72 DAVID M. OBRIEN, STORM CENTER 106 (Lisa C. McKay, 10th ed. 2014).

73 *Id.* at 31.

74 *Id.*

75 *Id.* at 227.

76 *Id.* at 259.

77 *Id.*

78 *See* Dow, *supra* note 11.

79 Berkheiser, *supra* note 63, at 516.

80 *See* Miller v. Alabama, 132 S. Ct. 2455, 2477–78 (2012) (Roberts, C.J., dissenting).

81 *See id.*

82 *See id.*

this as the majority's way of "bootstrap[ing] its way to declaring that the Eighth Amendment absolutely prohibits" LWOP sentences for juveniles.[83] Prior to this portion of the opinion, the majority appeared to be going down a path where the only logical conclusion was that it was going to categorically prohibit all LWOP sentences.[84] Therefore, the dissenters argued, the majority's opinion merely paved the way for "further judicial displacement of the legislative role in prescribing appropriate punishment for crime."[85]

In *Miller*, the Court could have—and should have—relied on the Eighth Amendment to explain how "cruel and unusual" it is for society to determine that a twelve-year-old boy or girl is so incorrigible or so "morally depraved" that they need to be locked up forever.[86] There are likely only two presumptions that can potentially explain the Court's approach. First, the majority only addressed the issue before the Court and intentionally avoided the larger question in order to pave the way for the Court to address it in a future case. In the alternative, considering the "need to muster the five votes," the difficulty in "drawing lines," or both, perhaps the majority only decided "what was necessary," to find the *mandatory* nature of the LWOP sentence unconstitutional.[87] Regardless, it is clear that these are just small steps that are likely the result of judicial minimalism.[88] Consequently, the Court in *Miller* is criticized for making "either a big mistake or a terrible blunder."[89]

Nevertheless one thing is clear: the decision in *Miller* indicates a sharp indication of how the American judicial system views juvenile offenders.[90] In fact, "[w]hat we are seeing is a very stark and important rethinking" of how juvenile offenders are treated.[91] For example, as explained, prior to

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83 *Id.* at 2481 (using the word "unusual" as a synonym for "uncommon," Chief Justice Roberts explains how eventually, the practice of LWOP will become so rare that the national consensus of LWOP will be practically non-existent and thus, the Court will be able to make LWOP unconstitutional in a later case in the future); *see also id.* at 2469 (majority opinion).

84 *See also id.* at 2469 (majority opinion).

85 Miller v. Alabama, 132 S. Ct. 2455, 2481 (2012) (Roberts, C.J., dissenting).

86 *See, e.g.*, Dow, *supra* note 11.

87 *See id.*

88 *See* Sunstein, *Minimal Appeal*, *supra* note 60.

89 *See* Dow, *supra* note 11.

90 Ethan Bronner, *Sentencing Ruling Reflects Rethinking on Juvenile Justice*, N.Y. TIMES (June 26, 2012), http://www.nytimes.com/2012/06/27/us/news-analysis-ruling-reflects-rethinking-on-juvenile-justice.html?_r=0 (quoting Marsha Levick, co-founder of the nonprofit Juvenile Law Center in Philadelphia in 1975, "For years we were trying to convince the courts that kids have constitutional rights just like adults. Now we realize that to ensure kids are protected, we have to recognize that they are actually different from adults.").

91 *See id.*

Roper, all juvenile offenders faced the death penalty,[92] and prior to *Graham*, nonhomicide juvenile offenders potentially faced LWOP sentences.[93] Accordingly, in less than a decade, the Court has stepped away from (1) sentencing children to die,[94] (2) sentencing nonhomicide juvenile offenders to LWOP,[95] and (3) mandatorily sentencing children to LWOP.[96] However, the one thing that distinguishes the first two cases from the last is the Court's approach. For example, in *Roper* and *Graham*, the Court's decisions were not minimalistic because in both, the Court categorically prohibited the sentences in their entirety.[97] However, in *Miller*, the Court only prohibited the mandatory nature of the sentence.[98]

This is not to say that judicial minimalism is never appropriate. Judicial minimalism may be an appropriate approach in some areas of the law.[99] However, the juvenile justice system is not one of those areas.[100] Considering all that is known about how "kids are different," and should accordingly be treated differently, the Court must drastically move towards preventing juveniles from being sentenced unfairly and disproportionately.[101] In fact, considering the rate at which issues relating to juvenile sentencing arise, the Court must provide future sentencers with "a sense of what the law is," or it will result in a significant burden on decisionmakers, future juvenile offenders, and their families.[102] A look at the Court's history indicates that in several occasions, it has recognized such issues in other cases. For example, after decades of confusion regarding when a confession is considered voluntary, the Court decided the landmark case of *Miranda v. Arizona*.[103] In *Miranda*, the Court presumed

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92 *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 551 (2005).

93 *See, e.g.*, Graham v. Florida, 560 U.S. 48, 48 (2010).

94 *See Roper*, 543 U.S. at 551.

95 *See Graham*, 560 U.S. at 48.

96 *See* Miller v. Alabama, 132 S. Ct. 2455 (2012).

97 *See Roper*, 543 U.S. at 555; *Graham*, 560 U.S. at 48.

98 *See Miller*, 132 S. Ct. at 2455.

99 Cass R. Sunstein, *Beyond Judicial Minimalism*, 43 TULSA L. REV. 825 (2008) (describing how minimalism can be "a terrible blunder" in some areas, and explaining the areas where judicial minimalism may be appropriate, even though, in the end, they do not, "provide an adequate justification of minimalism") [hereinafter Sunstein, *Beyond Judicial Minimalism*].

100 *See id.* at 826 (explaining that minimalist rulings may only be appropriate when they decrease the costs of decisions and errors).

101 *See* Bronner, *supra* note 90 (quoting Lisa M. Wayne, president of the National Association of Criminal Defense Lawyers, "[n]ow all the research and the rulings support what we have known in our hearts to be true."); *see also* Chang et al., *infra* note 172, at 95–101 (discussing disproportionate and extraordinary length sentences).

102 *See* Sunstein, *Beyond Judicial Minimalism*, *supra* note 99, at 836 (arguing that there is no adequate justification for judicial minimalism).

103 *See id.* at 837 (citing Miranda v. Arizona, 384 U.S. 436, 478–79 (1966) and using it as an

that all custodial interrogations created inherent coercion and required law enforcement to provide all suspects with a set of warnings before commencing custodial interrogations.[104] In clarifying this area of the law, the Court understood the importance of providing further guidance due to the confusion and difficulty that resulted from the case-by-case analysis on the "voluntariness of confessions."[105]

The Court similarly employed this more expansive approach in *Roper* and *Graham*, where, among other things, the Court exercised its own independent judgment to reverse its position on the sentencing scheme at issue in both cases.[106] For instance, in *Roper*, the Court noted that "the prosecutor argued Simmons' youth was aggravating rather than mitigating, and although this sort of overreaching could be corrected by a particular rule to ensure that the mitigating force of youth is not overlooked"—such as the one laid down in *Miller*—it would nevertheless "not address the Court's larger concerns."[107] Therefore, specifically in regards to the juvenile justice system, because the costs and errors of these minimalistic decisions are too high and too risky, the Court must engage in a more expansive approach to further clarify this area of the law.[108]

THE MILLER DECISION

In June 2012, the Supreme Court decided two companion cases, *Miller v. Alabama* and *Jackson v. Hobbs*, where two fourteen-year-old boys were convicted of murder and mandatorily sentenced to LWOP.[109] The Court explained that in both cases, "[s]tate law mandated that each juvenile die in prison even if a judge or jury would have thought his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence more appropriate."[110] Thus, the Court concluded, mandatory sentencing schemes are unconstitutional when applied to LWOP for juveniles.[111]

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example of the importance of an expansive constitutional law interpretation); *see also Miranda*, 384 U.S. at 478–79.

104 *Id.*

105 *Id.*

106 *See* Berkheiser, *supra* note 63, at 514 n.210; *see also* Roper v. Simmons, 543 U.S. 551, 551 (2005); Graham v. Florida, 560 U.S. 48, 48 (2010).

107 *See Roper*, 543 U.S. at 573.

108 *See* Sunstein, *Beyond Judicial Minimalism*, *supra* note 99, at 826 (minimalist rulings may only be appropriate when they decrease the costs of decisions and errors).

109 Miller v. Alabama, 132 S. Ct. 2455, 2457 (2012).

110 *Id.* at 2460.

111 *Id.* at 2463.

This conclusion was premised on two strands of precedent.[112] The first strand focused on *Roper v. Simmons* and *Graham v. Florida*.[113] Together, these decisions adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of the penalty.[114] The second strand was based on *Woodson v. North Carolina* and *Lockett v. Ohio*, which collectively required sentencing authorities to consider a defendant's characteristics and the details of the offense before sentencing the defendant to death.[115] Based on these cases, the Court in *Miller* concluded that children are entitled to an "individualized consideration" before being sentenced to LWOP.[116] Accordingly, *Miller* reaffirmed the principle that "kids are different."[117]

Although the majority and the dissenters both acknowledged the "kids are different" principle, the evolving standards of decency inquiry caused a split amongst the Justices.[118] Chief Justice Roberts, and Justices Scalia, Thomas, and Alito dissented, explaining that a national consensus existed because there was evidence of twenty-nine jurisdictions permitting mandatory LWOP for juveniles.[119] The majority disagreed and emphasized its narrow decision, explaining that a national consensus was not needed because it was not banning LWOP in its entirety, but merely requiring a sentencer to follow a certain process before sentencing a juvenile to LWOP.[120]

The majority reasoned that states authorizing LWOP sentences for juveniles do so through "two independent statutory provisions"—one allowing the transfer of juveniles to adult court, and the other setting penalties for those who are tried in adult court.[121] Nevertheless, the majority explained, this process did not indicate that "the penalty ha[d] been endorsed through deliberate . . . legislative consideration."[122] However, unpersuaded by the majority's rationale, the dissenters

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112 *Id.*

113 *Id.*; *see also* Roper v. Simmons, 543 U.S. 551, 551 (2005); Graham v. Florida, 560 U.S. 48, 48 (2010).

114 *Id.*

115 Miller v. Alabama, 132 S. Ct. 2455, 2463 (2012); *see also* Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion); Lockett v. Ohio, 438 U.S. 586 (1978).

116 *Miller*, 132 S. Ct. at 2470.

117 *Id.* at 2470.

118 *Id.* at 2478 (Roberts, C.J. dissenting).

119 *Id.* at 2477 (arguing that if 2,500 juveniles are serving LWOP, the sentence is not unusual).

120 *See id.* at 2471 (majority opinion).

121 *Id.* at 2472.

122 Miller v. Alabama, 132 S. Ct. 2455, 2472 (2012) (citing Graham v. Florida, 560 U.S. 48, 67 (2010)).

vehemently disagreed and criticized the majority for imposing its own values and displacing "the legislative role in proscribing appropriate punishment for crime."[123] The Court nevertheless stopped short of banning all juvenile LWOP sentences.[124] Thus, *Miller* only requires judges to consider a juvenile's age and attendant characteristics before irrevocably sentencing the juvenile to spend the rest of his or her life in prison.[125]

As a result, the *Miller* decision merely purported to "help" about eighty percent of the 2,500 juvenile inmates serving mandatory LWOP sentences.[126] However, this is more of a theory than a fact, because in *Miller*, the Court did not rule that LWOP is absolutely prohibited and therefore, unconstitutional when applied to juvenile offenders.[127] Instead, it explained that sentencing juveniles to mandatory LWOP should be "uncommon."[128] The majority intentionally left open the possibility of there being some "appropriate occasions for sentencing juveniles to this harshest possible penalty. . . ."[129] Therefore, the Court stopped short of banning the sentence in its entirety and thus, merely banned the mandated nature of the sentencing procedure.[130]

ANALYSIS

WHERE MILLER WENT WRONG

Although the decision in *Miller* signaled another step forward for the juvenile justice community, it was in effect, only a small step forward.[131] In its decision, the Court took a "decided detour" around the Eighth Amendment "kids are different" jurisprudence.[132] Most importantly, it departed from the precedent on which it passionately relied on.[133] For instance, although it relied on *Roper* and *Graham* in its legal analysis, the decision veered far away from the conclusion of those decisions.[134] Specifically, *Miller* did not impose a broad categorical rule prohibiting

123 *Id*. at 2481 (Roberts, C.J. dissenting); *see also* Dow, *supra* note 11.
124 *See* Tanehaus, *supra* note 18.
125 *See id.*
126 *See* Dow, *supra* note 11.
127 *Id.*
128 *See* Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).
129 *Id.*
130 *Id.* at 2463.
131 *See* Sunstein, *Minimal Appeal*, *supra* note 60.
132 *See* Berkheiser, *supra* note 63, at 507.
133 *See Miller*, 132 S. Ct. at 2455.
134 *See* Berkheiser, *supra* note 63, at 501.

LWOP sentences on all juvenile offenders, which is a result both *Roper* and *Graham* reached.[135] A categorical ban on all LWOP sentences on juvenile offenders would have drawn a clear line, which is necessary to ensure these "cruel and unusual" punishments are not imposed on juvenile offenders.[136] However, the Court in *Miller* distinguished its decision from the one it made in *Graham* by relying on the fact that *Graham* imposed a "flat ban" on LWOP sentences applicable to only nonhomicide crimes.[137] Although the decision in *Graham* only related to nonhomicide offenses, *Miller* was not similarly constrained because both of the petitioners had requested the Court to consider prohibiting LWOP sentences for all juvenile offenders.[138] There is no reason, nor does the Court attempt to provide for one, as to why juveniles who commit murder are more culpable, and thus, distinguishable from those who do not.[139]

Moreover, a central problem in *Miller* is that it requires lower courts to employ a case-by-case, individualized sentencing scheme, which is an approach the Court expressly rejected in both *Roper* and *Graham*.[140] In *Roper*, the Court originally considered individualized sentencing, acknowledging that it was a central feature in death penalty sentencing cases.[141] However, in rejecting this approach, the Court announced the "kids are different" principle and emphasized the potential risks that exist when the "brutality or cold-blooded nature of [a] particular crime overpower mitigating arguments based on youth as a matter of course."[142] As a result, the Court explained, "in some cases, a defendant's youth may even be counted against him."[143] The Court also found it compelling how

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135 *See* Brian J. Fuller, Case Note, *A Small Step Forward in Juvenile Sentencing, But Is It Enough? The United States Supreme Court Ends Mandatory Juvenile Life Without Parole Sentences;* Miller v. Alabama, 132 S. Ct. 2455 (2012), 13 WYO. L. REV. 377, 382–84 (2013) (explaining had the Court employed the Eighth Amendment proportionality analysis, it would have relied on the objective indicia of societal consensus and its own independent moral judgment to establish a categorical ban on the imposition of juvenile LWOP sentences).

136 *See* Berkheiser, *supra* note 63, at 501; *see also* Roper v. Simmons, 543 U.S. 551, 551 (2005); Graham v. Florida, 450 U.S. 48 (2010).

137 *See* Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012); *see also* Berkheiser, *supra* note 63, at 501.

138 *See Miller*, 132 S. Ct. at 2465; *see also* Berkheiser, *supra* note 63, at 501.

139 *See Miller*, 132 S. Ct. at 2469 (finding sufficient its holding that mandatory LWOP sentences for juvenile offenders violates the Eighth Amendment, thus it did not need to "consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on [LWOP] for juveniles, or at least for those 14 and younger.").

140 *See* Berkheiser, *supra* note 63, at 502.

141 *See* Roper v. Simmons, 543 U.S. 551, 572 (2005) (explaining this "system is designed to consider both aggravating and mitigating circumstances, including youth, in every case.").

142 *Id.* at 572–73.

143 *See id.* at 573 (noting "the prosecutor argued Simmons' youth was aggravating rather than

even expert psychologists find it difficult and refrain from attempting to differentiate between juvenile offenders whose crimes reflect a capacity for change, from those whose crimes reflect "irreparable corruption."[144] The Court thus concluded that states must similarly "refrain from asking jurors to issue a far graver condemnation—that a juvenile merits the death penalty."[145] Accordingly, to ensure that no juvenile offender would be sentenced to death again, the Court adopted a rule, whereby all juvenile offenders were placed off limits.[146]

Additionally, in *Graham*, the Court battled with confining the boundaries[147] of the LWOP sentences for non-homicide juvenile offenders, which required "a case-specific gross disproportionality inquiry."[148] In rejecting this case-specific disproportionality inquiry, the Court noted the potential risk of inaccuracy associated with attempting to distinguish between juvenile offenders who are incorrigible and those who have the capacity for change.[149] Furthermore, this approach fails to consider the difficulties associated with representing juvenile offenders.[150] Thus, the Court focused on protecting nonhomicide, juvenile offenders from being erroneously sentenced to LWOP because of the risk of a judge or jury finding the juvenile sufficiently culpable to deserve a LWOP sentence.[151] Thus, based on all that we know about how "kids are different," the Court in *Roper* and *Graham* rejected individualized sentencing schemes because of the risks that gory facts of a heinous crime committed by a juvenile offender would pose in a judge or jury's sentencing determination.[152]

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mitigating," and although "this sort of overreaching could be corrected by a particular rule to ensure that the mitigating force of youth is not overlooked, [it] would not address [the Court's] larger concerns.").

144 *Id.* (explaining the rule prohibiting psychiatrists from diagnosing patients under the age of eighteen with antisocial personality disorders).

145 *Id.* (prohibiting states from ending a juvenile's life and potential to attain a mature understanding of his own maturity).

146 *See id.* at 574; *see also* Berkheiser, *supra* note 63, at 504.

147 Graham v. Florida, 560 U.S. 48, 77 (2010) (explaining how difficult sentencing is for trial judges, because they must take into account "the human existence of the offender and the just demands of a wronged society").

148 *Id.* (the case-specific gross disproportionality inquiry requires that the sentencer consider the offender's age and weigh it against the seriousness of the crime).

149 *Id.* (citing Roper v. Simmons, 543 U.S. 551, 572 (2005)).

150 *Id.* at 78 (explaining how juveniles mistrust adults and have limited understandings of the criminal justice system, as well as the roles of the institutional actors within it); *see also* YOUTH ON TRIAL, *supra* note 23.

151 *Id.* at 79.

152 Berkheiser, *supra* note 63, at 510; *Roper*, 543 U.S. at 573 (explaining how the defendant's youth was used as an aggravating rather than a mitigating factor); Graham v. Florida, 560 U.S. 48, 76 (2010) (explaining how the sentencing judge found the defendant "irredeemably depraved," and "incorrigible").

Notwithstanding this, *Miller* neglected all the potential risks associated with such a sentencing scheme and "inject[ed] it into the very heart of sentencing."[153]

Although the "lynchpin of the *Graham* logic" was based on the juvenile's "diminished culpability" and "heightened capacity for change," the Court in *Miller* disregarded the penological justifications that it had relied on in *Graham*.[154] Although "[t]he Eighth Amendment does not mandate adoption of any one penological theory," it is not dispositive in establishing whether a sentence is justified.[155] Thus, a sentence lacking any legitimate penological justification, is in effect, disproportionate to the offense.[156] In fact, the Court in *Graham* explained that LWOP is "the second most severe penalty permitted by law."[157] In explaining the severity of a LWOP sentence, the Court in *Graham* compared LWOP to a death sentence, noting that LWOP: "[M]eans denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days."[158]

In *Miller*, the Court was correct in considering the penological justifications before concluding that none of the penological goals were served by the mandatory sentencing schemes.[159] Namely, deterrence plays no role in the decision-making process of juvenile offenders because they make impetuous and ill-considered actions and decisions, which indicates they are less likely to take possible punishment into consideration when making such decisions.[160] Additionally, although incapacitation is an important goal because of the risk that an offender's potential recidivism might pose to society, justifying LWOP for a juvenile requires "making a judgment that the juvenile is incorrigible."[161] Notably, this runs contrary to the notion that juveniles have "greater prospects of reform."[162] Finally,

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153 *See* Berkheiser, *supra* note 63, at 513.

154 *See Graham*, 560 U.S. at 74; *see also* Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

155 *See id.* at 71 (quoting Harmelin v. Michigan, 501 U.S. 957, 996 (1991) and noting that the Court has recognized four penological sanctions as legitimate: (1) retribution, (2) deterrence, (3) incapacitation, and (4) rehabilitation).

156 *See id.*

157 *See id.* at 69–70 (noting that LWOP is an especially harsh punishment for a juvenile offender to serve because he or she will serve more years in prison than an adult offender).

158 *See id*. at 70 (citing Naovarath v. State, 105 Nev. 525, 526 (1989)).

159 *See* Miller v. Alabama, 132 S. Ct. 2455, 2465–66 (2012).

160 *See id.*; *see also* Graham v. Florida, 560 U.S. 48, 72 (2010) (Juveniles offenders "have a lack of maturity and an underdeveloped sense of responsibility.").

161 *Miller*, 132 S. Ct. at 2465 (citing *Graham*, 560 U.S. at 72).

162 *See supra* text accompanying note 5 ("Capacity for change" is one of the three fundamental characteristics that make children constitutionally different from adults.).

rehabilitation is a penological goal that forms the basis of parole systems.[163] Accordingly, as the Court in *Miller* acknowledged, LWOP "cannot be justified by the goal of rehabilitation,"[164] because this penalty "forswears altogether the rehabilitative ideal."[165]

Most defendants serving LWOP rarely receive access to the rehabilitative services that are available to other inmates.[166] Juvenile offenders need and are most receptive to such rehabilitation. The absence of such rehabilitative services or treatments results in an extremely disproportionate punishment for juvenile offenders.[167] However, despite the Court's understanding and awareness of the lack of justifications that make LWOP sentences inadequate for juvenile offenders, it surprisingly still believes there would be "appropriate occasions for sentencing juveniles to [LWOP]."[168] This narrow decision in *Miller* failed to offer any reason or explanation for its limited ruling, which in turn, has left many questions unanswered. The resulting effect of this decision is discussed in the following section.

MILLER'S EFFECT ON THE FUTURE OF THE JUVENILE JUSTICE SYSTEM

Those who sought resentencing under *Miller* faced a "head-on collision with everything *Roper* and *Graham* warned against."[169] Although *Miller* provided all juvenile offenders with the opportunity to seek a lesser sentence, it failed to ensure that this new sentencing determination was the product of sound and principled decision-making.[170] For example, because *Miller* only required sentencers to consider the fact that children are different, and how these differences counsel against irrevocably sentencing them to LWOP, it failed to provide any guidelines for sentencing such juvenile offenders.[171] Accordingly, it left many questions unanswered. First, will it apply retroactively?[172] Second, will it apply to discretionary

163 *Graham*, 560 U.S. at 73.
164 *Id.* at 74.
165 *Miller*, 132 S. Ct. at 2465.
166 Graham v. Florida, 560 U.S. 48, 74 (2010).
167 *Id*.
168 *See* Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).
169 *See* Berkheiser, *supra* note 63, at 507.
170 *See id.* at 514.
171 *See Miller*, 132 S. Ct. at 2469.
172 *See* Robert S. Chang et al., *Evading* Miller, 39 SEATTLE U. L. REV. 85, 86 (2015).

sentencing schemes or extraordinary length sentences?[173] Lastly, what, if anything, does *Miller* require when courts sentence juvenile offenders on a case-by-case basis?[174] As a result, states were left responding to these situations differently, using a variety of approaches, which in turn, has resulted in many different conclusions.[175] The most concerning of these approaches relates to those states that "have found ways to circumvent" the individualized sentencing scheme required by *Miller*.[176]

First, *Miller* never addressed the question[177] of resentencing inmates who had already been mandatorily sentenced to LWOP for crimes committed when they were children.[178] Accordingly, this question—of retroactivity—resulted in state courts responding differently.[179] While some of the states that found *Miller* retroactive provided juvenile offenders with an opportunity to be resentenced, other states did not.[180] Consequently, similar offenders, in similar positions, have been treated and subsequently sentenced very differently.[181]

A retroactivity analysis usually follows the framework provided for in *Teague v. Lane*, which provided distinctions for determining a "new rule" versus an "old rule," and "between decisions based on 'substantive' law rather than procedure."[182] Most courts addressing this issue found that *Miller* announced a new rule, however, they reached different conclusions on whether it was a substantive rule or if it constituted a watershed rule of criminal procedure.[183] For instance, courts in Florida, Michigan, and

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173 *Id.* at 87.

174 *Id.* at 92.

175 *See* Montgomery v. Louisiana, 136 S. Ct. 718, 725 (2016) (comparing the cases that have reached different conclusions on whether the holding in *Miller* was retroactive).

176 Chang et al., *supra* note 172, at 87–88.

177 Although the Supreme Court subsequently found the holding in *Miller* is retroactive, this portion of the analysis is limited to only discussing the issues that arose after *Miller*. *See* Montgomery v. Louisiana, 136 S. Ct. 718 (2016). A more thorough analysis of the retroactivity issue is beyond the scope of this Note.

178 *See* The Sentencing Project, *Slow to Act: State Responses to 2012 Supreme Court Mandate on Life Without Parole 3* (2014), http://sentencingproject.org/doc/publications/jj_State_Responses_to_Miller.pdf [hereinafter The Sentencing Project].

179 *See id.*; *see also* Lyle Denniston, *Argument Preview: A New Look–Maybe–at Life Sentences for Youths*, SCOTUSBLOG, www.sctousblog.com/2015/10/a-new-look-maybe-at-life-sentences-for-youths (explaining the complexity of the decision in Teague v. Lane, 489 U.S. 288 (1989)).

180 *See* The Sentencing Project, *supra* note 178.

181 *See id.*

182 *See* Chang et al., *supra* note 172, at 92; *see also Teague*, 489 U.S. at 289.

183 *See* Chang et al., *supra* note 172, at 92; *see also* Denniston, *supra* note 179 (explaining how *Teague* Doctrine requires a new rule apply retroactively in two circumstances: "first, if it is a substantive rule limiting the kind of conduct that can be treated as criminal or limiting a kind of punishment that can be imposed; or, second, if it is a procedural rule that goes to the basic fairness of a criminal trial.").

Minnesota interpreted *Miller* as a procedural rule, finding that *Miller* was "not retroactively applicable to cases pending on collateral review."[184] On the other hand, state courts in Mississippi, Massachusetts, Illinois, Iowa, and Louisiana, found that *Miller* announced a substantive rule, which did apply retroactively to cases on collateral review.[185] Nevertheless, despite the Court's ruling in *Montgomery v. Louisiana*, states still retain the authority to decide whether to provide retroactive relief under their respective retroactivity doctrines.[186]

Additionally, although recent studies suggest a "robust consensus" against the use of juvenile LWOP,[187] and boast about the "speed and consistency" in which states have responded to *Miller*, these conclusions are misleading.[188] The fact that states factually or statistically appear to be rejecting the idea of juvenile LWOP is not dispositive. These states may not be sentencing juveniles to LWOP, but instead, are in-effect imposing sentences that are the functional equivalent of a LWOP.[189] For example, it has been reported that since *Miller*, fourteen of the twenty-eight states that had mandatory juvenile LWOP sentences before *Miller*, have enacted laws "in compliance" with federal law.[190] These laws may appear beneficial to juvenile offenders because they restrict the imposition of a maximum number of years that the juvenile may be sentenced. However, they also provide the minimum term that a juvenile may be sentenced, which generally range from fifteen years to forty years.[191]

These issues are specifically prevalent in the context of whether *Miller* was limited solely to *mandatory* sentences or if it also included *discretionary* or *extraordinary length* sentences. This issue can be especially attributed to the majority's decision in *Miller* to conclude with

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184 Cara H. Drinan, Commentary: *Misconstruing* Graham *&* Miller, 91 WASH. U. L. REV. 786, 791 (2014) (discussing the many ways in which state actors have failed to comply with the Court's mandate).

185 *Id.*

186 *See* Juvenile Life Without Parole After Miller v. Alabama, A Report of the Phillips Black Project, at 2 (July 2015).

187 *Cf.* Brief of The Charles Hamilton Houston Institute for Race & the Justice & the Criminal Justice Institute as *Amicus Curiae* in Support of Neither Party at 12, Montgomery v. Louisiana, 136 S. Ct. 718 (2016) (No. 14–280) (arguing a national consensus exists against the use of LWOP because most states have abandoned the practice of sentencing juveniles to LWOP in law or practice).

188 *Id.* at 6 (comparing the rate that states have "responded" to *Miller* to explain that it has been much faster than that of other decisions involving juveniles by relying on that fact that in the three years since *Miller*, an average of three states per year have repudiated juvenile LWOP).

189 Chang et al., *supra* note 172, at 100.

190 *But cf.* Miller v. Alabama *and Juvenile Life Without Parole Laws*, NAT'L CONF. ST. LEGISLATURES (Jan. 25, 2016), http://www.ncsl.org/research/civil-and-criminal-justice/miller-v-alabama-and-juvenile-life-without-parole-laws.aspx.

191 *See id.*

there being "appropriate occasions for sentencing juveniles to this harshest possible penalty. . . ."[192] As the Chief Justice noted, this "disclaimer" was entirely unnecessary to the rule that the majority announced.[193] Nevertheless, because of this "decided departure," many states have interpreted *Miller* narrowly and thus, have limited it to only prohibiting *mandatory* LWOP sentences. In effect, these states do not interpret *Miller* as a prohibition on *discretionary* or *extraordinary length* sentences. What these states fail to acknowledge is that although *Miller*'s conclusion was ambiguous, the Supreme Court has nevertheless unambiguously expressed the "kids are different" principle in various cases over the past decade. Practically speaking, these states are using the decision in *Miller* to inadvertently violate a precedential constitutional principle. *Discretionary* sentences usually provide the sentencer with the option of imposing a variety of sentences,[194] and *extraordinary length* sentences are exactly what the name suggests; sentences consisting of an unusually extended length of time.[195]

Courts struggling with this issue argue that *Miller*'s language is explicitly directed solely towards mandatory LWOP sentences, and thus, does not apply to *discretionary* or *extraordinary length* sentences.[196] At least seven of these states that do not consider *Miller* binding on them interpret *Miller*'s holding as only prohibiting mandatory sentences.[197] These states argue that because they provide *nonmandatory*, or *discretionary* sentencing schemes, they are not violating the mandate in *Miller* because *Miller* only prohibits mandatory LWOP sentences on juvenile offenders.[198] Thus, a court in these states can still impose a LWOP sentence on a juvenile offender so long as there is nothing "requiring" it to do so.

As to the states imposing "extraordinary length" sentences, these states also interpret the holding in *Miller* narrowly, by finding that *Miller* only prohibited mandatory *life without parole* sentences.[199] These states argue that because they will provide juvenile offenders with parole at a later date, they are not *actually* prohibiting parole.[200] The caveat lies within the temporal limitation, which in effect, offers parole at a date so far in the

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

193 *Id.* at 2481 (Roberts, C.J., dissenting).

194 Chang et al., *supra* note 172, at 95–98.

195 *Id.* at 99–101.

196 *Id.* at 95, 98–99.

197 *Id.* at 98 (including Virginia, Georgia, Nevada, New Mexico, Tennessee, West Virginia, and Wisconsin).

198 *See id.* at 95–98.

199 *See id.* at 99–101.

200 *See id.* at 100.

future that it will likely exceed the juvenile's natural life expectancy.[201] For example, in Florida, the longest sentence recorded was a ninety-nine-year single sentence.[202] These sentences are essentially imposing the same punishment the juvenile would have received had he been sentenced to LWOP. Thus, the juvenile is facing the "functional equivalent" of LWOP, without the mandated individualized consideration *Miller* imposes.[203] These sentences deprive the child of the "most basic liberties without [being] given hope of restoration," which is constitutionally repugnant because the Eighth Amendment "forbids States [sic] from making the judgment at the outset that those offenders [will ever] be fit to reenter society."[204]

Lastly, and perhaps the biggest question moving forward is: what does *Miller* require from a sentencer when sentencing a juvenile offender? While not an exhaustive list, the Court in *Miller* did offer some sort of guidance on what sentencing judges should identify when sentencing a juvenile offender.[205] The sentencing judge should consider several factors relating to specific characteristics surrounding the child and the crime, such as: (1) the character and record of the individual offender and the circumstances of the offense; (2) the child's background, as well as mental and emotional development, (3) the child's age and hallmark features; (4) the child's family and home environment, especially where it will help the sentencer understand why the child was surrounded by such a harmful environment; (5) the child's participation in the offense, especially with an eye towards whether peer pressure was involved; (6) whether any lesser included offenses could have been included; and (7) the child's ability to be rehabilitated.[206]

Nevertheless, although it appears that *Miller* left the lower courts with some factors to consider, these factors do not address whether they should be considered exclusively, whether they are not mutually exclusive, or instead, whether the lower courts may consider only those factors it deems appropriate. As to the latter, this increases the risk that a sentencer will

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201 *See id.*

202 *See* Maggie Lee, *Florida Struggles with Youth Life Sentences*, JUV. JUST. INFO. EXCH. (July 30, 2012), http://jjie.org/florida-struggles-youth-life-sentences/90589/ (explaining Florida's battle with extraordinary length sentences after *Graham*).

203 Chang et al., *supra* note 172, at 100 (as stated above, this Note takes the position that the individualized consideration mandated by *Miller* contradicts the principles established in *Roper* and *Graham*, but nevertheless concede to it in this respect, in order to establish that *Miller* left lower courts with no direction, which is another problem with the decision in *Miller*).

204 *Id.* at 101.

205 *See* Miller v. Alabama, 132 S. Ct. at 2468–69 (2012).

206 *See id.* at 2467–68; *see also* Chang et al., *supra* note 172, at 90–91.

subjectively choose which factors to consider while emphasizing the factors that appeal the most to him or her. This is precisely a risk the Court expressly warned against in *Roper* and *Graham*, when it rejected such individualized sentencing schemes. Therefore, without further guidance, the lower courts will essentially be able to continue behaving in a manner that ignores the constitutional principle that "kids are different." In fact, now judges have a list of factors that they can use to justify their decisions in sentencing juvenile offenders to LWOP.

THE JUVENILE JUSTICE SYSTEM THROUGH A COMPARATIVE LAW PERSPECTIVE

The concerns stated above are further exacerbated by evidence of the juvenile justice system through a comparative law perspective. A close look at the Court's precedent shows that it has generally given some consideration to international standards as part of the Eighth Amendment's decency calculus in cases involving juveniles.[207] For reasons not explained, however, the Court in *Miller* did not partake in any comparative analysis.[208] The Court in *Miller* disregarded the fact that "the international community speaks with one clear, disapproving voice" towards the way our country treats juvenile offenders.[209] Nevertheless, before delving into why the comparative law perspective is so important in cases involving juveniles, it may be helpful to begin by first explaining why a comparative constitutional law analysis is appropriate and legitimate in the first place.

Constitutional meaning derives from the practice of argument and appeal made with proper forms, which appeal to the text, history, doctrine, prudence, structure, and ethos of the Constitution of the United States.[210] Thus, judicial review is legitimated by our adherence to these six different approaches.[211] First and foremost, a comparative constitutional analysis has influenced legal reasoning and judicial decision-making since the birth of the United States.[212] Over the past seventy-five years, the Court has

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207 *See* Craig, *supra* note 32, at 397–98; *see, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005).

208 *See generally* Miller v. Alabama, 132 S. Ct. 2455 (2012).

209 *See* Craig, *supra* note 32, at 397. For a further explanation on the history of the Supreme Court's behavior in interpreting foreign sources of law see for example Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 856–57, 859, 864 (Dec. 2005) [hereinafter Calabresi, *The Supreme Court & Foreign Law*].

210 Bradley Silverman, *The Legitimacy of Comparative Constitutional Law: A Modal Evaluation*, 24 MICH. ST. INT'L. L. REV. 307, 309 (2016).

211 *Id.* at 309–10.

212 *Id.* at 310.

referenced foreign law[213] in an increasingly significant number of constitutional cases.[214] Therefore, the Court's precedent implies that it is appropriate to refer to foreign law in constitutional cases.

Similarly, it is not dispositive that the application of foreign law is not expressly discussed in the Constitution. Instead, the fact that the Constitution is silent on applying foreign law suggests that although it does not condone the practice, it does not condemn it either.[215] As former Chief Justice Marshall once explained, decisions of other countries exhibit how the law of nations is understood elsewhere, and how it will be considered in determining the rule, which is to prevail here.[216] Those decisions, he clarified, while not binding authority on United States Courts, merit respectful attention for their potential persuasive value.[217] Consequently, foreign law serves as a tool that can help the Court understand and interpret what is, fundamentally, American law.[218] For example, just as we regularly employ a number of various other sources, such as law review articles, books, other laws, canons of construction, legislative history, and common law terms of art, we should apply foreign law similarly.[219]

In determining the meaning of the Eighth Amendment, "the climate of international opinion concerning the acceptability of a particular punishment is also not irrelevant."[220] In fact, "[t]o decide any case, a judge needs to know certain things about the world; statutes and case law cannot be used to resolve legal disputes, unless on their own, they are applied to the facts at hand."[221] Accordingly, "foreign decisions may contain truths, knowledge, or information about facts of the world that are relevant to an American Judge."[222] As Justice Ginsburg has instructed, judges should make an effort to learn what they can from the experience and wisdom that

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213 *See* Calabresi, *The Supreme Court & Foreign Law*, *supra* note 209, at 748 n.5 ("Foreign law is considered to include statutes and cases of other countries arrived at after American independence in 1776. We think the term includes the writing of foreign jurists and scholars.").

214 *See id.* at 838–39.

215 *See* Silverman, *supra* note 210, at 319.

216 Justice Ruth Bader Ginsburg, Speech at the American University International Academy of Comparative Law (Jul. 30, 2010) [hereinafter Justice Ginsburg, Speech]; *see also* Calabresi, *The Supreme Court & Foreign Law*, *supra* note 209, at 763–80 (discussing former Chief Justice John Marshall's "lengthy tenure" on the United States Supreme Court, where he wrote several important opinions that referred to foreign law).

217 Justice Ginsburg, Speech, *supra* note 216 (discussing Chief Justice Marshall's perspective on the impact international law has on U.S. law).

218 *See* Silverman, *supra* note 210, at 344.

219 *Id.* at 310.

220 Graham v. Florida, 130 S. Ct. 2011, 2033 (2010).

221 *See* Silverman, *supra* note 210, at 334.

222 *Id.*

foreign sources may convey because they are helpful in what they should do—and more importantly, they are helpful in what they should not do.[223] Notably, relying on foreign law creates healthy relationships around the world, which builds trust and cooperation between nations to combat mutual enemies, and find solutions to the new legal problems of today that practitioners can all learn and benefit from tomorrow.[224]

Additionally, applying foreign law is further supported in proportion to how recently it has found expression in the case law."[225] For example, the Supreme Court of the United States has recently invoked foreign or international legal sources to aid it in resolving constitutional questions in a number of recent cases, which represents doctrinal support for citing foreign law as persuasive authority.[226] This idea focuses on the "consistency, harmonization, and integrity of treating like cases alike."[227] Harmonizing our law with that of other nations allows us to achieve transnational consistency because "we are bound into a global community, especially on questions of fundamental rights."[228]

However, historical evidence suggests that the application of foreign law should be limited to cases where the justices must determine whether a certain practice is reasonable, as it does in the Fourth Amendment context, or whether it is unusual, as it does in the Eighth Amendment context.[229] Specifically, "[w]here the text [of the Constitution] takes the form of determinate rules, an interpreter's discretion is fixed; but where it uses vague standards or abstract principles, we must apply them to our own circumstances in our own time."[230] For instance, in *Roper*, the majority opinion and Justice O'Connor's dissent both cited foreign law, despite their disagreement on the constitutionality of the juvenile death penalty.[231] In *Roper*, the Court compared the number of countries that had executed juvenile offenders within the preceding fifteen years to demonstrate the existence of a virtually universal global repulsion toward executing children.[232] In comparing the evolution of the practice in the international community, the Court explained that referring to the laws of other countries

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223 *See* Justice Ginsburg, Speech, *supra* note 216.

224 *Id.*

225 *See* Silverman *supra* note 210, at 327.

226 *Id.* at 328.

227 *Id.*

228 *Id.* at 16.

229 *See* Calabresi, *The Supreme Court & Foreign Sources of Law*, *supra* note 209, at 755–56.

230 Silverman, *supra* note 210, at 318.

231 Roper v. Simmons, 543 U.S. 551, 574–79 (2005); *see also id.* at 605 (O'Connor, J., dissenting).

232 *See id.* at 575–78 (majority opinion).

and international authorities is instructive in interpreting the Eighth Amendment's prohibition on "cruel and unusual punishments."[233] As a result, *Roper* serves as just one example of how the Court has consistently relied on foreign law; specifically, in cases involving the Eighth Amendment, which require an analysis into the objective indicia.[234]

Accordingly, interpreting a textually indeterminate constitutional provision, such as the Eighth Amendment, in light of contemporary conditions, requires looking to external sources.[235] Therefore, relying on foreign law is especially appropriate in cases involving cruel and unusual punishment, where the Court is asked to make determinations of reasonableness.[236] Moreover, because "comparative analysis is emphatically relevant to the task of . . . enforcing human rights," applying foreign law is particularly important in these Eighth Amendment cases.[237] Therefore, applying foreign law to cases involving cruel and unusual punishment reiterates the following two important principles: (1) that our Constitution is a living document, meant to endure for the ages;[238] and (2) the formulation expressed in *Trop v. Dulles*.[239] Notably, the plurality opinion in *Trop* was not only important because it provided the benchmark for the Court in understanding the phrase "cruel and unusual punishment,"[240] but it is also important because it serves as the beginning of the modern Court's reliance on foreign law in its Eighth Amendment jurisprudence.[241] Thus, in Eighth Amendment cases, the Court frequently looks to foreign law to determine the evolving standards of decency in evaluating what punishments are unconstitutionally cruel and unusual.[242]

Therefore, because an international perspective is appropriate and legitimate in interpreting the Eighth Amendment, this Note will continue by

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233 *Id.*

234 *See* Miller v. Alabama, 132 S. Ct. 2455, 2487 (2012) (Alito, J., dissenting) (noting how the Court occasionally relied on foreign law in Roper v. Simmons, 543 U.S. 551, 575 (2005); Enmund v. Florida, 458 U.S. 782, 796 (1982); Thompson v. Oklahoma, 487 U.S. 815, 830–31 (1988); and Coker v. Georgia, 433 U.S. 584, 596 (1977)).

235 *See id.*

236 *See* Steven Calabresi, *A Shining City on a Hill: American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1413 (2006).

237 *See* Thomas E. Baker, *A Modest Experiment in Pedagogy: Lessons on Comparative Constitutional Law*, 6 FIU L. REV. 99, 108 (2010–11).

238 *See* M'Culloch v. Maryland, 17 U.S. 316 (1819).

239 *See* Wormiel, *supra* note 51 (explaining how the meaning of the Eighth Amendment would change over time as society's views on different criminal sanctions changed); *see also* Trop v. Dulles, 356 U.S. 86 (1958).

240 *See id.*

241 *See id.*

242 *See id.*

explaining its importance in relation to *Miller v. Alabama* and specifically, as it relates to the issues surrounding the juvenile justice system. As mentioned above, over the last seventy-five years, a significant number of cases have relied on foreign law in criminal cases.[243] In fact, most Eighth Amendment cases decided during the last seventy-five years have, at the minimum, at least impliedly or expressly mentioned foreign law.[244] However, the Court in *Miller* did not; instead, it ignored the fact that the United States is currently the only country in the world that is responsible for 100% of all the children currently being sentenced to die in prison as a result of their LWOP sentences.[245]

Moreover, the international community has impliedly confirmed the Court's own principle that "kids are different," where most states[246] have either never allowed, expressly prohibited, or avoided sentencing juvenile offenders to LWOP.[247] In fact, international law recognizes that sentencing children to LWOP contravenes society's notion of fairness and emphasizes the "shared legal responsibility" that society has in protecting and promoting child development.[248] Hence, there is a clear international consensus against sentencing juvenile offenders to LWOP.[249]

In addition to this international consensus, there are human rights treaties that prohibit LWOP sentences for juvenile offenders in which the United States is a party.[250] Treaties are relevant to the Eighth Amendment analysis because the United States is a party to several of these treaties.[251] As a party to a treaty, the United States assumes the responsibility of complying with such international obligations.[252] Moreover, under the United States Constitution, the United States must uphold these legal

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243 *See* Calabresi, *The Supreme Court & Foreign Sources of Law*, *supra* note 209, at 846 (noting there is "scarcely a prominent Eighth Amendment case decided during the last sixty-five years that does not at least mention foreign legal opinion and practice").

244 *See id.*

245 Connie De La Vega & Michelle Leighton, *Article: Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 989 (2008).

246 This Note follows the international practice of referring to the nations around the world as "states," which is commonly done in the international realm.

247 De La Vega & Leighton, *supra* note 245, at 989 (explaining that as of 2008, there were at least 135 states that expressly rejected the sentence via their domestic legal commitments, and 185 countries that have done so in the U.N. General Assembly).

248 *Id.* at 1008–09.

249 *See* Brief of Amici Curiae Amnesty International, et al., in Support of Petitions at *6, Miller v. Alabama, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647).

250 *See id.* at *6.

251 *See id.* at *28.

252 *See id.*

obligations.[253] Specifically, there are two relevant treaties that relate to juvenile sentencing practice. First, is the Committee on Rights of the Child ("CRC"), which forbids sentencing juveniles to LWOP. Second, is the International Convention on Civil and Political Rights ("ICCPR"), which reflects language similar to the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution.[254]

The CRC requires states to prohibit sentencing juvenile offenders to the death penalty and LWOP.[255] The United States is the only country in the world that has failed to ratify the CRC.[256] Additionally, the ICCPR prohibits "cruel, inhumane, or degrading treatment or punishment."[257] It also requires prisons to focus on reforming and socially rehabilitating prisoners, as well as segregating juvenile offenders from adult offenders so that treatment can be provided according to the offender's age and legal status.[258]

However, the United State has failed to comply with the ICCPR since its ratification. In fact, fourteen years after the U.S. ratified the ICCPR, the Committee on Human Rights determined the U.S. had failed to comply with the treaty, despite its reservation, where the U.S. reserved its right to try juvenile offenders in adult court only in "exceptional circumstances."[259] The ICCPR determined that the U.S. was abusing its reservation in applying LWOP sentences only in "exceptional circumstances."[260] The ICCPR concluded that the U.S. was not limiting LWOP sentences to "exceptional circumstances."[261] Instead, the ICCPR found that a significant number of U.S. children—many of whom were first-time offenders—had been tried as adults.[262]

This is just one example of how the United States continues to disregard international norms and rules, some of which it has formally agreed to follow, and subsequently violated. It is clear that the U.S. is not in compliance with its international obligations. Specifically, the fact that the U.S. is the only country in the world that still permits sentencing

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253 *See id.*

254 De La Vega & Leighton, *supra* note 245, at 1009.

255 *Id.*

256 *See id.*

257 ICCPR art. 7.

258 ICCPR art. 10(3).

259 De La Vega & Leighton, *supra* note 245, at 1010–11 n.145. In its ratification of the ICCPR, the United States declared, "The United States reserves the right, in exceptional circumstances, to treat juveniles as adults, notwithstanding paragraphs 2(b) and 3 of article 10 and paragraph 4 of article 14."

260 *Id.* at 1010–11.

261 *See id.*

262 *Id.*

children to LWOP, indicates an international consensus against this practice. Consequently, the U.S. must make significant changes to ensure that juvenile offenders are proportionately sentenced so that it is in compliance with its international obligations, and in turn, effectively begin to display the "kids are different" principle that the Supreme Court has emphatically advocated for within the past decade.

ALTERNATIVES: A CUMULATIVE EFFORT

Despite all that has been said as to "where *Miller* went wrong," it is nevertheless a decision handed down by the United States Supreme Court. Moreover, it was premised on the "kids are different" principle. In addition, it is currently the only guiding decision on LWOP sentences for juvenile homicide offenders. It is also helpful as a starting point for a cumulative effort for juvenile justice reform. This cumulative effort requires the cooperation of all those involved with juvenile offenders. For example, state actors should do their best to give "meaningful effect to the substantive principles animated in the Court's prior decisions."[263] After *Miller*, state governments should have attempted to take "proactive" measures.[264] Ideally, state legislatures should have filled the gaps where outdated legislation prevented judges from acting.[265] Moreover, state courts should have re-analyzed previously sentenced juvenile offenders, as well as juvenile sentencing in its entirety.[266] Notwithstanding the ambiguities that resonated from the decision in *Miller*, one thing is clear: because "children are categorically different in the eyes of the law at sentencing . . . prosecutorial practices should reflect that interpretation of the Constitution."[267] However, it appears that this principle has "fallen on deaf ears."[268]

If our juvenile justice system is to experience any real, positive change, there must be a cumulative effort on behalf of all three branches of government. To begin, our state lawmakers must accept their responsibility in taking the first step.[269] For instance, mandatory LWOP is a statutory-based penalty.[270] Accordingly, in *Miller*, the Court considered the objective

263 *See, e.g.*, Drinan, *supra* note 184, at 788.
264 *See id.*
265 *Id.*
266 *Id.*
267 *Id.*
268 *Id.* at 785.
269 *See id.* at 786.
270 *See* Miller v. Alabama, 132 S. Ct. 2455, 2471 n.10 (2012).

indicia of society's standards, as expressed in legislative enactments and state practice to determine whether there was a national consensus against LWOP.[271] As a result, the legislature's actions and states' practices were a direct result of why the Court decided the way it did. However, as previously mentioned, although prohibiting or removing mandatory LWOP sentences is a step in the right direction, when these sentences are replaced with discretionary or extraordinary length sentences, the state is in-effect contravening "the spirit of *Miller*."[272] Therefore, in order to "embrace the Supreme Court's vision" of treating juvenile offenders differently because of their capacity for change, state lawmakers must consider alternatives to help juvenile inmates in the long run.[273]

States should begin by re-focusing the juvenile justice system to reflect its originally intended purpose: to be an alternative system to the adult criminal system, which focuses on individualized rehabilitation and treatment, civil jurisdiction, informal procedure, and separate incapacitation.[274] A good example of this is exhibited in the innovative policies and programs recently implemented by the state legislatures in Maine, Maryland, and New Jersey.[275] Specifically, in 2015, the Maine Supreme Court modified the Rules of Unified Criminal Procedure to prohibit using restraints on juveniles in the courtrooms.[276] Additionally, Maryland and New Jersey passed stricter laws to lessen the number of juveniles being charged as adults.[277] State lawmakers should also ensure that prisons provide these juvenile inmates with opportunities to demonstrate their capacity for change.[278] This can be accomplished by providing juvenile inmates with classes relating to "substance abuse and alcohol education and treatment, as well as employment and skills training."[279]

Additionally, state court judges, who play a more active role in sentencing, can make a significant difference in the juvenile justice system

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271 *See id.* at 2480.

272 *See* Drinan, *supra* note 184, at 793.

273 *See id.*

274 Tanehaus, *supra* note 18 (explaining the principles that the first juvenile justice system in the U.S. was founded upon).

275 *See NCSL Juvenile Justice Quarterly Newsletter*, NAT'L CONF. ST. LEGISLATURES (Jan. 2016), http://www.ncsl.org/research/civil-and-criminal-justice/ncsl-juvenile-justice-quarterly-newsletter635876058.aspx.

276 *See id.*

277 *See id.*; *cf.* H.R. 618, Gen. Assemb., Reg. Sess. (Md. 2015) (ending the practice of automatically holding juveniles, who are being charged as adults, in adult criminal court), *and* S.J. Res. 2003, 216th Leg., (N.J. 2003) (increasing the minimum age that a youth can be tried as an adult).

278 *See* Drinan, *supra* note 184, at 793.

279 *See id.*

as well.[280] As noted in the cases discussed thus far, sentencing judges often have one of the closest interactions with the inmate and the case. This makes them more capable of ensuring first-hand that juvenile offenders receive a fair process.[281] These judges have the power of deciding whether to implement the individualized sentencing approach mandated by *Miller* by interpreting their state constitutional provisions in a way that either expands or minimizes *Miller*'s reach.[282] Therefore, state court judges are equipped with the "tools" necessary to give substantive meaning to the Court's vision of juvenile rehabilitation, and the ability to ensure that such decisions are applied even-handedly.[283]

Executive actors also share the responsibility of upholding "the law of the land" because of the important role they play within the administration of the juvenile justice system.[284] Considering *Miller's* mandate on individualized sentencing, executive state actors are uniquely situated because of "the executive branch's agility and discretion."[285] Accordingly, before a juvenile's case ever reaches a judge, state prosecutors first have the responsibility of charging and then subsequently sentencing the juvenile offender.[286] A prosecutor basically "lives" with the case starting at its inception and therefore, has the power to not only control the direction the case travels, but also, to ensure that the juvenile is given a fair and just process.

Specifically, prosecutors often have the discretion of deciding whether a juvenile offender will be transferred to the adult criminal system.[287] This raises an immediate concern for a juvenile offender because most jurisdictions employ generally applicable penalty provisions, which means that in a jurisdiction mandating juvenile LWOP, the juvenile can be sentenced to LWOP without his or her age ever being considered.[288] Additionally, some states have no minimum age standards or rules restricting the age that a juvenile may be transferred to adult court.[289] In

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280 *Id.*

281 *See id.*; *see, e.g.*, Miller v. Alabama, 132 S. Ct. 2455 (2012).

282 *See* Drinan, *supra* note 184, at 793 (noting that the Massachusetts Supreme Judicial Court found the *Miller* decision applied retroactively and that discretionary LWOP sentences for juvenile homicide offenders were unconstitutional under the Massachusetts Declaration of Rights).

283 *See id.*

284 *See id.*

285 *See id*. at 794.

286 *See id.*

287 *See* Miller v. Alabama, 132 S. Ct. 2455, 2473 (2012) ("Almost all jurisdictions allow some juveniles to be tried in adult court for some kinds of homicide.").

288 *See id.*

289 *See id.*

some states, children as young as thirteen are transferred to the adult criminal system, where they not only sit in jail alongside adult criminal offenders, but are also tried and sentenced before judges who deal with adult criminal offenders on a daily basis. As a result, these children are prevented from receiving the very benefits or rights upon which the juvenile justice system was created.

Moreover, when deciding whether to transfer a juvenile to the adult criminal system, prosecutors are sometimes not required to take the child's age or maturity into account; in some jurisdictions, prosecutors are even able to unilaterally decide whether to file the case directly in adult court without providing the juvenile with a hearing.[290] This legal practice is known as "direct file," and it allows prosecutors to exclusively make the decision of where to file the case, allowing the prosecutor to act as both judge and jury.[291] Although the issues of transferring juvenile offenders to the adult criminal court system will be discussed below, the fact that prosecutors have the sole discretion of immediately and expeditiously controlling this process from the get-go, evidences the enormous amount of power they have, where they not only control—and thus, limit—the number of transfers, but also, are in an especially valuable position to protect the life of the juvenile offender.

Florida's "direct file" system highlights the need for change in the juvenile justice system.[292] This Note uses Florida to illustrate the many issues surrounding the "direct file" system that is employed by many other states nationwide.[293] Specifically, and perhaps most shockingly, according to a study conducted by The James Madison Institute, since 2009, more than 12,000 children were tried as adults in Florida.[294] This study analyzed the effects of keeping children within the juvenile justice system and concluded that sending children to adult court actually increases crime and

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290 Tchoukleva, *supra* note 21.

291 *See Miller*, 132 S. Ct. at 2474 n.16 (listing Florida, Michigan, and Virginia); *see, e.g.*, Sal Nuzzo et al., *Policy Brief, No Place for A Child: Direct File for Juveniles Comes at A High Cost*; *Time to Fix Statutes*, JAMES MADISON INST. at 1 (Feb. 2016), http://www.jamesmadison.org/wp-content/uploads/2016-Juvenile-Justice-Policy-Brief-21.pdf [hereinafter *Policy Brief*, JAMES MADISON INSTITUTE]; *see also Direct File Wrong for Juvenile Offenders*, MIAMI HERALD (Oct. 26, 2015), http://www.miamiherald.com/opinion/editorials/article41433630.html.

292 *See generally Policy Brief*, JAMES MADISON INSTITUTE, *supra* note 291; *see also Miller*, 132 S. Ct. at 2473–75 (discussing the jurisdictions that transfer juveniles to adult court).

293 This Note uses Florida as an example because Florida currently has the highest number of adult transfers of any state, and thus, is the state that requires the most critical examination); *see e.g.*, *Miller*, 132 S. Ct. at 2474 n.16 (citing FLA. STAT. ANN. § 985.557(1) (West 2012); MICH. COMP. LAWS ANN. § 712A.2(a)(1) (West 2015); VA. CODE ANN. §§ 16.1–241(A), 16.1–269.1(C), (D) (West 2012)).

294 *See Policy Brief*, JAMES MADISON INSTITUTE, *supra* note 291, at 1; *see Miller*, 132 S. Ct. at 2473–75 (discussing the jurisdictions that transfer juveniles to adult court).

reduces public safety.[295] Youth who are transferred to the adult criminal justice system are more likely to recidivate than those retained in the juvenile justice system.[296] The evidence overwhelmingly displays that keeping children in the juvenile justice system results in children being treated through a variety of programs such as, diversion, probation, redirection, and non-secure detention.[297] Ultimately, the study implicitly confirmed the Supreme Court's principle behind treating children differently. It determined that the juvenile justice system is more effective in promoting rehabilitation than the adult criminal justice system.[298] For example, a juvenile offender who is transferred to the adult criminal system is approximately 34% percent more likely to be rearrested for a felony than a juvenile offender who had stayed in the juvenile justice system.[299]

Even more compelling, the study found that economically, a reinvestment strategy directed at keeping children within the juvenile justice system, while offering them rehabilitative and educational programs, would result in savings of about $12 million.[300] Although the reinvestment program would not immediately produce significant fiscal savings, these alternative rehabilitative and educational programs would ultimately result in long-term savings.[301] In emphasizing the competing interests between juvenile offenders and the public safety, this realignment strategy would focus on creating a system designed to address a juvenile offender's developmental challenges and opportunities.[302] Accordingly, juvenile offenders would be examined under a variety of Department of Juvenile Justice assessment tools, such as the Positive Achievement Change Tool Assessment and the Disposition Matrix.[303] The results from these assessments would help determine the level of supervision and the types of rehabilitative programs that the child will need.[304] Therefore, the program would cater to those children who need more intensive supervision and rehabilitative services than others.[305] As a result, these children will be supervised much closer than they would have been in the adult criminal justice system, resulting in less recidivism, and in effect, more productive

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295 *See Policy Brief*, THE JAMES MADISON INSTITUTE, *supra* note 291, at 2–3.
296 *Id.* at 4.
297 *Id.* at 5.
298 *Id.* at 6.
299 *Id.*
300 *Id.*
301 *See Policy Brief*, JAMES MADISON INSTITUTE, *supra* note 291, at 6.
302 *Id.*
303 *Id.* at 9.
304 *Id.*
305 *Id.*

members of society.[306]

Florida's realignment strategy is consistent with the principles that the Court illustrated in *Miller*. Although the individualized consideration expressed in *Miller* runs contrary to the precedent in which it relied, and serves as a double-edged sword against juveniles, the use of individualized considerations in Florida's realignment procedure seems appropriate and effective. This strategy embraces everything the Court has expressed over the past decade in relation to how "kids are different." It does not limit itself to only addressing issues of sentencing or rehabilitation. Instead, it focuses on the entire situation: from the moment the juvenile offender enters the juvenile justice system, throughout the legal proceedings, and then at the end, when the juvenile is either sentenced, placed in in probation, or is order to receive services. Additionally, this strategy focuses on providing juveniles with the hope that someone else is "rooting for them," while also providing a realistic and viable opportunity for change and growth.[307] Here, "good behavior and character improvement" are not immaterial; instead, they are completely relevant.[308] Therefore, this program effectively balances society's concerns with that of a juvenile offender's, which, as mentioned above, was the focus of our nation's first juvenile courts.

Moreover, in *Miller*, the Court compared the discretion that judges have in transfer hearings with the discretion judges have at sentencing.[309] In doing so, the Court briefly addressed the issue of transferring juvenile offenders to the adult criminal system and acknowledged the "key moment for the exercise of discretion is the transfer."[310] It noted that judges often determine whether to transfer a juvenile based on limited information because judges usually do not know what they will learn about the offender or the case over the course of the proceeding.[311] Interestingly enough, however, the Court noted that when granting a transfer, some judges will do so based on the fact that the judge believes the juvenile deserves a "much harsher sentence than he would receive in juvenile court."[312] The Court

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306 *Id.* (noting how more than seventy-two percent of juveniles transferred to the adult justice system are placed on adult probation, does nothing to protect society because in the adult system, probation has very little rehabilitative elements, and offenders are usually not supervised strictly).

307 *See* Graham v. Florida, 560 U.S. 48, 70 (2010) (LWOP "means a denial of hope; that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of the convict, he will remain in prison for the rest of his days.").

308 *Id.*

309 *See* Miller v. Alabama, 132 S. Ct. 2455, 2474 (2012).

310 *See id.*

311 *See id.* (This refers only to those jurisdictions that allow for transfer hearings).

312 *Id.* at 2475.

observed that judges often use their subjective judgment in their rulings.[313] In fact, the Court made this distinction in defending against permitting judges from making individualized considerations about the child at the transfer hearing.[314]

So, why is an individualized consideration appropriate at a sentencing hearing, yet inappropriate at a transfer hearing when the same rationalizations exist in both situations? In its analysis, the Court in *Miller* appears to be undermining this idea, where it explained the risk associated with a child being transferred to the adult system unfairly and disproportionately.[315] Despite the Court's attempt to distinguish the two situations, it nevertheless concluded that the "discretion available to a judge at the transfer stage cannot substitute for discretion at post-trial sentencing in adult-court."[316] The Court somehow rationalized that permitting a judge's discretion would be better served at a sentencing hearing, which is the last and final stage of the trial process available to an offender.[317] However, this can hardly be seen as a "better substitution," when it is "the last and final stage," and where the only correction that can be made is at the appellate level.

This is one of the most prevalent issues facing juvenile offenders all over the country today. It is an issue that must be addressed and abolished in totality. As the Court in *Miller* conceded, judges will inject their own subjective reasoning into their decisions despite the lack of information available to them.[318] There is no evidence that a judge who uses his or her subjective reasoning in a transfer hearing, where there is limited information, will not do so again at a sentencing hearing. Therefore, individualized considerations serve no purpose in the realm of sentencing juvenile offenders.

Finally, Governors can also play a role in bringing state practice into compliance with the Supreme Court's view on treating juveniles differently by using their "obligation to exercise mercy where it is appropriate," which is also known as the clemency power.[319] Governors could potentially appoint "Miller Commissions," whose charge would be: (1) [T]o identify all state inmates affected by the . . . *Miller* decision; (2) identify a range of appropriate sentences for such inmates; and (3) to make recommendations

313 *See id.*

314 *See id.*

315 Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012).

316 *See id.*

317 *See id.*

318 *See id.* at 2475.

319 Drinan, *supra* note 184, at 794.

to the governor regarding each inmate and what new sentence may be appropriate in light of the Miller sentencing factors.[320] In effect, this would allow the executive branch to remedy several problems all at once.[321] Governors would be able to reach cases the courts cannot, ensure that federal law is applied even-handedly, and to avoid the "piecemeal nature of failed legislative attempts and wildly unpredictable court outcomes," all while providing juvenile inmates relief in an expeditious manner.[322]

Accordingly, states have the power to effectively balance the public safety concerns with the need to treat these offenders fairly and proportionately.[323] In reality, abolishing LWOP only means that states will be providing these offenders, who were sentenced to LWOP as children, with a possibility—not a guarantee—of being released within their lifetime.[324] Despite the concerns surrounding the juvenile justice system, the states are in a unique position to take the lead and revise their sentencing practices to exhibit a growing consensus among the states and eventually align the U.S. with international norms.[325] However, in order to ensure that a meaningful effect is given to the Supreme Court's vision of juvenile rehabilitation and the "kids are different" principle, states must consider a "complete overhaul of juvenile incarceration" altogether.[326] Given all that we know about how "kids are different," states can no longer turn a blind eye; states are now equally responsible for ensuring that juvenile offenders are given the opportunity to mature and reform, as well as demonstrate these changes.

CONCLUSION

The Supreme Court's decision in *Miller* signaled another one of the Court's minimalistic approaches towards redefining our nation's juvenile justice system within the last decade. Despite the Supreme Court's most recent ruling in *Montgomery v. Louisiana*, the decision in *Miller*, nevertheless failed to account for other aspects affecting the juvenile justice system and those juvenile offenders who can still potentially face LWOP sentences. This decision not only runs afoul to its prior decisions in *Roper*

320 *See id.*

321 *Id.*

322 *Id.*

323 *See* Montgomery v. Louisiana*,* Brief of the Charles Hamilton Houston Institute for Race and Justice and the Criminal Justice Institute as *Amici Curiae* in Support of Neither Party, at 15 n.37 (2015).

324 *See id.*

325 *See* The Sentencing Project, *supra* note 178.

326 *See* Drinan, *supra* note 184, at 788–89.

and *Graham*, but also to the penological goals for punishment and from a comparative law perspective. The decision in *Miller* detoured around the principle that "kids are different," and that children have a "diminished capacity that makes them less culpable" than adults. Consequently, states were left to interpret *Miller*'s mandate differently, which in turn, resulted in similarly situated children being sentenced very differently. Our juvenile justice system has experienced a bumpy ride in the United States.

However, this is not dispositive of the Court's ability to clarify its decision in *Miller* and foreclose on the issues surrounding the juvenile justice system once and for all. The most important issue relating to prohibiting juvenile offenders from being sentenced to LWOP begins with the issue of transferring juveniles to adult court. Transferring juvenile offenders to the adult criminal system serves little-to-no purpose and considering the alternatives available, there should never be such an "extraordinary circumstance" justifying a juvenile offender's transfer to the adult criminal system; especially before other alternatives have been explored. Additionally, it is extremely compelling that the United States is one of the only countries in the world that does not prohibit, and still sentences, juvenile offenders to LWOP. By emphasizing the importance of parole boards and abolishing the transfer of juveniles to adult court, the Court could've satisfied the Eighth Amendment's ban on cruel and unusual punishment, and more importantly, followed the principle it has repeatedly emphasized in its decisions over the past decade: that children should be and will be treated differently and proportionately within the juvenile justice system of the United States.