# THE EVOLUTION OF DECENCY: WHY MANDATORY MINIMUM AND PRESUMPTIVE SENTENCING SCHEMES VIOLATE THE EIGHTH AMENDMENT FOR CHILD OFFENDERS

***Suzanne S. La Pierre & James Dold*** *



* Suzanne S. La Pierre is a founding member and President of the Board of Directors of Human Rights for Kids, a non-profit organization dedicated to the promotion and protection of the human rights of children. Ms. La Pierre is a 1981 graduate of the University of Virginia School of Law.

James Dold is the founder and Chief Executive Officer of Human Rights for Kids. Mr. Dold received dual baccalaureates in Criminal Justice and Psychology from the University of Nevada Las Vegas and graduated *Cum Laude* from the University of Maryland School of Law in 2010.

We would like to acknowledge the support of the Coalition for Public Safety, the Weissberg Foundation, and Represent Justice in the development of this article. Special thanks to Holly Harris and Leni Dworkis for believing in, and supporting, Human Rights for Kids, and to Amy Solomon at Arnold Ventures who has quietly championed our work from the beginning, which has made all the difference. We also want to acknowledge the life and work of Bryan Stevenson, who successfully litigated *Sullivan v. Florida* and *Miller v. Alabama* in the U.S. Supreme Court, which helped establish the jurisprudence on which this article is based.

We would like to dedicate this article to the countless children prosecuted in the adult criminal justice system every year in violation of their human rights. It is our hope that this article lays the foundation to challenge their inhumane and unjust treatment in the U.S. justice system.

# THE EVOLUTION OF DECENCY: WHY MANDATORY MINIMUM AND PRESUMPTIVE SENTENCING SCHEMES VIOLATE THE EIGHTH AMENDMENT FOR CHILD OFFENDERS

Suzanne S. La Pierre & James Dold

## INTRODUCTION

THE Eighth Amendment's prohibition against cruel and unusual punishment "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense."[1] Beginning with its decision in *Thompson v. Oklahoma*,[2] the U.S. Supreme Court has articulated and refined the parameters of this proportionality analysis for use in assessing the constitutionality of juvenile sentences, converging two lines of case law in 2012 in *Miller v. Alabama*. While the sentences held unconstitutional in each of these cases are different, the primary rationale for their respective holdings is the same: 1) Children are less culpable than adults because their brains are not fully developed; 2) this diminished culpability undermines the penological justifications underlying criminal sentencing schemes; and 3) without consideration of this diminished culpability and the mitigating qualities of youth, certain sanctions are disproportionate in their effects on children and thus violate the cruel and unusual punishment provision of the Eighth Amendment.

While this fundamental principle is now beyond debate, its application post-*Miller* continues to evolve. While state courts have given both narrow and expansive readings of *Miller*, state legislative bodies in recent years have embraced its underlying rationale in revising their sentencing schemes, reflecting a contemporary understanding of children's diminished culpability and their capacity for reform as informed by recent developments in juvenile neurological science, relevant expert opinion, and international norms.

This article first chronicles the development of Supreme Court jurisprudence regarding juvenile sentencing. It then reviews recent state court decisions and actions of state legislatures in the wake of *Miller* and *Montgomery v. Louisiana*[3] concluding that the use of mandatory minimum sentencing schemes on children, without consideration of the mitigating qualities of youth and children's diminished culpability, violates the Eighth Amendment. Lastly, it analyzes relevant retroactivity cases with reference to the standards enunciated by the Supreme Court in *Teague v.*

[1] Miller v. Alabama, 567 U.S. 460, 469 (2012) (quoting Roper v. Simmons, 543 U.S. 551, 560 (2005) (quoting Weems v. U.S., 217 U.S. 349, 367 (1910))).

[2] 487 U.S. 815 (1988).

[3] 136 S.Ct. 718 (2016).

*Lane*[4] demonstrating how courts might apply a prohibition on mandatory sentencing schemes retroactively to cases on collateral review.

## I. THE DEVELOPMENTAL DIFFERENCES BETWEEN CHILDREN AND ADULTS UNDERMINE THE PENOLOGICAL JUSTIFICATIONS FOR HARSH SENTENCES RENDERING THEM DISPROPORTIONATE FOR CHILDREN IN THE ABSENCE OF CONSIDERATION OF THE MITIGATING QUALITIES OF YOUTH.

### *A. Children are less culpable for their actions than adults and more amenable to rehabilitation.*

Regardless of the test employed,[5] in assessing a challenge to a juvenile sentence under the cruel and unusual punishment provision of the Eighth Amendment, the Supreme Court typically begins its analysis with a discussion of the distinctive attributes of youth and how they affect the traditional penological justifications underlying criminal sanctions. In *Thompson v. Oklahoma*, for example, the Court noted:

> '[A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but *they deserve less punishment* because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.'[6]

In light of these differences, the *Thompson* Court concluded that "less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult,"[7] and that neither the policy rationale of retribution nor deterrence supported applying the death penalty to child offenders.[8] The Court concluded that because "nothing more than the purposeless and needless imposition of pain and suffering" was achieved by executing children less than 16 years of age, it was an unconstitutional punishment.[9]

4 489 U.S. 288 (1989).

5 *See* discussion *infra* Section I.B.

6 487 U.S. 815, 834 (1988) (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 n.11 (1982)) (emphasis added).

7 478 U.S. at 835.

8 *Id.* at 836–37.

9 *Id.* at 838 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

Seventeen years later, invoking these same mitigating qualities of youth, in *Roper v. Simmons*, the Court expanded the death penalty bar to all children under the age of 18.[10] Subsequently in *Graham v. Florida*, the Court expressly embraced the *Roper* Court's assessment of these deficiencies concluding that: "With respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation, provides an adequate justification" for such a sentence.[11]

Seven years later, in *Miller v. Alabama*, the Court reaffirmed its determination that "children are constitutionally different from adults for purposes of sentencing," citing the same characteristics the *Roper* and *Graham* Courts identified as limiting juvenile culpability,[12] that in turn undermined "the penological justifications for imposing the harshest sentences on juvenile offenders," [13] to bar life without parole for all but the rarest of juveniles convicted of homicide.[14] The *Miller* Court concluded:

> Because "[t]he heart of the retribution rationale" relates to an offender's blameworthiness, "the case for retribution is not as strong with a minor as with an adult." Nor can deterrence do the work in this context, because "the same characteristics that render juveniles less culpable than adults"—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. Similarly, incapacitation could not support the life-without-parole sentence in *Graham*: Deciding that a "juvenile offender forever will be a danger to society" would require "mak[ing] a judgment that [he] is incorrigible"—but "incorrigibility is inconsistent with youth." And for the same reason, rehabilitation could not justify that sentence. Life without parole "forswears altogether the rehabilitative ideal." It reflects "an irrevocable judgment about [an offender's] value and place in society," at odds with a child's capacity for change.[15]

The *Miller* Court further commented: "Our [earlier] decisions rested not only on common sense—on what 'any parent knows'—but on science and

[10] 543 U.S. 551, 564 (2005).

[11] 560 U.S. 48, 71 (2010) (citation omitted); s*ee also id.* at 71–74 (further discussion).

[12] 567 U.S. 460, 471 (2012).

[13] *Id.* at 472.

[14] *Id.* at 479.

[15] *Id.* at 472–73 (citations omitted).

social science as well."[16] Moreover, in the years intervening since its decision in *Graham*, the Court noted: "[t]he evidence presented to us … indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger."[17] It is thus well-settled that because children's brains have not yet fully matured, they are simultaneously less culpable than adults and more amenable to rehabilitation.

### *B.* Miller *announces a new Constitutional framework for assessing whether a sentence is disproportionate for child offenders in violation of the Eighth Amendment.*

In determining how the distinctive attributes of youth should be considered in challenges to specific sentences under the Eighth Amendment as applied to juveniles, the Court has looked to two lines of precedent, ultimately combining them in its decision in *Miller*.[18] The *Graham* Court categorized the applicable proportionality analyses as falling within two general classifications: challenges to lengthy "term-of-years" sentences, requiring consideration of the circumstances in a particular case, and death penalty sentences that identify bars to the practice premised on categorical exclusions.[19] The latter rubric in turn has two subsets, one focusing on the nature of the offense, the other addressing the characteristics of the offender.[20] *Graham* noted the novelty of the sentence at issue in its case, recognizing its mixed nature as "a categorical challenge to a term-of-years sentence" based on the underlying sentencing practice.[21] Because the case implicated "a particular type of sentence [life without parole] as it applies to an entire class of offenders who have committed a range of crimes," the Court

[16] *Id.* at 471 (citation omitted).

[17] *Id.* at 472 n.5. (*See, e.g.*, Brief for Am. Psych. Ass'n et al. as Amici Curiae in Support of Petitioners at 3–4, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647) ("[A]n ever-growing body of research in developmental psychology and neuroscience continues to confirm and strengthen the Court's conclusions … It is increasingly clear that adolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance."); Brief for J. Lawrence Aber et al. as Amici Curiae in Support of Petitioners at 12–28, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647) (discussing post-*Graham* studies); *id.* at 26–27 ("Numerous studies post-*Graham* indicate that exposure to deviant peers leads to increased deviant behavior and is a consistent predictor of adolescent delinquency.") (footnote omitted)).

[18] 567 U.S. at 470.

[19] 560 U.S. 48, 60 (2010).

[20] *Id.*

[21] *Id.* at 61.

concluded that "the appropriate analysis is the one used in cases that involved the categorical approach…"[22] Under that analysis:

> The Court first considers "objective indicia of society's standards, as expressed in legislative enactments and state practice" to determine whether there is a national consensus against the sentencing practice at issue. Next, guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose," the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution.[23]

In adopting a new version of the categorical approach, the *Graham* Court identified the deficiencies inherent in a case-by-case analysis, initially pointing to the difficulty a court would have in distinguishing with sufficient accuracy "the few incorrigible juvenile offenders from the many that have the capacity for change."[24] But while the *Graham* Court relied on categorical exclusion analysis to bar life without parole for non-homicide juvenile offenders, the *Miller* Court noted that *Graham*'s likening of life without parole to the death penalty implicates its second line of analysis, *i.e.*, individualized sentencing.[25] Merging these two lines of precedent led the *Miller* Court to hold that where the crime reflected "transient immaturity" rather than "irreparable corruption," life without parole for child homicide offenders violates the Eighth Amendment: "By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment," as there is no way to distinguish between the two classes of offenders.[26]

Despite its express recognition of these distinct classes of offenders, the *Miller* Court contends that it did not strike down juvenile life without parole based on a categorical exclusion as did the *Graham* Court, stating: "*Graham* established one rule (a flat ban) for nonhomicide offenses, while we set out a different one (individualized sentencing) for homicide offenses."[27] The Court's reasoning, combined with its subsequent decision in *Montgomery v. Louisiana*, however, reveals that at its core, the decision is none other than a categorical prohibition of a particular sentencing practice, albeit one limited to all but the rarest of juvenile offenders. "[G]iven all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we

[22] *Id.* at 61–62.
[23] *Id.* at 61 (citations omitted).
[24] *Id.* at 77.
[25] 567 U.S. 460, 470 (2012).
[26] *Id.* at 479–80.
[27] *Id.* at 474 n.6.

think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'"[28] *Miller* further holds that identifying the class of juveniles subject to the prohibition, *i.e.*, the overwhelming majority of child offenders, requires consideration of the mitigating qualities of youth identified in *Roper* and *Graham*.[29]

While some read *Miller* to be limited to *mandatory* juvenile life without parole,[30] as Chief Justice Roberts noted in his dissenting opinion in *Miller*, applying the majority's test will invalidate juvenile life without parole for all but the most depraved individuals even when it is imposed as a result of a court's discretion. "Today's holding may be limited to mandatory sentences, but the Court has already announced that discretionary life without parole for juveniles should be 'uncommon'—or, to use a common synonym, 'unusual.'"[31]

Justice Roberts' conclusion is validated by the Court's subsequent decision in *Montgomery v. Louisiana*, which considered the retroactivity of *Miller*'s holding.[32] Under the analysis developed in *Teague v. Lane*, only new substantive rules of constitutional law or watershed rules of criminal procedure may be given retroactive effect. Substantive rules include those "forbidding criminal punishment of certain primary conduct," as well as those "prohibiting a certain category of punishment for a class of defendants because of their status or offense."[33] A watershed rule "is one that (1) is 'implicit in the concept of ordered liberty,' and that 'alters our understanding of the bedrock procedural elements' essential to a proceeding; such that a proceeding conducted without the benefit of that rule 'implicates . . . fundamental fairness'; and is (2) 'central to an accurate determination of innocence or guilt,' such that the rule's absence creates an impermissibly large risk that innocent persons will be convicted."[34]

Despite all its talk in *Miller* of not establishing a categorical bar to juvenile life without parole,[35] the Court sets the record straight in *Montgomery*:

[28] *Id.* at 479–80 (citations omitted).

[29] *Id.* at 477–78.

[30] *See, e.g.*, U.S. v. Sparks, 941 F.3d 748, 753 (5th Cir. 2019); Wharton v. State, No. 2017-CT-00441-SCT, at *11 (Miss. Dec. 5, 2019).

[31] 567 U.S. at 500–01.

[32] 136 S.Ct. 718, 728 (2016).

[33] Penry v. Lynaugh, 492 U.S. 302, 330 (1989); *see also* Teague v. Lane, 489 U.S. 288, 307 (1989).

[34] Casiano v. Comm'r of Corr., 317 Conn. 52, 69 (2015); *see* Whorton v. Bockting, 549 U.S. 406, 417–18 (2007).

[35] 567 U.S. at 474 n.6.

> *Miller*, it is true, did not bar a punishment for all juvenile offenders, as the Court did in *Roper* or *Graham*. *Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility. For that reason, *Miller* is no less substantive than are *Roper* and *Graham* ... The only difference between *Roper* and *Graham,* on the one hand, and *Miller*, on the other hand, is that *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption.[36]

Accordingly, it held *Miller* to apply retroactively in cases on collateral review as a new substantive rule of constitutional law.[37] In *Miller*'s aftermath, state courts have interpreted the decision as defining a new subset of categorical exclusion analysis.[38]

Whether the *Miller* Court's analysis is viewed as one resting on a categorical exclusion or an individualized sentencing analysis, however, is far less important than the substantive requirements of its holding. Even under the most conservative reading, *Miller* bars mandatory juvenile life without parole. It requires an individualized sentencing hearing, originally

[36] 136 S.Ct. 718, 734 (2016) (citations omitted). As discussed *infra*, the Court could have concluded that the required *Miller* hearing to determine "irreparable depravity" constituted a "watershed rule of criminal procedure" deserving of retroactive application under *Teague*.

[37] *Id.* at 732.

[38] *See* State v. Lyle, 854 N.W.2d 378, 386 (Iowa 2014) ("*Miller* … conjoin[ed] … two sets of caselaw: outright categorical prohibitions on certain punishments for certain crimes or against certain offenders, with another line of cases requiring a sentencer have the ability to consider certain characteristics about the offender as mitigating circumstances in favor of not sentencing the offender to death … *Miller* effectively crafted a new subset of categorically unconstitutional sentences: sentences in which the legislature has forbidden the sentencing court from considering important mitigating characteristics of an offender whose culpability is necessarily and categorically reduced as a matter of law, making the ultimate sentence categorically inappropriate. This new subset carries with it the advantage of simultaneously being more flexible and responsive to the demands of justice than outright prohibition of a particular penalty while also providing real and substantial protection for the offender's right to be sentenced accurately according to their culpability and prospects for rehabilitation.") (citations omitted); State v. Link, 441 P.3d 664, 670 (Or. Ct. App. 2019) (agreeing with *Lyle*'s description of *Miller*'s ruling as a new subset of categorical exclusion analysis); s*ee also* State v. Michel, 257 So.3d 3, 5 (Fla. 2018) ("[I]n *Miller* … the United States Supreme Court extended its categorical rule prohibiting life sentences without parole for juvenile offenders convicted of nonhomicide crimes to juvenile offenders convicted of homicide.").

developed in the death penalty context, addressing the mitigating factors of youth to determine if the offender falls within the class of juveniles for whom the punishment would be prohibited under the categorical exclusion test of *Graham* and *Roper*.[39] A broader reading, seemingly embraced in *Montgomery*, extends the prohibition on juvenile life without parole beyond mandatory sentencing schemes, finding the sentence to be disproportionate punishment for the vast majority of youth regardless of the procedure used to impose it. At their core, both the categorical exclusion and individualized sentencing analyses answer the Eighth Amendment proportionality test by reference to the universally accepted mitigating qualities of youth, as specifically embodied by the juvenile offender. *Miller* expressly acknowledges this parallel, yet substantively identical inquiry, stating: "So *Graham* and *Roper and* our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult."[40]

In late 2019, the Supreme Court was given the opportunity to explicitly clarify the scope of *Miller* as it applies to the constitutionality of juvenile life without parole, regardless of the procedure by which it is imposed. In *Mathena v. Malvo*, the Court was presented with an appeal by the state of Virginia arguing that relief under *Miller* did not apply to children previously sentenced to discretionary life without parole.[41] Before the Court ruled, however, Virginia enacted legislation retroactively barring life without parole sentences for all children, thus mooting the case before the Court.[42] As is discussed hereafter,[43] Virginia joined the overwhelming majority of states that understand *Miller* as prohibiting life without parole sentences for the vast majority of children regardless of the sentencing scheme used to impose it. The Court has since granted certiorari in *Jones v. Mississippi*, where it will answer a question posed in *Malvo*: "Whether the Eighth Amendment requires the sentencing authority to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole."[44] This will further clarify the contours of the constitutional protections afforded to children facing such sentences.

[39] 567 U.S. at 475–477.

[40] *Id.* at 477 (italics added); *see* State v. McCleese, 333 Conn. 378, 392 (2019) ("[T]he United States Supreme Court's juvenile sentencing cases rest as much on the diminished moral culpability and enhanced capacity for rehabilitation of a juvenile offender as on the irrevocability of a punishment of death or life imprisonment without parole.").

[41] 893 F.3d 265 (4th Cir. 2018), *cert. dismissed*, 140 S.Ct. 919 (2020).

[42] H.B. 35th Gen. Assemb., Reg. Sess. (Va. 2020).

[43] *See infra* Section II.B.

[44] Jones v. State, No. 2015-CT-00899-SCT (Miss. 2018), *cert. granted*, 140 S.Ct. 1293 (2020).

### *C.* Miller*'s rationale applies to all cases where children are sentenced pursuant to a mandatory minimum sentencing scheme.*

The *Miller* Court's discussion of the unsuitability of mandatory life without parole for juveniles casts doubt on the constitutionality of *all* mandatory minimum sentences imposed on a child convicted in adult court. The Court initially focused on the debilitating attributes of youth associated with cognitive immaturity and detrimental environments, noting: "Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional."[45] The impact of these deficiencies should not only be considered in relation to the actual sentence imposed, the Court further acknowledged, but also earlier in the process as "the features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings."[46] A child "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth," including difficulties interacting with police officers upon arrest or under interrogation, working with prosecutors in negotiating a plea agreement, or in assisting counsel in preparing his defense.[47] Finally, the Court reiterated its concern that juvenile life without parole "disregards the possibility of rehabilitation even when the circumstances most suggest it."[48]

Because the identified infirmities attach to the offender not the crime, the *Miller* Court's logic is equally applicable in assessing the constitutionality of other mandatory minimum sentences. In extending *Graham*'s ban against life without parole to juveniles convicted of homicide, the *Miller* Court expressly acknowledged this truism: "[N]one of what [the *Graham* Court] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific."[49] Further adopting *Graham*'s conclusion that an offender's age is a relevant consideration when assessing constitutionality under the cruel and unusual punishment prohibition of the Eighth Amendment, *Miller* held that "criminal procedure laws that fail to take defendants' youthfulness into account … would be flawed."[50]

In his dissent, Chief Justice Roberts once again correctly underscores the broad reach of the majority's decision, affirming that there is no principled means of restricting its application to the mandatory sentence

[45] 567 U.S. at 477.
[46] *Id.* at 478 (quoting Graham v. Florida, 560 U.S. 48, 78 (2010)).
[47] 567 U.S. at 477–78.
[48] *Id.* at 478.
[49] *Id. at* 473.
[50] *Id.* at 473–74 (citation omitted).

at issue in *Miller*. "The principle behind today's decision seems to be only that because juveniles are different from adults, they must be sentenced differently … There is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive."[51] Indeed, as the Supreme Court confirmed in *Ramos v. Louisiana*: "It is usually a judicial decision's reasoning—its *ratio decidendi*—that allows it to have life and effect in the disposition of future cases."[52]

Accordingly, under *Miller*'s rationale, requiring a court to consider the mitigating factors of youth should not only invalidate life without parole sentences for all but a tiny subset of juvenile offenders, but it also calls into question all mandatory sentencing schemes as applied to children. There is no principled rationale for restricting consideration of the mitigating attributes of youth to only the most serious cases; fairness and uniformity require they be assessed in all cases where children are subject to adult sentencing provisions.

## II. STATE COURTS AND LEGISLATURES EMBRACE *MILLER*'S REASONING TO EXTEND GREATER PROTECTIONS TO CHILDREN SENTENCED IN ADULT COURT.

### *A. While there is variation among state court decisions regarding* Miller*'s scope, the more reasoned approach supports a broad construction of its holding.*

Not surprisingly, decisions of state courts faced with constitutional challenges premised on *Miller* considerations vary considerably, running the gamut from narrow rulings limiting application of *Miller*'s rationale to mandatory life without parole sentences[53] to more expansive decisions that completely prohibit the use of life without parole[54] or invalidate the use of mandatory minimum sentences altogether.[55] Some courts have required the challenged sentence to be at least as severe as those at issue

[51] *Id.* at 501.

[52] Ramos v. Louisiana, 140 S.Ct. 1390, 1404 (Apr. 20, 2020); *see id.* at n. 54 ("J. SALMOND, JURISPRUDENCE §62, p. 191 (G. Williams ed., 10th ed. 1947) ('The concrete decision is binding between the parties to it, but [it] is the abstract *ratio decidendi* which alone has the force of law as regards the world at large.'); Frederick Schauer, *Precedent*, *in* ROUTLEDGE COMPANION TO PHIL. OF L. 129 (A. Marmor ed. 2012) ('[T]he traditional answer to the question of what is a precedent is that subsequent cases falling within the *ratio decidendi*—or *rationale*—of the precedent case are controlled by that case.'); NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 65–66 (2008).")

[53] *See, e.g.*, People v. Tate, 352 P.3d 959, 970 (Colo. 2015).

[54] *See, e.g.*, State v. Sweet, 879 N.W.2d 811 (Iowa 2016).

[55] *See, e.g.*, State v. Houston-Sconiers, 391 P.3d 409, 420 (Wash. 2017) (en banc).

in *Roper*, *Graham*, and *Miller*[56] or one of the most severe sentences available to the court.[57] Others have viewed *Miller*'s mandate more broadly to include discretionary sentences[58] or sentences that are "functionally equivalent" to life.[59]

In the years following *Miller*, both before and after *Montgomery* provided additional guidance, it was clear that the failure to consider youth status before imposing a life without parole sentence was enough to demonstrate prejudice against a juvenile offender in violation of the Constitution, even if the court had discretion to impose a lesser sentence at the original sentencing hearing. The Ohio Supreme Court, for example, in *State v. Long*, held: "Because the trial court did not separately mention that Long was a juvenile when he committed the offense, we cannot be sure how the trial court applied this factor . . . Therefore, his sentence did not comport with the newly announced procedural strictures of *Miller v. Alabama*."[60] Similarly, in *Windom v. State*, the Idaho Supreme Court concluded: "The sentencing hearing in Windom's case did not include evidence of the factors required by *Miller* and *Montgomery*, and therefore

[56] *See* State v. Taylor G., 110 A.3d 338, 346 (Conn. 2015).

[57] *See* State v. Link, 441 P.3d 664, 676–77 (Or. Ct. App. 2019).

[58] *See, e.g.*, State v. McCleese, 333 Conn. 378, 396–98 (2019); People v. Holman, 91 N.E.3d 849, 861–62 (Ill. 2017); Windom v. State, 398 P.3d 150, 156 (Idaho 2017), *cert. denied*, 138 S.Ct. 977, 200 (2018); Steilman v. Michael, 389 Mont. 512, 519 (2017); State v. Sweet, 879 N.W.2d 811, 839 (Iowa 2016); *see also* Malvo v. Mathena, 893 F.3d 265, 274 (4th Cir. 2018) (*Miller* applies to discretionary juvenile life without parole sentences); McKinley v. Butler, 809 F.3d 908, 911, 914 (7th Cir. 2016) ("The relevance to sentencing of 'children are different' also cannot in logic depend on whether the legislature has made the life sentence discretionary or mandatory; even discretionary life sentences must be guided by consideration of age-relevant factors.") (vacating a 100-year sentence imposed on a non-incorrigible juvenile offender).

[59] *See, e.g.*, McCleese, 333 Conn. at 383; State v. Zuber, 227 N.J. 422, 448 (2017) ("[L]engthy term-of-years sentences imposed on the juveniles . . . are sufficient to trigger the protections of *Miller* ..."); People v. Franklin, 63 Cal.4th 261, 276 (2016) ("[A] juvenile may not be sentenced to the functional equivalent of life without parole for a homicide offense without the protections outlined in *Miller*."); Cloud v. State, 334 P.3d 132, 141–42 (Wyo. 2014) ("[T]he teachings of the *Roper/Graham/Miller* trilogy require sentencing courts to provide an individualized sentencing hearing to weigh the factors for determining a juvenile's 'diminished culpability and greater prospects for reform' when, as here, the aggregate sentences result in the functional equivalent of life without parole."); *see also* U.S. v. Grant, 887 F.3d 131, 142 (3d Cir. 2018), *reh'g granted en banc*, *vacated*, 905 F.3d 285 (3d Cir. 2018) (vacating a sentence under which a juvenile would become parole eligible at 72 years old, the same age as his life expectancy); Moore v. Biter, 725 F.3d 1184, 1191–92 (9th Cir. 2013) (finding that an aggregate sentence of 254 years for a juvenile non-homicide offender is "materially indistinguishable" from a life sentence without parole and thus entitled to protection under *Graham*).

[60] 8 N.E.3d 890, 898–99 (Ohio 2014).

his sentencing did not comport with the requirements of those decisions."[61] And, in *Luna v. State*, the Oklahoma Court of Criminal Appeals concluded there was a *Miller* violation because "[a] finding that Luna's sentencing jury considered his youth with its attendant characteristics and his chances for rehabilitation in deciding punishment is simply not supported by the record."[62]

But the most expansive reading of *Miller* to date has been in the context of constitutional challenges to mandatory minimum sentences imposed on juveniles regardless of the nature or severity of the offense. In *State v. Lyle*, the Iowa Supreme Court became the first in the nation to consider the propriety of mandatory minimum sentencing for child offenders irrespective of the offense.[63] At issue in *Lyle* was the imposition of a mandatory seven-year prison sentence on a juvenile stemming from a conviction for second degree robbery for taking a small amount of marijuana from a fellow student.[64] In holding the sentence unconstitutional, the *Lyle* Court reasoned that the diminished culpability of juveniles discussed in the context of death and life without parole "also applies, perhaps more so, in the context of lesser penalties. . . ."[65] "More importantly," the Lyle Court noted, "the Supreme Court has emphasized that nothing it has said is 'crime-specific,' suggesting the natural concomitant that what it said is not punishment-specific either."[66]

The *Lyle* Court expressly noted that the "sentencing of juveniles according to statutorily required mandatory minimums does not adequately serve the legitimate penological objectives in light of the child's categorically diminished culpability."[67] Retribution in light of a juvenile's diminished culpability is an "irrational exercise."[68] The deterrence rationale is "even less applicable when the crime (and concordantly the punishment) is lesser."[69] Similarly, "the rehabilitative objective can be inhibited by mandatory minimum sentences"[70] and delaying the release of a juvenile once he or she matures and reforms is "nothing more than the purposeless and needless imposition of pain and suffering."[71] The *Lyle* Court concluded:

61 398 P.3d 150, 158 (Idaho 2017).

62 387 P.3d 956, 962 (Okla. Crim. App. 2016).

63 854 N.W.2d 378 (Iowa 2014).

64 *Id.* at 381.

65 *Id.* at 396 (quoting State v. Pearson, 836 N.W.2d 88, 98 (Iowa 2013)).

66 854 N.W.2d at 399.

67 *Id.* at 398; *see* Graham v. Florida, 560 U.S. 48, 71 (2011).

68 Lyle, 854 N.W.2d at 399; *see* Thompson v. Oklahoma, 487 U.S. 815, 836–37 (1988).

69 854 N.W.2d at 399.

70 *Id.* at 400.

71 *Id.* (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)); *see* Thompson, 487 U.S. at 838.

> The constitutional prohibition against cruel and unusual punishment does not protect all children if the constitutional infirmity identified in mandatory imprisonment for those juveniles who commit the most serious crimes is overlooked in mandatory imprisonment for those juveniles who commit less serious crimes . . . *Mandatory minimum sentencing results in cruel and unusual punishment due to the differences between children and adults*. This rationale applies to all crimes, and no principled basis exists to cabin the protection only for the most serious crimes.[72]

Following *Lyle*, a number of other state courts have applied *Miller*'s rationale to invalidate the mandatory minimum sentence at issue. In *Commonwealth v. Perez*, the Massachusetts Supreme Court held that a mandated minimum sentence longer than fifteen years for non-homicide crimes violated the principal of proportionality and was thus unconstitutional.[73] In *State v. Houston-Sconiers*, two boys charged with robbing kids of their Halloween candy were automatically placed in adult court facing sentences ranging from thirty-six to forty-five years because of a firearm enhancement provision that precluded early release.[74] Citing *Miller*, the Washington Supreme Court held that "sentencing courts must have complete discretion to consider mitigating circumstances associated with the youth of any juvenile defendant, even in the adult criminal justice system … Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements."[75] The Court further acknowledged: "To be sure, the Supreme Court has not applied the rule that children are different and require individualized sentencing consideration of mitigating factors in exactly this situation … [b]ut we see no way to avoid the Eighth Amendment requirement to treat children differently, with discretion, and with consideration of mitigating factors, in this context."[76] Recently, in *State v. Link*, the Oregon Court of Appeals held that a mandatory minimum sentence of life *with* the possibility of parole imposed on a juvenile homicide offender in the absence of an individualized sentencing hearing violated the Eighth Amendment.[77] Post-*Montgomery*, even when courts have failed to apply *Miller* to bar mandatory minimums, they acknowledge the decision's

[72] 854 N.W.2d at 401–02 (emphasis added).
[73] 80 N.E.3d 967, 975 (Mass. 2017).
[74] 391 P.3d 409, 413–14 (Wash. 2017).
[75] *Id.* at 420.
[76] *Id.* at 419.
[77] 441 P.3d 664, 682 (Or. Ct. App. 2019).

rationale supports such a conclusion, but defer to definitive Supreme Court guidance before extending its holding.[78]

Individual jurists are also increasingly of the opinion that *Miller*'s reasoning invalidates all mandatory minimums for children. As Justice Eveleigh correctly pointed out in his dissent in *State v. Taylor G.*: "Year after year, the Supreme Court has chipped away at sentences that harshly punish juveniles, but only if those sentences—or sentencing schemes—fail to allow a sentencing court to consider the fundamental differences of juvenile offenders before imposing the sentence or to meaningfully tailor the sentence to suit those differences."[79] Because a juvenile's decreased culpability does not depend on the crime charged, "such mandatory sentences can never properly take into account the effect of juvenile differences on the culpability of the juvenile and, thus, the proportionality of the sentence imposed."[80]

More recently, in his concurring opinion in *State v. Zarate*, Justice Appel stated:

> I have come to the conclusion that predicting the future course of a juvenile offender, as psychiatrists have repeatedly warned us, is simply not possible with any degree of accuracy. Time and time again, professional organizations have repeatedly warned judges that prediction of the future course of an offender generally, and a youthful offender more particularly, is really impossible.[81]

Citing a study[82] presenting research by the American Psychological Association revealing that the majority of juveniles are misdiagnosed with

[78] *See* State v. Smith, 836 S.E.2d 348, 349–50 (S.C. 2019), *appeal docketed*, No. 2017-001178 ("We are . . . being asked to ignore the confines of the holdings of the Supreme Court and instead extend the rationale underlying the holdings … [W]e decline the invitation and leave resolution of the reach of the Eighth Amendment, including any possible extensions, to the Supreme Court."); Burrell v. State, 207 A.3d 137, 146 (Del. 2019) ("Now, it may be that the 'evolving standards of decency that mark the progress of a maturing society' will compel the United States Supreme Court to rule someday that the Eighth Amendment prohibits *any* minimum mandatory sentences for juvenile offenders, but *Miller* did not mark that day."); *see also* Commonwealth v. Okoro, 26 N.E.3d 1092, 1099–1101, 1101 n.17 (Mass. 2015) (noting the novelty of research on the adolescent brain and the "rapidly changing field of study and knowledge" counseling awaiting future developments before applying it to juvenile sentencing).

[79] 110 A.3d 338, 367 (Conn. 2015) (Eveleigh, J., dissenting).

[80] *Id.* at 368–69.

[81] 908 N.W.2d 831, 857–58 (Iowa 2018) (Appel, J., concurring) (citations omitted).

[82] *See* Elizabeth Cauffman et. al., *Comparing the Stability of Psychopathy Scores in Adolescents Versus Adults: How Often Is "Fledgling Psychopathy"*

psychopathy, because the observed psychopathic traits are related to the undeveloped brain and are thus most often transient, Justice Appel concluded that: "We should not expect judges to be any better at [diagnosis] than professionally trained psychiatrists."[83] In his opinion, the "constitutionally sound approach is to abolish mandatory minimum sentences" for kids and replace this demonstrably "unreliable judicial guess" with discretion by a parole board to periodically assess whether a child offender "has demonstrated maturity and rehabilitation as reflected in an observable track record."[84]

Similarly, in his dissent in *State v. McCleese*, where the majority affirmed a legislative remedy providing a parole opportunity for a juvenile originally sentenced to the functional equivalent of a life without parole sentence, as compliant with *Miller* and *Montgomery*,[85] Justice Ecker chastised the majority for adopting a formalistic rule that only recognized the mitigating factors of youth in the context of death or life without parole sentences. "The time is fast approaching," he stated, "when we must acknowledge that the constitutional implications of this idea—that children are constitutionally different for the purposes of criminal sentencing—extend[s] beyond the minimalist holding settled on by the majority…"[86] He concludes: "The profoundly significant principle that 'children are constitutionally different from adults for sentencing purposes,' [previously] embraced enthusiastically by this court … has been reduced to this disheartening reformulation: 'Children are constitutionally the same as adults for sentencing purposes, even for the most severe sentences, short of death and its functional equivalent.' The result is unfortunate and unnecessary."[87]

Evolving judicial interpretations of the appropriate reach of *Miller*'s holding thus reflect acceptance of the undisputed science recognizing the neurophysiological differences between children and adults that both minimize children's culpability and enhance the prospects of their reform and rehabilitation. These biological differences, exacerbated in many cases by adverse childhood experiences,[88] are synonymous with youth, and are ever present. There is thus no legitimate rationale that can be

*Misdiagnosed?*, 22 PSYCH. PUB. POL'Y & L. 77, 80, 88 (2016) (cited in State v. Zarate, 908 N.W.2d at 857–58 (Iowa 2018)).

83 Zarate, 908 N.W.2d at 858.

84 *Id.*

85 215 A.3d 1154, 1166 (Conn. 2019).

86 *Id.* at 1191–92 (Ecker, J., dissenting).

87 *Id.* at 1205.

88 ACEs include physical, sexual and emotional abuse; physical and emotional neglect; family, and specifically domestic, violence; household substance abuse and mental illness; separated or divorced parents; and incarceration of a family member. HUMAN RIGHTS FOR KIDS ACEs FACT SHEET (2018), https://humanrightsforkids.org/wp-content/uploads/2018/12/HRFK-ACES-Infographic-final.pdf.

offered in support of the imposition of mandatory minimum sentences on children, regardless of the underlying offense.

### *B. In revising their child sentencing statutes, state legislatures are embracing the understanding that the mitigating aspects of youth must be considered whenever children are subject to adult sentencing schemes.*

The importance of state legislative enactments in assessing the constitutionality of juvenile sentences stems from the dictates of the categorical exclusion test of proportionality under the Eighth Amendment.[89] Making the proportionality determination first requires the court to assess contemporary societal standards.[90] "'[T]he concept of proportionality is central to the Eighth Amendment.' And we view that concept less through a historical prism than according to 'the evolving standards of decency that mark the progress of a maturing society.'"[91] As the *Atkins* court explained: "Proportionality review under those evolving standards should be informed by 'objective factors to the maximum possible extent.'"[92] The *Atkins* Court concluded that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."[93]

In the wake of *Miller*, twenty-six states have revised their juvenile sentencing laws.[94] Review of the resulting statutes reveals that these legislative bodies view *Miller*'s and *Montgomery*'s requirements as the

[89] As previously discussed, *see supra* Section I.B., because the *Miller* decision, when properly labelled, is a new subset of the traditional categorical exclusion caselaw, the actions of state legislatures are germane to the analysis.

[90] Only after that assessment will the court exercise its independent judgement in determining whether the punishment violates the Eighth Amendment; *see* Graham v. Florida, 560 U.S. 48, 61 (2010); *see also supra* section I.B.

[91] Miller v. Alabama, 567 U.S. 460, 469–70 (2012) (citations omitted).

[92] Atkins v. Virginia, 536 U.S. 304, 312 (2002) (citations omitted).

[93] *Id.* (citations omitted).

[94] *See* WYO. STAT. ANN. § 6–10–301(c) (2013); W.VA. CODE § 61-11-23 (2014); HAW. REV. STAT. § 706-656-657 (2014); NEV. REV. STAT. § 176.025 (2015); NEV. REV. STAT. § 176.017 (2017); CONN. GEN. STAT. § 54-125a(f) (2015); DEL. CODE tit. 11, § 4204A (2013); UTAH CODE ANN. § 76-3-209 (2016); VT. STAT. ANN. tit. 13, § 7045 (2015); ARK. CODE ANN. § 5-4-108 (2017); CAL. PENAL CODE §§ 3051, 4801 (2017); N.D. CENT. CODE §12.1-32-13.1 (2017); TEX. PENAL CODE ANN. § 12.31 (2013); N.J. REV. STAT. § 2C:11-3 (2017); S.D. CODIFIED LAWS § 22-6-1.3 (2016); D.C. CODE § 24-403.03 (2017); S.B. 1008, 80th Leg., Reg. Sess. (Or. 2019); FLA. STAT. § 921.1402 (2014); ALA. CODE § 13A-6-2 (2016); 730 ILL. COMP. STAT. 5/5-4.5-105 (2016); LA. REV. STAT. § 15:574.4 (2016); MICH. COMP. LAWS § 769.25 (2014); MO. REV. STAT. § 565.033-565.034 (2016); NEB. REV. STAT. § 28-105.02 (2013); N.C. GEN. STAT. § 15A-1340.19B (2012); 18 PA. CODE § 1102.1 (2012); H.B. 35 & 744, Gen. Assemb. (Va. 2020).

minimum safeguards that must be imposed to avoid constitutional infirmity. Many of the jurisdictions have gone well beyond a narrow reading of *Miller*'s holding that requires an individual sentencing hearing only for children facing life without parole sentences. West Virginia, for example, now requires an individualized *Miller*-type sentencing hearing for every child sentenced as an adult, regardless of the crime or penalty.[95] Nevada requires courts to consider the "diminished culpability of juveniles as compared to that of adults and the typical characteristics of youth," authorizing judges to "reduce *any* mandatory minimum period of incarceration . . . by not more than 35 percent . . ."[96] The District of Columbia Comprehensive Youth Justice Amendment Act eliminates all mandatory minimum sentences for child offenders prosecuted in the adult criminal system.[97]

Most recently, during the 2020 state legislative session, five states introduced bills to reform how children are sentenced in adult court, requiring courts to consider the mitigating factors of youth and allowing departure from mandatory minimum sentences in a number of contexts.[98] In addition, Virginia introduced and passed several landmark pieces of legislation, including HB 35 which retroactively bans life and de facto life without parole sentences for children. Significantly, through passage of HB 744, Virginia became the first state in the nation to enact legislation authorizing judges to depart from *any* mandatory minimum or suspend any sentence of a

[95] H.B. 4210, 81st Leg., Reg. Sess. (W. Va. 2014).

[96] A.B. 218, 79th Leg., Gen. Sess. (Nev. 2017) (emphasis added).

[97] D.C. Law 21-238 (2016).

[98] *See* H.873, 102nd Leg., Gen. Sess. (Vt. 2020) (Requiring the court to consider whether a child was subjected to any early childhood trauma or adverse childhood experiences as potential mitigating factors and allowing the court to depart from any mandatory minimum sentence or penalty enhancement if the court finds such mitigating factors exist); H.B. 2101, 33rd Leg., Reg. Sess. (Haw. 2020) (Requiring circuit courts to apply special sentencing considerations when sentencing a minor for a nonviolent offense and allowing courts to impose a sentence up to fifty per cent shorter than the mandatory minimum or to decline to impose a mandatory enhanced sentence); H.B. 3134, 57th Leg. Sess. (Okla. 2020) ("[I]t is the intent of the Legislature to allow courts to depart up to thirty-five percent (35%) from any applicable mandatory minimum sentence when sentencing children, as well as any applicable mandatory sentencing enhancements, if the court believes such a reduction is warranted given the young age of the child and the prospects for rehabilitation"); H.B. 1437, 441st Leg., Gen. Sess. (Md. 2020) ("When sentencing a minor convicted as an adult, a court may impose a sentence less than the minimum term required by law"); S.B. 5488, 66th Leg. Sess. (Wash. 2020) (If a person is being sentenced in adult court for a crime committed under age eighteen, the court has full discretion to depart from mandatory sentencing enhancements and to take the particular circumstances surrounding the defendant's youth into account.)

child prosecuted in adult court.[99] In 2019, bills were also introduced in two states, and in Congress, requiring the *Miller* factors to be considered at sentencing and authorizing judges to depart from mandatory minimums.[100]

In addition, legislatures in South Carolina, Hawaii, Vermont, and Rhode Island have all adopted resolutions expressing support for the U.N. Convention on the Rights of the Child (CRC), which states in relevant part: "[E]very child having infringed the penal law shall have the right to be treated in a manner which *takes into account the child's age* and the desirability of *promoting the child's reintegration*."[101] This human rights protection has been interpreted as requiring no child to be "sentenced by the same guidelines that would apply to adults, regardless of the offense committed."[102] Every member of the United Nations, except the U.S., has ratified the CRC, despite the legislative endorsement by four states urging the Senate to do so.[103]

### *C. Contemporary societal standards of decency render the imposition of any mandatory minimum sentence on a juvenile unconstitutional under the Eighth Amendment.*

The *Atkins* Court explained that when determining whether a national consensus against a sentencing practice exists, "[i]t is not so much the number of States that is significant, but the consistency of the direction of

[99] H.B. 744, Gen. Assemb. (Va. 2020).

[100] *See* H.R. 1949, 116th Cong. (2019) (Requiring consideration of youth and giving judges greater discretion when sentencing children in the federal system); S.B. 607, 92nd Gen. Assemb. (Ark. 2019) ("The General Assembly finds that there is a recent *trend in the United States of giving greater discretion to judges when sentencing children, including departing from mandatory minimums in appropriate cases . . .*") (emphasis added); H.B. 218, 30th Leg., Reg. Sess. (Haw. 2019) (Requiring consideration of the *Miller* factors at sentencing and allowing judges to depart from mandatory minimum sentences).

[101] H.R. 1949, 116th Cong. (2019); *see also* S.B. 607, 92nd Gen. Assemb., Reg. Sess. (Ark. 2019); H.B. 218, 32nd Leg., Reg. Sess. (Haw. 2019); H.C.R. No. 69, 20th Leg., Reg. Sess. (Haw. 2007); S.R. 3013, Gen. Assemb., Reg. Sess. (R.I. 2002); J.R.S. 33, 82nd Leg., Gen. Sess. (Vt. 1998); S.C.R. 790, 109th Leg., Reg. Sess. (S.C. 1992).

[102] INTER-AM. COMM'N ON HUM. RTS., THE SITUATION OF CHILDREN IN THE ADULT CRIMINAL JUSTICE SYSTEM IN THE UNITED STATES 142 (2018), http://www.oas.org/en/iachr/reports/pdfs/Children-USA.pdf.

[103] *See* Sarah Mehta, *There's Only One Country That Hasn't Ratified the Convention on Children's Rights: US*, ACLU (Nov. 20, 2015), https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens.

change."[104] In the aftermath of the *Lyle*, *Perez*, and *Houston-Sconiers* decisions, state legislatures in Nevada, Virginia, and the District of Columbia have kept pace by enacting legislation to end or significantly curtail mandatory minimum sentencing for children.[105] In the past three years alone, similar legislation was introduced in seven additional states and the U.S. Congress. Bolstering the argument that these legislative actions reflect the "evolving standards of decency" of contemporary society is the fact that they have been championed by Democratic and Republican legislators alike in every region of the country, from Hawaii to Arkansas, Vermont to Oklahoma.[106] And while there are jurisdictions that have not yet reached the question of mandatory minimum sentencing for children, *Graham* teaches us that the mere availability of a sentence "does not indicate that the penalty has been endorsed through deliberate, express, and full legislative consideration."[107] As the *Lyle* Court noted:

> [S]ociety is now beginning to recognize a growing understanding that mandatory sentences of imprisonment for crimes committed by children are undesirable in society. If there is not yet a consensus against mandatory minimum sentencing for juveniles, a consensus is certainly building … in the direction of eliminating mandatory minimum sentencing.[108]

That was 2014. Six years later, the objective indicia of societal standards as expressed in legislative enactments and state practice offer even more compelling evidence that the use of mandatory minimum sentences on children, without consideration of their child status, violates the Eighth Amendment. As noted above, an absence of consensus is not dispositive of the question, as "the evolution of society that gives rise to change over time necessarily occurs in the presence of an existing consensus, as history has repeatedly shown."[109]

Moreover, after assessing community standards, the analysis articulated in *Graham* requires the court to use its independent judgement

[104] Atkins v. Virginia, 536 U.S. 304, 315 (2002).

[105] A.B. 218, 79th Leg., Gen. Sess. (Nev. 2017); H.B. 744, Gen. Assemb. (Va. 2020); D.C. Law 21-238 (2016).

[106] *See* legislative efforts, *supra* note 96.

[107] Graham v. Florida, 560 U.S. 48, 67 (2010); *see* Miller v. Alabama, 567 U.S. 460, 485–87 (2012) (Court was unfazed by the number of jurisdictions that permitted or mandated life without parole sentences for juvenile homicide offenders at the time saying that given the nature of juvenile transfer laws "it was impossible to say whether a legislature had endorsed a given penalty for children…").

[108] State v. Lyle, 854 N.W.2d 378, 389 (Iowa 2014).

[109] *Id.* at 387.

to determine if the Eighth Amendment is breached by the sentencing practice under review:

> Community consensus, while "entitled to great weight," is not itself determinative of whether a punishment is cruel and unusual. In accordance with the constitutional design, "the task of interpreting the Eighth Amendment remains our responsibility." The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question. In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals.[110]

In this regard, the Supreme Court has considered professional opinions and international norms, particularly if embraced by legislators. The *Roper* Court explicitly noted: "[T]he Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments.'"[111] In addition, the *Roper*, *Graham*, and *Miller* courts all relied on emerging knowledge of adolescent neuroscience and the diminished culpability of juveniles as provided by the American Psychological Association,[112] in reaching their decisions. The decision in *Graham* mirrored the position advocated by the American Medical Association in its amicus filing in that case.[113] *Graham* also bolstered its decision noting that "'the overwhelming weight of international opinion against' life without parole for nonhomicide offenses committed by juveniles 'provide[s] respected and significant confirmation for our own conclusions.'"[114] The *Miller* Court ultimately looked to such sources[115] in determining that none of the penological justifications offered in support of life without parole sentences applied to children in light of their

[110] 560 U.S. at 67 (citations omitted).

[111] Roper v. Simmons, 543 U.S. 551, 575 (2005) (citing Trop v. Dulles, 356 U.S. 86, 102–103 (1958) (plurality opinion)).

[112] *See* Miller v. Alabama, 567 U.S. 460, 472 n.5 (2012).

[113] State v. Sweet, 879 N.W.2d 811, 828 (2016) (citing Graham, 560 U.S. at 68).

[114] 560 U.S. at 81 (citation omitted). "The Court has looked beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual. *See, e.g.*, Roper, 543 U.S. at 575–578, 125 S.Ct. 1183; Atkins, 536 U.S. at 317–318, n. 21, 122 S.Ct. 2242; Thompson, 487 U.S. at 830, 108 S.Ct. 2687 (plurality opinion); Enmund [v. Florida, 458 U.S. 782, 796–797], n. 22, 102 S.Ct. 3368; Coker, 433 U.S. at 596, n. 10, 97 S.Ct. 2861 ([plurality opinion]); Trop, 356 U.S., at 102–103, 78 S.Ct. 590 ([plurality opinion]). Today we continue that longstanding practice in noting the global consensus against the sentencing practice in question." 560 U.S. at 80.

[115] *See, e.g.*, 567 U.S. at 471–72.

diminished culpability relative to adult offenders.[116] Similarly, state courts have cited studies and recommendations by professional organizations including the American Bar Association, the American Psychological Association, the American Psychiatric Association, the National Association of Social Workers, as well as the American Law Institute, in exercising their independent judgement striking down life and de facto life without parole sentences for children.[117] It stands to reason then that when conducting its own independent analysis, a court should give appropriate consideration to such sources, including the international consensus that children should not be sentenced by the same standards used for adults.[118] As the *Atkins* court observed, "[a]lthough these factors are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue."[119] Accordingly, as more states reach the issue, either through their legislatures or their courts, they will find mounting evidence that imposing mandatory minimum sentences on children has become increasingly rare in the United States, reflecting the understanding that such practices fail to serve any rational penological objectives in light of children's diminished culpability.

## III. A BAN ON MANDATORY MINIMUM SENTENCING SCHEMES FOR CHILDREN IS EITHER A NEW SUBSTANTIVE RULE OR A WATERSHED RULE OF CRIMINAL PROCEDURE REQUIRING RETROACTIVE APPLICATION UNDER *TEAGUE*.

After determining that mandatory minimum sentences violate the prohibition on cruel and unusual punishment, the next inquiry is whether this new rule is to be retroactively applied. A state court finding such a violation, based solely on its interpretation of the state's constitution, may need to conduct a separate retroactivity analysis based on its own jurisprudence. The *Teague* analysis governing federal habeas proceedings may still be instructive, however, particularly for those states with similar retroactivity tests. Under *Teague*, as previously discussed, there are two exceptions to the general bar against retroactive application of a new federal constitutional rule: those that are considered "substantive" and those that constitute a "watershed rule of criminal procedure."[120]

When the *Miller* rule was announced in 2012, state and federal courts across the country split on the question of its retroactivity. Most of those ruling in favor viewed it as a new substantive rule, reasoning that "*Miller* places a particular class of persons covered by the statute—juveniles—

116 *Id.* at 472-74.

117 *See, e.g.*, State v. Sweet, 879 N.W.2d 811, 817, 821–22, 828–29, 837–39 (Iowa 2016) (taking note of these submissions by amici in *Miller*).

118 United Nations Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989 (entered into force Sept. 2, 1990).

119 Atkins v. Virginia, 536 U.S. 304, 317 n.21 (2002).

120 *See supra*, section I.B.

constitutionally beyond the State's power to punish with a particular category of punishment—*mandatory* sentences of natural life without parole."[121] Those denying retroactivity uniformly categorized the decision as a procedural change that "merely altered the ***permissible methods*** by which the State could exercise its continuing power, in this case to punish juvenile homicide offenders by life imprisonment without the possibility of parole,"[122] but not one of sufficient gravity to meet the *Teague* exception. A minority of courts that ruled in favor, however, did find *Miller*'s rule as satisfying *Teague*'s watershed threshold.[123]

Of particular importance is the fact that most of the courts addressing the retroactivity question were reviewing *mandatory* sentences. By contrast, *Aiken v. Byars* is one of the few pre-*Montgomery* state high court decisions holding that *Miller* applied to life without parole sentences imposed under *discretionary* sentencing schemes.[124] Because South Carolina did not have a mandatory sentencing scheme, the *Aiken* Court focused its inquiry on the punishment itself, *i.e.*, life without parole, rather than the procedure by which it was imposed, *i.e.*, mandatory as opposed to discretionary.[125] Under that analysis, the *Aiken* Court adopted a different rationale for giving *Miller* retroactive effect as a new substantive rule under *Teague*, holding that "the rule plainly excludes a certain class of defendants—juveniles—from specific punishment—life without parole absent individualized considerations of youth. Failing to apply the *Miller* rule retroactively risks subjecting defendants to a legally invalid punishment."[126] In *Montgomery*, the Supreme Court seemingly agreed with the *Aiken* Court's focus on the nature of the punishment in holding *Miller*'s rule to be substantive and, as such, entitled to retroactive application under *Teague*. The *Montgomery* Court deemphasized the procedural hearing mandated by *Miller* stating that it "does not replace but rather gives effect to *Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect transient immaturity."[127]

Given the Court's retroactivity analysis in *Montgomery*, and its focus on the nature of the penalty rather than the method by which it was

[121] People v. Davis, 6 N.E.3d 709, 722 (Ill. 2014); *see* Jones v. State, 122 So.3d 698, 703 (Miss. 2013); *Ex parte* Maxwell, 424 S.W.3d 66, 75 (Tex. Crim. App. 2014); State v. Mantich, 842 N.W.2d 716, 730 (Neb. 2014).

[122] State v. Tate, 130 So.3d 829, 838, 841 (La. 2014) (emphasis in original); *see* Commonwealth v. Cunningham, 81 A.3d 1, 10 (Pa. 2013); Chambers v. State, 831 N.W.2d 311, 331 (Minn. 2013).

[123] *See, e.g.*, Casiano v. Comm'r of Corr., 317 Conn. 52, 62 (2015); People v. Williams, 982 N.E.2d 181, 197 (Ill. App. Ct. 2012); *see also* People v. Wilder, 412 P.3d 686, 699–700 (Colo. App. 2015) (Terry, J., concurring).

[124] 765 S.E.2d 572, 576–77 (S.C. 2014).

[125] *Id.* at 575–77.

[126] *Id.* at 575–76.

[127] Montgomery v. Louisiana, 136 S.Ct. 718, 735 (2016).

imposed, the question remains whether the imposition of *any* mandatory sentence—regardless of duration—on a child offender creates a new right to challenge that sentence on collateral review and request a new sentencing hearing. One challenge courts may face in making this decision is the absence of an articulated punishment, *e.g.*, the death penalty or life without parole, that can be used to draw a comparison with *Roper*, *Graham*, or *Miller*. This jurisprudential void can be filled, however, by adopting the reasoning used by the state supreme courts that previously considered the retroactivity question in the context of mandatory life without parole sentences.

Accordingly, if a court finds that any mandatory minimum sentence imposed on a juvenile offender violates the Eighth Amendment, it has two options that will trigger retroactivity under *Teague*. It can adopt the analysis of the Illinois Supreme Court in *Davis*, reasoning that its decision establishes a new substantive rule in placing "a particular class of persons covered by the statute—juveniles—constitutionally beyond the State's power to punish with a particular category of punishment—*mandatory* sentences . . ."[128] Alternatively, it could embrace the Connecticut Supreme Court's analysis in *Casiano* to conclude that the imposition of mandatory minimum sentences on children, absent an individualized sentencing hearing where youth and its attendant circumstances are considered, falls within *Teague*'s second exception as a watershed rule of criminal procedure.

In the sentencing context, where the issue is no longer one of guilt or innocence, to qualify for treatment under *Teague*'s watershed exception the new procedure must be deemed central to an accurate determination that the sentence imposed is a proportionate one.[129] The *Casiano* court concluded that it was, and thus viewed *Miller*'s rule as a watershed rule of criminal procedure that must be applied retroactively.[130] The *Casiano* court initially noted that "[m]any courts have recognized that it is difficult to categorize *Miller* as either substantive or procedural, as its holding has characteristics of both types of rules."[131] This conundrum arises because "the holding in *Miller* was predicated on the 'confluence' of two strands of the court's proportionality jurisprudence; one strand applying categorical bars, which must apply retroactively, and the other strand concerning individualized sentencing determinations, which may not apply retroactively."[132] The *Casiano* court ultimately concluded that the *Miller* hearing requirement was a procedural rule as it affected "how and under what framework a punishment may be imposed," but did not

[128] People v. Davis, 6 N.E.3d 709, 722 (Ill. 2014).

[129] Schriro v. Summerlin, 542 U.S. 348, 359–60 (2004) (Breyer, J., dissenting).

[130] Casiano v. Comm'r of Corr., 317 Conn. 52, 62 (2015).

[131] *Id.* at 65.

[132] *Id.* at 66 (citations and footnotes omitted).

invalidate the state's authority to impose the particular punishment.[133] The court viewed *Miller* as, in essence, setting forth a presumption that upon consideration of the mitigating factors of youth, a juvenile offender would not receive a life without parole sentence. Because this new procedure would impact the sentence imposed in most cases, it is "central to an accurate determination that the sentence imposed is a proportionate one,"[134] and as such, constitutes a watershed rule of criminal procedure necessitating its retroactive application.[135]

This reasoning applies to juveniles sentenced under *any* mandatory minimum sentencing scheme. If failing to consider the characteristics of youth creates a risk of disproportionate punishment in violation of the Eighth Amendment, then it necessarily "implicates the fundamental fairness of a juvenile sentencing proceeding because it is a 'basic precept of justice' that punishment must be proportionate 'to both the offender and the offense.'"[136] As the *Casiano* court observed, "our understanding of the bedrock procedural element of individualized sentencing was altered when the court intertwined two strands of eighth amendment jurisprudence to require consideration of new factors for a class of offenders to create a presumption against a particular punishment."[137] Indeed, a number of state courts have embraced the view that *Miller* created a presumption against the imposition of juvenile life without parole—a burden the government must overcome when seeking such a punishment.[138] In this case, there is a presumption against imposing the same sentence—regardless of what that sentence is—on a child that would otherwise be required for an adult, without first considering whether such a punishment is proportional in light of the offender's child status.

Courts must determine which *Teague* exception, if either, their case falls under when ruling on retroactivity. Following the *Davis* court's reasoning, such a decision would recognize a new substantive rule, while

133 *Id.* at 68.

134 *Id.* at.70 (citations omitted).

135 *Id.* at 69.

136 *Id.* at 70–71 (citation omitted).

137 *Id.* at 71.

138 *See, e.g.*, Williams v. United States, 205 A.3d 837, 867 n.22 (D.C. 2019) ("An individual with an unconstitutional sentence to die in prison cannot be made to bear the burden to show that the sentence should not be left in place. That burden falls to the government. *See, e.g.*, Davis v. State, 415 P.3d 666, 681 (Wyo. 2018) ("A faithful application of *Miller* and *Montgomery* requires . . . a presumption against imposing a life sentence without parole, or its functional equivalent, on a juvenile offender."); Commonwealth v. Batts, 640 Pa. 401, 163 A.3d 410, 452–55 (Pa. 2017) (placing the burden on the Commonwealth to prove beyond a reasonable doubt that a juvenile is irreparably corrupt so as to authorize imposing a life without parole sentence)"); State v. Sweet, 879 N.W.2d 811, 833 (Iowa 2016) ("[I]f a life sentence without parole could ever be imposed on a juvenile offender, the burden was on the state to show that an individual offender manifested 'irreparable corruption.'").

adopting the *Casiano* court's analysis would establish a new watershed rule of criminal procedure. While federal courts are constrained by *Teague*, state courts under *Danforth v. Minnesota* are free to give retroactive effect to a broader set of new procedural rules than *Teague* itself requires.[139] Thus, even if a state court finds that its holding does not rise to the level of a "watershed rule" under federal jurisprudence, the decision can still be applied retroactively because *Teague*'s bar "limit[s] only the scope of *federal* habeas relief…"[140]

The Supreme Court concluded in *Montgomery* "that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule."[141] The Court noted, however, that its holding was "limited to *Teague*'s first exception for substantive rules" and that "the constitutional status of *Teague*'s exception for watershed rules of procedure need not be addressed here."[142] This highlights a potential consideration for practitioners and state courts alike, as a new substantive rule under *Teague* must be applied retroactively, whereas a watershed rule of criminal procedure *may* be applied retroactively. In any event, a finding of retroactivity in such cases – as a matter of law and morality – is the most appropriate outcome, necessitating re-sentencing hearings for the impacted class of child offenders who remain incarcerated. "To hold otherwise would allow the state to impose unconstitutional punishment"—mandatory minimum sentences—"on some persons but not others, an intolerable miscarriage of justice."[143] And while resentencing may impose a burden on lower state courts, as it did in Iowa when more than 100 child offenders who had previously received mandatory minimums were re-sentenced, the children of each state, and the state itself, "will be better served when judges … give each juvenile the individual sentencing attention they deserve and our constitution demands."[144]

## CONCLUSION

The evolution of the Supreme Court's juvenile sentencing jurisprudence since *Thompson* can be summarized in one conclusion: for purposes of sentencing, children are different than adults. Their developmental infirmities render them simultaneously less culpable for

[139] 552 U.S. 264, 266, 282 (2008).

[140] *Id.* at 281–82.

[141] Montgomery v. Louisiana, 136 S.Ct. 718, 729 (2016).

[142] *Id.*

[143] Casiano v. Comm'r of Corr., 317 Conn. 52, 71 (2015) (citation omitted).

[144] State v. Lyle, 854 N.W.2d 378, 403 (Iowa 2014); *see also* Grant Rodgers, *Iowa Ruling Shifts from Mandatory Minimums for Juveniles*, DES MOINES REG. (July 18, 2014), https://www.desmoinesregister.com/story/news/2014/07/18/iowa-ruling-shifts-from-mandatory-minimums-for-juveniles/12833927/.

their crimes than their adult counterparts and more amenable to rehabilitation. These attributes of youth undermine the penological justifications underlying criminal sentences, triggering disproportionate punishment in violation of the Eighth Amendment if they are not taken into consideration at sentencing. Contemporary societal values are reflected in this understanding as indicated by state court decisions and legislative enactments in the wake of *Miller* and as society learns more about childhood cognitive development.

Full expression of *Miller*'s logic calls into question the constitutionality of any mandatory minimum sentence for juveniles. The infirmities of youth are ever present; they do not manifest and disappear according to the nature of an offense. Accordingly, no principled line can be drawn based on the nature of the offense to eliminate consideration of the inherent mitigating qualities of youth, at least when children are subjected to punishments designed for adults. To give expression to contemporary standards of decency, as demonstrated by legislative enactments and state practice, as well as the overwhelming weight of scientific evidence and international consensus, courts must exercise their own independent judgment and give effect to the *Miller* decision's underlying rationale in assessing the constitutionality of mandatory minimum sentencing schemes for juveniles. Accordingly, decisions predicated on a violation of the Eighth Amendment's prohibition on cruel and unusual punishment should be given retroactive effect under one or the other of the *Teague* exceptions.

***

Correction to previous edition VJSPL 27.1:

In the article Firearm Ownership & Violent Crime (full citation: Rahn K. Bailey, et al., Firearm Ownership & Violent Crime, 27 Va. J. Soc. Pol'y & L. 6 (2020)), the author's name Andrea Mata Saldana, M.D. was inadvertently omitted. A corrected version of the article may be found online at http://vjspl.org/wp-content/uploads/2020/07/Bailey-Saldana-1.pdf.