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**YOUTH MATTERS:
MILLER V. ALABAMA'S IMPLICATIONS
FOR INDIVIDUALIZED REVIEW
IN JUVENILE SENTENCING**

*Piper Waldron**

I. INTRODUCTION

At first glance, the United States Supreme Court's decision in *Miller v. Alabama*¹ seems somewhat limited, but upon closer inspection, the decision may have far-reaching implications for punishment under the Eighth Amendment. In a 5–4 decision, the *Miller* Court found sentencing schemes that prescribe mandatory life without parole (LWOP) for juveniles to be unconstitutional.² A cursory read of *Miller* suggests that perhaps the holding is limited; after all, the two boys at the center of the case might still end up in jail for life,³ and the opinion managed to evade deciding the constitutionality of juvenile LWOP. However, the crux of *Miller* is that juveniles are entitled to individualized review during sentencing because they stand in stark contrast to adults.⁴ Individualized review is a comprehensive approach to juvenile sentencing, under which a court must consider mitigating factors such as susceptibility to peer pressure, underdeveloped brains, and traumatic life stories.⁵

* J.D. Candidate, May 2013, Loyola Law School, Los Angeles; B.A., University of California, Berkeley, May 2009. I would like to extend my sincere gratitude to Professor Samuel H. Pillsbury for his invaluable guidance, patience, and for always pushing me to do better by asking, "Why?" Thank you to the members of the *Loyola of Los Angeles Law Review* who helped me fine tune this Comment. Most importantly, I thank my family for providing unconditional love and support, especially during the most difficult times.

1. 132 S. Ct. 2455 (2012).

2. *Id.* at 2475.

3. The defendants' sentencing rehearings could merely lead to a reimposition of LWOP. Tamar Birkhead, *The Ultimate Impact of Miller v. Alabama?*, RECLAIMING FUTURES (June 28, 2012), <http://www.reclaimingfutures.org/blog/ultimate-impact-miller-v-alabama>.

4. *See Miller*, 132 S. Ct. at 2471.

5. *See id.* at 2464, 2467–69.

While the Court focused on juvenile LWOP, the extension of the prohibition on mandatory sentences and the emphasis on the individualized sentencing requirement are significant. *Miller* expands the Eighth Amendment as it is applied to juveniles, since its reasoning may challenge other mandatory laws that negate individualized sentencing.⁶

This Comment argues that the implications of the *Miller* holding are potentially broad, in that prudent judges may now use individualized sentencing in all juvenile cases. Part II provides an overview of the facts of the case. Part III examines the Court's reasoning. Part IV highlights the differences between juveniles and adults by discussing the factors that should be considered during sentencing. It then analyzes how *Miller*'s rationale can be extended to other sentencing practices. Part V concludes that *Miller* is an important constitutional step because it encourages individualized review for all juveniles and implicates sentencing practices beyond the scope of juvenile LWOP.

II. STATEMENT OF THE CASE

Miller v. Alabama involved two consolidated cases: *Jackson v. Hobbs*⁷ and *Miller v. Alabama*.⁸ Both cases raised Eighth Amendment challenges to sentencing schemes prescribing mandatory LWOP for juvenile defendants.⁹

In *Jackson*, fourteen-year-old Kuntrell Jackson's life as he knew it ended when he and his friends decided to rob a video store.¹⁰ On the way to the store, Jackson learned that one of his friends was surreptitiously carrying a gun.¹¹ Although he initially remained outside, Jackson later entered the store to find his friend pointing the gun at the clerk.¹² The parties disputed whether Jackson said to the clerk, "We ain't playin'," or whether he said to his friends, "I

6. See *Recent Changes in the Law*, APP. DEFENDERS, INC., http://www.adi-sandiego.com/recent_changes_cases.html#LWOP (last visited Oct. 2, 2012).

7. 132 S. Ct. 548 (2011) (No. 10-9647).

8. 132 S. Ct. 548 (2011) (No. 10-9646).

9. *Miller*, 132 S. Ct. at 2460.

10. *Id.* at 2461.

11. *Id.*

12. *Id.*

thought you all was playin’.”¹³ Jackson’s friend ultimately shot and killed the clerk.¹⁴

The Arkansas prosecutor charged Jackson as an adult with capital felony murder and aggravated robbery.¹⁵ Arkansas law provides that “[a] defendant convicted of capital murder . . . shall be sentenced to death or life imprisonment without parole.”¹⁶ Accordingly, once the jury convicted Jackson, the young boy faced mandatory LWOP.¹⁷

After the judgment became final, Jackson filed a state petition for habeas corpus, arguing that mandatory LWOP violated the Eighth Amendment.¹⁸ But the Arkansas Supreme Court denied his petition.¹⁹

Fourteen-year-old Evan Miller similarly faced an end to his freedom in the second case, *Miller v. State*.²⁰ In 2003, Miller and his friend went to his neighbor Cole Cannon’s home to drink alcohol and smoke marijuana after Cannon completed a drug deal with Miller’s mother.²¹ When Cannon passed out, Miller stole money out of Cannon’s wallet.²² As the boys tried to place Cannon’s wallet back in his pocket, Cannon awoke and seized Miller by the throat.²³ Miller’s friend hit Cannon with a nearby baseball bat, and once released, Miller took up the bat and began to assault Cannon as well.²⁴ Miller then placed a sheet over Cannon’s head, said, “I am God, I’ve come to take your life,” and delivered one more blow.²⁵ To cover up their crime, the boys set the trailer on fire.²⁶ Cannon eventually died from

13. *Jackson v. State*, 194 S.W.3d 757, 760 (Ark. 2004), *rev’d sub nom.* *Miller v. Ala.*, 132 S. Ct. 2455 (2012).

14. *Miller*, 132 S. Ct. at 2461.

15. *Id.*

16. ARK. CODE ANN. § 5-4-104(b) (1997).

17. *Miller*, 132 S. Ct. at 2461.

18. *Id.*

19. *Jackson v. Norris*, 378 S.W.3d 103 (Ark. 2011), *cert. granted sub nom.* *Jackson v. Hobbs*, 132 S. Ct. 548 (2011), *rev’d and remanded sub nom.* *Miller v. Ala.*, 132 S. Ct. 2455 (2012).

20. 63 So. 3d 676 (Ala. Crim. App. 2010), *rev’d*, 132 S. Ct. 2455 (2012).

21. *Miller*, 132 S. Ct. at 2462.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* (internal quotation marks omitted).

26. *Id.*

both the injuries he sustained in the beating and from smoke inhalation.²⁷

In a turn of events strikingly similar to that of Jackson's case, the Alabama District Attorney removed Miller's case to adult court.²⁸ Alabama law provided that murder in the course of arson carries a mandatory minimum punishment of LWOP.²⁹ Like Kuntrell Jackson's, Evan Miller's conviction meant he would automatically spend the rest of his life behind bars.

Similar to the court in Arkansas, the Alabama Court of Criminal Appeals affirmed Miller's sentence, finding that the mandatory sentencing scheme was permissible under the Eighth Amendment.³⁰ Scheduling Miller's case to be argued in tandem with Jackson's, the Supreme Court granted certiorari to address the permissibility of a sentencing scheme that imposes mandatory juvenile LWOP without considering mitigating factors.³¹

III. REASONING OF THE COURT

The key issue in both cases was whether the Eighth Amendment prohibited mandatory juvenile LWOP. The Eighth Amendment prohibits cruel and unusual punishment.³² Central to its application is the concept of proportionality.³³ The following section highlights the Court's struggle to define proportionality in *Miller v. Alabama*.

A. The Majority

The majority opinion, authored by Justice Kagan, reasoned that the confluence of two lines of case precedent compels the conclusion that mandatory juvenile LWOP violates the Eighth Amendment.³⁴ The first line of precedent established categorical bans on sentencing when the severity of sentences far exceeded the culpability of that

27. *Id.*

28. *Id.*

29. ALA. CODE §§ 13A-5-39(1), 13A-5-40(a)(9), 13A-6-2(c) (LexisNexis 2005).

30. *Miller v. State*, 63 So. 3d 676, 691 (Ala. Crim. App. 2010), *rev'd*, 132 S. Ct. 2455 (2012).

31. *Miller*, 132 S. Ct. at 2463; *see also* Alison Carrizales & Tom Schultz, *Miller v. Alabama (10-9646)*, CORNELL U. L. SCH., LEGAL INFO. INST., <http://www.law.cornell.edu/supct/cert/10-9646> (last visited Oct. 2, 2012) (discussing the constitutionality of mandatory sentencing schemes that preclude consideration of a juvenile offender's mitigating circumstances).

32. U.S. CONST. amend. VIII.

33. *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010).

34. *Miller*, 132 S. Ct. at 2463–64.

particular class of offenders.³⁵ The second line of precedent stressed the importance of individualized sentencing in the capital punishment context.³⁶

The *Miller* Court recognized the first line of precedent by discussing three major differences between children and adults: (1) children lack a mature sense of responsibility, leading to behavior that is reckless, impulsive, and risky; (2) children are more susceptible to adverse influences and pressures; and (3) children are not fully developed, so their criminal actions are less likely to be permanent.³⁷ The Court also recognized that neuroscience provides concrete evidence to support the conclusion that juveniles have a reduced “moral culpability” and thus should not face adult punishments.³⁸ After all, “children cannot be viewed simply as miniature adults.”³⁹

Additionally, the Court reasoned that mandatory juvenile LWOP does not accord with the predominant theories of punishment.⁴⁰ A retributive theory imposes punishment on the basis of the offender’s blameworthiness.⁴¹ Because juveniles have a severely diminished moral culpability, an LWOP sentence does not fit this theory.⁴² Furthermore, juveniles as a group are impulsive and often unable to consider the consequences of their actions; thus, the deterrence rationale is flawed.⁴³ Incapacitation does not support juvenile LWOP because it is tantamount to a decision that the child is forever incorrigible; however, “incorrigibility is inconsistent with youth.”⁴⁴ Lastly, the rehabilitative theory is flawed because LWOP entirely precludes any hope for a child’s ultimate rehabilitation.⁴⁵

35. *Id.* at 2463. The Court focused largely on *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 130 S. Ct. 2011 (2010), which established that “children are constitutionally different from adults for purposes of sentencing.” *Miller*, 132 S. Ct. at 2464. While *Roper* held that the Eighth Amendment prohibits capital punishment for juveniles, *Graham* established a categorical ban on juvenile LWOP for nonhomicide offenses. *Id.* at 2463.

36. *Miller*, 132 S. Ct. at 2467.

37. *Id.* at 2464 (citations omitted).

38. *Id.* at 2464–65.

39. *Id.* at 2470 (quoting *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2404 (2011)).

40. *Id.* at 2465.

41. *Id.*

42. *See id.*

43. *Id.*

44. *Id.* (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2029 (2010)).

45. *Id.*

Next, in analyzing the importance of individualized sentencing under the second line of precedent, the Court noted that LWOP is akin to the death penalty, since its irrevocable surrender to life behind bars is similar in many ways to a death sentence.⁴⁶ A court's refusal to consider mitigating factors before handing down a death sentence would be strictly forbidden.⁴⁷ Accordingly, a court must prioritize consideration of mitigating factors when juveniles face life—and therefore death—in prison.⁴⁸ A mandatory scheme gives “no significance to ‘the character and record of the individual offender or the circumstances’ of the offense, and ‘exclude[s] . . . the possibility of compassionate or mitigating factors.’”⁴⁹

The Court considered the mandatory penalty schemes at issue to be flawed because they prevent the sentencer from considering youth and its attendant circumstances.⁵⁰ For example, Jackson did not fire the shot that killed the store clerk.⁵¹ The possibility that Jackson said, “I thought you all was playin’,”⁵² shows that he may have been unaware that his friend intended to kill. Once Jackson learned that his friend was carrying a gun, his age could have impaired his calculation of the risk, and his willingness to walk away could have been diminished by the social pressures inherent with youth.⁵³ Moreover, Jackson grew up in a violent family⁵⁴ and experienced the abandonment of his father at a young age.⁵⁵

Evan Miller's case is similarly replete with mitigating factors. Miller suffered physical abuse at the hands of his stepfather and experienced the neglect of his drug-addicted mother.⁵⁶ Miller had been in and out of foster care and had even tried to kill himself four times—the first when he was only six years old.⁵⁷ Despite his unfortunate upbringing, his criminal history was nevertheless

46. *Id.* at 2466–67.

47. *Id.* at 2467.

48. *See id.* at 2467–68.

49. *Id.* at 2467 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)).

50. *Id.* at 2466.

51. *Id.* at 2468.

52. *Id.*

53. *Id.*

54. *Id.*

55. EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON 26 (2007), available at <http://ej.org/eji/files/20071017cruelandunusual.pdf>.

56. *Miller*, 132 S. Ct. at 2469.

57. *Id.*

limited, with only two instances of truancy and one of criminal mischief.⁵⁸

The Court believed a sentencer should have examined these circumstances before concluding that these young boys were so beyond repair that they should die in prison.⁵⁹ A sentencing scheme that mandates juvenile LWOP poses “too great a risk of disproportionate punishment.”⁶⁰ The Court therefore held that mandating LWOP without considering the mitigating factors associated with youth violates the Eighth Amendment’s ban on cruel and unusual punishment.⁶¹

B. *The Concurrence*

Justice Breyer agreed with Justice Kagan’s opinion but filed a separate concurring opinion, joined by Justice Sotomayor, to address the specific issue of intent.⁶² Justice Breyer argued that sentences of LWOP must exclude instances in which the juvenile did not kill or intend to kill.⁶³ A juvenile who lacks such intent “has a twice diminished moral culpability.”⁶⁴ For example, Jackson simply went along with his friends to the store and was unaware that a gun was involved until shortly before the crime.⁶⁵ Moreover, Jackson did not pull the trigger.⁶⁶ The facts suggest it was unlikely that he intended to kill the clerk.⁶⁷ Thus, the court sentenced Jackson based on his teenage accomplices’ actions.⁶⁸ Justice Breyer argued that the Eighth Amendment forbids an imposition of LWOP when the juvenile defendant lacks intent.⁶⁹

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 2475 (Breyer, J., concurring).

63. *Id.* at 2475–76.

64. A lack of intent is therefore a level of diminished culpability in addition to a juvenile’s lack of maturity and sense of responsibility. *Id.* at 2475.

65. *Id.* at 2477.

66. *Id.*

67. *Id.* It is still uncertain whether Jackson said “I thought you all was playin’” or “We ain’t playin’.” *Id.*

68. *See id.*

69. *Id.*

C. *The Dissents*

Chief Justice Roberts and Justices Thomas⁷⁰ and Alito disagreed with the majority and filed dissenting opinions in *Miller*. Chief Justice Roberts stressed that LWOP is not unusual in America today and thus should not be struck down based on the Eighth Amendment.⁷¹ Chief Justice Roberts insisted that when a majority of legislatures have enacted laws that impose mandatory LWOP, such a punishment cannot possibly be considered “cruel” or “unusual.”⁷² According to the Chief Justice, by the 1980s, “outcry against repeat offenders, [disdain for] the rehabilitative model, and other factors led many legislatures to reduce or eliminate the possibility of parole, [thereby] imposing longer sentences.”⁷³ If legislation across the country has evolved to mandate LWOP for juvenile murderers, the Court should not intervene.⁷⁴

Justice Alito’s dissent suggested that Kuntrell Jackson and Evan Miller are anomalies.⁷⁵ He insisted that the murderers typically affected by LWOP sentences are those approaching the legal age of adulthood, not the rare fourteen-year-old.⁷⁶ Furthermore, when legislatures impose laws requiring categories of offenders to face LWOP, those prescriptions are presumably the wishes of the electorate.⁷⁷ Justice Alito warned that Eighth Amendment cases are no longer decided upon objective indicia of society’s standards;⁷⁸ accordingly, the outcome of future cases may be uncertain.

IV. ANALYSIS

The *Graham* Court emphasized that “criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.”⁷⁹ So why does the American justice system continue to

70. Justice Thomas argued that the Court’s reasoning was not consistent with the original understanding of the Eighth Amendment. *Id.* at 2482 (Thomas, J., dissenting). Such arguments are outside the scope of this Comment.

71. *Id.* at 2477 (Roberts, J., dissenting).

72. *Id.* at 2477–78.

73. *Id.* at 2478.

74. *See id.* at 2482.

75. *Id.* at 2489 (Alito, J., dissenting).

76. *Id.*; *see e.g.*, *Roper v. Simmons*, 543 U.S. 551, 556 (2005) (involving a defendant who committed a brutal murder just nine months shy of his eighteenth birthday).

77. *Miller*, 132 S. Ct. at 2490.

78. *Id.*

79. *Graham v. Florida*, 130 S. Ct. 2011, 2031 (2010).

implement sentencing practices that fail to consider the attributes of youth?

This Part first discusses the unique characteristics of juveniles that reduce their culpability and render mandatory schemes unconstitutional. It then analyzes *Miller*'s implications on mandatory sentence enhancements. Ultimately, this Comment demonstrates that *Miller* is part of a line of cases developing a constitutional theme that the differences between adolescents and adults need to be reflected in punishment policy and practice.⁸⁰

A. Kids Are Different

Miller stressed the importance of individualized sentencing by recognizing that children differ from adults for purposes of punishment. According to the Court, if a minor's age and the attendant circumstances of the committed crime are mitigating factors, the background and life story of a young defendant should also be considered during sentencing.⁸¹

1. The Psychosocial and Biological Attributes of Youth Necessitate Individualized Sentencing

Individual review during sentencing is important because it highlights the stark behavioral differences between juveniles and adults. Adolescence is a distinct phase of development, manifesting itself in unique psychosocial and physiological traits that impact judgment and conduct.⁸² *Miller*, along with the cases leading up to it, recognized that juveniles differ from adults because they are particularly sensitive to peer influence and because their brains are not completely developed, leading to an inability to fully consider consequences.⁸³

Youth is not just an age; it is the time when a person is most impressionable.⁸⁴ Juveniles make choices in response to the pressures inherent in their desire for peer approval. Research

80. See Laurence Steinberg, *Introducing the Issue*, FUTURE CHILD., Fall 2008, at 12, available at http://futureofchildren.org/futureofchildren/publications/docs/18_02_FullJournal.pdf.

81. *Miller*, 132 S. Ct. at 2467–68.

82. See Brief for American Psychological Ass'n & Missouri Psychological Ass'n as Amici Curiae Supporting Respondent at 4, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1636447, at *4.

83. See *Miller*, 132 S. Ct. at 2464.

84. *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982).

suggests that juveniles who engage in certain behaviors may enjoy a higher status among peers.⁸⁵ For that reason, juveniles tend to commit crimes in groups more often than adults.⁸⁶ It should come as no surprise then that both Jackson and Miller committed their crimes in group settings. Additionally, in some high-crime neighborhoods, resisting peer pressure can result in loss of status, ostracism, and physical injury.⁸⁷ The *Miller* Court recognized that a juvenile should have an opportunity to present mitigating evidence of his or her innate susceptibility to peer pressure.⁸⁸

Biology also plays a significant role in differentiating juveniles from adults. Developments in neuroscience provide concrete evidence that juveniles often cannot fully assess consequences.⁸⁹ Juveniles generally process information through their amygdalae, which are associated with aggressive and impulsive behavior, instead of through their frontal lobes.⁹⁰ The frontal lobes, which are responsible for emotional regulation, planning, mature judgment, and impulse control, do not fully develop until late adolescence.⁹¹ Science demonstrates that the brain development most critical to making good judgments and controlling rash behavior is incomplete during adolescence.⁹² Naturally, juveniles are often unable to weigh costs and benefits before engaging in conduct that may lead to harsh punishment.⁹³

Individualized sentencing is necessary because juveniles are psychologically and physically distinct from adults. An adolescent's immaturity mitigates his blameworthiness⁹⁴ and should be considered during sentencing. The issue is not whether his conduct

85. Elizabeth S. Scott & Laurence Steinberg, *Adolescent Development and the Regulation of Youth Crime*, FUTURE CHILD., Fall 2008, at 15, 20, available at http://futureofchildren.org/futureofchildren/publications/docs/18_02_FullJournal.pdf.

86. *Id.* at 21.

87. *Id.* at 23.

88. *Miller*, 132 S. Ct. at 2467–68.

89. See Brief for American Medical Ass'n and the American Academy of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party at 12–15, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647), 2012 WL 121237, at *12–15.

90. Brief of American Medical Ass'n et al. as Amici Curiae Supporting Respondent at 11, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1633549, at *11.

91. *Id.* at 16.

92. EQUAL JUSTICE INITIATIVE, *supra* note 55, at 7.

93. Brief of the American Probation & Parole Ass'n et al. as Amici Curiae Supporting Petitioners at 5–7, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647), 2012 WL 166268, at *5–7.

94. See Scott & Steinberg, *supra* note 85, at 20.

should be completely excused because of his youth, but rather it is the degree of responsibility he should bear and the severity of punishment he should endure.⁹⁵ Mandatory penalty schemes prevent the sentencer from taking into account these mitigating factors and often lead to sentences that are exceedingly harsh for juveniles.⁹⁶

2. Juvenile Life Stories Compel Individualized Sentencing

“[W]e judge more harshly and hurt more readily those whose full humanity we need not acknowledge.”⁹⁷

It is easy to severely punish those who are presented as dangerous and vile, but the individual review of defendants’ life stories can appeal to a sentencer’s compassion and affect his or her assessment of blame.⁹⁸ Stories of childhood trauma can illuminate the context in which juveniles commit crimes and can make their criminal conduct more understandable.⁹⁹

Juveniles who commit serious crimes often bear histories filled with victimization and abuse.¹⁰⁰ Many have been neglected, abandoned, and physically or sexually abused, and their parents are often prostitutes, substance abusers, and drug dealers.¹⁰¹ These environments “can leave children with little hope and limited choices.”¹⁰² Unlike adults, who can freely relocate, victimized juveniles generally cannot leave their schools, homes, and neighborhoods.¹⁰³ Adults do not have a similar claim to “situational mitigation.”¹⁰⁴

Miller recognized the importance of considering a juvenile’s background during sentencing.¹⁰⁵ For example, Evan Miller’s father

95. Laurence Steinberg & Ron Haskins, *Keeping Adolescents Out of Prison*, FUTURE CHILD., Fall 2008, at 3, available at http://futureofchildren.org/futureofchildren/publications/docs/18_02_PolicyBrief.pdf.

96. *Miller*, 132 S. Ct. at 2466.

97. Samuel H. Pillsbury, *A Problem in Emotive Due Process: California’s Three Strikes Law*, 6 BUFF. CRIM. L. REV. 483, 510 (2002).

98. *See id.* at 485, 509.

99. Beth Caldwell, *Appealing to Empathy: Counsel’s Obligation to Present Mitigating Evidence for Juveniles in Adult Court*, 64 ME. L. REV. 391, 397 (2012).

100. *Id.* at 392.

101. *See* EQUAL JUSTICE INITIATIVE, *supra* note 55, at 15.

102. Gail Garinger, *Juveniles Don’t Deserve Life Sentences*, N.Y. TIMES, Mar. 15, 2012, at A35.

103. Scott & Steinberg, *supra* note 85, at 23.

104. *Id.*

105. “[I]f ever a pathological background might have contributed to a 14-year-old’s commission of a crime, it is here.” *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

inflicted repeated beatings on him.¹⁰⁶ Miller attempted suicide several times throughout his childhood and simultaneously began drinking and using drugs in order to escape the cruelty.¹⁰⁷ His mother was addicted to drugs and failed to provide her son with basic necessities or supervision.¹⁰⁸ It would be a rare display of indifference to hear the background of this young boy and not imagine it played a crucial role in his criminality. While his background does not excuse his behavior, it should appeal to his sentencer's human emotions.¹⁰⁹ Individualized review of mitigating circumstances may help to restore some dignity to the offender by treating him as a person with an emotional life story rather than as a monster.¹¹⁰

Conscientious judgment requires one to imagine another's situation.¹¹¹ "People tend to support less severe punishments when they are [given] . . . a greater level of detail regarding the [context] of a crime."¹¹² But mandatory sentencing prevents the sentencer from gaining a personal view of a juvenile's history. Youthful offenders, for whom the connection between their traumatic backgrounds and their criminal behavior is tight, have life stories that are especially powerful in shaping legal outcomes.¹¹³ Justice in sentencing requires that both sides have the chance to appeal to a sentencer's compassion.¹¹⁴ Mandatory sentencing turns this concept on its head.

B. Miller's Reasoning Undercuts Many Sentencing Practices

The *Miller* decision implicates several sentencing practices that ignore the differences between youths and adults.¹¹⁵ None of what

106. Petition for Writ of Certiorari at 4, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (No. 10-9646), 2011 WL 5322568, at *4.

107. *Id.* at 4-5.

108. *Id.* at 5.

109. See Pillsbury, *supra* note 97, at 506.

110. See *id.* at 521.

111. *Id.* at 499.

112. Caldwell, *supra* note 99, at 398.

113. See *id.* at 395-96.

114. Pillsbury, *supra* note 97, at 506.

115. The felony-murder doctrine is one sentencing practice to reevaluate in light of *Miller*. A fifteen-year-old child who passively acts as a lookout can end up in the same situation as a serial killer for sentencing purposes. Erin H. Flynn, Comment, *Dismantling the Felony-Murder Rule: Juvenile Deterrence and Retribution Post-Roper v. Simmons*, 156 U. PA. L. REV. 1049, 1073 (2008). Felony murder "amounts to strict liability for death during a felony for both direct actors

the Court has said about children is crime specific; rather, a child's distinctive mental traits and environmental vulnerabilities are significant regardless of the crime and associated punishment.¹¹⁶ Accordingly, the rationale behind *Miller's* rejection of mandatory juvenile LWOP provides an opportunity to conceive of juvenile justice policies more broadly, with an emphasis on individualized review for all juveniles.¹¹⁷

1. Gun and Gang Enhancements

Mandatory sentence enhancements defy the principle of individualized review so highly valued by the *Miller* Court. A sentence may receive automatic enhancements as a result of various circumstances, such as use of a weapon, membership in a gang, severity of the injury inflicted, or prior convictions.¹¹⁸ These statutes broaden the nature of sentencing by imposing predetermined enhancements on the sentence resulting from the underlying crime. The interplay of multiple enhancements for a single crime can lead to inappropriately excessive sentences.¹¹⁹

For example, gun enhancements impose mandatory sentences for crimes involving the use of firearms, thereby undercutting *Miller's* emphasis on individualized review. In 1999, firearms were used in 67 percent of reported homicides in California.¹²⁰ In response, the legislature passed the Firearm Enhancement Statute, which provides sentence enhancements for certain crimes involving firearms.¹²¹ The purpose of the statute is to deter violent crime by providing longer prison sentences for those who use firearms during

and accomplices." *Id.* at 1062. It does not distinguish according to prior record, susceptibility to peer pressure, adolescent vulnerability, or the culpability distinction between acting as the killer or the accomplice. See Samuel H. Pillsbury, *Learning from Forgiveness*, 28 CRIM. JUST. ETHICS 135, 148–49 (2009). The type of mandatory sentencing that occurs in the context of felony murder is plainly inconsistent with the goal of individualizing juvenile sentencing. Brian R. Gallini, *Equal Sentences for Unequal Participation: Should the Eighth Amendment Allow All Juvenile Murder Accomplices to Receive Life Without Parole?*, 87 OR. L. REV. 29, 91–92 (2008).

116. See *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012).

117. Caldwell, *supra* note 99, at 394 n.15; Pillsbury, *supra* note 97, at 522.

118. Michael Vitiello & Clark Kelso, *A Proposal for a Wholesale Reform of California's Sentencing Practice and Policy*, 38 LOY. L.A. L. REV. 903, 922 (2004).

119. See Jennifer Walwyn, *Targeting Gang Crime: An Analysis of California Penal Code Section 12022.53 and Vicarious Liability for Gang Members*, 50 UCLA L. REV. 685, 687 (2002).

120. *Id.* at 686.

121. CAL. PENAL CODE § 12022.53 (West 2012).

the course of a crime.¹²² The enhancements under this statute apply to any person who commits an enumerated felony while using or discharging a firearm.¹²³

Gang enhancements similarly impose mandatory sentences, regardless of the age of the offender or the circumstances of the crime. Recognizing California's "state of crisis which had been caused by violent street gangs," the legislature enacted Penal Code Section 186.22, commonly known as the STEP Act, in an attempt to eradicate criminal gang activity.¹²⁴ An enhancement under this Act can result in an additional term ranging from two years to life imprisonment.¹²⁵

Instead of requiring mandatory gang enhancements, the legislature should allow sentencers to consider *Miller* and account for potential mitigating factors. For example, gang violence is rooted in many of the same factors that regularly characterize juvenile crime, such as social disorganization, failures of families, and prior victimization.¹²⁶ "For the youth who simply got caught with the wrong people at the wrong place and time, the additional sentence imposed by the STEP Act can be devastating"¹²⁷

When mandatory sentence enhancements are in effect, the sentencer cannot account for the full range of information concerning the offender, including any mitigating factors that might be available.¹²⁸ This contradicts *Miller*'s fundamental principle that juveniles are unique, such that they are entitled to individualized review. For example, Jackson's case would have revealed that he was not even initially aware his accomplice was carrying a gun, let alone that the accomplice would use it. Mandatory sentence enhancements preclude considering potential mitigating factors, such

122. Walwyn, *supra* note 119, at 695.

123. CAL. PENAL CODE § 12022.53(b)–(d). The enhancements result in an automatic ten years imprisonment for personally using a firearm, twenty years for personally discharging a firearm, and twenty-five years to life for intentionally and personally discharging a firearm and causing great bodily injury or death. *Id.* Subsection (e) applies the enhancement to any person, whether or not he personally discharged the firearm, if the crime is gang related. *Id.* § 12022.53(e).

124. Walwyn, *supra* note 119, at 693.

125. CAL. PENAL CODE § 186.22(b)(1)(A)–(C), (b)(4).

126. Erin R. Yoshino, Note, *California's Criminal Gang Enhancements: Lessons from Interviews with Practitioners*, 18 S. CAL. REV. L. & SOC. JUST. 117, 149 (2008).

127. *Id.* at 151.

128. Pillsbury, *supra* note 97, at 485.

as prior victimization, peer pressure, or impulsivity. Thus, *Miller* should provide the impetus for courts to reconsider sentence enhancements as applied to juveniles.

2. Three-Strikes Laws

Thirty-one jurisdictions have passed legislation based on a “three-strikes” model, which imposes mandatory lengthy or life sentences for repeat offenders.¹²⁹ In California for example, many prisoners are serving second- or third-strike sentences as a result of at least one prior juvenile strike.¹³⁰ The use of juvenile strikes to enhance future sentences defies the logic used by the Court in *Miller*.¹³¹

Under California law, if a defendant has one prior conviction for a serious or violent felony, then the sentence for any new felony is automatically doubled, regardless of whether the second felony is as serious or violent as the first.¹³² A defendant who is convicted of any felony is sentenced to a mandatory twenty-five years to life if he has also been convicted of at least two prior serious or violent felonies.¹³³ There is no time limit regarding the proximity of prior convictions to the third-strike conviction, and no age limit regarding the offender’s age when the prior crime was committed, which means that crimes committed by juveniles can be used to enhance sentences.¹³⁴ Age has become irrelevant.¹³⁵

“The behavior underlying strike charges is often . . . connected to the developmental stage of adolescence, when [children commonly] engage in risk-taking and impuls[ivity] . . . without considering the consequences”¹³⁶ Many strike offenses involve unplanned conduct such as robberies or fights that occur in a group context.¹³⁷ Jackson’s case emphasizes this reality, since he was likely

129. Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes as Cruel and Unusual Punishment*, 46 U.S.F. L. REV. 581, 584 (2012).

130. *Id.* at 595.

131. *See id.* at 610.

132. Brian Brown & Greg Jolivet, *A Primer: Three Strikes—The Impact After More Than a Decade*, LEGIS. ANALYST’S OFF. (Oct. 2005), http://www.lao.ca.gov/2005/3_strikes/3_strikes_102005.htm (emphasis omitted).

133. Pillsbury, *supra* note 115, at 148.

134. *See* Brown & Jolivet, *supra* note 132.

135. Pillsbury, *supra* note 97, at 488.

136. Caldwell, *supra* note 129, at 582.

137. *Id.* at 610.

influenced by peer pressure and was unaware until immediately before the crime that a gun was involved. Imposing lifelong consequences based on juvenile conduct “is not justifiable because most youth will grow out of their delinquent behavior.”¹³⁸

Because three-strikes laws were primarily enacted as recidivist statutes that aim to deter future criminal conduct and incapacitate habitual offenders,¹³⁹ each strike should be based on culpable conduct. Where the Court has recognized the limitations of adolescent decision-making and the diminished culpability of juvenile offenders, the validity of third-strike sentences that are imposed as a result of prior juvenile strikes should be reconsidered.¹⁴⁰

A broad reading of the *Miller* decision suggests that the Court may ultimately disavow sentencing practices such as three-strikes laws. By excluding information regarding the offender and his background, these laws do not allow the defendant to appeal to sentencer compassion.¹⁴¹ As such, laws providing for mandatory sentence enhancements conflict with *Miller*.

V. CONCLUSION

Roper and *Graham* laid a solid foundation for *Miller* by highlighting the fundamental differences between juveniles and adults. *Miller* built on this foundation by holding that LWOP cannot be imposed on juveniles without affording them a closer look during sentencing. *Miller*, like *Graham*, “has the potential to bring about systemic changes to laws that ignore the developmental differences between youth and adults.”¹⁴² Limiting the opinions of *Roper*, *Graham*, and *Miller* to death penalty or LWOP cases would be inconsistent with the Supreme Court’s understanding of the nature of juvenile crime. After *Miller*, legislatures and courts must recognize that current sentencing policy and practice should reflect the variances between juveniles and adults.

Gun and gang enhancements, along with three-strikes laws, subject juveniles to the kind of mandatory punishments implicitly

138. *Id.*

139. *Id.* at 616–22.

140. *See id.*

141. Pillsbury, *supra* note 97, at 505–09.

142. Caldwell, *supra* note 129, at 604.

frowned upon by the *Miller* Court. These types of practices fail to take into account the stark differences between juveniles and adults. Mitigating factors such as the child's age and development, the impact of peer pressure, and the child's family and home environment must be taken into account during juvenile sentencing. Although some may choose to view *Miller* solely as a prohibition on mandatory juvenile LWOP, it is more appropriate to take a broader view in order to realize the implications for punishment under an expanding Eighth Amendment. The Supreme Court has recognized that children are different. It is time for the country's laws to recognize the same.

