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AS THOUGH THEY ARE CHILDREN: REPLACING  
MANDATORY MINIMUMS WITH INDIVIDUALIZED  
SENTENCING DETERMINATIONS FOR JUVENILES IN  
PENNSYLVANIA CRIMINAL COURT AFTER *MILLER V.*  
*ALABAMA*\*

I. INTRODUCTION

In 2012, the United States Supreme Court decided *Miller v. Alabama*<sup>1</sup> and prohibited the imposition of mandatory life without the possibility of parole (LWOP) sentences on juvenile offenders.<sup>2</sup> According to the Court in *Miller*, state-sentencing schemes violate the Eighth Amendment if they fail to provide juvenile offenders with both a proportionate and individualized sentence.<sup>3</sup> However, juveniles tried in adult court in Pennsylvania are still subjected to the same mandatory minimum sentencing statutes as their adult counterparts.<sup>4</sup> In order for Pennsylvania to fully comply with *Miller*, all mandatory minimum sentencing statutes should be inapplicable to juveniles and be replaced with a system of individualized sentencing that takes into consideration the inherent diminished culpability of children.

This Comment proceeds in four sections. Section II discusses the current state of juvenile sentencing policy in Pennsylvania. Section III discusses the judicial precedent and social science underlying *Miller*'s proportionality requirement. Section IV discusses the judicial precedent underlying *Miller*'s individualized sentencing requirement. Lastly, Section V examines Pennsylvania's inadequate response to *Miller*, the available alternatives to mandatory sentencing for juveniles in Pennsylvania, and a recommended legislative change that would bring Pennsylvania into full compliance with *Miller*.

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

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

3. *Id.* at 2475.

4. See 42 PA. CONS. STAT. ANN. § 6355(a) (West 2013) (stating that a juvenile offender may be prosecuted in a court reserved for adult criminal proceedings if certain conditions are met).

## II. PENNSYLVANIA STATE POLICY ON JUVENILE SENTENCING AND MANDATORY MINIMUMS

As of this writing, juvenile offenders that are tried as adults in Pennsylvania criminal court are subjected to the same mandatory minimum sentences as their adult counterparts for nearly all offenses, without consideration of their inherent diminished culpability.<sup>5</sup> Although juvenile court in Pennsylvania developed from an understanding of the distinctive needs of juveniles, the treatment of juveniles in adult court has not followed the same trajectory.<sup>6</sup> And despite a full-blown incarceration crisis that negatively affects the state's economy, juveniles are still receiving mandatory minimum sentences that can be disproportionately harsh.<sup>7</sup>

### A. *Recognition of Proportionality: The History of Juvenile Sentencing Practices in Pennsylvania Juvenile Court*

Pennsylvania has a long history of recognizing the disparate needs of juveniles and adults with respect to the criminal justice system. In the eighteenth century, before the establishment of juvenile court in Pennsylvania, all offenders were recognized as either “infants” or “adults.”<sup>8</sup> Infants were presumed incapable of forming the intent to commit a crime and therefore could not be found guilty and sentenced in Pennsylvania.<sup>9</sup> All children under the age of seven were conclusively presumed to be infants.<sup>10</sup> The infancy defense was also available to children ages seven to fourteen, but it could be rebutted if prosecutors presented evidence that a child was capable of criminal intent.<sup>11</sup> Juveniles over the age of fourteen were prohibited from asserting an infancy defense and were punished as if they were adults.<sup>12</sup>

The nineteenth century ushered in dissatisfaction with the treatment of juvenile

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5. *See id.* (stating that a juvenile offender may be prosecuted in a court reserved for adult criminal proceedings if certain conditions are met).

6. *See* Schall v. Martin, 467 U.S. 253, 263 (1984) (stating that Pennsylvania has “a *parens patriae* interest in preserving and promoting the welfare of the child,” making the purposes and goals of the juvenile-justice system fundamentally different from those of an adult criminal court); Brief of Campaign for Youth Justice et al. as Amici Curiae Supporting Appellant at 18–24, Commonwealth v. Brown, 26 A.3d 485 (Pa. Super. Ct. 2011) (No. 1159 WDA 2010) (emphasizing that the stated purposes of juvenile court—treatment and rehabilitation balanced with accountability and punishment—are distinct from the purposes of the adult criminal justice system); PA. JUVENILE COURT JUDGES COMM’N, PENNSYLVANIA JUVENILE DELINQUENCY BENCHBOOK 20 (2008) [hereinafter BENCHBOOK], [http://www.jcjc.state.pa.us/portal/server.pt/community/publications\\_and\\_forms/5037/juvenile\\_delinquency\\_benchbook/484187](http://www.jcjc.state.pa.us/portal/server.pt/community/publications_and_forms/5037/juvenile_delinquency_benchbook/484187) (stating that reforms leading up to the foundation of juvenile court sought to isolate the treatment of young criminals from the treatment of adults).

7. *See* PA. COMM’N ON SENTENCING, REPORT TO THE HOUSE OF REPRESENTATIVES: A STUDY ON THE USE AND IMPACT OF MANDATORY MINIMUM SENTENCES 5 (2009) [hereinafter PCS SPECIAL REPORT] (describing the increase in Pennsylvania prison populations); Letter from Marsha L. Levick, Deputy Dir. & Chief Counsel, Juvenile Law Ctr., to Mark H. Bergstrom, Exec. Dir., Pa. Sentencing Comm’n, (Feb. 22, 2013) (asserting that Pennsylvania’s mandatory minimum sentencing scheme for juveniles tried as adults is “excessively harsh”).

8. BENCHBOOK, *supra* note 6, at 20.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

criminals in Pennsylvania and the lack of separation between adults and children in the incarceration setting.<sup>13</sup> By 1893, Pennsylvania law required that juvenile offenders have separate trials, trial dockets, and facilities for confinement.<sup>14</sup> In 1903, Pennsylvania enacted the Juvenile Court Act, modeled after the nation's first juvenile court established in Cook County, Illinois.<sup>15</sup> This patriarchal model of juvenile court exercised broad powers—processing children through informal proceedings such that “they shall be treated not as criminals but as children in need of aid, encouragement, and guidance.”<sup>16</sup> The articulated purpose of early juvenile courts was to provide opportunities for rehabilitation.<sup>17</sup> The Juvenile Court Law of 1933 extended the juvenile court's jurisdiction to all crimes except murder, and an amendment in 1939 gave the juvenile court jurisdiction of children under the age of eighteen.<sup>18</sup>

However, the informal process of early juvenile courts often imposed harsher punishments and greater injustices on children than those imposed on adults in criminal court.<sup>19</sup> Beginning in the 1960s, the Supreme Court addressed this problem by issuing a series of decisions that awarded children in juvenile court many of the same due process protections enjoyed by adult offenders in criminal court.<sup>20</sup>

In response to rulings of the Supreme Court, the Pennsylvania legislature passed the Juvenile Act of 1972, based on the Uniform Juvenile Court Act developed by the National Conference of Commissioners on Uniform State Laws.<sup>21</sup> A series of amendments established the minimum age of delinquency, authorized fingerprinting and photographing of juvenile offenders, relaxed confidentiality requirements for juvenile court records, and gave victims the right to attend hearings in juvenile court.<sup>22</sup> However, the Juvenile Act did not take what is essentially its current form until 1995, when the Pennsylvania legislature restricted the jurisdiction of juvenile court by automatically excluding certain serious offenses.<sup>23</sup>

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13. *Id.*

14. *Id.*; Jim Anderson, *Pennsylvania's Juvenile Justice System: A Rich Heritage, Clear Mission, and Bright Future*, PA. JUVENILE JUSTICE (Juvenile Court Judges' Comm'n, Harrisburg, Pa.), Mar. 1999, at 1, 2.

15. BENCHBOOK, *supra* note 6, at 20.

16. *Id.*

17. See WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE* 125 (6th ed. 1998) (stating that the purpose of the first juvenile court was “[r]eeducation rather than retribution”).

18. BENCHBOOK, *supra* note 6, at 20.

19. ELIZABETH CALVIN ET AL., *JUVENILE DEFENDER DELINQUENCY NOTEBOOK 2* (2d ed. 2006), [http://www.njdc.info/delinquency\\_notebook/interface.swf](http://www.njdc.info/delinquency_notebook/interface.swf).

20. See *Fare v. Michael C.*, 442 U.S. 707, 727–28 (1979) (holding that whether a juvenile voluntarily waives constitutional rights is based on the totality of the circumstances); *Breed v. Jones*, 421 U.S. 519, 541 (1975) (providing protection from double jeopardy for an adult criminal action based on the same set of facts previously adjudicated in juvenile court); *In re Winship*, 397 U.S. 358, 368 (1970) (holding that as a matter of due process the prosecution must prove the case against a juvenile beyond a reasonable doubt); *In re Gault*, 387 U.S. 1, 34, 41, 55 (1967) (holding that juveniles adjudicated in juvenile court are entitled to due process, representation of counsel and protections against self-incrimination); *Kent v. United States*, 383 U.S. 541, 562 (1966) (holding that a juvenile must be afforded due process rights, specifically the right to a hearing and representation by counsel).

21. BENCHBOOK, *supra* note 6, at 21.

22. *Id.*

23. See 42 PA. CONS. STAT. ANN. § 6302 (West 2013) (excluding offenses such as murder and rape from the definition of “Delinquent act”). At the same time, the Pennsylvania legislature redefined the mission of

Pennsylvania juvenile courts now have jurisdiction over “[p]roceedings in which a child is alleged to be delinquent.”<sup>24</sup> A delinquent act is defined as “an act designated [as] a crime under the law of this Commonwealth.”<sup>25</sup> However, the Juvenile Act excludes five categories of offenses from this definition for the purposes of jurisdiction in juvenile court.<sup>26</sup> These offenses, at least initially, must be processed in adult criminal court.<sup>27</sup>

As of 2013, the following offenses, if committed by a juvenile, are automatically excluded from juvenile court: (1) murder, (2) certain enumerated felonies committed by a juvenile fifteen years of age or older involving the use of a deadly weapon, (3) selected repeat offenses, (4) certain enumerated felonies committed by a juvenile fifteen years of age or older who has previously been found guilty of certain felonies, and (5) summary offenses.<sup>28</sup> In addition, certain categories of offenses are eligible for discretionary transfer from juvenile court to adult criminal court.<sup>29</sup>

The Juvenile Act authorizes discretionary transfer of a juvenile case to adult criminal court if the child satisfies the requirements of the statute.<sup>30</sup> One of the most significant statutory requirements is whether the transfer serves the public interest.<sup>31</sup> The judge must consider a number of factors—including the child’s amenability to treatment, rehabilitation, and supervision in juvenile court—when determining whether the public interest would be served by transferring the child’s case to adult court.<sup>32</sup>

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juvenile court to include “balanced and restorative justice principles.” BENCHBOOK, *supra* note 6, at 21.

24. 42 PA. CONS. STAT. ANN. § 6303(a)(1). The statute defines a child as an individual under the age of eighteen (or the age of twenty-one in limited circumstances). *Id.* § 6302.

25. *Id.*

26. *Id.*; BENCHBOOK, *supra* note 6, at 35–36.

27. 42 PA. CONS. STAT. ANN. § 6302; BENCHBOOK, *supra* note 6, at 35.

28. 42 PA. CONS. STAT. ANN. § 6302. The enumerated felonies involving a juvenile fifteen years of age or older and the use of a deadly weapon are the following: rape, involuntary deviate sexual intercourse, aggravated assault, robbery, robbery of a motor vehicle, aggravated indecent assault, kidnapping, voluntary manslaughter, and any attempt, conspiracy, or solicitation to commit murder or any of these crimes. *Id.* The enumerated felonies involving a juvenile fifteen years of age or older who has previously committed these felonies are the following: rape, involuntary deviate sexual intercourse, robbery, robbery of a motor vehicle, aggravated indecent assault, kidnapping, voluntary manslaughter, and any attempt, conspiracy, or solicitation to commit murder or any of these crimes. *Id.*

29. *Id.* § 6355(a).

30. *See id.* § 6355(a)(1)–(4) (providing that discretionary transfer from juvenile to adult court is appropriate when the juvenile is at least fourteen at the time of the offense, a proper hearing is held, proper notice is given to the child, the child committed an offense that would be considered a felony in adult court, there exists a prima facie case that the juvenile committed the alleged offense, there exists no mental health or retardation issues that require commitment, and the transfer would serve the public interest).

31. *Id.* § 6355(a)(4)(iii).

32. *Id.* § 6355(a)(4)(iii)(G). Additionally, in determining whether the juvenile’s transfer serves the public interest, the courts shall consider the impact of the offense on the victim, the impact of the offense on the community, the threat to public safety, the nature of the offense, the degree of culpability, and the adequacy of disposition options available in juvenile court. *Id.* § 6355(a)(4)(iii)(A)–(F).

*B. Mandatory Sentencing for Juveniles in Pennsylvania Criminal Court*

Although the juvenile court system has long recognized the special needs of juvenile offenders and has focused more on rehabilitation than punishment, children who are excluded from juvenile court jurisdiction for offenses that carry mandatory minimum sentences in adult court may not receive full consideration of their youthfulness or inherent diminished culpability during the sentencing process.<sup>33</sup> Juveniles excluded from juvenile court jurisdiction or subject to discretionary transfer from juvenile court are sentenced by Pennsylvania's sentencing scheme for adults.<sup>34</sup> For certain offenses, the Pennsylvania legislature has required the imposition of a mandatory minimum sentence.<sup>35</sup> Although the courts cannot go below the minimum sentence mandated by statute, a sentence longer than the minimum may be imposed if "the extent and severity of an offender's prior record, as well as other factors, are taken into account."<sup>36</sup> In such cases, the court must consider the Pennsylvania guidelines prior to sentencing and explain, for the record, the reasons for the departure from the guidelines.<sup>37</sup>

In Pennsylvania, there are two types of mandatory minimum sentencing provisions: "notice required" and "no notice required."<sup>38</sup> For notice-required provisions, reasonable notice must be provided to the defendant of the intent to proceed under a mandatory minimum sentencing statute.<sup>39</sup> If no notice is provided, the mandatory provision will not apply.<sup>40</sup> For no-notice-required provisions, the notice is not required, and the mandatory provision applies automatically upon conviction.<sup>41</sup>

As of 2013, Pennsylvania law provides mandatory minimums for certain general categories of offenses, including, but not limited to, homicide offenses,<sup>42</sup> firearms

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33. See, e.g., *Commonwealth v. Berry*, 785 A.2d 994, 997 (Pa. Super. 2001) (holding that the criminal court did not err in failing to consider juvenile's rehabilitative needs at sentencing after the case had been transferred to adult court).

34. BENCHBOOK, *supra* note 6, at 69.

35. PA. COMM'N ON SENTENCING, SENTENCING IN PENNSYLVANIA 2011 ANNUAL REPORT 29 (2012) [hereinafter PCS 2011 ANNUAL REPORT], <http://pcs.la.psu.edu/publications-and-research/annual-reports/2011-revised-10-11-2012/view>.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. See 18 PA. CONS. STAT. ANN. § 1102(a)(1) (West 2013) (requiring a sentence of either death or life imprisonment for murder in the first degree or murder of a law enforcement officer in the first degree); *id.* § 1102(a)(2) (requiring a sentence of life imprisonment for murder of an unborn child in the first degree); *id.* § 1102(b) (requiring a sentence of life imprisonment for murder in the second degree or murder of an unborn child or law enforcement officer in the second degree); *id.* § 2604(a)(2) (requiring life imprisonment for murder of an unborn child in the first degree); *id.* § 2604(b)(2) (requiring life imprisonment for murder of an unborn child in the second degree); 42 PA. CONS. STAT. ANN. § 9711 (West 2013) (stating that after a verdict for murder in the first degree is recorded, a jury will determine whether a sentence of death or life imprisonment is appropriate).

offenses,<sup>43</sup> drug offenses,<sup>44</sup> repeat offenses,<sup>45</sup> offenses committed on public transportation,<sup>46</sup> offenses against elderly persons,<sup>47</sup> offenses against victims under the age of sixteen,<sup>48</sup> failure to comply with registration of sexual offenders,<sup>49</sup> offenses committed while impersonating a law enforcement officer,<sup>50</sup> and vehicular offenses including driving under the influence (DUI).<sup>51</sup> Juveniles sentenced in adult court are subject to the same mandatory minimum sentences as their adult counterparts, except for the imposition of an LWOP sentence.<sup>52</sup> And in all cases where juveniles are tried as adults in Pennsylvania, conviction of an offense that carries a mandatory minimum sentence precludes the judge and jury from fully considering the child's diminished

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43. See 18 PA. CONS. STAT. ANN. § 6111(h)(1) (requiring five years of imprisonment for subsequent violations of the sale or transfer of firearms); *id.* § 6121(c) (requiring five years of imprisonment for the possession of certain prohibited bullets); 42 PA. CONS. STAT. ANN. §9712(a) (requiring five years of imprisonment for an offense committed with a firearm); *id.* § 9712.1 (requiring five years of imprisonment for a drug offense committed with a firearm).

44. See 18 PA. CONS. STAT. ANN. § 5123(a.1) (requiring two years of imprisonment for possession of a controlled substance); *id.* § 6314(a) (requiring one year of imprisonment for the trafficking of drugs to minors); *id.* § 6314(b) (requiring three years of imprisonment for the trafficking of drugs to minors if the offender also intended to promote the habitual use of drugs, intended to engage the minor in trafficking, committed the offense within 1,000 feet of the real property of a school, or committed the offense within 500 feet of a school bus stop); *id.* § 6317 (requiring two years of imprisonment for the possession of drugs in a drug-free school zone).

45. See 42 PA. CONS. STAT. ANN. § 9714(a) (requiring ten years of imprisonment for a second conviction for a crime of violence and twenty-five years of imprisonment for a third and subsequent conviction for a crime of violence).

46. See *id.* § 9713(a) (requiring five years of imprisonment for a crime of violence committed on or near public transportation).

47. See *id.* § 9717 (requiring two years of imprisonment for aggravated assault against an elderly person, five years of imprisonment for rape of an elderly person, five years of imprisonment for involuntary deviate sexual intercourse with an elderly person, and one year of imprisonment for theft by deception of an elderly person).

48. See *id.* § 9718(a)(1) (requiring two years of imprisonment for aggravated assault against a child younger than sixteen years of age, ten years of imprisonment for rape of a child younger than sixteen years of age, ten years of imprisonment for involuntary deviate sexual intercourse with a child less than sixteen years of age, and five years of imprisonment for aggravated indecent assault of a child less than sixteen years of age); *id.* § 9718(a)(2) (requiring five years of imprisonment for aggravated assault against a child younger than thirteen years of age); *id.* § 9718(a)(3) (requiring ten years of imprisonment for rape of a child younger than thirteen years of age and ten years of imprisonment for aggravated indecent assault of a child less than thirteen years of age).

49. See *id.* § 9718.4(a) (requiring between two and seven years of imprisonment for failure to comply with sex-offender registration requirements).

50. See *id.* § 9719(a) (requiring three years of imprisonment for certain offenses committed while impersonating a law enforcement officer).

51. See 75 PA. CONS. STAT. ANN. § 3735 (West 2013) (requiring three years of imprisonment for homicide while driving under the influence of drugs or alcohol); *id.* § 3804 (requiring various minimum sentences for driving while under the influence of drugs or alcohol).

52. Compare, e.g., 18 PA. CONS. STAT. ANN. § 1102(a), (b) (West 2013) (mandating a sentence of either death or life imprisonment without parole for murder of the first degree and mandating a sentence of life imprisonment without parole for murder of the second degree, except as provided in section 1102.1), with, e.g., *id.* § 1102.1(a), (c) (providing for shorter minimum terms of imprisonment than those mandated in section 1102 where the murders of the first and second degree were committed by juveniles).

culpability and character of youthfulness when making a sentencing determination.<sup>53</sup>

C. *The Negative Effect of Mandatory Minimum Sentences on Pennsylvania's Incarceration Crisis*

In the midst of Pennsylvania's incarceration crisis,<sup>54</sup> the United States Supreme Court upheld the constitutionality of mandatory minimum sentencing statutes.<sup>55</sup> These statutes, currently on the books in Pennsylvania, limit judicial discretion by forcing judges to impose at least a prescribed minimum sentence once an initial factual determination is made, regardless of any mitigating circumstances.<sup>56</sup> Mandatory minimum sentencing statutes negatively impact prison overcrowding and the cost of corrections in Pennsylvania.<sup>57</sup>

The practice of imposing mandatory minimum sentences often elicits two very different ideological responses.<sup>58</sup> The practice is viewed by many as a vital tool for effective law enforcement, providing for increased deterrence, sentencing uniformity, and limitations on otherwise lenient state judges.<sup>59</sup> On the other hand, there are many who view the imposition of mandatory sentences as a counterproductive sentencing

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53. See Martin Guggenheim, *Graham v. Florida and a Juvenile's Right to Age-Appropriate Sentencing*, HARV. C.R.-C.L. L. REV. 457, 494 n.267 (2012) (listing Pennsylvania among the states in which judges have no choice but to impose at least the mandatory minimum sentence on juveniles tried as adults).

54. See *infra* notes 61–65 and accompanying text for a discussion of the incarceration crisis in Pennsylvania.

55. *Harris v. United States*, 536 U.S. 545, 567 (2002) (finding that within the range authorized by the jury's verdict, the legislature may channel judicial discretion and rely upon judicial expertise by requiring defendants to serve minimum terms after judges make certain factual findings). The narrow holding of *Harris* was overruled by the Supreme Court in *Alleyne v. United States*, 133 S. Ct. 2151 (2013), which held that any element of a crime necessary for the conviction of an offense carrying a mandatory minimum must be adjudged by the jury. *Id.* at 2155. *Alleyne* still upheld the broader holding of *Harris*: mandatory minimum sentences are constitutional. *Id.*

56. Alison Powers, *Cruel and Unusual Punishment: Mandatory Sentencing of Juveniles Tried as Adults Without the Possibility of Youth as a Mitigating Factor*, 62 RUTGERS L. REV. 241, 252 (2009).

57. Stewart Greenleaf, *Prison Reform in the Pennsylvania Legislature*, 160 U. PA. L. REV. PENUMBRA 179, 179–80 (2011). The crisis of prison overcrowding in Pennsylvania is well documented. The Pennsylvania Department of Corrections reported an inmate population of 34,964 in 1997. PA. DEP'T OF CORRECTIONS, ANNUAL STATISTICAL REPORT 28 (1997), [http://www.portal.state.pa.us/portal/server.pt/directory/statistical\\_reports/179616?DirMode=1](http://www.portal.state.pa.us/portal/server.pt/directory/statistical_reports/179616?DirMode=1). In 2007, the Commission reported an increased inmate population of 46,028, a 31.6% increase from 1997. PA. DEP'T OF CORRECTIONS, ANNUAL STATISTICAL REPORT 24 (2007), [http://www.portal.state.pa.us/portal/server.pt/directory/statistical\\_reports/179616?DirMode=1](http://www.portal.state.pa.us/portal/server.pt/directory/statistical_reports/179616?DirMode=1). Even higher inmate populations of 51,487 and 51,321 were reported in 2009 and 2010, respectively. PA. DEP'T OF CORRECTIONS, ANNUAL STATISTICAL REPORT 22 (2010), [http://www.portal.state.pa.us/portal/server.pt/directory/statistical\\_reports/179616?DirMode=1](http://www.portal.state.pa.us/portal/server.pt/directory/statistical_reports/179616?DirMode=1). Although Pennsylvania's civilian population remained relatively stable from 1997 to 2007, and the crime rate during that time period dropped, the number of criminal incidents reported to the Commission between those years increased by 40%. PCS SPECIAL REPORT, *supra* note 7, at 5. The reported use of mandatory minimum sentences also increased from 784 mandatory sentences in 1997 to 1,676 in 2007. *Id.* The Pennsylvania legislature spent \$92.85 million on the Department of Corrections in 1980 and 1981. Greenleaf, *supra*, at 181. In 2011 and 2012, the legislature budgeted \$1.875 billion for that department. *Id.* The number of inmates in Pennsylvania state prisons is expected to grow 24% between 2011 and 2016. *Id.*

58. PCS SPECIAL REPORT, *supra* note 7, at 1.

59. *Id.*

mechanism that “not only fail[s] to deter, but actively promote[s] disparity and injustice.”<sup>60</sup> This ideological discord is only amplified when imposing a mandatory minimum sentence on a juvenile offender.

In 2007, a resolution passed by the Pennsylvania House of Representatives directed the Pennsylvania Commission on Sentencing (the Commission) to study the use and impact of mandatory minimum sentences in Pennsylvania.<sup>61</sup> Through this study, the Commission found a number of unintended consequences of mandatory minimum sentences.<sup>62</sup> The costs of corrections increased “due to longer prison terms and an increasing prison population.”<sup>63</sup> In addition, the Commission found that the imposition of mandatory minimum sentences eliminates alternative sentencing options that may be less costly or more effective than a mandatory sentence.<sup>64</sup> Mandatory minimum statutes also limit the discretion of the sentencing judge, contribute to increased severity in sentencing, and reduce the use of alternative sentencing programs.<sup>65</sup>

In 2009, the Commission stated that, in order to promote the stated purposes of mandatory minimum sentences while reducing their unintended consequences, the legislature needs to confirm the need for each mandatory provision.<sup>66</sup> If the need for a mandatory minimum sentence exists, it becomes important to “identify the primary purpose for the provision, to target the population of offenders subject to the mandatory, and to implement the use of the mandatory consistent with the purpose.”<sup>67</sup> The Commission also found that while retribution, uniformity, and proportionality in sentencing are among the underlying goals for the sentencing system in Pennsylvania, factors specific to the offense or the offender should impact the applicability of the mandatory sentencing provision.<sup>68</sup>

It is clear that the Commission is starting to recognize the effect that mandatory minimum sentencing schemes have on the incarceration crisis in Pennsylvania and is

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60. *Id.*

61. *Id.*

62. *Id.* at 4.

63. *Id.*

64. *Id.*

65. *Id.* at 5–6.

66. *Id.* at 6.

67. *Id.*

68. *Id.* at 6–7. When the expressed purpose of a mandatory minimum sentence is rehabilitation, the target population is those who commit drug trafficking and first-tier DUI offenses. *Id.* at 7. “Drug involved offenders with low risk of violent re-offense may benefit from . . . treatment . . . programs in lieu of incarceration.” *Id.* When the expressed purpose of a mandatory minimum sentence is incapacitation, the target population is repeat violent offenders and sex offenders. *Id.* The current two/three strikes mandatory minimum for high-risk offenders relies only on retributive factors such as past convictions. *Id.* Other factors that should be considered for those at high risk of violent re-offense include age, number of prior arrests, type of sentence, violent history, psychopathy, use of a gun, and age at first offense. *Id.* When the expressed purpose of a mandatory minimum sentence is deterrence, the target population is offenders convicted of firearms offenses. *Id.* “If deterrence is a primary purpose for a mandatory minimum sentencing statute, it is important that the public be aware of the mandatory penalties and that there be consistency and certainty in the application of the mandatory.” *Id.* However, since public awareness of mandatory sentencing provisions is low, the deterrent effects of mandatory minimums are undermined. *Id.*



looking to reevaluate the categories of offenders that are subject to mandatory sentencing. Many of the stated purposes of mandatory minimums are simply not served when applied to juvenile offenders. The increased understanding of the inherent diminished culpability of juveniles merits the elimination of the mandatory sentencing of juvenile offenders altogether, not simply the elimination of mandatory LWOP sentences found unconstitutional in *Miller*.

### III. MILLER'S PROPORTIONALITY REQUIREMENT

The United States Supreme Court decision in *Miller v. Alabama* stemmed from a line of cases that examined modern advances in adolescent development research and its effect on determinations of proportionality in sentencing. On numerous occasions, “the Court adopted categorical bans on sentences reflecting a mismatch between the culpability of the offender and the severity of the punishment.”<sup>69</sup> Beginning with the death penalty cases, the Court found that the imposition of a death sentence was out of proportion when applied to nonhomicide offenders, mentally retarded offenders, and juveniles.<sup>70</sup> The Court extended this line of reasoning when prohibiting the imposition of an LWOP sentence for a juvenile convicted of a nonhomicide offense, analogizing the severity of a juvenile LWOP sentence to that of the death penalty.<sup>71</sup>

In her majority opinion for the Court in *Miller*, Justice Kagan emphasized the significance of a juvenile offender's youthfulness in determining the constitutionality of a death sentence and a lifetime of incarceration.<sup>72</sup> She took this reasoning one step further by stating that “[a]n offender's age . . . is relevant to the Eighth Amendment, and so criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.”<sup>73</sup> Although she refrained from eliminating the possibility of a juvenile LWOP sentence entirely,<sup>74</sup> Justice Kagan indicated that youthfulness matters, and a proportional sentencing determination cannot ignore those characteristics.<sup>75</sup>

#### A. *From Roper to Miller: The Court's Recognition of the Categorical Differences Between Juvenile and Adult Offenders*

Since 2005, the Supreme Court has handed down a series of four decisions that develop a modern concept of justice for juveniles, recognizing them as categorically less culpable than adult offenders.

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69. Marsha L. Levick & Robert G. Schwartz, *Practical Implications of Miller and Jackson: Obtaining Relief in Court and Before the Parole Board*, 31 LAW & INEQ. 369, 371 (2013).

70. *Kennedy v. Louisiana*, 554 U.S. 407, 438 (2008) (nonhomicide offenders); *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (juvenile offenders); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (mentally retarded offenders).

71. *Graham v. Florida*, 560 U.S. 48, 69–70 (2010).

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

73. *Id.* at 2466 (quoting *Graham*, 560 U.S. at 76) (internal quotation marks omitted).

74. *See id.* at 2469 (explaining that the Court need not consider *Miller's* alternative argument that the Eighth Amendment requires a categorical ban on LWOP sentences for juveniles).

75. *Id.* at 2475.

1. *Roper v. Simmons*

The Supreme Court first reviewed the modern advances in adolescent psychology and brain development research in *Roper v. Simmons*,<sup>76</sup> when it prohibited death sentences for juveniles.<sup>77</sup> In this decision, the Court recognized that juveniles are inherently less deserving of the death sentence than their adult counterparts.<sup>78</sup>

At age seventeen, Christopher Simmons and two younger teens planned and committed burglary and murder of a middle-aged woman.<sup>79</sup> Simmons was tried as an adult in Missouri state court and sentenced to death.<sup>80</sup> After Simmons's case was decided and state postconviction relief was denied, the Supreme Court heard *Atkins v. Virginia*<sup>81</sup> and held that the Eighth Amendment prohibits the execution of mentally retarded offenders.<sup>82</sup> In the wake of the *Atkins* decision, Simmons successfully filed a new petition for state postconviction relief, arguing that the reasoning of *Atkins* established that the Eighth Amendment prohibits the execution of juveniles who were under eighteen at the time of the commission of the crime.<sup>83</sup> The United States Supreme Court then affirmed the decision of the Missouri Supreme Court and held that the death penalty, as applied to juvenile offenders, is unconstitutional as cruel and unusual punishment under the Eighth Amendment.<sup>84</sup>

In its opinion, the Court referred to three main developmental characteristics that distinguish juveniles from adults: (1) immaturity, (2) vulnerability, and (3) changeability.<sup>85</sup> In *Roper*, the Court examined modern advances in adolescent development research for the first time and noted: "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."<sup>86</sup> Rather, the Court found that, as a category of offenders, juveniles were inherently less culpable than their adult counterparts to such an extent that in every case, no matter the facts and circumstances, a death sentence is considered cruel and unusual punishment.<sup>87</sup> The *Roper* decision fell squarely within the long-established

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76. 543 U.S. 551 (2005).

77. *Roper*, 543 U.S. at 578.

78. *See id.* at 569–70 (recognizing three general differences between juveniles and adults—immaturity, vulnerability, and changeability—that demonstrate that "juvenile offenders cannot with reliability be classified among the worst offenders").

79. *Id.* at 556–57.

80. *Id.* at 557–58.

81. 536 U.S. 304 (2002).

82. *Roper*, 543 U.S. at 559; *Atkins*, 536 U.S. at 321.

83. *Roper*, 543 U.S. at 559–60.

84. *Id.* at 578.

85. *Id.* at 569–70; Marsha L. Levick & Elizabeth-Ann Tierney, *The United States Supreme Court Adopts a Reasonable Juvenile Standard in J.D.B. v. North Carolina for Purposes of the Miranda Custody Analysis: Can a More Reasoned Justice System for Juveniles Be Far Behind?*, 47 HARV. C.R.-C.L. L. REV. 501, 508–09 (2012).

86. *Roper*, 543 U.S. at 570.

87. *Id.* at 568–75; *see also* Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J.L. & SOC. CHANGE 285, 304 (2012) (reasoning that since juveniles have inherent diminished culpability, they cannot be subjected to the law's harshest punishment reserved for the most depraved adult offenders and that punishment for juveniles must reflect their diminished culpability).

trend in death penalty jurisprudence that “death is different” and should be applied only to our society’s worst offenders, which the Court decided did not include juveniles.<sup>88</sup>

## 2. *Graham v. Florida*

Traditionally, only death sentences were afforded the highest scrutiny under the Eighth Amendment’s cruel and unusual punishment standard.<sup>89</sup> Until the Court decided *Graham v. Florida*,<sup>90</sup> such careful scrutiny had never been extended to the administration of nondeath sentences. However, in *Graham*, the Court prohibited the imposition of an LWOP sentence for juveniles found guilty of nonhomicide offenses.<sup>91</sup>

At age seventeen, Terrance Graham was convicted of armed burglary and attempted armed robbery while he was serving probation for another attempted robbery.<sup>92</sup> The trial court sentenced Graham to the maximum sentence on each charge: life imprisonment for the armed burglary and fifteen years of imprisonment for the attempted armed robbery.<sup>93</sup> Because Florida had abolished its parole system, Graham’s sentence effectively became LWOP.<sup>94</sup>

In Justice Kennedy’s majority opinion, the Court found that LWOP is by nature irrevocable and categorically too severe to be applied to juvenile nonhomicide offenders.<sup>95</sup> In part, the Court deemed Graham’s harsh sentence to be inappropriate because juvenile nonhomicide offenders are inherently less culpable than adult offenders convicted of the same crime.<sup>96</sup> Relying on the adolescent development and neuroscience principles discussed in the *Roper* decision,<sup>97</sup> the *Graham* court found scientific support for the three foundational distinctions that diminish the culpability of juvenile offenders: (1) immaturity, (2) vulnerability, and (3) changeability.<sup>98</sup> But, for the first time, the Court treated children differently from adults in the sentencing context beyond the imposition of the death penalty.<sup>99</sup> “In an unprecedented way, *Graham* paves the way toward a new jurisprudence based on what is special about children.”<sup>100</sup> The *Graham* Court extended the well-established Eighth Amendment principle that “death is different” for sentencing decisions.<sup>101</sup> Since *Graham*, it can also be said that “juveniles are different” and that an LWOP sentence for a nonhomicide offense is categorically too harsh for a juvenile offender whose culpability is inherently

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88. *Roper*, 543 U.S. at 578; Guggenheim, *supra* note 53, at 459.

89. *See Roper*, 543 U.S. at 568–69 (“Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force.”).

90. 560 U.S. 48 (2010).

91. *Graham*, 560 U.S. at 82.

92. *Id.* at 52–55.

93. *Id.* at 57.

94. *Id.*

95. *Id.* at 74–75, 82.

96. *Id.* at 68.

97. *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005); Levick et al., *supra* note 87, at 300.

98. *Graham*, 560 U.S. at 68.

99. Guggenheim, *supra* note 53, at 489–90.

100. *Id.* at 457.

101. *Id.* at 459.

diminished.<sup>102</sup>

### 3. *J.D.B. v. North Carolina*

Just one year after *Graham*, the Supreme Court invoked the “juveniles are different” rationale beyond the sentencing context in *J.D.B. v. North Carolina*.<sup>103</sup> The Court explained that a child’s age and characteristics of youthfulness must be considered when making custodial interrogation determinations.<sup>104</sup>

J.D.B., a thirteen-year-old student, was taken from his classroom by a uniformed police officer and questioned for thirty minutes in a closed room in the presence of school administrators about his involvement in a breaking-and-entering incident.<sup>105</sup> J.D.B. was not given his *Miranda* warnings nor told that he was free to go until he had confessed to his involvement in the crime.<sup>106</sup> On review, the Supreme Court stated in no uncertain terms that age must be considered when determining if a child is in custody for *Miranda* purposes.<sup>107</sup>

The adolescent development and neuropsychology research that laid the foundation for the Court’s decision in *Roper* and *Graham* was reduced to a single footnote in *J.D.B.*<sup>108</sup> Instead, the Court noted that a child’s age is “a fact that generates commonsense conclusions about behavior and perception. . . . [a]nd, they are self-evident to anyone who was a child once himself.”<sup>109</sup> *J.D.B.* stands for the proposition that scientific evidence supporting what is different about juveniles is applicable beyond the sentencing context and has been firmly established in our judicial history.<sup>110</sup>

### 4. *Miller v. Alabama*

In 2012, the Court once again took up the Eighth Amendment in the context of juvenile sentencing. In *Miller v. Alabama*, the Court officially held that mandatory LWOP sentences for juveniles convicted of homicide offenses are unconstitutional as cruel and unusual punishment.<sup>111</sup> At age fourteen, Evan Miller was found guilty of

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102. *Id.* at 463–64.

103. 131 S. Ct. 2394 (2011).

104. *See J.D.B.*, 131 S. Ct. at 2404 n.6, 2405 (recognizing that immaturity and vulnerability are inherent characteristics of childhood and that in some cases “the custody analysis would be nonsensical absent some consideration of the suspect’s age”).

105. *Id.* at 2399.

106. *Id.*

107. *See id.* at 2406 (holding that when a child’s age is known or objectively apparent to law enforcement at the time of questioning, it must be considered for custody determinations).

108. *Id.* at 2403 n.5.

109. *Id.* at 2403 (internal quotation mark omitted) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 674 (2004) (Breyer, J., dissenting)); *see also* Emily C. Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper, Graham, & J.D.B.*, 11 CONN. PUB. INT. L.J. 297, 297 (2012) (explaining that scientific research is not necessary to establish the commonsense premise that adults and children are different).

110. *See Levick, supra* note 82, at 517 (explaining that the Supreme Court’s consideration of age as a factor in the custody analysis opens the door to the examination of age for determining reasonableness in many areas of the law).

111. 132 S. Ct. 2455, 2475 (2012).

murder in the course of arson for assaulting a neighbor and setting fire to his trailer.<sup>112</sup> Miller was sentenced to the mandatory minimum sentence for that crime, LWOP.<sup>113</sup>

On review, the Supreme Court prescribed that the administration of an LWOP sentence for a juvenile offender must afford the sentencer the opportunity to make an individualized sentencing determination based upon the juvenile's age and the "wealth of characteristics and circumstances attendant to it."<sup>114</sup> Writing for the majority, Justice Kagan concluded that "youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole."<sup>115</sup> The Court found that state laws providing for mandatory LWOP sentences prohibited the proper assessment of whether a juvenile offender is disproportionately punished<sup>116</sup> because the mandatory sentencing scheme deprived the sentencing authority of the opportunity to consider the mitigating qualities of youthfulness.<sup>117</sup> In a footnote to her opinion, Justice Kagan noted that the scientific evidence establishing the categorical differences between juveniles and adults in *Roper* and *Graham* has only grown stronger and more persuasive in the intervening years.<sup>118</sup> The *Miller* Court was careful to limit its holding to the imposition of *mandatory* LWOP sentences and refrained from categorically banning LWOP for juvenile offenders entirely.<sup>119</sup> However, what seems to be a narrow holding preserving the possibility of LWOP for juveniles has provided an opportunity to advocate for age-appropriate sentences beyond the context of our society's most severe punishments.<sup>120</sup> Justice Kagan noted that "none of what i[s] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific."<sup>121</sup> The *Miller* opinion provides ammunition to challenge mandatory sentencing schemes that fail to consider the categorical differences of juveniles evidenced in adolescent development and neuropsychology research.

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112. *Miller*, 132 S. Ct. at 2462–63.

113. *Id.* at 2463.

114. *Id.* at 2467.

115. *Id.* at 2458.

116. *Id.*; see also ABA, *Juvenile Defense Attorneys Must Address Mitigating Factors in Homicide Cases*, 31 No. 8 CHILD. L. PRAC. 104 (2012) (reiterating the disadvantage of state laws that prohibit sentencing authorities from assessing whether LWOP is a disproportionate punishment).

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

118. *Id.* at 2464 n.5. (citing Brief for American Psychological Ass'n et al. as Amici Curiae Supporting Petitioners at 3, *Miller v. Alabama* 132 S. Ct. 2455 (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."); *id.* at 4 ("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 Supporting Petitioners at 12–28, *Miller v. Alabama* 132 S. Ct. 2455 (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.")).

119. *Id.* at 2469 (finding it unnecessary to consider the argument that the Eighth Amendment mandates a categorical bar of all LWOP sentences for juveniles).

120. *Id.*

121. *Id.*

B. *Advances in Adolescent Development and Neuropsychology Underlying Modern Juvenile Sentencing Practices*

The Court's decision in *Miller* remains firmly grounded in established adolescent development and neuropsychology research.<sup>122</sup> The American Psychological Association filed an amicus curiae brief in support of petitioners,<sup>123</sup> assembling the applicable social science research and identifying three main distinctive characteristics of juvenile offenders that affirm their inherently diminished culpability: (1) immaturity, (2) vulnerability, and (3) changeability.<sup>124</sup> Any further developments in age-appropriate sentencing must take into account these considerations.

1. Immaturity

Adolescents have a diminished capacity for mature judgment when compared to their adult counterparts.<sup>125</sup> As the *Roper* Court noted, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”<sup>126</sup> Reckless behavior is a characteristic normally associated with adolescence, and studies have shown that it is “statistically aberrant” for adolescents to refrain from criminal conduct.<sup>127</sup> Studies have also shown that criminal conduct peaks in adolescence and drops significantly in young adulthood.<sup>128</sup>

Juveniles' proclivity toward reckless and often criminal conduct stems from their diminished capacity for mature judgment and decision making.<sup>129</sup> Research points to several characteristics of adolescent judgment and decision making that are distinguishable from those of mature, fully formed adults: adolescents (1) are less able to control their impulses, (2) weigh the risks and rewards of their conduct differently,

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122. See Levick & Schwartz, *supra* note 69, at 372 (explaining that the *Miller* court acknowledged the expanding body of research confirming that juveniles are different from adults and recognized that the scientific proof has grown even stronger since the *Roper* and *Graham* decisions).

123. Brief for American Psychological Ass'n et al. as Amici Curiae Supporting Petitioners, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647) [hereinafter *APA Amicus Brief*].

124. See *infra* Parts III.B.1, III.B.2, and III.B.3 for a summary discussion of the social science research associated with each of these three characteristics. See *APA Amicus Brief*, *supra* note 123, at 6–25, for a more detailed examination of the social science research associated with each of these three characteristics.

125. See *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (stating that “[t]he susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult” (internal quotation marks omitted)).

126. *Id.* at 569 (alteration in original) (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

127. Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 344 (1992); Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674, 685–86 (1993).

128. See Moffitt, *supra* note 127, at 675 (indicating that the age-crime curve shows a steep peak in late adolescence, around age seventeen).

129. See Elizabeth Cauffman et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEVELOPMENTAL PSYCHOL. 193, 204 (2010) (finding that when decision making related to risk is influenced by both emotional and cognitive factors, juveniles have diminished reasoning skills and cognitive capabilities).

and (3) are less able to understand the future consequences of their actions.<sup>130</sup>

*a. Impulse Control*

Adolescents have a diminished capacity for self-regulation and are therefore less able to resist their own impulses.<sup>131</sup> Studies have shown that juveniles tend to make less adaptive decisions than adults because they have a diminished capacity to resist the impulses arising from social and emotional cues and are thus less able to remain focused on long-term goals when making decisions.<sup>132</sup> Adolescents often lack experience regulating their impulses and other emotional pressures.<sup>133</sup> It is not until very late in the teen years that adolescents display the ability to employ their own experiences in controlling their impulses.<sup>134</sup> In fact, studies have shown that the brain continues to develop in precisely the areas devoted to processing impulse control, planning, and self-regulation.<sup>135</sup> Juveniles have a diminished capacity for impulse control until early adulthood and are therefore less capable of controlling their emotions and behavior, even when such behavior is unlawful.<sup>136</sup>

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130. See Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 459, 468–471 (2008) (focusing on adolescent's susceptibility to peer pressure, limited orientation towards the future, sensitivity to rewards, and limited capacity or self-regulation).

131. See Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741, 759 (2000) (finding that adolescents exhibit antisocial decision making due to diminished functioning in a number of developmental areas including the ability to exercise restraint against aggressive impulses).

132. See Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. RES. ON ADOLESCENCE 211, 220 (2011) (suggesting that adults make more adaptive decisions than adolescents because they have a more mature capacity to resist social and emotional pressures and stay focused on long-term goals); Adriana Galvan et al., *Risk-Taking and the Adolescent Brain: Who Is at Risk?*, 10 DEVELOPMENTAL SCI. F8, F13 (2007) (explaining that the adolescent tendency toward "risky behaviors as immediate positive outcomes associated with social status among peers, substance abuse and sexual encounters may outweigh potential long-term negative consequences").

133. See Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1012 (2003) ("[T]he weaker future orientation of adolescents may reflect their more limited life experience. For adolescents, a consequence 5 years in the future may seem very remote in relation to how long they have been alive; teens may simply attach more weight to short-term consequences because they seem more salient to their lives.").

134. See Franklin Zimring, *Penal Proportionality for the Young Offender*, in YOUTH ON TRIAL 271, 282 (Thomas Grisso & Robert G. Schwartz eds., 2000) ("[E]xpecting the experience-based ability to resist impulses and peers to be fully formed prior to age eighteen or nineteen would seem on present evidence to be wishful thinking.").

135. *APA Amicus Brief*, *supra* 123, at 9–10.

136. See Cauffman et al., *supra* note 129, at 194 (explaining that a growing body of work suggests various brain changes that occur during adolescence create a "period of special vulnerability to suboptimal decision making in middle adolescence, when sensation-seeking is high and self-control is still maturing").

*b. Risk-Reward Calculus*

While adults tend to approach a decision by weighing the risks and the rewards equally, adolescents give much more cognitive attention to the potential rewards of a decision.<sup>137</sup> This distinction is particularly pronounced when the potential rewards are immediate rather than delayed.<sup>138</sup> Adolescents are also much less likely than adults to seek out alternatives in situations where risks are high.<sup>139</sup> An adolescent's cognitive preference for decision making based on reward calculations increases his or her propensity for criminal activity as well as other kinds of risk-taking behaviors.<sup>140</sup>

*c. Understanding of Future Consequences*

Adolescents are less able to foresee the consequences of their actions and plan for the future than adults.<sup>141</sup> Adolescents do not devote as much cognitive attention to the future and the potential future consequences of risky behavior; they are focused on the present and the potential for immediate rewards.<sup>142</sup> Studies have shown that adolescents are less capable of predicting short- and long-term consequences and less able to take other people's perspectives into account when making decisions.<sup>143</sup> The ability to think realistically about the future and rationally plan for the future increases throughout adolescence and into early adulthood.<sup>144</sup> Therefore, juvenile offenders are less capable than their adult counterparts of weighing the potential future consequences of their illegal actions.

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137. See *id.* at 204–06 (observing that various brain changes occurring during adolescence create a "peak in reward sensitivity" during that period).

138. See Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28, 39 (2009) (observing adolescents' preference for smaller rewards that they will receive in the short term over larger ones to be received at some point in the future).

139. See Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. APPLIED DEVELOPMENTAL PSYCHOL. 257, 268 (2001) (finding that adolescents give less consideration than adults to "options, risks, long-term consequences, and benefits" when making decisions).

140. See Arnett, *supra* note 127, at 343–44 (explaining that fifty percent or more of adolescents report drunk driving, unprotected sex, illegal drug use, or "some form of minor criminal activity").

141. See Arnett, *supra* note 127, at 351 (finding that adolescents' perceptions are skewed by their desires for excitement and false notions that they are immune from negative consequences).

142. See Steinberg et al., *supra* note 138, at 39 (noting adolescents' preference for immediate rewards over long-term rewards even if the long-term rewards are greater).

143. Cauffman & Steinberg, *supra* note 131, at 756 (finding that adolescents displayed less responsibility, perspective, and temperance and demonstrated a greater tendency for antisocial decision-making).

144. See Jari-Erik Nurmi, *How Do Adolescents See Their Future? A Review of the Development of Future Orientation and Planning*, 11 DEVELOPMENTAL REV. 1, 28–29 (1991) (summarizing research on children's contemplation of and planning for the future).



## 2. Vulnerability

Juveniles are more vulnerable to external influences, particularly peer pressure, and the actions of others more directly shape their behavior.<sup>145</sup> Difficult family and neighborhood environments have a greater impact on children whose living situations are entirely dependent on the decisions of their family members or guardians.<sup>146</sup> Adolescents often lack the capacity to remove themselves from dangerous or unhealthy situations and are therefore less to blame than adults for the effects such situations have on their decisions.<sup>147</sup>

In addition, juveniles are uniquely susceptible to the negative influences of peer pressure, with peak vulnerability at age fourteen.<sup>148</sup> In the presence of peers, adolescents are more likely to make risky decisions than adults.<sup>149</sup> One study indicates significantly greater activation of brain areas associated with reward processing when adolescents—but not adults—were told their peers were observing them.<sup>150</sup>

Adolescents are more likely to engage in antisocial or criminal behavior to fulfill peer expectations or to achieve a desirable social status.<sup>151</sup> Additionally, juveniles are far more likely than adults to commit crimes in groups, in the presence of immediate pressure by the peer group.<sup>152</sup> The ability to deflect peer pressure—directly correlating with adolescent law abidingness—is a social skill that is not fully formed until adulthood.<sup>153</sup>

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145. See Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625, 625 (2005) (conducting psychological studies that indicate “adolescents are more inclined toward risky behavior and risky decision making than are adults and that peer influence plays an important role in explaining risky behavior during adolescence”).

146. Alan E. Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, in YOUTH ON TRIAL 33, 47 (Thomas Grisso & Robert G. Schwartz eds., 2000).

147. APA Amicus Brief, *supra* note 123, at 16.

148. See ELIZABETH S. SCOTT & LAURENCE STEINBERG, RETHINKING JUVENILE JUSTICE 38 (2008) (“Substantial research evidence supports the conventional wisdom that teenagers are more oriented toward peers and responsive to peer influence than are adults.”); Thomas J. Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEVELOPMENTAL PSYCHOL. 608, 612 (1979) (describing experimental results indicating that “conformity to peers peaks during midadolescence”); Laurence Steinberg & Susan B. Silverberg, *The Vicissitudes of Autonomy in Early Adolescence*, 57 CHILD DEV. 841, 848 (1986) (describing experimental results indicating how adolescence involves “dependency on peers rather than straight-forward and unidimensional growth in autonomy”).

149. See Gardner & Steinberg, *supra* note 145, at 625 (noting that adolescent participants in a study made riskier decisions while with peers as opposed to alone).

150. Jason Chein et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain’s Reward Circuitry*, 14 DEVELOPMENTAL SCI. 1, 7 (2011).

151. See JOAN MCCORD & KEVIN P. CONWAY, NAT’L INST. OF JUSTICE, CO-OFFENDING AND PATTERNS OF JUVENILE CRIME 5 (2005) (finding that “[c]o-offending violence increased throughout adolescence”); Zimring, *supra* note 134, at 281 (explaining that the period of adolescence is characterized by “group offending”).

152. Zimring, *supra* note 134, at 281.

153. See *id.* at 280–81 (“A necessary condition for an adolescent to stay law-abiding is the ability to deflect or resist peer pressure. Many kids lack this crucial social skill for a long time.”).

### 3. Changeability

One of the hallmark characteristics of adolescents is their malleable character.<sup>154</sup> The character of a juvenile is “more transitory, [and] less fixed” than that of an adult.<sup>155</sup> Juveniles have a heightened capacity for change, and a child’s antisocial behaviors are less indicative of an “irretrievably depraved character.”<sup>156</sup> The signature qualities of adolescence reflect the incomplete development of a juvenile during adolescence, not their hardened and unchangeable character traits.<sup>157</sup>

The Court in *Graham* recognized that equating an adolescent’s criminal conduct with that of an adult would disregard a child’s increased capacity to reform.<sup>158</sup> In fact, most juveniles who engage in criminal conduct will not commit such acts as adults.<sup>159</sup> Social science researchers have failed in their attempt to predict what, if any, risk factors are associated with future criminality among juvenile offenders and warn against the “danger that policy makers will start to use less than good predictions as a rationale for harsh punishments and severe legal sanctions.”<sup>160</sup> The Court in *Miller* accounted for juveniles’ heightened capacity for change by holding that a juvenile LWOP sentence must be accompanied by a review of the child’s culpability and reform potential.<sup>161</sup>

This fundamental proportionality requirement of *Miller* is informed by the social science research in the areas of adolescent development and neuropsychology—with particular consideration given to a juvenile’s immaturity, vulnerability, and changeability.<sup>162</sup>

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154. See Scott & Steinberg, *supra* note 133, at 1014 (explaining that most individuals go through an “identity crisis” during adolescence, but the “coherent integration of the various retained elements of identity into a developed *self* does not occur until late adolescence or early adulthood”).

155. *Roper v. Simmons*, 543 U.S. 551, 570 (2005) (citing ERIK H. ERIKSON, *IDENTITY, YOUTH, AND CRISIS* (1968)).

156. *Graham v. Florida*, 560 U.S. 48, 68 (2010) (quoting *Roper*, 543 U.S. at 570).

157. See Brent W. Roberts et al., *Patterns of Mean-Level Change in Personality Traits Across the Life Course: A Meta-Analysis of Longitudinal Studies*, 132 *PSYCHOL. BULL.* 1, 14–15 (2006) (study results indicating that “personality traits show a clear pattern of normative change across the life course”).

158. *Graham*, 560 U.S. at 67–69; see also SCOTT & STEINBERG, *supra* note 148, at 52 (finding that a coherent integration of an adolescent’s identity does not take place before late adolescence and that the final stages of identity formation do not occur until early adulthood); Alan S. Waterman, *Identity Development from Adolescence to Adulthood: An Extension of Theory and a Review of Research*, 18 *DEVELOPMENTAL PSYCHOL.* 341, 355 (1982) (observing that “[t]he most extensive advances in identity formation occur during the time spent in college”).

159. See Scott & Steinberg, *supra* note 134, at 1015 (noting that most delinquent youths do not become adult criminals because the values and preferences that drive the youth’s criminal choices change as the youth matures).

160. Rolf Loeber et al., *Conclusions and Policy Implications*, in *VIOLENCE AND SERIOUS THEFT: DEVELOPMENT AND PREDICTION FROM CHILDHOOD TO ADULTHOOD* 309, 333 (2008).

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

162. *Id.* at 2464–2469.

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#### IV. MILLER'S INDIVIDUALIZED SENTENCING REQUIREMENT

Significantly, Justice Kagan does not end her *Miller* opinion with the analysis of proportionality and inherent diminished culpability.<sup>163</sup> She refers to a second strand of Eighth Amendment cases, invoking the individualized sentencing requirement of early death penalty cases.<sup>164</sup> Justice Kagan calls on death penalty jurisprudence to support the requirement of individualized sentencing determinations in the administration of juvenile LWOP sentences, specifically analogizing an LWOP sentence as applied to a juvenile to an adult death sentence.<sup>165</sup>

Since the 1970s, the Court has affirmed the individualized sentencing requirement in the capital context by invalidating state-sentencing schemes that prohibit the consideration of mitigating factors or limit the range of factors that can be considered by the sentencer.<sup>166</sup> In fact, the Court has held that any formulaic method of weighing predetermined mitigating factors would thwart the very purpose of the individualized determination requirement and rob the sentencer of the discretion necessary to decide if death is the appropriate sentence.<sup>167</sup> It is the incorporation of these seminal death penalty cases that make the *Miller* decision so transformative, providing a prescription for the future of juvenile sentencing practices—individualized determinations that take into consideration a juvenile offender's inherent diminished culpability.

##### A. *From Woodson to Miller: The Court's Prohibition of Mandatory Sentencing Schemes that Fail to Consider Mitigating Factors*

Mandatory death sentences have been found unconstitutional under the Eighth Amendment because they do not permit consideration of either the character and record of the offender or the circumstances of the offense.<sup>168</sup> Over the years, the individualized sentencing requirement has been used to challenge state schemes that prohibited consideration of an offender's social and financial poverty, history of being abused as a child, mental impairment, mental retardation, low IQ, youth, history of good behavior awaiting trial, and character evidence.<sup>169</sup> The "fundamental weakness"

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163. See *id.* at 2475 (holding that "the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment").

164. *Id.* at 2463–64.

165. *Id.* at 2466–67.

166. See *infra* Part IV.A for a discussion of Supreme Court jurisprudence regarding prohibition of mandatory sentencing schemes that fail to consider mitigating factors.

167. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 303–04 (1976) (plurality opinion) (requiring that the sentencer consider the characteristics of a defendant and the details of his offense before sentencing him to death).

168. See, e.g., *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978) (holding that the Eighth Amendment requires that sentencers not be precluded from considering a range of mitigating factors before imposing the death penalty).

169. See *McKoy v. North Carolina*, 494 U.S. 433, 436–38 (1990) (low IQ); *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (mental retardation), *abrogated by Atkins v. Virginia*, 536 U.S. 304, 321 (2002); *Mills v. Maryland*, 486 U.S. 367, 370–71 (1988) (youth); *Hitchcock v. Dugger*, 481 U.S. 393, 397–98 (1987) (social and financial poverty and mental impairment); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (history of

of such mandatory capital sentencing statutes is the limitation placed on the decision maker's discretion to determine that death is the morally appropriate sentence.<sup>170</sup> *Miller* extends the individualized sentencing requirement of these death penalty cases beyond the capital context for the first time—demonstrating that sentencing juveniles absent consideration of their inherent diminished culpability violates the Eighth Amendment.<sup>171</sup>

1. *Woodson v. North Carolina*

In *Woodson v. North Carolina*,<sup>172</sup> the United States Supreme Court held that state statutes providing for the mandatory imposition of the death penalty are unconstitutional.<sup>173</sup> In 1976, James Woodson and Luby Waxton were convicted of first-degree murder for their participation in an armed robbery of a convenience store, which led to the murder of the store's cashier.<sup>174</sup> The Supreme Court of North Carolina upheld their death sentence under a North Carolina statute, which required death sentences for all defendants convicted of first-degree murder.<sup>175</sup>

The Court invoked the Eighth Amendment prohibition on cruel and unusual punishment to strike down the North Carolina capital sentencing scheme, which required the imposition of the death penalty for offenders convicted of first-degree murder.<sup>176</sup> The Court found that any statute providing for mandatory death sentences was unconstitutional because it excluded from consideration potential mitigating factors.<sup>177</sup> In the proceeding years, the Court expanded the general proposition laid down in *Woodson*, recognizing that the Eighth Amendment requires consideration of mitigating factors in the capital sentencing context.<sup>178</sup>

2. *Lockett v. Ohio*

In *Lockett v. Ohio*,<sup>179</sup> the United States Supreme Court held that state statutes limiting the mitigating evidence that courts can consider when making capital sentencing decisions are unconstitutional.<sup>180</sup> In 1978, Sandra Lockett, who had encouraged and driven the getaway car for a robbery that resulted in the murder of a pawnshop owner, was found guilty of aggravated murder and sentenced to death in

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good behavior awaiting trial and character evidence); *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982) (history of child abuse).

170. Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1770–71 (2012); Louis D. Bilionis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 290 (1991).

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

172. 428 U.S. 280 (1976) (plurality opinion).

173. *Woodson*, 428 U.S. at 304–05.

174. *Id.* at 282–83.

175. *Id.* at 284.

176. *Id.* at 304–05.

177. *Id.* at 304.

178. Bierschbach, *supra* note 170, at 1767–68.

179. 438 U.S. 586 (1978).

180. *Lockett*, 438 U.S. at 608.

Ohio.<sup>181</sup> An Ohio statute required that individuals found guilty of aggravated murder be given the death penalty unless one of the three statutorily enumerated mitigating circumstances was found.<sup>182</sup>

The Court in *Lockett* held that the Ohio statute violated the Eighth Amendment because the sentencer was precluded from considering “any of the circumstances of the offense” or “any aspect of a defendant’s character or record” that could influence a mitigation determination.<sup>183</sup> The Court held that sentencing juries must be able to give meaningful consideration to all mitigating evidence that might provide a basis for rejecting the imposition of the death penalty on a particular offender.<sup>184</sup> In light of the cases that have followed from and applied *Lockett*, capital sentencing determinations are conducted on a case-by-case basis—giving sufficient consideration and effect to all of the relevant mitigating evidence so as to ensure that the death penalty is applied only to the most culpable offenders committing the worst offenses.<sup>185</sup>

### 3. *Eddings v. Oklahoma*

In *Eddings v. Oklahoma*,<sup>186</sup> the United States Supreme Court held that chronological age, background, and psychological development are all mitigating factors that must be considered when assessing the culpability of a youthful offender and the appropriateness of a death sentence for such an individual.<sup>187</sup> In 1982, Monty Lee Eddings, a sixteen-year-old, shot and killed a police officer at point-blank range.<sup>188</sup> The Court invalidated the imposition of a death sentence in the case because the sentencing judge did not consider evidence of Eddings’s mother’s drug abuse, his father’s physical abuse, and his own emotional disturbance.<sup>189</sup> The Court found the mitigating evidence “particularly relevant” to Eddings—more so than it would have been for an adult offender.<sup>190</sup>

The Court in *Eddings* recognized that “youth is more than a chronological fact” and that it is a “condition of life when a person may be most susceptible to influence

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181. *Id.* at 590, 593–94.

182. *Id.* at 607. Before the Court was an Ohio statute that required courts to impose the death penalty for a defendant found guilty of a murder with at least one of seven listed aggravating circumstances. *Id.* Those convicted of aggravated murder could only avoid the death penalty if, considering “the nature and circumstances of the offense and the history, character, and condition of the offender,” the sentencing judge found by a preponderance of the evidence at least one of the following mitigating circumstances: (1) the victim induced or facilitated the offense; (2) the offense probably would not have been committed had the offender not been under duress, coercion, or strong provocation; and (3) a psychosis or mental deficiency largely caused the offender to commit the offense. *Id.* (citing OHIO REV. CODE ANN. § 2929.04(B) (1975)).

183. *Id.* at 604, 608.

184. *Id.* at 608.

185. *Miller v. Alabama*, 132 S. Ct. 2455, 2467 (2012); *see also Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (“[T]he rule in *Lockett* is the product of a considerable history reflecting the law’s effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual.”).

186. 455 U.S. 104 (1982).

187. *Eddings*, 455 U.S. at 116.

188. *Id.* at 105–06.

189. *Id.* at 115–16.

190. *Id.*

and to psychological damage.”<sup>191</sup> The underlying understanding of a juvenile’s distinctive qualities, which was used by the Court in *Roper* and *Graham* to support a categorical ban on the death penalty and LWOP for nonhomicide offenders, was first employed in *Eddings* for the purpose of mandating individualized sentencing determinations in death penalty cases.<sup>192</sup> The Court explained, “just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered” in making an appropriate sentencing determination.<sup>193</sup> Capital sentencing determinations require the utmost individualization, and recognition of a juvenile’s inherent diminished culpability plays a major role in the full examination of mitigating factors.<sup>194</sup>

#### 4. *Miller v. Alabama*

The Court in *Miller v. Alabama* prohibited state-sentencing schemes that provided for the mandatory imposition of LWOP sentences on juvenile homicide offenders because they precluded from consideration a juvenile offender’s age and resultant inherent diminished culpability.<sup>195</sup> Under the mandatory sentencing scheme in the state of Alabama, a juvenile offender convicted of a homicide offense would receive the same punishment if he were a juvenile or an adult.<sup>196</sup>

In the Court’s majority opinion, Justice Kagan forewent the opportunity to impose a categorical ban on LWOP sentences for juvenile homicide offenders for precisely the reasons enumerated in the individualized sentencing cases.<sup>197</sup> She was satisfied that the guarantee of individualized sentencing determinations would take into consideration the distinguishable characteristics of youthfulness. Specifically, she stated that, “given all we have said in *Roper*, *Graham*, and this decision about children’s diminished culpability and heightened capacity for change, we think the appropriate occasion for sentencing juveniles to this harshest possible penalty will be uncommon.”<sup>198</sup> The *Miller* decision relied on the authority of the states to impose sentencing systems that not only comply with the required prohibition of mandatory sentencing of juvenile homicide offenders to LWOP, but also comply with its underlying message: that individualized sentencing determinations must consider a juvenile offender’s inherent diminished culpability as required by the Eighth Amendment.

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191. *Id.* at 116.

192. *See id.* at 115 (categorizing a defendant’s age as one of the main factors that a sentencing court should consider when imposing an individualized sentence).

193. *Id.* at 116.

194. *Id.* at 115.

195. 132 S. Ct. 2455, 2475 (2012).

196. *Miller*, 132 S. Ct. at 2467–68.

197. *See supra* Part IV.A for a discussion of the individualized sentencing line of cases.

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

V. MANDATORY MINIMUM SENTENCES SHOULD BE PROHIBITED FOR JUVENILES IN PENNSYLVANIA AND REPLACED WITH A SYSTEM OF INDIVIDUALIZED SENTENCING THAT TAKES INTO CONSIDERATION THE INHERENT DIMINISHED CULPABILITY OF JUVENILE OFFENDERS

The message from *Miller* is clear: state sentencing schemes that include any mandatory provisions for juvenile offenders violate the Eighth Amendment of the Constitution.<sup>199</sup> For the sentencing system in Pennsylvania to fully comply with the Court's decision in *Miller*, it must provide proportionality through an individualized sentencing determination.<sup>200</sup>

Pennsylvania's sentencing system is constitutionally deficient because it does not incorporate individualized determinations into every juvenile sentencing decision in adult criminal court.<sup>201</sup> Pennsylvania's legislative response to *Miller* fixed only part of the problem by prohibiting mandatory LWOP sentences for juveniles—ignoring the individualized sentencing requirement of *Miller*.<sup>202</sup> Juveniles are still subject to the same mandatory sentencing statutes as adults for other offenses.<sup>203</sup> In order for Pennsylvania law to comply fully with *Miller*, a change to the current sentencing scheme is necessary.

A. *Current State of Mere Compliance: Pennsylvania's Response to Miller*

In the wake of the *Miller* decision, the Pennsylvania legislature had the opportunity to create a sentencing scheme for juveniles that would be both proportional and individualized. Instead, the legislature responded with a statutory amendment rising to the level of mere compliance with the prohibition of mandatory LWOP for juveniles. As of 2013, first- and second-degree murder are the only offenses that carry with them a lower minimum sentence for juveniles than adults.<sup>204</sup> However, the downgraded mandatory sentence still prevents the court from fully considering a juvenile offender's youthfulness when making sentencing determinations.<sup>205</sup>

On October 25, 2012, Governor Tom Corbett signed into law Senator Greenleaf's bill, SB 850, which provided for a different sentencing mechanism for juveniles found guilty of first- and second-degree murder than for adults found guilty of those offenses.<sup>206</sup> LWOP is still on the table for juveniles convicted of first-degree murder,

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199. See *supra* Part IV.A.4 for a detailed analysis of *Miller*'s individualized sentencing requirement.

200. See *supra* Sections III & IV for discussions of *Miller*'s proportionality and individualized sentencing requirements.

201. See *supra* Part II.B for a discussion of Pennsylvania's sentencing practices for juveniles tried in adult criminal court.

202. S.B. 850, Sess. of 2011, Sec. 2 (Pa. 2012).

203. See *supra* Part II.B for an explanation of Pennsylvania's mandatory sentencing statutes.

204. See 18 PA. CONS. STAT. ANN. § 1102.1 (West 2013) (providing the sentencing structure for individuals under eighteen who committed first- and second-degree murder).

205. See *id.* § 1102 (noting that the provision's sentencing scheme does not apply to individuals under the age of eighteen).

206. Rebecca LeFever, *Gov. Corbett Signs Law Regarding Sentencing Juveniles to Life*, YORK DAILY

but it is no longer mandatory.<sup>207</sup> Under Pennsylvania's new sentencing scheme for juveniles tried in adult criminal court, a child convicted of first-degree murder between the ages of fifteen and seventeen can be sentenced to LWOP or a minimum of thirty-five years to life imprisonment.<sup>208</sup> If the child found guilty of first-degree murder is under the age of fifteen, he can be sentenced to LWOP or a minimum of twenty-five years to life imprisonment.<sup>209</sup>

Additionally, LWOP sentences are no longer available for juveniles sentenced to second-degree murder.<sup>210</sup> Those children convicted of second-degree murder between the ages of fifteen and seventeen can be sentenced to a minimum of thirty years to life imprisonment.<sup>211</sup> If the child found guilty of second-degree murder is under the age of fifteen, he can be sentenced to a minimum of twenty years to life imprisonment.<sup>212</sup>

The Pennsylvania legislature only got part of the message of Justice Kagan's decision. Although Pennsylvania law is now technically in compliance with *Miller*'s prohibition of mandatory LWOP for juveniles, and legislators recognize that these modifications result from an appreciation that juveniles are different from adults, the *Miller* decision stands for more. It stands for a broader understanding of the principle that proportionate sentencing determinations ought to be individualized for all sentences so as to consider juvenile offenders' inherent diminished culpability.<sup>213</sup> Pennsylvania must further amend its system of sentencing to ensure that juveniles tried in adult criminal court are afforded the proportionality *and* individualization required by *Miller* and the Eighth Amendment.

#### B. *Current Individualized Sentencing Models Miss the Mark*

Although Pennsylvania law provides for individualized sentencing determinations in a number of contexts, including capital sentencing, juvenile transfer determinations, and sentencing under the Pennsylvania Sentencing Guidelines,<sup>214</sup> each would be deficient for sentencing juveniles subject to mandatory minimum sentences in adult criminal court.<sup>215</sup> This Comment suggests a new model for sentencing juveniles, one that prohibits the imposition of mandatory minimum statutes on juvenile offenders and instead incorporates the list of relevant *Miller* criteria into the Pennsylvania Sentencing Guidelines.<sup>216</sup>

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REC. (Oct. 25, 2012, 9:45 PM), [http://www.ydr.com/ci\\_21857365/gov-corbett-signs-law-regarding-sentencing-juveniles-life](http://www.ydr.com/ci_21857365/gov-corbett-signs-law-regarding-sentencing-juveniles-life).

207. 18 PA. CONS. STAT. ANN. § 1102.1(a).

208. *Id.* § 1102.1(a)(1).

209. *Id.* § 1102.1(a)(2).

210. *Id.* § 1102.1(c).

211. *Id.* § 1102.1(c)(1).

212. *Id.* § 1102.1(c)(2).

213. See *supra* Sections III & IV for a discussion of *Miller*'s proportionality and individualized sentencing requirements.

214. 42 PA. CONS. STAT. ANN. § 6355, 9711 (West 2013); 204 PA. CODE § 303.1 (2013).

215. See *infra* Parts V.B.1–V.B.3 for an examination of the available individualized sentencing models currently in use in Pennsylvania and their deficiencies as a response to the *Miller* requirements.

216. See *infra* Part V.C for further explanation of the suggested modification to Pennsylvania's sentencing scheme.



### 1. Capital Sentencing

In Pennsylvania, an adult offender cannot be sentenced to death absent a full-scale, individualized sentencing hearing.<sup>217</sup> Pennsylvania law requires that once the jury enters a verdict of first-degree murder, there must be a separate sentencing proceeding to determine if the death penalty is appropriate.<sup>218</sup> In a capital sentencing hearing, any evidence “the court deems relevant and admissible on the question of the sentence to be imposed” can be introduced, including evidence relevant to the eighteen enumerated aggravating factors and the eight enumerated mitigating factors.<sup>219</sup> Among the mitigating factors listed in the statute, the Pennsylvania legislature makes specific reference to age and includes a “catch-all” provision allowing the defense to present “[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.”<sup>220</sup> Therefore, the information available to the capital sentencing jury is functionally limitless.

The utmost discretion is given to the jury in deciding whether to impose a death sentence. The capital sentencing hearing provides jurors with any and all information relevant to the death penalty decision before them.<sup>221</sup> Jurors have a moral obligation to consider all of the evidence in the sentencing hearing—one that is based on “an ethic of caring, compassion, and mercy.”<sup>222</sup> To satisfy the specific needs of jurors faced with the arduous but unequivocal decision of imposing—or not imposing—the death penalty, capital sentencing proceedings have developed into a lengthy process that fully considers all of the available mitigating evidence.<sup>223</sup>

The task before a sentencing judge in a criminal case is distinct from that of the capital jury. The judge has a professional obligation to consider evidence limited to aggravating and mitigating circumstances to determine an appropriate sentence for an offender within a legal range of available sentencing options.<sup>224</sup> Identifying evidence of aggravating and mitigating circumstances is part of the process of calculating the applicable sentencing guideline range.<sup>225</sup> The court’s resources would be wasted in presenting judges with the quantity and breadth of information considered by the capital sentencing jury when the task before them is sentencing a juvenile in adult criminal court and prescribing a penalty less than death. A slightly more restrained approach to individualized sentencing is necessary.

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217. 42 PA. CONS. STAT. ANN. § 9711(a).

218. *Id.*

219. *Id.* § 9711(a)(2), (d), (e).

220. *Id.* § 9711(e)(4), (8).

221. See Russell Stetler, *The Mystery of Mitigation: What Jurors Need to Make a Reasoned Moral Response in Capital Sentencing*, 11 U. PA. J.L. & SOC. CHANGE 237, 263 (2008) (explaining that the ultimate beneficiaries of mitigation specialists might be jurors, who are entitled to all relevant evidence when making their decision).

222. *Id.* at 244.

223. *Id.* at 241.

224. *Commonwealth v. Cottam*, 616 A.2d 988, 1006 (Pa. 1992).

225. See 204 PA. CODE § 303.16 (2013) (providing a sentencing guideline range for all criminal offenses in Pennsylvania and an adjustment to that range for aggravating or mitigating circumstances).

## 2. Juvenile Transfer Determinations

For juveniles alleged delinquent and not automatically excluded from juvenile court jurisdiction, the court can decide to transfer the child's case to criminal court if the transfer hearing provides due process, fundamental fairness, and complies with the other requirements of Pennsylvania's Transfer to Criminal Proceedings statute.<sup>226</sup> Pennsylvania law provides that a juvenile case can be transferred to adult criminal court if there are reasonable grounds to believe that the transfer would better serve the public interest<sup>227</sup> and if "the child is [not] amenable to treatment, supervision or rehabilitation."<sup>228</sup> This amenability determination takes into consideration ten factors:

(I) age; (II) mental capacity; (III) maturity; (IV) the degree of criminal sophistication exhibited by the child; (V) previous records, if any; (VI) the nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate the child; (VII) whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction; (VIII) probation or institutional reports, if any; (IX) any other relevant factors; and [(X)] that there are reasonable grounds to believe that the child is not committable to an institution for the mentally retarded or mentally ill.<sup>229</sup>

These ten factors are specifically geared towards determining if juvenile court jurisdiction is appropriate.<sup>230</sup> In particular, the seventh factor evaluates whether a juvenile can be rehabilitated prior to the expiration of juvenile court jurisdiction when the child reaches twenty-one years of age.<sup>231</sup> Although these factors are designed to individually evaluate the needs of juvenile offenders, the determination of amenability of the child to juvenile court jurisdiction is limited by the capacity of juvenile court.<sup>232</sup> It would therefore be inappropriate to apply the transfer factors outside of the juvenile court context.

## 3. Pennsylvania Sentencing Guidelines

For many years, the stated purpose of the Pennsylvania Sentencing Guidelines was to enforce retributive ideals, focusing only on the severity of the crime and of the offender's prior record.<sup>233</sup> However, in 2008, the Pennsylvania General Assembly passed a series of sentencing reforms designed in part to shift the purposes of the

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226. 42 PA. CONS. STAT. ANN. § 6355(a) (West 2013).

227. See *supra* notes 30–32 and accompanying text for a more detailed explanation of the factors considered in making a discretionary transfer from juvenile to adult criminal court and a more specific definition of when the transfer would serve the public interest.

228. 42 PA. CONS. STAT. ANN. § 6355(a)(4)(iii)(G).

229. *Id.* § 6355(a)(4)(iii)(G), (a)(4)(iv).

230. *Id.* § 6355(a).

231. See *id.* § 6302 (providing that juvenile court has jurisdiction over a child under the age of twenty-one who was under the age of eighteen at the time of the offense).

232. See BENCHBOOK, *supra* note 6, at 64 (affirming that the determination of the appropriate occasion for transferring a juvenile—while rare—is informed by the opportunities for treatment, rehabilitation, learning and growth available in juvenile court that do not exist in the adult system).

233. Jordan M. Hyatt et al., *Reform in Motion: The Promise and Perils of Incorporating Risk Assessments and Cost-Benefit Analysis into Pennsylvania Sentencing*, 49 DUQ. L. REV. 707, 714–15 (2011).

sentencing guidelines away from purely retributive considerations and to incorporate public safety concerns.<sup>234</sup> Although the 2008 sentencing reforms moved Pennsylvania in the right direction by recognizing a broader purpose to punishment, the current system does not provide a mechanism to consider the specific needs of juvenile offenders.<sup>235</sup>

Pennsylvania law generally provides for an indeterminate sentencing structure, giving the court broad discretion in imposing sentences, with some clearly defined limits.<sup>236</sup> The Commission promulgates a set of advisory sentencing guidelines that courts are required to consider when making sentencing determinations.<sup>237</sup> However, judges are not bound by these guidelines and can recommend sentences that deviate from the recommended sentencing range.<sup>238</sup> Judges may deviate from the guidelines only after considering “the protection of the public, the rehabilitative needs of the defendant, and the gravity of the particular offense” and stating for the record the specific reasons for the deviation from the guidelines.<sup>239</sup>

To calculate the proper sentencing range in a particular case, the criminal court judge uses the formulaic methodology provided in the guidelines to determine an appropriate offense gravity score and prior record score for each offender.<sup>240</sup> The guidelines provide a suggested offense gravity score for each offense in the criminal code and a method of scoring the prior convictions that inform the prior record score.<sup>241</sup> The guidelines also provide a matrix for judges to use when calculating the appropriate sentencing guideline for each combination of offense gravity scores and prior record scores.<sup>242</sup> The matrix includes the standard sentencing range for use in the typical case, the aggravated range for use in a case where there is an aggravating circumstance, and a mitigated range for use in a case where there is a mitigating circumstance.<sup>243</sup> However, unlike most other states, Pennsylvania’s sentencing guidelines do not incorporate a list of factors necessary to determine if an aggravated or mitigated sentencing range is appropriate.<sup>244</sup>

Although the Pennsylvania Sentencing Guidelines provide an established formulaic method for the administration of sentences in adult criminal court, there is no

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234. Mark H. Bergstrom & Joseph Sabino Mistick, *Danger and Opportunity: Making Public Safety Job One in Pennsylvania’s Indeterminate Sentencing System*, 12 JUST. RES. & POL’Y 73, 76–77 (2010).

235. See 42 PA. CONS. STAT. ANN. § 2154 (requiring that the Pennsylvania Commission on Sentencing consider the seriousness of the offense, criminal history of the offender, threat to public safety, and aggravating and mitigating circumstances).

236. *Commonwealth v. Yuhasz*, 923 A.2d 1111, 1119 (Pa. 2007); *Commonwealth v. Gause*, 659 A.2d 1014, 1016 (Pa. Super. Ct. 1995).

237. Hyatt et al., *supra* note 233, at 715–16.

238. *Id.* at 715–17.

239. *Commonwealth v. Johnson*, 666 A.2d 690, 693 (Pa. Super. Ct. 1995) (quoting *Commonwealth v. Canfield*, 639 A.2d 46, 50 (Pa. Super. Ct. 1994)).

240. Jodeen M. Hobbs, *Structuring Sentencing Discretion in Pennsylvania: Are Guidelines Still a Viable Option in Light of Commonwealth v. Devers?*, 69 TEMP. L. REV. 941, 943–44 (1996).

241. 204 PA. CODE § 303.3, 303.15, 303.8 (2013).

242. *Id.* § 303.16.

243. *Id.*

244. *Id.* § 303.13.

assurance that judges will consider the unique characteristics of juvenile offenders when making sentencing decisions under the guidelines. Simply subjecting juveniles to individualized sentencing under the current version of the guidelines would not fulfill the *Miller* requirements.<sup>245</sup> Sentencing judges must be required to consider the specific characteristic of youthfulness and a juvenile's inherent diminished culpability.

C. *A Modified Sentencing Scheme for Juveniles in Pennsylvania*

None of the models of individualized sentencing currently instituted in Pennsylvania fully and practically address the requirements of *Miller*. Pennsylvania should create a unique sentencing model for juveniles—one that prohibits the application of mandatory minimum sentencing statutes in a juvenile's case and instead incorporates into the current guidelines system a requirement that the sentencer consider the juvenile offender's inherent diminished culpability.

The Pennsylvania Sentencing Guidelines permit the sentencing judges to recommend a downward departure from the applicable guideline range.<sup>246</sup> Judges should be required to consider evidence related to a juvenile's inherent diminished culpability in every case and have the discretion to recommend a downward departure when appropriate.

The factors relevant to a juvenile's culpability can be drawn from the *Miller* decision. In her opinion, Justice Kagan lists a number of factors that are relevant to juvenile sentencing determinations, including (1) a child's chronological age and its distinguishing characteristics—such as “immaturity, impetuosity, and failure to appreciate risks and consequences[;]” (2) a child's family and home environment and his inability to extricate himself from that environment; (3) the circumstances of the offense, such as the extent of his participation and the presence of peer pressure; and (4) a child's lack of sophistication in dealing with a criminal justice system designed for adults.<sup>247</sup> These juvenile-specific sentencing factors capture what social scientists have concluded are the distinctive characteristics of youthfulness that make juvenile offenders inherently less culpable than their adult counterparts, and they should be considered by the judge to ensure proportionate and individualized sentencing determinations for juvenile offenders.<sup>248</sup>

## VI. CONCLUSION

Justice Kagan's opinion in *Miller* stands for more than its holding. It prohibits state sentencing schemes that “prevent[] those meting out punishment from considering a juvenile's lessened culpability and greater capacity for change, and run[] afoul of our cases' requirement of individualized sentencing for defendants facing the most serious

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245. See *supra* Part III.A.4 for a discussion of how the individualized sentencing requirements set forth in *Miller* must take into account the juvenile's age and circumstances attendant to their youth.

246. 204 PA. CODE § 303.1(d).

247. *Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012).

248. See *supra* Part III.B for a discussion of the neuropsychological characteristics of youthfulness—including diminished capacity for impulse control, misaligned risk-reward calculus, and poor understanding of future consequences—which underlie the *Miller* decision.

penalties.”<sup>249</sup> States can no longer sentence juveniles in a manner that “proceed[s] as though they were not children.”<sup>250</sup> The current system of sentencing juveniles in Pennsylvania criminal court does just that. It subjects juvenile offenders to the same mandatory minimum statutes as adult offenders, limiting the sentencer’s ability to consider the child’s inherent diminished culpability when making sentencing determinations.<sup>251</sup>

Pennsylvania’s system for sentencing juveniles in adult criminal court violates the Constitution’s Eighth Amendment prohibition of cruel and unusual punishment. In order to comply with *Miller*’s clearly articulated requirements for proportionality and individualized sentencing, Pennsylvania must reexamine its sentencing scheme and incorporate what social scientists have long concluded is special about children—their immaturity, vulnerability, and changeability—into the individual calculation of an appropriate punishment.

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249. *Miller*, 132 S. Ct. at 2460 (internal quotation marks omitted).

250. *Id.* at 2466.

251. See *supra* Part II.B for a discussion of Pennsylvania’s sentencing practices for juveniles tried in adult criminal court.

