

The Role of State Constitutionalism in Determining Juvenile Life Sentences

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ABSTRACT

In Miller v. Alabama, the United States Supreme Court established a sweeping national precedent limiting the imposition of criminal sentences for juvenile offenders. However, it left many nuanced, unanswered questions for the states to resolve. This article uses a survey approach to examine the role of state courts, which employ both federal and state constitutional law, in interpreting and implementing the holding and principles of Miller. This article identifies and discusses the implementation trends among the states post-Miller and explores the role that dialogue between state courts has in resolving questions left open by the U.S. Supreme Court. A wide range of judicial approaches related to the understanding of judicial power in relation to coordinate branches of government is revealed.

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INTRODUCTION

When the United States Supreme Court decides a case, it establishes a legal precedent, but that is only the beginning of the story. This article is about the rest of the story—how lower courts face the task of resolving legal questions unresolved by Supreme Court¹ opinions; opinions which are often vague, overgeneralized, or purposefully limited to address only a portion of the legal issues raised by the parties. Frequently it is left to state supreme courts² to address these unanswered questions. This article focuses on the Supreme Court’s decision in *Miller v. Alabama*,³ which struck down state sentencing statutes mandating life without the possibility of parole for juvenile defendants, and it investigates state responses to the new constitutional guidelines for juvenile life sentences set by the Supreme Court in that case. This article also examines how state supreme courts use state constitutions and principles of judicial federalism to insulate their decisions against further review by the Supreme Court. Indeed, state constitutions and judicial federalism promise to play a crucial role in resolving the questions left open by *Miller*, questions which are particularly salient in light of Justice Kennedy’s retirement.⁴

1. The term “Supreme Court” with both words capitalized refers to the United States Supreme Court throughout the remainder of this Article. Individual state supreme courts will be referred to individually by complete name (e.g. Utah Supreme Court), “Court” within the context of a state case, or state supreme courts collectively.

2. While the court of last resort is not called the supreme court in every state (e.g., New York Court of Appeals is the state court of last resort), to provide uniformity and simplicity throughout this Article, the courts of last resort collectively will be referred to as “state supreme courts.”

3. 567 U.S. 460 (2012).

4. Justice Kennedy provided the pivotal fifth vote in the *Miller* decision, so his departure and confirmation of Justice Kavanaugh as his successor is likely to alter the calculus of parties seeking answers to the legal questions unresolved by *Miller*. One specific instance where this may be particularly important concerns the issue of whether the functional equivalent of life without the possibility of parole sentences are covered within the holding and reasoning of *Miller v. Alabama* (or within the meaning of

In addition to examining state jurisprudence surrounding questions left unanswered by *Miller*, this article discusses how state supreme courts look to one another for answers. This process establishes a dialogue that helps to resolve larger questions left open by the Supreme Court.⁵ In this dialogue, state supreme courts evaluate the reasoning employed by sister state courts in deciding whether to follow the interpretation and holdings of other states.⁶ Part of this dialogue includes a debate over judicial federalism, generated by the fact that the Supreme Court sets only a floor when establishing federal precedent, providing state supreme courts with the freedom to expand rights for defendants on the basis of state constitutional rights. In this dialogue, each court addressing state constitutional arguments must (at least implicitly) consider the tradeoff between the values of uniformity and predictability of federal constitutional law on the one hand,⁷ and on the other hand the values of state flexibility and adaptability to extend additional state constitutional rights⁸ in order to protect vulnerable populations such as juvenile offenders, who have limited recourse to the regular political process.⁹ Thus, the appropriate scope of judicial power is an underlying question confronting state supreme courts interpreting state provisions in light of the *Miller* precedent. Some state supreme courts have construed the judicial role narrowly and followed the desire of the state legislature as closely as possible. Others have chosen to interpret judicial power expansively, extending the protections of *Miller* (or more precisely the reasoning supporting the *Miller* decision) beyond the intentions of their state legislatures. This article examines the role of state constitutions in the interpretation of the Supreme Court ruling in *Miller* and

state constitutional provisions analogous to the 8th Amendment). See *infra* notes 86–112 and accompanying text.

5. For a detailed look at the concept of judicial dialogue, see generally MARK W. DENNISTON, *DIALOGUE AMONG STATE SUPREME COURTS: ADVANCING STATE CONSTITUTIONALISM* (2014).

6. *Id.* at 17–26 (discussing state supreme court citations of other state constitutional decisions as an example of horizontal federalism); see also James N.G. Cauthen, *Horizontal Federalism in the New Judicial Federalism: A Preliminary Look at Citations*, 66 ALB. L. REV. 783 (2003).

7. In other words, one constitutional rule from coast-to-coast based on federal constitutional law. This value is enhanced by accompanying interpretive guidance to state trial and intermediate appellate courts from federal constitutional precedents across the country (by both federal and other state courts), which will also help maintain some measure of consistency with other states.

8. When state supreme courts rely upon state constitutional law as the basis for their opinion, they sacrifice national uniformity, and thus some predictability and consistency in the law, in exchange for the value of more robust and expansive interpretations of rights. Then, the respective state supreme court becomes the “last word” on the new state constitutional standard within that state (so long as the new standard remains above the federal floor established by the U.S. Supreme Court). There may still be some sister state precedents for state intermediate appellate courts and state trial courts to draw upon in the absence of clear answers by their own state supreme court, but typically there are many fewer such precedents as comparatively few state supreme courts choose to go this route. Thus, another drawback is that the lower state courts in these states have a smaller body of persuasive constitutional precedent, as well as legal scholarship, to draw upon in interpreting state constitutional law.

9. See generally the discussion of value of state constitutional law as an additional bulwark of freedom in Justice William Brennan’s seminal 1977 Harvard Law Review article *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489.

the general trends which have emerged in response to the questions left open by the Court with a survey of state court decisions.

Part II of this article summarizes the *Miller* precedent, identifies the questions left unanswered by the Supreme Court, and explains the methodology of measuring the state responses. In Part III, the reactions by state supreme courts to the *Miller* precedent are categorized into three main groups: (1) minimalist responses which attempt to do the least damage to state legislative intent of state sentencing statutes adopted prior to *Miller*, (2) state courts confirming statutory responses by state legislatures to the *Miller* decision, and (3) expansive judicial interpretations, going beyond the holding in *Miller* to answer questions that the Supreme Court left open. These expansive judicial interpretations often rely upon state constitutional provisions to expand the rights of juvenile offenders to either (1) certain types of sentencing hearings before the longest adult sentences may be imposed upon them or (2) to be categorically free from the longest sentences faced by their adult counterparts. Part IV concludes this article by anticipating where legal developments might go in this area of mixed federal and state constitutional law.

I. BACKGROUND

A. *What Miller Did and Did Not Do*

In *Miller v. Alabama* (and its companion case *Jackson v. Hobbs*) the Supreme Court considered the constitutionality of state sentencing schemes that mandated life without the possibility of parole (“LWOP”) for juvenile offenders convicted of murder.¹⁰ Relying upon the reasoning set forth in *Roper v. Simmons*¹¹ and *Graham v. Florida*,¹² the Supreme Court ruled that sentencing juvenile offenders to mandatory LWOP sentences runs afoul of the Eighth Amendment’s prohibition on cruel and unusual punishment.¹³ *Miller* quite clearly did not categorically bar a sentence from being imposed but rather only required that the sentencer¹⁴ have the discretion to consider the factors of youth and impose a sentence based upon all mitigating or aggravating factors.¹⁵ The *Miller* Court noted that both *Roper* and *Graham* had ruled that children are constitutionally different from adults for sentencing and their diminished culpability and greater ability to reform make them less deserving of the most severe punishments.¹⁶ The *Miller* Court also explained that a principle tenet established in *Graham* is the idea that youth is an important consideration when determining the appropriateness of a lengthy sentence and a sentence reasonably imposed on an adult may be

10. 567 U.S. 460 (2012).

11. 543 U.S. 551 (2005).

12. 560 U.S. 48 (2010).

13. *Miller v. Alabama*, 567 U.S. 460, 489 (2012).

14. The sentencer will typically be the trial judge, however, this is not always the case. *See, e.g., infra* section II.B.4. (discussing *State v. Houston*, 353 P.3d 55 (Utah 2015) as an example of a sentencing system where the jury has a role in suggesting a sentence under Utah statute).

15. *Miller*, 567 U.S. at 489.

16. *Id.* at 471.

disproportionate when considering the penological goals of the criminal justice system as applied to juvenile offenders.¹⁷

In *Miller*, the Supreme Court noted that while its ruling relies upon the reasoning employed in *Graham* and *Roper* regarding juvenile development and culpability, the nature of the holding in *Miller* is different. Unlike the previous juvenile offender cases, *Miller* did not categorically bar a sentence from being imposed but rather only required that the sentencer have the discretion to consider the factors of youth and impose a sentence based upon all mitigating or aggravating factors in an individualized sentencing hearing.¹⁸ The *Miller* Court reasoned that while all states allow for some juveniles to be tried as adults, and are therefore subject to adult sentencing laws, there is little evidence that state legislatures believe the juvenile offenders should be subjected to the harshest penalties available to adult offenders.¹⁹ The *Miller* Court observed: “Of the 29 jurisdictions mandating life without parole for children, more than half do so by virtue of generally applicable penalty provisions, imposing the sentence without regard to age.”²⁰ Based upon the generally applicable laws that mandate the imposition of LWOP for juveniles, the Supreme Court reasoned, there was not a clear, deliberate choice by state legislatures showing their endorsement of the sentencing scheme for juveniles.²¹

Another large portion of the reasoning in the *Miller* decision is the Supreme Court’s reliance on medical and social science research.²² This research indicates that the development of the adolescent mind is not complete until the twenties, and this diminishes the culpability and incorrigibility of a juvenile offender.²³ The Supreme Court explained that juvenile sentencing which does not allow for individualized sentencing hearings undermines the four penological goals: retribution, deterrence, incapacitation, and rehabilitation.²⁴ First, the rationale of retribution relies upon the culpability of the offender, which is reduced in a juvenile.²⁵ Second, the deterrence rationale is undermined because the same characteristics of youth that make juvenile offenders less culpable also make them less likely to consider the benefits and costs of the crime.²⁶ Third, the incapacitation inherent in a mandatory LWOP sentence would require the determination that the offender is incorrigible, which scientific data suggests is difficult to predict as a juvenile.²⁷ Fourth, rehabilitation cannot serve as a legitimate justification for an LWOP sentence, as such a sentence necessarily means that there is no

17. *Id.* at 473–74.

18. *Id.* at 480.

19. *Id.* at 486–87.

20. *Id.* at 486.

21. *Id.* at 487.

22. *Id.* at 471–72.

23. *Id.*

24. *Id.* at 472–73.

25. *Id.* at 472.

26. *Id.*

27. *Id.* at 472–73, 479.

opportunity for release and therefore no opportunity for rehabilitation back into the community.²⁸ Thus, the sentencing authority must have the discretion in an individualized sentencing hearing to tailor the punishment to the offender based upon consideration of the mitigating and aggravating factors of the case and the constitutionally recognized attributes of youth applicable to juvenile offenders.²⁹

While the Supreme Court's holding stated that a mandatory sentencing scheme of LWOP for juveniles violates the Eighth Amendment's prohibition against cruel and unusual punishment and the sentencer must "take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison,"³⁰ it did not address many of the questions that this holding would create throughout the states. Some of the questions the states must address following the *Miller* decision include: (a) what is required during the individualized sentencing hearing; (b) whether the protection against mandatory LWOP sentences applies to functionally equivalent sentences (lengthy sentences where juveniles are likely to die in prison before becoming eligible for parole);³¹ and (c) whether the reasoning of *Miller* logically extends beyond its narrow holding to less severe crimes and punishments? Each of these questions has been addressed by state supreme courts in various forms with limited guidance from the Supreme Court. As seen below, these questions and the lack of clarity from the Supreme Court have resulted in wide-ranging decisions by state courts and legislatures.

B. Categorizing State Supreme Court Responses

While there are many possible ways to interpret and categorize state supreme court rulings in response to *Miller*, the survey used in this article reviews and identifies seminal cases from each of the states citing to *Miller*.³² The continuation of case law and legislative action related to juvenile sentencing necessarily means that, while the cases identified within this survey are generally the first state cases dealing with the substantive issues left open by *Miller*, there certainly have been state legislatures or state supreme courts that have subsequently adopted the reasoning identified in these initial cases. A few of these follow-on cases are also discussed.³³

28. *Id.* at 473.

29. *Id.* at 476–77.

30. *Id.* at 480.

31. For instance, in *State v. Null*, the Iowa Supreme Court noted that "[n]either *Roper*, *Graham*, nor *Miller* involved a sentence for a lengthy term of years that was not life without parole." 836 N.W.2d 41, 67 (Iowa 2013).

32. There is continuing evolution of legislative and judicial action surrounding juvenile sentencing following these seminal cases, but the initial survey focused on one of the initial decisions by each state supreme court applying the *Miller* case. See *infra* Table 2.

33. The focus of this article is on decisions by state supreme courts. State intermediate appellate courts (and to a lesser extent state trial courts because trial court rulings are typically not reported/published) also contribute to the work of answering unanswered questions left by the Supreme Court. A few state intermediate appellate court decisions are also included.

Following the identification of the cases for the survey,³⁴ each was divided into one of three categories: (i) minimalist judicial interpretations; (ii) judicial approval of statutory resolutions; or (iii) expansive judicial interpretations.³⁵ Within each group, there are additional sub-categories that serve to refine the understanding of each state supreme court holding and identify trends throughout the nation in response to the *Miller* holding.³⁶ The examination of resolutions within the sub-categories shows that even among states which have adopted similar interpretations of *Miller*, state supreme courts still have reached somewhat varying resolutions to the questions presented.

II. ANALYSIS

A. *Minimalist Interpretations*

Several state supreme courts have chosen to interpret the holding of *Miller* as narrowly as possible while comporting to the literal wording of the decision.³⁷ Under these interpretations, the courts have refused to expansively apply the reasoning of the *Miller* decision and have reasoned that the least amount of damage should be done to the wishes of the legislature while bringing state sentencing into compliance. Within this minimalist interpretation of *Miller*, there are several sub-categories that better identify the rulings of the state supreme courts and their understanding of the *Miller* requirements. Some of these categories are used to resolve questions such as: What is required of the individualized hearing? Does the reasoning of *Miller* apply beyond the strict holding of the case?

1. Preserving the State Sentencing Scheme While Complying with *Miller*

Several state supreme courts resolved the challenge to their state sentencing scheme from the *Miller* decision by simply holding that an individualized

34. The original state supreme court cases were identified using LexisNexis by searching for citations of *Miller v. Alabama* within state decisions. These state supreme court cases were then sorted by date decided and read to identify the cases which provide substantive responses to the questions left open by the Supreme Court holding.

35. After identifying those cases that cited *Miller*, Table 1 was created to show the cases by state. From there, each case was read to determine if other state cases would better fit within the scope of the examination or if the identified case was indeed the best representation for the initial substantive response to *Miller* from that state. Each of the cases were then read and briefed to determine the relevant facts, rule, and holding so that it could be classified. Through those readings, three categories emerged. First, if the state court chose to apply a narrow interpretation of the *Miller* holding to their case, they would fall into the minimalist category since they did not expand the holding of *Miller*. Second, those states that had some form of statutory requirement comporting with *Miller's* requirements (enacted either before the decision or immediately after) were placed into the statutory category. Courts in these cases focused not on interpreting *Miller* but instead on applying the existing state statute. Third, if the state court chose to implement the reasoning of *Miller* beyond its strict holding (or to answer the questions left unanswered by *Miller* in a manner favorable to juvenile offenders), they would fall into the expansive category as they served to expand juvenile sentencing rights beyond *Miller* within their state.

36. See *infra* Table 2

37. See *infra* Table 2.

sentencing hearing must be held to consider the mitigating factors of youth and determine if the crime “[reflects] transient immaturity.”³⁸ In such cases, state supreme courts, concerned with the intent and desire of the state legislature, attempted to mitigate any damage to preexisting sentencing statutes. In several cases, this resulted in state supreme courts attempting to determine the course that the legislature would have taken if the legislature had anticipated the *Miller* holding.³⁹ This can be seen clearly in *People v. Tate*, where the Colorado Supreme Court stated that, based upon the legislative record, if the state legislature had known that mandatory LWOP sentences would be barred, they would have required life with the possibility of parole (“LWPP”).

Several minimalist state supreme courts relied upon the following wording in the *Miller* opinion in attempting to do as little damage to the state sentencing scheme as possible: “[while] we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon . . . we do not foreclose a sentencer’s ability to make that judgment in homicide cases”⁴⁰ Relying on this language, the Illinois Supreme Court declared in *People v. Davis* that the imposition of LWOP sentences was not barred by *Miller*, only that it could not be mandatorily imposed upon juvenile offenders.⁴¹ The Illinois Supreme Court concluded that “[a] minor may still be sentenced to natural life imprisonment without parole so long as the sentence is at the trial court’s discretion rather than mandatory,” and on remand, the trial court is to ensure that the proper sentence is imposed by considering all mitigating factors and possible sentences.⁴²

In *State v. Ali*, the Minnesota Supreme Court held that the imposition of consecutive life sentences, which created a functional LWOP sentence, was outside the scope of *Miller* because the choice by the sentencing judge to impose consecutive sentences was discretionary, not mandatory.⁴³ Additionally, in keeping with the belief in judicial restraint, the Minnesota Supreme Court refused to interpret the Minnesota constitutional provision analogous (and almost identical) to the Eighth Amendment as limiting functionally equivalent sentences.⁴⁴ The defendant made no showing that imposition of consecutive sentences was disproportionate given the gravity of the offense—killing three people in a convenience store robbery.⁴⁵ The Minnesota Supreme Court also stated, in its state

38. See, e.g., *Johnson v. State*, 395 P.3d 1246, 1258 (Idaho 2017).

39. In contrast to actual legislative intent, the state supreme court is engaged in an attempt to predict what the legislature would have intended (i.e., if the legislature had foreknowledge of the *Miller* holding). “We conclude that LWPP is the sentence that the legislature would have imposed had it known that LWOP could be imposed under *Miller* only after individualized sentencing, and that such individualized sentencing could lead to cases in which LWOP is unwarranted.” *People v. Tate*, 352 P.3d. 959, 963 (Colo. 2015).

40. *Miller v. Alabama*, 567 U.S. 460, 479–80 (2012).

41. *People v. Davis*, 6 N.E.3d 709, 718 (Ill. 2014).

42. *Id.* at 723.

43. *State v. Ali*, 855 N.W.2d 235, 258 (Minn. 2014).

44. *Id.*

45. *Id.* at 259.

constitutional analysis, that it would “compare the defendant’s sentence with sentences received by other offenders convicted of the same or similar offenses both inside and outside of Minnesota.”⁴⁶ In making that comparison, the court noted it had already upheld similar consecutive life sentences for double murders, and that the defendant made no showing such sentences are unusual in other states.⁴⁷

Some state supreme courts have elected to provide guidance to trial courts in dealing with the proper method for individualized hearings. For instance, in *Bear Cloud v. State (Bear Cloud II)*, the Wyoming Supreme Court attempted to provide clarity and guidance to lower state courts when it provided a summary of the individual hearing requirements, stating that “*Miller* . . . requires an individualized sentencing hearing for every juvenile convicted of first-degree murder at which the sentencing court must consider the individual, the factors of youth, and the nature of the homicide in determining whether to order a sentence that includes the possibility of parole”⁴⁸ While *Miller* does not mandate that parole is appropriate for each juvenile offender, it does require the sentencing court to meaningfully consider the mitigating factors identified.⁴⁹ *Bear Cloud II* is based upon the idea that, while bringing the state into compliance with *Miller*, it is the judiciary’s role to preserve as much of the legislative intent as possible. The Wyoming Supreme Court asserted, “[W]e must provide guidance to the district courts that will face sentencing issues on remand in this case and in other pending cases, at least until the Legislature amends the sentencing scheme for juveniles in Wyoming to accord with *Miller* and other Eighth Amendment jurisprudence.”⁵⁰ It then proceeded to spell out seven juvenile sentencing factors for trial courts to consider when choosing between LWOP and LWWP based on language in the *Miller* decision.⁵¹

2. Judicial Modification of State Statutes to Comply with *Miller*

While some courts have found no need to judicially modify state statutes if an individualized sentencing hearing is held, others have had to judicially modify or strike down portions of their state sentencing scheme to comply with *Miller*. In several of these cases, the issue before the state supreme courts was the state parole statutes, which often precluded those serving life sentences from parole eligibility. In *Parker v State*, the Mississippi Supreme Court held that an individualized hearing must take place to determine if the juvenile offender should be exempted from the statutory bar against parole, or whether the

46. *Id.*

47. *Id.* (citing MINN. CONST. art. I, § 5).

48. *Bear Cloud v. State*, 294 P.3d 36, 47 (Wyo. 2013). For clarity’s sake, it should be noted that two *Bear Cloud* cases are discussed in this article. This case is known as *Bear Cloud II*, since it is the follow up to the earlier *Bear Cloud v. State*, 275 P.3d 377 (Wyo. 2012) (*Bear Cloud I*). *Bear Cloud III* is an expansive case discussed in section II.C of this article.

49. *Id.*

50. *Id.* at 45.

51. *Id.* at 47.

prohibition of parole is in the best interest of justice and state penological goals.⁵² In *Jackson v. Norris*, the Arkansas Supreme Court examined and reevaluated the sentencing scheme under which juveniles could be sentenced.⁵³ Under Arkansas's sentencing scheme at the time of *Miller*, those convicted of capital murder were required to receive either death or LWOP, both of which are prohibited by *Roper* and *Miller*, respectively.⁵⁴ The Arkansas Supreme Court ruled that once the unconstitutional portions were severed, the remaining statutory provisions provide that capital murder is a Class Y felony.⁵⁵ By leaving the punishment section intact with the remainder of the statute, the court ensured that "the sentence is not a mandatory sentence of life imprisonment without parole, but instead a discretionary sentencing range of not less than ten years and not more than forty years, or life."⁵⁶

B. Statutory Resolutions

What distinguishes this category from the minimalist decisions discussed above is that the cases in this category involve statutory sentencing or parole systems not covered by the *Miller* holding. Many of these statutory systems were adopted by state legislatures adjusting their state statutes either shortly before the decision in *Miller* or after the *Miller* decision was handed down. The respective state supreme courts then confirmed the statutory system following the *Miller* decision. The overall range of resolutions brought forward by state legislatures include: parole possibilities under the state statute; multiple sentencing options left to the discretion of the sentencing judge; requirement of an individualized hearing prior to sentencing; and requirement that juries provide sentencing recommendations to the sentencing judge. Each of these statutory resolutions represents a statutory system in compliance with *Miller* while fulfilling the penological goals of retribution, deterrence, incapacitation, and rehabilitation.

1. Parole Possible

Several state statutes give prisoners the possibility of meaningful release through their parole systems. State statutes allowing for the possibility of parole grant juvenile offenders the opportunity to show that they have matured and are rehabilitated from their crimes. *State v. Brown* is a clear example.⁵⁷ The constitutional issue in *Brown* centered on the sentence given to a thirteen year-old girl found guilty of murdering the victim while attempting to steal his car.⁵⁸ The defendant received a hard twenty-year sentence for the first-degree felony murder.⁵⁹

52. *Parker v. State*, 119 So. 3d 987 (Miss. 2013).

53. *Jackson v. Norris*, 426 S.W.3d 906 (Ark. 2013).

54. *Id.* at 908–09.

55. *Id.* at 910.

56. *Id.* at 911 (quoting ARK. CODE ANN. § 5-4-401(a)(1) (Repl. 1997)).

57. *State v. Brown*, 331 P.3d 781 (Kan. 2014).

58. *Id.* at 785.

59. *Id.* at 796.

When the case reached the Kansas Supreme Court, the defendant argued the imposition of the mandatory twenty-year sentence was a violation of the *Miller* holding because it prevented the sentencing court from taking into account the age of the offender.⁶⁰ In rejecting this argument, the court stated the imposition of the hard twenty-year sentence did not run afoul of *Miller*, as it provided the meaningful opportunity for release after serving the minimum required twenty-year sentence if there was demonstrated rehabilitation of the defendant during that time.⁶¹

2. Multiple Sentencing Options and Discretionary Sentences

Some states have made the imposition of LWOP sentences completely discretionary, thus eliminating the conflict with *Miller* while ensuring that the mitigating factors identified in *Miller* are given full weight and consideration before imposition. For instance, in Michigan, a statutory resolution adopted in response to *Miller* allows for the imposition of other mandatory sentences less than a life sentence, while permitting the prosecution to request an LWOP sentence. This type of sentencing is discussed in *People v. Carp*, in which the Michigan Supreme Court noted that its sentencing statute requires that the court impose a sentence not less than twenty-five years but not more than sixty years.⁶² If, however, the prosecution seeks an LWOP sentence, there must be a hearing to consider the factors outlined in *Miller* before the imposition of the sentence.⁶³ This style of sentencing ensures that there are no *Miller* issues with the statute itself because there is no possibility for a mandatory LWOP sentence; however, it also allows for the *Miller* considerations to be fully considered if there is a request that an LWOP sentence is given.

Another notable method of discretionary sentencing authorized by state legislatures is the ability of sentencing judges to suspend any portion of the sentence they believe best serves the interests of justice. For instance, in *Jones v. Commonwealth*,⁶⁴ the defendant pled guilty to capital murder and received a LWOP sentence. The defendant argued his sentence was unconstitutional because the state sentencing scheme did not allow for the judge to consider mitigating circumstances.⁶⁵ The Virginia Supreme Court, however, ruled that under Virginia Code statute 19.2-303 the sentencing judge could suspend all or part of the life sentence.⁶⁶ Further, the Virginia Supreme Court explained that the Virginia Legislature amended the state code following the decision in *Miller* to clarify the meaning of “mandatory minimum” where it is included in the state code. The Virginia Supreme Court ruled that, before the sentencing of Jones, the penalties for a Class I felony in the state code did not include the term “mandatory minimum,” and it had not been added at any point since. Thus, the sentence given to

60. *Id.*

61. *Id.* at 797.

62. *People v. Carp*, 852 N.W.2d 801, 812 (Mich. 2014).

63. *Id.*

64. 763 S.E.2d 823 (Va. 2014).

65. *Id.* at 823.

66. *Id.* at 824–26.

Jones was not mandatory, as the judge had the discretion to suspend the sentence, and his LWOP sentence was not covered by the protections presented in *Miller*.⁶⁷

3. Statute Requires Individualized Hearing

In response to *Miller*, several state legislatures chose to incorporate an individualized hearing requirement into their state sentencing schemes. While some state supreme courts have not provided specific information that should be considered before sentencing, other courts and legislatures have chosen to address this issue and provide clarification to lower courts for future sentencing hearings. A notable case addressing this issue is *State v. Castaneda*, which focused not only on the factors that should be considered during the sentencing hearing, but also on factors that should influence parole hearings within the state.⁶⁸ In addressing the requirements of *Miller*, the Nebraska legislature enacted Nebraska statute 28-105.02, which requires a juvenile offender convicted of a Class IA felony to be sentenced to not less than forty years and not more than life.⁶⁹ To decide the proper sentence, the court must consider the mitigating factors which led to the commission of the crime, a partial list of which is included in the revised statute.⁷⁰

In addition to the partial list of mitigating factors, the state legislature also addressed factors for the parole board's consideration when juvenile offenders request parole. Under Neb. Rev. Stat. § 83-1, 110.04 (Supp. 2013), a juvenile offender must be considered for parole each subsequent year if initially denied parole.⁷¹

67. *Id.* at 826.

68. 842 N.W.2d 740 (Neb. 2014).

69. *Id.* at 759.

70. While the list of possible mitigating circumstances is not exhaustive, the statute lists some of the factors to be considered, including:

- (a) The convicted person's age at the time of the offense;
- (b) The impetuosity of the convicted person;
- (c) The convicted person's family and community environment;
- (d) The convicted person's ability to appreciate the risks and consequences of the conduct;
- (e) The convicted person's intellectual capacity; and
- (f) The outcome of a comprehensive mental health evaluation of the convicted person conducted by an adolescent mental health professional licensed in this state

NEB. REV. STAT. § 28-105.02 (Supp. 2013).

71. Under the statute, the parole board must consider, at a minimum:

- (a) The offender's educational and court documents;
- (b) The offender's participation in available rehabilitative and educational programs while incarcerated;
- (c) The offender's age at the time of the offense;
- (d) The offender's level of maturity;
- (e) The offender's ability to appreciate the risks and consequences of his or her conduct;
- (f) The offender's intellectual capacity;
- (g) The offender's level of participation in the offense;
- (h) The offender's efforts toward rehabilitation; and
- (i) Any other mitigating factor or circumstance submitted by the offender.

These changes to the state parole system serve to offer juvenile offenders more opportunity for release, based upon the Supreme Court's recognition that juveniles have a greater "capacity for change."⁷² Thus, the Nebraska legislature embraced the idea that children are fundamentally different from adults when it comes to sentencing.

The Nebraska legislature endeavored to provide uniform guidance to courts and parole boards across the state to address the individualized hearing requirements established by *Miller*. By providing an outline of factors, the Nebraska legislature provided the groundwork for the even application of individualized hearings and sentencing that serves the best interest of justice for the state, the victim, the victim's family members, and the offender.

4. Jury Makes Sentencing Recommendation

Another statutory resolution that has been interpreted to comply with *Miller* allows the jury to hear the mitigating and aggravating evidence and then recommend a sentence to the judge.⁷³ The judge uses the information from the hearing, along with the jury recommendations, and imposes a sentence on the offender. This sentencing process complies with *Miller* by giving the judge discretion to impose a sentence based upon the recommendation of local citizens and the evidence presented during the sentencing hearing.

In *State v. Houston* the Utah Supreme Court upheld the defendant's LWOP sentence for the rape and murder of a female staff member working at the youth treatment center where the defendant had been committed for prior sexual assaults.⁷⁴ In upholding the sentence, the Utah Supreme Court distinguished the Utah sentencing scheme from a mandatory scheme because "[i]t subjects all defendants guilty of aggravated murder to a jury's determination of what sentence is most 'appropriate' given the particular circumstances of each case."⁷⁵ Because the jury is required to review any mitigating factors presented and then decide the best sentence for the case at hand, any LWOP sentence that is imposed is at the discretion of the sentencing jury.⁷⁶

The Utah Supreme Court relied heavily upon the Supreme Court's idea of proportionality and the narrow holding of the *Miller* decision.⁷⁷ In discussing the

NEB. REV. STAT. § 83-1, 110.04 (Supp. 2013).

72. *Graham v. Florida*, 560 U.S. 48, 68, 74 (2010).

73. *See, e.g., Luna v. State*, 387 P.3d 956, 961–62 (Okla. Crim. App. 2016).

74. *State v. Houston*, 353 P.3d 55, 62, 87 (Utah 2015). It should be noted here that the statute analyzed in *Houston* was in place well before *Miller* and the Utah legislature subsequently modified the relevant statute prior to *Miller* being decided. *See id.* at 65 n.55 and accompanying text. The *Houston* case illustrates the role of state statutes providing discretion to the jury as sentencer and is a particularly interesting case given the substantial state constitutional arguments made by the concurring and dissenting opinions.

75. *Id.* at 71.

76. *Id.* at 75.

77. *Id.* at 73–75.

Miller opinion, the Utah Supreme Court focused on the idea that the Supreme Court did not categorically bar the imposition of LWOP sentences for juveniles, and while the occasion would be rare, there are “appropriate occasions” for the imposition of such a harsh penalty.⁷⁸ The Utah Supreme Court further observed that under the Utah statute then applicable for juvenile offenders, “[there is a] presumptive sentence of twenty years [and] LWOP may be imposed only if ten or more jurors agree it is appropriate.”⁷⁹ The sentencing statute relied upon complete jury discretion for the imposition of an LWOP sentence, based upon the facts of the individual case.⁸⁰ The Utah Supreme Court ultimately ruled the LWOP sentence was proportional to the crime and was in violation of neither the Eighth Amendment nor Article I, Section 9 of the Utah Constitution.⁸¹

The Utah Supreme Court emphasized it was not the only state supreme court to reach this conclusion and explained that a large majority of the states authorized the imposition of LWOP sentences for juveniles convicted of murder prior to the *Miller* decision.⁸² The Utah Supreme Court justified its conclusion regarding societal standards—applying the Supreme Court’s “evolving standards of decency” test for alleged Eighth Amendment violations—by observing that “[a]s of 2010, thirty-nine states allowed such sentences while only six jurisdictions affirmatively prohibited them.”⁸³ Thus, the Utah Supreme Court demonstrated that societal consensus has not moved to a categorical prohibition on LWOP sentences for juveniles convicted of homicide.⁸⁴

Unlike Utah, the Oklahoma Court of Criminal Appeals in *Luna v. State* provided additional guidance to Oklahoma trial courts by providing a sample jury instruction addressing the individualized sentencing requirements outlined in *Miller*:

Under the law of the State of Oklahoma, every person found guilty of murder in the first degree shall be punished by imprisonment for life without the possibility of parole, or imprisonment for life with the possibility of parole.

You are further instructed that the defendant was a juvenile when this crime was committed. The law regards juvenile offenders generally as having lesser

78. *Id.* at 75 (quoting *Miller v. Alabama*, 567 U.S. 460, 479 (2012)).

79. *Id.*

80. *Id.*

81. *Id.* at 76–77. However, the dissenting opinion heavily criticized the holding on state constitutional grounds, asserting that “[b]oth the extreme infrequency of a juvenile LWOP sentence in Utah and global rejection of permanent incarceration for crimes committed before adulthood confirm my independent assessment that juvenile LWOP is cruel and unusual under the Utah Constitution.” *Id.* at 130 (Durham, J., dissenting). The concurring opinion, on the other hand, rejected even the premise of proportionality review under the Utah Constitution. “[T]he Cruel and Unusual Punishments Clause of the Utah Constitution bars only those methods of punishment that are ‘cruel’ in the sense of being barbaric or torturous and ‘unusual’ in the sense of being contrary to law and longstanding practice. Houston’s state constitutional claim fails under this standard.” *Id.* at 113 (Lee, J., concurring).

82. *Id.* at 75.

83. *Id.* at 76.

84. *Id.*

moral culpability and greater capacity for change than adult offenders. An offender's youth matters in determining the appropriateness of the sentence in this case.

You are therefore instructed to consider, in determining the proper sentence, whether the defendant's youth and youth-related characteristics, as well as any other aggravating and mitigating circumstances, and the nature of the crime, reflect the defendant's transient immaturity as a juvenile; or, on the other hand, irreparable corruption and permanent incorrigibility.

No person who committed a crime as a juvenile may be sentenced to life without the possibility of parole unless you find beyond a reasonable doubt that the defendant is irreparably corrupt and permanently incorrigible.⁸⁵

By providing a model instruction which addresses the basic tenants of *Miller's* requirements, the Oklahoma Court of Criminal Appeals provided a framework that can be adopted by the state and trial courts to conform to the specific cases and facts that they are faced with in future cases.

C. Expansive Interpretations

While many state supreme courts and legislatures have chosen to limit the impact of *Miller* on their state sentencing schemes, some state supreme courts have chosen to expand the protections and requirements far beyond the Supreme Court's juvenile jurisprudence. These state supreme courts purport to extend the trend they perceive developing across the Supreme Court cases of *Roper*, *Graham*, and *Miller*. Additionally, unlike many of the cases from the minimalist and statutory categories, the courts in the expansive category are willing to overturn legislative decisions and intent when legislative decisions run contrary to the state supreme court's interpretation of *Miller* or their interpretation of state constitutional provisions analogous to (and frequently almost textually identical to) the Eighth Amendment's Cruel and Unusual Punishment Clause.⁸⁶ This willingness creates the opportunity for state supreme courts to have a much larger impact on the overall discussion of *Miller* than those in the other categories which are more willing to defer to their legislatures.

The expansive interpretations are unique and merit discussion for several reasons. First, the cases use *Miller's* comparatively broad reasoning (as contrasted with its relatively narrow holding) to justify the expansion of protections beyond those of other states or the federal government. Second, many of the expansive cases rely heavily on other state supreme court decisions to better explain the social trends which led to the expanded protection. Finally, the expansive courts all express the idea that their judicial role is to protect the rights of their citizens rather than deferring all judgment to state legislatures. When taken together, these decisions have far-reaching implications on state sentencing schemes and have a

85. *Luna v. State*, 387 P.3d 956, 963 (Okla. Crim. App. 2016).

86. *See infra* Table 2.

greater impact on the national discussion regarding the implementation of *Miller* than those cases conforming to the minimalist and statutory approaches. Juveniles in these states either face shorter sentences or, at a minimum, the opportunity to demonstrate their rehabilitation to the parole board and ultimately the chance at release and reentry into society prior to dying in prison. These states embrace the potential for rehabilitation of youthful offenders following even the most serious and heinous crimes.

1. Sentences Functionally Equivalent to LWOP Are Unconstitutional

One of the significant questions left open in the *Miller* opinion is the constitutionality of sentences functionally equivalent to LWOP sentences. This is a matter which was not addressed by the *Miller* Court, which only ruled the imposition of a mandatory LWOP sentence was a violation of the Eighth Amendment. Several state supreme courts were presented with the issue of whether sentences functionally equivalent to LWOP violate either the Eighth Amendment or their state constitutions following the decision in *Miller*. Each of the state supreme courts which ruled that functionally equivalent sentences are constitutionally prohibited created a slightly different definition of what constitutes a “functionally equivalent sentence,” but they shared a basic premise: such sentences are barred when applying the principles elucidated in *Graham* and *Miller*. While relying upon the reasoning in the *Graham* and *Miller* opinions, several of these state supreme courts chose to resolve the question on the basis of their respective state constitutions, allowing the state supreme courts to grant further protection to juvenile offenders. Relying on state constitutional grounds also insulated their decisions from further Supreme Court review.⁸⁷ Additionally, the states which granted *Miller* or state constitutional protection to functionally equivalent sentences relied heavily upon one another for the reasoning and constraints of these new protections, illustrating support of the dialogue theory of communication and reliance among state supreme courts.⁸⁸

The Iowa Supreme Court is one example of a state court expanding the constitutional protections beyond the holding of *Miller* to cover functionally equivalent sentences.⁸⁹ Following *Miller*, Denem Null argued to the Iowa Supreme Court that serving 52.5 years of his sentence before being eligible for parole equated to a de facto LWOP sentence, thereby violating the underlying principle of *Miller* and the other juvenile sentencing cases.⁹⁰ To support this claim, Null introduced data from the National Vital Statistics Report showing that the average additional life expectancy for his demographic is 51.7 years—less than his mandatory

87. See Brennan, *supra* note 9, at 501 (discussing how state constitutional decisions are outside the jurisdiction of the Supreme Court); DENNISTON, *supra* note 5, at 2–3 (discussing how this would specifically work regarding juvenile sentencing issues); *Michigan v. Long*, 465 U.S. 1032 (1983).

88. See *supra* notes 5–9.

89. *State v. Null*, 836 N.W.2d 41 (Iowa 2013).

90. *Id.* at 50.

minimum sentence of 52.5 years.⁹¹ In other words, he was statistically likely to die in prison before becoming eligible for parole; thus his sentence for a term of years was the functional equivalent of a life without possibility of parole sentence. Additionally, he argued “even if he were to live to be paroled, release when he is elderly and infirm to die on the streets after spending all his adult years in prison would be little, if at all, better than dying in prison.”⁹² Under this rationale, Null argued that before imposing a sentence mandating a juvenile offender to spend most, if not all, of his life in prison without the possibility of parole, there must be the same considerations for youth and immaturity that are required for the imposition of a true LWOP sentence.⁹³

In ruling that functionally equivalent sentences must be given the same protections as granted under *Miller* to formal LWOP sentences, the Iowa Supreme Court relied heavily upon the reasoning contained in the evolving jurisprudence of juvenile sentencing from the Supreme Court.⁹⁴ The Iowa Supreme Court pointed to the same social science research relied upon by the Supreme Court in *Roper*, *Graham*, and *Miller* showing that juvenile offenders have diminished culpability based upon the transient features of immaturity.⁹⁵ Along with the mitigating factors of youth, the Iowa Supreme Court discussed the penological goals of juvenile detention and the increased ability for change in juveniles compared to their adult counterparts.⁹⁶ The Iowa Supreme Court argued that the reasoning of the three Supreme Court cases rationally extends beyond merely the holdings of these cases: the notion that the reasoning of *Roper* was limited to death penalty cases was proven wrong in *Graham*, and the notion that *Graham's* reasoning was limited to non-homicide cases was proven wrong in *Miller*.⁹⁷ Further, the Supreme Court in *Miller* specifically declared that what it said about juveniles in *Roper*, *Graham*, and *Miller* is “not crime-specific.”⁹⁸ This understanding led the Iowa Supreme Court to conclude the imposition upon a juvenile of even a sentence functionally equivalent to an LWOP sentence must be accompanied by a consideration of the mitigating factors of youth. Mandatory imposition of sentences functionally equivalent to LWOP runs afoul of the penological goals of juvenile detention.⁹⁹

Ultimately by relying on the Iowa Constitution, the Iowa Supreme Court held that an individualized sentencing hearing must occur before the imposition of any sentence that could be considered functionally equivalent to an LWOP sentence.¹⁰⁰ This includes those sentences that, although they may not result in the

91. *Id.* at 51.

92. *Id.*

93. *Id.*

94. *Id.* at 60–70.

95. *Id.* at 61.

96. *Id.* at 63, 65.

97. *Id.* at 67.

98. *Id.* at 68.

99. *Id.* at 67–68.

100. *Id.* at 76–77.

offender dying in prison, would result in a geriatric release for the juvenile with no skills or prospect of a productive life.¹⁰¹ The Iowa Supreme Court was careful to limit its ruling in the case. It refused to consider whether the implications of the reasoning in the *Roper*, *Graham*, and *Miller* line of cases might in a future case require a categorical ban on LWOP or functionally equivalent sentences.¹⁰² The court also refused to address the constitutionality of all mandatory imposition of adult sentences on juveniles for any level of crime.¹⁰³ Instead, the Iowa Supreme Court simply required a resentencing for Denem Null.¹⁰⁴

Following the *Null* decision, other state supreme courts looked to the Iowa Supreme Court's reasoning when confronted with similar questions. For instance, in *Bear Cloud v. State (Bear Cloud III)*, the Wyoming Supreme Court drew heavily upon the reasoning in *Null*.¹⁰⁵ However, the Wyoming Supreme Court observed that unlike *Null*, the defendant in *Bear Cloud III* did not raise the issue of increased sentencing protection under the Wyoming Constitution, therefore the Wyoming Supreme Court based its decision upon the protections guaranteed under the Eighth Amendment.¹⁰⁶

Although the court in *Null* granted individualized sentencing protection under the Iowa Constitution for juvenile offenders facing the functional equivalent of an LWOP sentence, the Wyoming Supreme Court reached the same holding without invoking the protection of its state constitution.¹⁰⁷ While it is unclear if additional protection would have been granted under the Wyoming Constitution had state constitutional arguments been preserved at trial and briefed on appeal, the court in *Bear Cloud III* explicitly stated that the reasoning used in *Null* was persuasive.¹⁰⁸ The Wyoming Supreme Court's treatment of persuasive state constitutional reasoning from the Iowa Supreme Court shows the potential for the expansion of protection under *both* the federal and state constitutions if there is an open dialogue among states regarding constitutional reasoning.¹⁰⁹

101. *Id.* at 71.

102. *See id.* at 76; *but see infra* notes 135–47 and accompanying text (discussing *State v. Sweet*, where the Iowa Supreme Court later imposes a categorical ban on life without parole sentences for juvenile offenders).

103. *See Null*, 836 N.W.2d at 76.

104. *Id.* (“[U]nder article I, section 17 of the Iowa Constitution, this case must be remanded to the district court for resentencing in light of the requirement of *Miller* that the district court consider all that was said in *Roper* and its progeny about the distinctive qualities of youth.”).

105. *See Bear Cloud v. State (Bear Cloud III)*, 334 P.3d 132, 142 (Wyo. 2014) (quoting *Null*, 836 at 71–72). Please recall that *Bear Cloud III* is the follow-up to *Bear Cloud v. State (Bear Cloud I)*, 275 P.3d 377 (Wyo. 2012) and *Bear Cloud v. State (Bear Cloud II)*, 294 P.3d 36 (Wyo. 2013), the latter of which is discussed *supra* section II.A.

106. *See Bear Cloud III*, 334 P.3d at 137.

107. *See id.*

108. *Id.* at 142.

109. Of course, the Supreme Court may effectively end such expansion dialogue at the federal level if it squarely addresses and resolves an issue under the U.S. Constitution, but even then, the dialogue among states will go on for those state supreme courts which have shown a willingness to entertain state constitutional arguments by the parties. *Bear Cloud III* illustrates the importance of both the receptiveness of a state supreme court to consider state constitutional arguments and the need,

Bear Cloud III is an important case for a second reason. Following *Bear Cloud III* there is both the relatively vague federal precedent of *Miller*, which does not explicitly address the issue of the constitutionality of sentences functionally equivalent to LWOP sentences, and the state precedent of the *Bear Cloud III* decision which does specifically address that issue under the Eighth Amendment (albeit partially justified by reliance upon state constitutional jurisprudence from other states). What happens if the Supreme Court ultimately clarifies its *Miller* decision to specifically hold the Eighth Amendment should be narrowly construed as only addressing formal LWOP sentences? The replacement of Justice Kennedy may make this scenario more likely since he was the pivotal fifth vote in each of the *Roper*, *Graham*, and *Miller* line of cases that recently expanded the scope of the Eighth Amendment. Then the Wyoming Supreme Court will be confronted with a choice of whether to follow that hypothesized future Supreme Court precedent controlling on Eighth Amendment grounds, or the reasoning of its own state precedent. Will the Wyoming Supreme Court acknowledge that technically its *Bear Cloud III* precedent has been overruled by the Supreme Court, or will it continue to embrace the reasoning it has already found persuasive and rule that its *Bear Cloud III* decision should continue to be followed, but on the basis of state constitutional law instead of the Eighth Amendment? Indeed, the Wyoming Supreme Court will have good company if it finds itself facing this not-improbable dilemma. Recently, the issue of functionally equivalent sentences was presented to the Supreme Court following Wyoming's decision in *State v. Sam*.¹¹⁰ The petition for certiorari in *Wyoming v. Sam* noted that “[o]f the sixteen state supreme courts to consider the constitutionality of functional or de facto life sentences, seven have extended *Miller* to prohibit a sentence for a juvenile that those courts deem tantamount to life without parole. Nine have not.”¹¹¹ Those seven states that have extended *Miller* to functional equivalent sentences may soon confront a choice. These state supreme courts may choose to follow the anticipated future precedent of a more conservative Supreme Court's clarification or narrowing of *Miller*. Or these state supreme courts may choose to follow their own state's precedent based on the authority of their state constitutions which may be interpreted more broadly than the Eighth Amendment.¹¹²

specifically for defendants, to preserve, develop, and then brief state constitutional arguments for state constitutional law to develop.

110. 401 P.3d 834 (Wyo. 2017), *cert. denied*, 138 S. Ct. 1988 (2018).

111. Petition for Writ of Certiorari at 3, *Wyoming v. Sam*, 138 S. Ct. 1988 (2018) (No. 17-952).

112. See DENNISTON, *supra* note 5, at 135–40, for greater discussion of how this type of dilemma of conflicting precedent impacts state supreme court decision-making. In short, state supreme courts often chose to prefer their own precedents (sometimes previously made on federal grounds, sometimes on unclear or potentially mixed grounds) to those of subsequent Supreme Court precedent, preserving their earlier state precedents on state constitutional grounds. The Minnesota Supreme Court is one state supreme court, for example, that has considered such arguments comparing state precedent and subsequent Supreme Court precedent that narrows the scope of rights available. See Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865 (2007).

2. All Mandatory Sentences for Juveniles Are Unconstitutional

Moving beyond the narrow holding of *Miller*, the Iowa Supreme Court expanded the prohibition of mandatory minimum sentences to cover the entire range of juvenile crimes.¹¹³ In *State v. Lyle*, the Iowa Supreme Court declared that the imposition of any mandatory sentence for juveniles is a violation of the Iowa Constitution.¹¹⁴ Building upon the Supreme Court decisions in *Roper*, *Graham*, and *Miller*, along with the Iowa Supreme Court's earlier decision in *Null*, the Iowa Supreme Court argued¹¹⁵ in *Lyle* that even if there is not yet a national consensus against mandatory juvenile sentences, "consensus is certainly building in Iowa in the direction of eliminating mandatory minimum sentencing."¹¹⁶ The Iowa Supreme Court reasoned that age and the factors of youth are things which courts can no longer "overlook" for the whole range of juvenile crimes.¹¹⁷ "*Miller* is properly read to support a new sentencing framework that reconsiders mandatory sentencing for all children."¹¹⁸ The Iowa Supreme Court clarified, however, that "while youth is a mitigating factor in sentencing, it is not an excuse."¹¹⁹ The overall purpose of the holding in the case and the continued constitutional analysis of juvenile sentencing schemes is not about attempting to excuse the actions of juveniles, but "imposing punishment in a way that is consistent with our understanding of humanity today."¹²⁰

The Iowa Supreme Court in *Lyle* also examined the penological goals underlying juvenile sentencing, resting its ruling heavily on the Supreme Court's arguments¹²¹ against deterrence as an effective goal for juvenile sentences. The Iowa Supreme Court reasoned that juveniles often do not conduct the kind of

113. *State v. Lyle*, 854 N.W.2d 378, 400 (Iowa 2014).

114. *Id.*

115. We use "argue" in the context of a dialogue between state supreme courts (horizontal federalism). State supreme courts make a ruling and establish a holding generally for their own jurisdiction, and certainly for the parties in the case. However, this article is more interested in the discussion between and across state supreme courts, where state court opinions are not binding upon other states, but the reasoning employed in a specific state supreme court decision may very well be persuasive to another state supreme court addressing that or similar issues. See DENNISTON, *supra* note 5, at 11–27.

116. *Lyle*, 854 N.W.2d at 389.

117. *See id.* at 401–02.

118. *Id.* at 402.

119. *Id.* at 398 (quoting *State v. Null*, 836 N.W.2d 41, 75 (Iowa 2013)).

120. *Id.*

121. "Arguments" here is used in the sense of vertical federalism. The *Miller* opinion is binding upon the states only in so far as the Supreme Court imposes the Eighth Amendment upon them. When, however, a state supreme court is considering expanding rights under their respective state constitutions, as the Iowa Supreme Court was doing in *Lyle*, the U.S. Supreme Court decision is only *persuasive* regarding that expansion (i.e., the extent to which a state court might go beyond the actual holding of *Miller*). The Iowa Supreme Court was considering using the rationale provided by the U.S. Supreme Court—rather than the specific, narrow holding in *Miller*—and extending that reasoning to its logical conclusion to justify the conclusion it reached in *Lyle*. *State v. Lyle*, 854 N.W.2d 378, 399 (Iowa 2014) (quoting *Roper v. Simmons*, 543 U.S. 551, 571 (2005)).

cost-benefit analysis that would deter them from committing crimes.¹²² The Iowa Supreme Court also concluded that the imposition of a lengthy mandatory sentence runs counter to the idea that juveniles have a greater capacity for reform.¹²³ Thus sentencing judges must consider the mitigating factors for each juvenile offender before imposition of a sentence, regardless of the crime committed.¹²⁴ The Iowa Supreme Court summarizes the overarching logic of the opinion by stating, “[t]he keystone of our reasoning is that youth and its attendant circumstances and attributes make a broad statutory declaration denying courts [the discretion to consider these factors] categorically repugnant to article I, section 17 of our constitution.”¹²⁵

3. LWOP Categorically Barred for Juvenile Offenders

In perhaps the most expansive response to *Miller*, two states, relying upon state constitutional provisions, chose to categorically ban the imposition of LWOP sentences on juveniles. These cases represent an expansion of the reasoning employed in *Miller* reaching far beyond the facts and holding of that opinion. Using the evolving standard of juvenile sentencing jurisprudence from the Supreme Court, along with the state understanding of penological goals for juvenile detention, these courts categorically eliminated LWOP sentences for juvenile offenders. While the Iowa Supreme Court in *State v. Sweet*¹²⁶ worked toward this result based upon prior juvenile cases, the Supreme Judicial Court of Massachusetts in *Diatchenko v. District Attorney for the Suffolk District*, based its decision upon death penalty jurisprudence and other adult sentencing decisions absent prior state decisions regarding *Miller*.¹²⁷

In *Diatchenko*, the issue involved the proportionality of the sentence and whether it violated the cruel and unusual punishment section of the Massachusetts Constitution. The Supreme Judicial Court of Massachusetts considered the sociological and neurological evidence presented in *Miller* regarding the culpability of juvenile offenders.¹²⁸ When the Supreme Judicial Court of Massachusetts reviewed this evidence it concluded:

Given current scientific research on adolescent brain development, and the myriad significant ways that this development impacts a juvenile’s personality and behavior, a conclusive showing of traits such as an ‘irretrievably depraved character’ can never be made, with integrity, by the Commonwealth at an individualized hearing to determine whether a sentence of life without parole should be imposed on a juvenile homicide offender. Simply put, because the

122. *Id.*

123. *Id.*

124. *Id.* at 401–02.

125. *Id.* at 402–03.

126. 879 N.W.2d 811 (Iowa 2016).

127. See *Diatchenko v. Dist. Att’y for Suffolk Dist.*, 1 N.E.3d 270, 283 (Mass. 2013).

128. *Id.* at 283–84.

brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved.¹²⁹

The Supreme Judicial Court of Massachusetts took great care to identify the Supreme Court's understanding that juveniles are constitutionally different from adults, regardless of the crime committed.¹³⁰

While Supreme Court precedent helped guide the decision in *Diatchenko*, ultimately the Supreme Judicial Court of Massachusetts determined the most important consideration to be the Massachusetts Constitution, which requires "that criminal punishment be proportionate to the offender and the offense."¹³¹ Based upon the proportionality requirement under the Massachusetts Constitution, the imposition of a discretionary LWOP sentence is a violation of the cruel or unusual punishment clause of Article 26.¹³² This unconstitutionality is not based upon the length of the sentence itself, but from the absolute denial of any chance at parole.¹³³ The Supreme Judicial Court of Massachusetts concluded that, "[g]iven the unique characteristics of juvenile offenders, they should be afforded, in appropriate circumstances, the opportunity to be considered for parole suitability."¹³⁴

In *State v. Sweet*, the Iowa Supreme Court also held that the imposition of a juvenile LWOP sentence was a violation of its state constitution.¹³⁵ The Iowa Supreme Court reached this conclusion by extending the reasoning of its previous cases, *Null* and *Lyle*, as well as extending the reasoning and evidence presented in *Roper*, *Graham*, and *Miller*.¹³⁶ The Iowa Supreme Court asserted that the reasoning of these previous decisions is only a starting point:

[T]he rulings of the United States Supreme Court create a floor, but not a ceiling, when we are called upon to interpret parallel provisions of the Iowa Constitution. In interpreting provisions of the Iowa Constitution, we may find federal authority persuasive, but it is certainly not binding. In the development of our own state constitutional analysis, we may look to decisions of the United States Supreme Court, dissenting opinions of the Supreme Court, cases from other states, and other persuasive authorities.¹³⁷

The Iowa Supreme Court was careful to note that in the prior cases, it had never addressed the larger issue of a categorical ban on LWOP sentences, and

129. *Id.* (citations omitted).

130. *Id.* at 284.

131. *See id.*

132. *Id.* at 285.

133. *Id.*

134. *Id.*

135. *State v Sweet*, 879 N.W.2d 811, 811 (Iowa 2016).

136. *Id.* at 827–39.

137. *Id.* at 832 (citations omitted).

instead had used an incremental approach addressing only the issue(s) specifically raised by the parties in each preceding case.¹³⁸ Rejecting a continuation of an incrementalist approach, the Iowa Supreme Court concluded, “we think there is little to be gained by allowing further caselaw development on the question of whether a juvenile may ever receive a sentence of life without the possibility of parole.”¹³⁹

The Iowa Supreme Court in *Sweet* identified a continued discrepancy between the states as it considered whether to impose a categorical ban on LWOP sentences under the Iowa Constitution.¹⁴⁰ The *Sweet* Court noted that some state legislatures had eliminated LWOP sentences for juveniles, and the Supreme Judicial Court of Massachusetts had struck down the imposition of LWOP sentences.¹⁴¹ The Iowa Supreme Court also noted there have been several state supreme courts which have reached the opposite conclusion.¹⁴² While the Iowa Supreme Court observed that there is no clear consensus regarding proper juvenile sentencing, “[t]he fact that we have not found a consensus, however, does not end the inquiry. Although examination of statutes, sentencing practices, professional opinion, and other sources may inform our analysis, in the end we must make an independent judgment.”¹⁴³ Relying upon the reasoning and evidence from the United States Supreme Court and Iowa cases, the Iowa Supreme Court ultimately concluded:

[S]entencing courts should not be required to make speculative up-front decisions on juvenile offenders’ prospects for rehabilitation because they lack adequate predictive information supporting such a decision. The parole board will be better able to discern whether the offender is irreparably corrupt after time has passed, after opportunities for maturation and rehabilitation have been provided, and after a record of success or failure in the rehabilitative process is available.¹⁴⁴

138. *See id.* at 833.

139. *Id.* at 834.

140. *See id.* at 835–36.

141. *Id.* (citing *Diatchenko v. Dist. Att’y for Suffolk Dist.*, 1 N.E.3d 270, 276 (Mass. 2013)). In turn, the Iowa Supreme Court decision in *Sweet* has been cited by other state courts, thereby continuing the interstate dialogue. For example, the Washington Supreme Court, while ultimately deferring the state constitutional issue for lack of briefing, signaled to attorneys in its state that it would be willing to consider the arguments contained in *Sweet*. *See State v. Ramos*, 387 P.3d 650, 668 (Wash. 2017). Several state intermediate appellate courts, as well as law review articles and briefs submitted in both federal and state cases, have also cited the *Sweet* decision. Also worth remembering is that the Wyoming Supreme Court is in much the same position regarding the issue of de facto life sentences in the *Bear Cloud* case: it is cognizant of state constitutional law arguments on the matter, but it has yet to confront those arguments directly due to poor error preservation and briefing from legal counsel for juvenile offenders, who are perhaps not as well-versed in making state constitutional law arguments.

142. *Sweet*, 879 N.W.2d at 836. The Iowa Supreme Court specifically cited three state supreme court decisions, including *State v. Houston*, 353 P.3d 55, 62, 87 (Utah 2015).

143. *Sweet*, 879 N.W.2d at 836.

144. *Id.* at 839.

While the Iowa Constitution's categorical rule prevents a juvenile from being given an LWOP sentence, the Iowa Supreme Court (like the Supreme Judicial Court of Massachusetts before them) makes clear that this does not guarantee a juvenile offender release from prison.¹⁴⁵ Rather, by moving the decision-making process to the parole board, it ensures that the ultimate decision on the rehabilitative ability of the offender is made with all possible facts based upon demonstrated ability and willingness of the offender to change their life for the better.¹⁴⁶ If the juvenile shows that they are irreparably corrupt or unwilling to make necessary changes in their life, the court states that they "will no doubt spend their lives in prison."¹⁴⁷

CONCLUSION

While the United States Supreme Court held the mandatory imposition of LWOP sentences on juveniles violated the Eighth Amendment, it still left many questions unresolved and at the discretion of lower courts. These questions include: (a) what is required during an individualized sentencing hearing; (b) whether the protection against mandatory LWOP sentences applies to functionally equivalent sentences; and (c) whether the reasoning of *Miller* logically extends beyond the holding of that case to less severe crimes and punishments. Juvenile offenders have raised each of these questions before state supreme courts. The Supreme Court's lack of guidance and clarity has resulted in states resolving these issues in ways that differ significantly. While the three groups in the study (minimalist, statutory, and expansive) present broad trends, the sub-categories and reasoning used to reach similar conclusions present a more nuanced picture of judicial federalism within the United States and state supreme courts' understanding of their roles in shaping sentencing systems within their states.¹⁴⁸

While the case law and jurisprudence relating to juvenile sentencing continues to grow and evolve, the cases identified within this study represent many of the original cases from states dealing with the implementation and reach of the *Miller* decision.¹⁴⁹ Since the decision in *Miller*, forty-six petitions for certiorari have been sent to the Supreme Court related to the cases identified within this article or others directly dealing with the questions left open by *Miller* and the scope of the Eighth Amendment regarding juvenile offenders. Additionally, over one hundred petitions for certiorari have been presented to the Supreme Court which involved the principles of *Miller* in some indirect or minor way. To date the Supreme Court has refused to address these questions left unanswered by *Miller*.¹⁵⁰

145. *See id.*

146. *See id.*

147. *Id.*

148. *See infra* Table 2.

149. *See discussion supra* Part II.

150. However, the Supreme Court did address the issue of the retroactivity of its *Miller* decision in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

Importantly, the retirement of Justice Kennedy from the Supreme Court presents an opportunity for additional litigation around these issues as Kennedy provided the crucial fifth vote in each of the trinity of cases ending with *Miller*. With the confirmation of Justice Kavanaugh as Justice Kennedy's successor, it is possible the Supreme Court will resolve some of the questions left for the states after *Miller*. Such a decision by the Supreme Court would at least establish uniformity regarding the requirements of the Eighth Amendment. Whether such a decision would result in a narrow interpretation of the *Miller* decision and a retrenchment of protection under the United States Constitution, or a more expansive interpretation of the Eighth Amendment like those found in state constitutions as discussed in *Diatchenko* and *Sweet*,¹⁵¹ is difficult to predict. Regardless of the outcome of such a case at the Supreme Court, those decisions grounded upon state constitutions will endure, perpetuating a diverse and conflicted understanding of juvenile sentencing across the United States.

151. See *supra* notes 126–47 and accompanying text.

TABLE 1 (STATE CASES IDENTIFIED THAT PROVIDE A SUBSTANTIVE ANALYSIS AND INTERPRETATION OF *MILLER*)

Jurisdiction	Case
U.S. Supreme Court	Miller v. Alabama, 567 U.S. 460 (2012); Roper v. Simmons, 543 U.S. 551 (2005); Graham v. Florida, 560 U.S. 48 (2010); Montgomery v. Louisiana, 136 S. Ct. 218 (2016).
Alabama	Ex Parte Henderson, 144 So. 3d 1262 (Ala. 2013).
Alaska	No cases.
Arizona	State v. Vera, 334 P.3d 754 (Ariz. 2014).
Arkansas	Jackson v. Norris, 426 S.W.3d 906 (Ark. 2013).
California	People v. Gutierrez, 324 P.3d 245 (Cal. 2014); People v. Franklin, 370 P.3d 1053 (Cal. 2016).
Colorado	People v. Tate, 352 P.3d 959 (Colo. 2015).
Connecticut	State v. Riley, 110 A.3d 1205 (Conn. 2015).
Delaware	State v. Reyes, No. 9904019329, 2016 WL 358613 (Del.Super.Ct 2016).
DC	No Cases.
Florida	Atwell v. State, 197 So. 3d 1040 (Fla. 2016).
Georgia	Foster v. State, 754 S.E.2d 33 (Ga. 2014).
Hawaii	State v. Tran, 378 P.3d 1014 (Haw. 2016).
Idaho	Johnson v. State, 395 P.3d 1246 (Idaho 2017).
Illinois	People v. Davis, 6 N.E.3d 709 (Ill. 2014).
Indiana	Conley v. State, 972 N.E.2d 864 (Ind. 2012).
Iowa	State v. Null, 836 N.W.2d 41 (Iowa 2013); State v. Lyle, 854 N.W.2d 378 (Iowa 2014). State v. Sweet, 879 N.W.2d 811 (Iowa 2016).
Kansas	State v. Brown, 331 P.3d 781 (Kan. 2014); State v. Dull, 351 P.3d 641 (Kan. 2015).
Kentucky	Phon v. Commonwealth, No. 2014-CA-000073-MR, 2016 WL 1178651 (Ky.Ct.App. 2016)
Louisiana	State v. Tate, 130 So.3d 829 (La. 2013).
Maine	No Cases.

TABLE 1 CONTINUED	
Jurisdiction	Case
Maryland	<i>Alvira v. State</i> , No. 0960, 2016 WL 3548256 (Md.Ct.Spec.App. 2015).
Massachusetts	<i>Diatchenko v. Dist. Atty for Suffolk Dist.</i> , 1 N.E. 3d 270 (Mass. 2013).
Michigan	<i>People v. Carp</i> , 852 N.W. 2d 801 (Mich. 2014).
Minnesota	<i>State v. Ali</i> , 855 N.W.3d 235 (Minn. 2014).
Mississippi	<i>Parker v. State</i> , 119 So. 3d 987 (Miss. 2013).
Missouri	<i>State v. Hart</i> , 405 S.W.3d 232 (Mo. 2013).
Montana	No cases.
Nebraska	<i>State v. Castaneda</i> , 842 N.W.3d 740 (Neb. 2014).
Nevada	No cases.
New Hampshire	No cases.
New Jersey	<i>State v. Zuber</i> , 152 A.3d 197 (N.J. 2017).
New Mexico	<i>State v. Gutierrez</i> , No. 33, 364 (N.M. 2013).
New York	<i>Hawkins v. Dept. of Corrections</i> , 140 A.D.3d 34 (N.Y. 2016).
North Carolina	<i>State v. Young</i> , 794 S.E.2d 274 (N.C. 2016).
North Dakota	No cases.
Ohio	<i>State v. Long</i> , 8 N.E.3d 890 (Ohio 2014).
Oklahoma	<i>Luna v. State</i> , 387 P.3d 956 (Okla. Crim. App. 2016).
Oregon	<i>Sexton v. Person</i> , 341 P.3d 881 (Or. 2016).
Pennsylvania	<i>Commonwealth v. Batts</i> , 66 A.3d 286 (Pa. 2013).
Rhode Island	No Cases.
South Carolina	<i>Aiken v. Byars</i> , 765 S.E.2d 572 (S.C. 2014).
South Dakota	<i>State v. Springer</i> , 856 N.W.2d 460 (S.D. 2014).
Tennessee	<i>Darden v. State</i> , No. M2013-01328-CCA-R3-PC, 2014 WL 992097 (Tenn. Crim. App. 2014).
Texas	<i>Ex Parte Maxwell</i> , 424 S.W. 3d 66 (Tex. Crim. App. 2014).
Utah	<i>State v. Houston</i> , 353 P.3d 55 (Utah 2015).
Vermont	No Cases.

TABLE 1 CONTINUED	
Jurisdiction	Case
Virginia	Jones v. Commonwealth, 763 S.E.2d 823 (Va. 2014).
Washington	In re McNeil, 334 P.3d 548 (Wash. 2014).
West Virginia	State v. Redman, No. 13-0225, 2014 WL 1272553 (W. Va. 2014).
Wisconsin	State v. Williams, 842 N.W.2d 536 (Wis. 2013).
Wyoming	Bear Cloud v. State I, 275 P.3d 377 (Wyo. 2012); Bear Cloud v. State II, 294 P.3d 36 (Wyo. 2013); Bear Cloud v. State III, 334 P.3d 132 (Wyo. 2014).

TABLE 2 (STATE CASES GROUPED ACCORDING TO THE APPROACH AND INTERPRETATION OF *MILLER* USED BY THE COURTS)

Minimalist	Statutory	Expansive
Preserving State Sentencing Scheme (Part II(A)(1))	LWPP Mandatory	Protection Covers Functionally Equivalent Sentences (Part II(C)(1))
Ex Parte Henderson (Alabama)	State v. Tran (Hawaii)	People v. Franklin (California)
People v. Tate (Colorado)	Parole Possible Part II(B)(1)	Atwell v. State (Florida)
Johnson v. State (Idaho)	State v. Vera (Arizona)	State v. Null (Iowa)
People v. Davis (Illinois)	State v. Brown (Kansas)	State v. Zuber (New Jersey)
Alvira v. State (Maryland)	Darden v. State (Tennessee)	Hawkins v. Department of Corrections (New York)
State v. Ali (Minnesota)	Discretionary Sentence Part II(B)(2)	Bear Cloud v. State III (Wyoming)
State v. Hart (Missouri)	People v. Gutierrez (California)	Applies to Mandatory and Discretionary LWOP
State v. Gutierrez (New Mexico)	Foster v. State (Georgia)	State v. Riley (Connecticut)
State v. Young (North Carolina)	People v. Carp (Michigan)	Aiken v. Byers (South Carolina)
Ex Parte Maxwell (Texas)	State v. Long (Ohio)	All Mandatory Minimums Unconstitutional Part II(C)(2)
Judicial Modification of Statute Part II(A)(2)	Jones v. Commonwealth (Virginia)	State v. Lyle (Iowa)
Jackson v. Norris (Arkansas)	State v. Redman (West Virginia)	Lifetime Probation Unconstitutional

TABLE 2 CONTINUED		
Minimalist	Statutory	Expansive
Parker v. State (Mississippi)	State v. Williams (Wisconsin)	State v. Dull (Kansas)
Bear Cloud v. State II (Wyoming)	Individualized Hearing Part II(B)(3)	Juvenile LWOP Categorically Barred (Part II(C)(3))
	State v. Reyes (Delaware)	Diatchenko v. District Attorney for the Suffolk County (Massachusetts)
	Conley v. State (Indiana)	State v. Sweet (Iowa)
	State v. Tate (Louisiana)	
	State v. Castaneda (Nebraska)	
	Sexton v. Persson (Oregon)	
	Commonwealth v. Batts (Pennsylvania)	
	State v. Springer (South Dakota)	
	In re McNeil (Washington)	
	Jury Recommendation Part II(B)(4)	
	Phon v. Commonwealth (Kentucky)	
	Luna v. State (Oklahoma)	
	State v. Houston (Utah)	