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February 6, 2013

THE MANDATE OF MILLER

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THE MANDATE OF MILLER

William W. Berry III*

In applying the Eighth Amendment’s prohibition against cruel and unusual punishments, the United States Supreme Court has long abided by one core principle: death is different. Because the consequences of an execution are unique in their severity and irrevocability, counsels the Court, the Eighth Amendment requires that capital cases receive a heightened set of safeguards not available in non-capital cases. Likewise, the Court has historically refused to apply the Eighth Amendment to restrict disproportionate sentences in non-capital cases, even where the sentence imposed seems particularly excessive.

Recently, however, the Court has twice breached this formerly impervious barrier between capital and non-capital cases. In 2010, the Court held in Graham v. Florida that the Eighth Amendment barred imposition of life-without-parole sentences on juveniles in non-homicide cases. And last summer, the Court chipped away further at the bright line distinction between capital and non-capital cases in Miller v. Alabama, holding that the Eighth Amendment barred mandatory life-without-parole sentences for juvenile offenders.

By crossing this bright-line rule in Graham, the Court implicitly raised the issue of whether life-without-parole sentences require heightened Eighth Amendment scrutiny based on their own inherent severity and finality. And Miller arguably highlights an obvious application for such scrutiny: mandatory life-without-parole sentences.

It is not the mandatory sentence itself, but the consequence of such a sentence—death in the custody of the state—that implicates the Eighth Amendment. The principal constitutional problem with mandatory death-in-custody sentences is that they deny offenders their day in court by prohibiting individualized consideration of the offender and the offense by the court and by foreclosing introduction of mitigating evidence. The Court has made it clear that such a right is available to capital defendants, and now, in Miller, for juveniles facing life without parole.

This article, then, argues for an extension of this Eighth Amendment protection to all cases where a defendant faces the possibility of a death-in-custody sentence—a death sentence, a life-without-parole sentence, or a sentence with a term of years approaching the life expectancy of the offender. Accordingly, the mandate of Miller is that the Eighth Amendment should require individualized sentencing determinations and consideration of

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mitigating evidence by courts before the imposition of a death-in-custody sentence.

Part I of the article briefly considers the virtues and vices of mandatory sentences to contextualize the case for expanding the holding in Miller. Part II describes the meaning of Miller, highlighting the core principles of the Supreme Court’s Eighth Amendment mandatory sentencing cases. In Part III, the article then advances its central argument—the mandate of Miller—claiming that application of these principles authorizes an expansion of the Eighth Amendment to bar mandatory sentences in all death-in-custody cases and to provide for an opportunity to present mitigating evidence in such cases. Part IV explains where Miller’s mandate matters, exploring the normative consequences of applying this approach. Finally, Part V demonstrates why Miller’s mandate matters, articulating the policy reasons for expanding the scope of the Eighth Amendment in mandatory sentencing cases.

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INTRODUCTION

It’s a pity the law doesn’t allow me to be merciful.

-- Javert, from Les Misérables

In applying the Eighth Amendment’s prohibition against cruel and unusual punishments, the United States Supreme Court has long abided by one core principle: death is different. Because the consequences of an execution are unique in their severity and irrevocability, counsels the Court, the Eighth Amendment requires that capital cases receive a heightened set of safeguards not available in non-capital cases. In recent years, for instance, the Court has adopted categorical prohibitions against executions of mentally retarded offenders, juvenile offenders, and offenders whose criminal activity did not involve a homicide. Likewise, the Court has historically refused to apply the Eighth Amendment to restrict disproportionate sentences in non-capital cases, even where the sentence imposed seems particularly excessive.

1 Les Misérables, Universal (2012), based on VICTOR HUGO, LES MISÉRABLES (1862).
2 U.S. CONST. AMEND. VIII.
Recently, however, the Court has twice breached this formerly impervious barrier between capital and non-capital cases. In 2010, the Court held in *Graham v. Florida* that the Eighth Amendment barred imposition of life-without-parole sentences on juveniles in non-homicide cases. And last summer, the Court chipped away further at the bright line distinction between capital and non-capital cases in *Miller v. Alabama*, holding that the Eighth Amendment barred mandatory life-without-parole sentences for juvenile offenders.

To be sure, the outcomes in these cases rest upon the notion that, as a class, juvenile offenders are unique. Because juveniles are categorically different from other offenders, reasoned the Court, the Eighth Amendment proscribed certain juvenile non-capital sentences.

By crossing this bright-line rule in *Graham*, however, the Court also implicitly raised the issue of whether life-without-parole sentences require heightened Eighth Amendment scrutiny based on their own inherent severity and finality. And *Miller* arguably highlights an obvious application for such sentences.

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265–66 (1980) (affirming life with parole sentence for felony theft of $120.75 by false pretenses where defendant had two prior convictions), *but see* Solem v. Helm, 463 U.S. 277, 281–84 (1983) (reversing sentence of life without parole for presenting a no account check for $100, where defendant had six prior felony convictions).


11 *Miller v. Alabama*, 132 S.Ct. 2455 (2012). The Court combined *Jackson v. Hobbs* with *Miller*, as both cases presented the same question: whether a state law imposing a mandatory life-without-parole sentence for a juvenile offender violated the Eighth Amendment prohibition against “cruel and unusual” punishment. *Id.* at 2460-66.

12 Here, as in all of the cases discussed herein, “juvenile” means an individual that had not reached the age of eighteen at the time the crime in question occurred.


14 *Id.;* William W. Berry III, *Conceptualizing Juveniles as a Different Kind of Different*, 78 Mo. L. Rev. ___ (2013) (forthcoming) (exploring the questions of *how* and *when* juveniles are different and their implications for the application of the Eighth Amendment).

15 *Graham*, 130 S.Ct. at 2027. Many commentators on both sides of the political spectrum have been hesitant to advocate for a wholesale Eighth Amendment attack on life-without-parole sentences. For conservatives, the idea of expanding the Constitution to restrict the power of states to punish continues to raise objection in an age of penal populism.
scrutiny: mandatory life-without-parole sentences.\textsuperscript{16}

It is not the mandatory sentence itself, but the consequence of such a sentence—death in the custody of the state—that implicates the Eighth Amendment.\textsuperscript{17} The principal constitutional problem with mandatory death-in-custody sentences is that they deny offenders their day in court by prohibiting individualized consideration of the offender and the offense by the court and by foreclosing introduction of mitigating evidence.\textsuperscript{18}

Certainly, such offenders are often unsympathetic and may deserve, at least from the perspective of victims and their families, to spend the rest of their life in prison. But, it is likewise true that such offenders also deserve an opportunity to explain why such a harsh sentence is not appropriate in their specific case, given its particular circumstances and their personal character.

This day in court—an offender’s opportunity to plead for his life—is so crucial because it will likely be his only opportunity to avoid a sentence to die in state custody.\textsuperscript{19} The Court has made it clear that such a right is available to capital defendants,\textsuperscript{20} and now, in \textit{Miller}, for juveniles facing life without parole.\textsuperscript{21}

This article, then, argues for an extension of this Eighth Amendment protection to all cases where a defendant faces the possibility of a death-in-


\textsuperscript{17} As discussed in Part III, one can conceptualize \textit{Graham} and \textit{Miller} not as exceptions to the death-is-different rule, but instead as an extension of the death-is-different principle to death-in-custody sentences, which are slow and extended forms of capital punishment. See, e.g., William W. Berry III, \textit{More Different than Life, Less Different than Death}, 71 OHIO ST. L.J. 1109 (2010) (arguing that life-without-parole sentences are unique and deserve their own level of higher scrutiny).


\textsuperscript{19} It is certainly true that in many cases, this hearing will result in the same outcome. There exists, however, no other meaningful opportunity for someone who deserves a lesser sentence to argue for a different outcome. The legislature is unable to consider such a claim, prosecutors typically seek such a penalty as a lesser alternative to death, the appellate courts are unlikely to reverse a life-without-parole sentence on any grounds, and the likelihood of clemency in a non-capital case is miniscule.


\textsuperscript{21} Miller, 132 S.Ct. at 2475.
custody sentence—a death sentence, a life-without-parole sentence, or a sentence with a term of years approaching the life expectancy of the offender. Accordingly, the mandate of Miller is that the Eighth Amendment should require individualized sentencing determinations and consideration of mitigating evidence by courts before the imposition of a death-in-custody sentence.

Part I of the article briefly considers the virtues and vices of mandatory sentences to contextualize the case for expanding the holding in Miller. Part II describes the meaning of Miller, highlighting the core principles of the Supreme Court’s Eighth Amendment mandatory sentencing cases. In Part III, the article then advances its central argument—the mandate of Miller—claiming that application of these principles authorizes an expansion of the Eighth Amendment to bar mandatory sentences in all death-in-custody cases and to provide for an opportunity to present mitigating evidence in such cases. Part IV explains where Miller’s mandate matters, exploring the normative consequences of applying this approach. Finally, Part V demonstrates why Miller’s mandate matters, articulating the policy reasons for expanding the scope of the Eighth Amendment in mandatory sentencing cases.

I. CONSIDERING THE MERITS OF MANDATORY SENTENCES

Before assessing the propriety of broadening the Eighth Amendment to circumscribe the use of mandatory sentences, it is instructive to consider the utility and propriety of mandatory sentences themselves. At its core, the question of whether mandatory sentences are appropriate is one of institutional choice related to the allocation of sentencing discretion.

When a legislature assigns a mandatory penalty for violation of a criminal law, the result is the removal of discretion from a court to determine the appropriate sentence in a given case. The legislature can achieve this completely, or in part, as in the case of a mandatory minimum sentence. Thus, the adoption of a mandatory sentence is a decision to allow the legislature, and not the court, to choose the specific sentence for a certain crime.

Two theoretical frames are particularly useful to assess this institutional choice question: (1) bright-line rules v. case-by-case decisions and (2) ex ante v. ex post.
ex post decision-making.

A. Bright-Line Rules v. Case-by-Case Decisions

One presumed advantage of a mandatory sentence is its ability, as a bright-line rule, to create consistency in sentencing, assuming the statute at issue is specific enough to identify similar conduct. When the legislature removes the court’s discretion in such a manner, offenders who violate the same criminal provision will receive the same sentence. In the context of mandatory minimums, this goal of consistency aims to ensure all perpetrators of a particular crime receive a minimum sentence, placing a floor on the court’s sentencing discretion.

24 Politicians often describe this perceived advantage of a mandatory sentence using the rhetoric of “truth-in-sentencing.” Truth-in-sentencing laws seek to reduce the possibility of early release from prison for offenders, meaning that the sentence served is the same (or almost the same) as the sentence imposed. In practice, truth-in-sentencing laws have had mixed results. See, e.g., Joanna M. Shepherd, Police, Prosecutors, Criminals, and Determinate Sentencing: The Truth about Truth-in-Sentencing Laws, 45 J. LAW & ECON. 509 (2002); Susan Turner, et al., Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates, 11 STAN. L. & POLY REV. 75 (1999).

25 Felony murder statutes, for instance, do not succeed at doing this. Commentators have long criticized felony murder as an acceptable way of determining which offenders should be eligible for the death penalty and which should not. See, e.g., Nelson E. Roth & Scott E. Sundby, The Felony-Murder Rule: A Doctrine at the Constitutional Crossroads, 70 CORNELL L. REV. 446, 447–48 (1985) (arguing that the felony-murder rule “makes it possible that ‘the most serious sanctions known to law might be imposed for accidental homicide’” and that in addition to such “theoretical defects” the rule “contravenes due process and eighth amendment protections” (quoting John Calvin Jeffries Jr. & Paul B. Stephan III, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 YALE L.J. 1325, 1383 (1979))); Steven F. Shatz, The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study, 59 F.L.A. L. REV. 719, 750–52 (2007) (arguing that California’s felony murder statute creates disproportionate outcomes in capital cases); William W. Berry III, Practicing Proportionality, 64 FLA. L. REV. 687, 703 (2012). Indeed, the Court has questioned whether it is possible to group cases in such a way that results in the same sentence in every case. Woodson, 428 U.S. at 280 (“[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.”).

26 See Mirko Bagaric, Consistency and Fairness in Sentencing – The Splendor of Fixed Penalties, 2 CAL. CRIM. L. REV. 1 (2000) (arguing that consistency is one of the benefits of mandatory penalties).

The cost of adopting such a bright-line rule is that it precludes case-by-case consideration of the offender and the offense. Where the sentence is death-in-custody, the consequences of this inflexibility are more significant, as the bright-line rule will mandate death regardless of mitigating circumstances.\footnote{See, e.g., Cassia Spohn, Criticisms of Mandatory Minimums, in ANDREW VON HIRSCH, ANDREW ASHWORTH, \& JULIAN ROBERTS, eds., PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY (2009).}

The actions of prosecutors and juries further demonstrate this weakness of bright-line rules in death-in-custody cases. When a prosecutor deems a mandatory sentence to be excessive for a particular crime, he or she has the option to charge the offender with a lesser crime to avoid the mandatory sentence.\footnote{Id. (citing United States Sentencing Commission Study finding that federal prosecutors chose to charge lesser offenses in one-fourth of mandatory minimum cases).} Similarly, a jury can choose to nullify the mandatory sentence it finds objectionable by finding the defendant innocent of the crime.\footnote{See, e.g., CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE (1998); Alan W. Scheflin, Jury Nullification: the Right to Say No, 45 S. CAL. L. REV. 168 (1972). Note that in many cases, the jury is not aware of the existences, making this less of a problem. While many courts have held jury nullification improper, courts have difficulty determining in some cases whether nullification has occurred. Others believe that jury nullification is part of the right to trial by jury. As Judge Wiseman explained,}

The drafters of the Constitution clearly intended [the right of trial by jury] to protect the accused from oppression by the Government . . . Part of this protection is embodied in the concept of jury nullification: In criminal cases, a jury is entitled to acquit the defendant because it has no sympathy for the government’s position. The Founding Fathers knew
result, the purported bright-line consistency of mandatory sentences can become more theoretical than practical in nature.

B. Ex Ante v. Ex Post Decision-making

*Ex ante* decisions, like the ones made by a legislature in adopting a mandatory sentence, have the advantage of careful consideration looking forward to determine the best approach to solving a problem. The legislature enjoys a degree of insulation from any particular case and, as a result, may possess more objectivity in sentencing than a court. The representatives in the legislature also have a different kind (a less direct version) of political accountability than elected state judges, perhaps making it less likely that personal political calculations might affect sentencing decisions.

On the other hand, the exercise of making a determination through legislative debate results in a one-time judgment that may not appreciate many of the relevant *ex post* considerations that may later emerge during the commission of a crime. And, it assumes that *ex ante* decision-making of this type is practically achievable in that the cases that the legislature groups under the heading of a particular crime are fundamentally similar, or at least similar enough to warrant the same punishment.

Further, mandatory sentences forego the *ex post* benefits that emanate from the judicial branch in the sentencing process. By relying solely on an *a priori* decision of the legislature to determine the appropriate sentence, a court is unable to account for important facts or considerations that the legislature did not foresee. Indeed, the fine-tuning of a sentence that a judge can engage in by considering various aggravating or mitigating circumstances is lost when mandatory sentences foreclose the exercise of judicial discretion. Thus, mandating a particular sentence for a particular crime is likely to result in unfairness in at least some cases.

Perhaps most troubling, though, is that in practice the *ex post* decision-making that, absent jury nullification, judicial tyranny not only was a possibility, but was a reality in the colonial experience. Although we may view ourselves as living in more civilized times, there is obviously no reason to believe the need for this protection has been eliminated. Judicial and prosecutorial excesses still occur, and Congress is not yet an infallible body incapable of making tyrannical laws (internal citations omitted).

32 Id.
33 One can imagine a number of circumstances that may contribute to the commission of a crime that might increase or decrease the culpability of the offender in a way that the statute cannot capture.
34 See supra note 25.
making still persists in the office of the prosecutor. Not only do mandatory sentences preclude judges from exercising discretion, but also they, in effect, shift the exercise of that discretion to the executive branch in its exercise of prosecutorial discretion to determine the appropriate sentence.

Often criticized by commentators for this reason, mandatory sentences allow prosecutors to decide what sentence an offender merits by choosing what offense to charge. The plea bargaining process facilitates this transfer of sentencing discretion from the court to the prosecutor, meaning that in many cases a sentencing outcome depends more on which defendant has more to offer the prosecutor than upon what the circumstances of a particular case dictate to a judge at sentencing.

Despite their shortcomings from a policy perspective, mandatory sentences, on their face, comply with the requirements of the United States Constitution. That is, there is nothing inherently unconstitutional about the mandatory sentence itself. The Supreme Court has repeatedly emphasized that legislatures possess the power to determine the sentences of criminal offenders through mandatory sentences.


37 Id.

limits on mandatory sentences when they constitute a cruel and unusual punishment as prohibited by the Eighth Amendment.\textsuperscript{39} The \textit{Miller} case is the Court’s latest attempt to delineate such a limit on mandatory sentences.\textsuperscript{40}

\section*{II. Miller’s Meaning}

\textbf{A. Mandatory Sentences under the Eighth Amendment}

To understand the Supreme Court’s holding in \textit{Miller}, a brief overview of its applicable Eighth Amendment mandatory sentencing precedents is helpful. The Court first held, in \textit{Woodson v. North Carolina} and \textit{Roberts v. Louisiana}, that the Eighth Amendment prohibited mandatory death sentences.\textsuperscript{41} At the heart of these opinions were two concepts: (1) the Eighth Amendment requires consideration of the individualized (mitigating) characteristics of each offender because (2) death is different in that it is a permanent and irrevocable punishment.\textsuperscript{42}

Subsequently, the Court expanded \textit{Woodson’s} individualized sentencing principle in \textit{Lockett v. Ohio}.\textsuperscript{43} It concluded that individualized consideration included consideration of all mitigating evidence, meaning that any limit placed on the presentation of such evidence violated the Eighth Amendment.\textsuperscript{44} As in \textit{Woodson} and \textit{Roberts}, the Court limited its holding to capital cases, relying again on the principle that death sentences are unique in their finality and thus warrant heightened protections.\textsuperscript{45}

In \textit{Harmelin v. Michigan}, the Court held that the \textit{Woodson-Lockett} rules of individualized sentencing determinations and consideration of mitigating evidence did not apply to a defendant receiving a mandatory life-without-parole sentence.\textsuperscript{46} The Court, however, did not entertain the possibility that such protections might be appropriate for life-without-parole sentences. Rather, the Court simply (and somewhat blindly) relied on its death-is-different doctrine, limiting the application of the \textit{Woodson-Lockett} principles to capital cases.\textsuperscript{47}

Three years ago, however, the case of \textit{Graham v. Florida} undermined the

\begin{footnotesize}
\begin{enumerate}
\item \textit{Miller}, 132 S.Ct. at 2463-64.
\item See supra notes 3 & 4.
\item Lockett, 438 U.S. 586 (1978).
\item \textit{Id.} at 604.
\item \textit{Id.} at 605.
\item \textit{Id.} at 995-96.
\end{enumerate}
\end{footnotesize}
death-is-different doctrine by applying a capital case safeguard to a non-capital case for the first time.\footnote{Graham v. Florida, 130 S.Ct. 2011, 2046 (Thomas, J., dissenting) (“Today’s decision eviscerates that distinction. ‘Death is different’ no longer … [f]or the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone.”).}

Previously, the Court had held that the Eighth Amendment barred non-homicide offenders from receiving the death penalty.\footnote{See supra note 8.}

In Graham, though, the Court held that the Eighth Amendment barred juveniles from receiving life-without-parole sentences.\footnote{Graham, 130 S.Ct. at 2026.}

### B. Miller v. Alabama

Given this backdrop, the Court considered in Miller whether the Eighth Amendment prohibited mandatory life-without-parole sentences for juveniles. Decided in June 2012, Miller and its companion case, Jackson v. Hobbs, both involved the sentencing of 14-year-old boys to life-without-parole sentences for their participation in two separate aggravated murders.\footnote{Miller, 132 S.Ct. at 2460-61.}

Jackson participated in the robbery of a video store, with one of his co-conspirators shooting a store clerk. Miller, on the other hand, brutally beat a man to death with a baseball bat while under the influence of marijuana.\footnote{Id. at 2461.}

In both cases, the state statutes\footnote{\textsection 13A–5–40(9), 13A–6–2(c) (1982); \textsection 5–4–104(b) (1997).} required a mandatory life sentence, and neither state allowed for parole.\footnote{Miller, 132 S.Ct. at 2460-61.}

Thus, state law “mandated that each juvenile die in prison,” even if “a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence more appropriate.”\footnote{Id.}

The question before the Court was whether the mandatory sentences violated the Eighth Amendment.\footnote{Miller, 132 S.Ct. at 2463, 66.}

In other words, in light of the lesser culpability of juveniles and their greater capacity for change,\footnote{Miller, 132 S.Ct. at 2460-61.}

the Court had to determine if such a sentence violated “our cases’ requirement of individualized sentencing for defendants facing the most serious penalties.”\footnote{Id.}

\footnote{See supra note 8.}

\footnote{Graham, 130 S.Ct. at 2026.}

\footnote{Miller, 132 S.Ct. at 2460-61.}

\footnote{Id.}

\footnote{Id.}

\footnote{The Court’s focus here was in part its conceptualization that juveniles are different.\textperiodcentered\textperiodcentered\textperiodcentered\textperiodcentered\textperiodcentered\textperiodcentered Roper, 543 U.S. at 569-570; Graham, 130 S. Ct. at 2026-2027.}

\footnote{Miller, 567 U.S. at 2460-61. The basis, of course, for this requirement are the cases discussed above, Woodson and Lockett.}
Continuing its decade-long trend of broadening the scope of the Eighth Amendment, the Court held that sentencing juveniles to mandatory life-without-parole sentences violated the Eighth Amendment. Applying its evolving standards of decency jurisprudence, the Court explained that the question was one of proportionality, as in its other recent cases.

Specifically, the combination of two lines of cases provided the basis for the conclusion that the sentence was unconstitutionally excessive. First, the Court emphasized that juveniles are different, citing its decision in Roper to prohibit the death penalty for juveniles and its decision in Graham to prohibit life-without-parole sentences for juveniles convicted of non-homicide crimes.

Second, the Court applied the Woodson-Lockett line of cases discussed above to emphasize that proportionality required the individualized sentencing of offenders in certain cases. The Court here likened life without parole to the death penalty, explaining, “[l]ife-without-parole terms . . . ‘share some characteristics with death sentences that are shared by no other sentences.’”

Justice Scalia ironically foreshadowed this trend of broadening the scope of the Eighth Amendment in his dissent in Atkins v. Virginia, 536 U.S. 304, 353 (2002) (Scalia, J., dissenting). Criticizing the Court’s decision, Scalia complained, “there is something to be said for popular abolition of the death penalty; there is nothing to be said for its incremental abolition by this court.”

The concept of evolving standards of decency comes from the case of Trop v. Dulles, where the Court explained that “[t]he words of the [Eighth] Amendment are not precise, and … their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” 356 U.S. 86, 100-01 (1958). Originalists have, of course, criticized this view of the Constitution. See, e.g., Atkins, 536 U.S. at 353 (Scalia, J., dissenting). But commentators have also criticized the evolving standards based on their use of a majoritarian approach (in counting states that use a particular practice) and the somewhat dubious manner in which the Court engages in such counting. See, e.g., John F. Stinneford, Evolving Away from Evolving Standards of Decency, 23 FED. SENT. REP. 87 (2010); William W. Berry III, Following the Yellow Brick Road of Evolving Standards of Decency, 28 PACER L. REV. 15 (2007); see also Corinna Barrett Lain, The Unexceptionalism of ‘Evolving Standards,’ 57 UCLA L. REV. 365 (2009)(arguing that the majoritarian approach of the evolving standards is consistent with the Court’s majoritarian tendencies). Here, the court is arguably exercising its independent judgment and then coming up with post hoc evolving standards justifications. Interestingly, the Court did not engage in jurisdiction counting as it had in prior cases. Atkins v. Virginia, 536 U.S. 304 (2002); Roper v. Simmons, 543 U.S. 551 (2006); Kennedy, 554 U.S. 407 (2008); Graham v. Florida, 130 S.Ct. 2011 (2010). The subtle movement away from such counting may signal an attempt to place this doctrine on more solid footing.

This idea also applies to lengthy sentences that, for all practical purposes, will result in death in prison. People v. Caballero, No. S190647 (Cal. Aug. 18, 2012).
It added, “[i]mprisoning an offender until he dies alters the remainder of his life ‘by a forfeiture that is irrevocable.’”\textsuperscript{67}

For the Court, the combination of these two principles—the constitutional requirement of considering individual mitigating circumstances and the age of juvenile offenders providing evidence of such circumstances—made a mandatory juvenile life-without-parole sentence unconstitutional.\textsuperscript{68}

And, the Court foreshadowed the possible extension of this doctrine to all life-without-parole sentences for juveniles. It stated:

But given all we have said in Roper, Graham, and this decision about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon . . . Although we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.\textsuperscript{69}

While much of the Court’s focus in \textit{Miller} was on the characteristics of juveniles, the extension of the prohibition against mandatory sentences and the individualized sentencing requirement into non-capital cases is significant. In particular, the Court rebuffed the argument that its prior decision in \textit{Harmelin v. Michigan} precluded the extension of the \textit{Woodson-Lockett} doctrine to non-capital cases.\textsuperscript{70} In dismissing the prior barrier between capital and non-capital cases, the Court concluded, “[w]e think that argument myopic … if (as \textit{Harmelin} recognized) ‘death is different,’ children are different too.”\textsuperscript{71}

In sum, the Court reaffirmed three key principles that, collectively, constitute the core meaning of \textit{Miller}: First, the Court emphasized the importance of the \textit{Woodson} principle—the need for individualized sentencing. Second, the Court highlighted the importance of considering mitigating evidence, the \textit{Lockett} principle, at sentencing. Finally, the Court suggested that the distinction between capital and non-capital cases under the Eighth Amendment is not absolute, at least in cases involving juveniles.

III. \textit{Miller’s Mandate}

The central question, then, is to what extent these core principles of \textit{Miller} open the door to, and even mandate, expansion of the scope of the Eighth

\textsuperscript{67} Id. at 2472 (quoting Graham, 130 S. Ct. at 2027).
\textsuperscript{68} Id. at 2466-67.
\textsuperscript{69} Id. at 2477.
\textsuperscript{70} 501 U.S. 951 (1991). The Court sentenced Harmelin to a mandatory life-without-parole term for a first offense of possessing more than 650 grams of cocaine.
\textsuperscript{71} \textit{Miller}, 132 S.Ct. at 2479.
Amendment with respect to mandatory sentences. In other words, should the principles reaffirmed in *Miller* give rise to Eighth Amendment limits on other types of mandatory sentences?

This article argues that *Miller* mandates that the Eighth Amendment prohibit the use of mandatory sentences in all death-in-custody cases. A corollary of this claim is that the Eighth Amendment requires that defendants have the opportunity to offer mitigating evidence in any case where death-in-custody is a possible sentence. A second corollary of this claim is that judges or juries, not legislatures, must impose all death-in-custody sentences.

### A. The Logical Extension of Miller’s Meaning

Logically, it is easy to see how the principles articulated in *Miller* support this claim. First, the value of individualized sentencing determinations—the *Woodson* principle—undermines the use of mandatory sentences in the death-in-custody context. The need for consideration of the individual characteristics of the offender and the facts and circumstances of the crime at issue is paramount when the consequence is death in the custody of the state, whether by lethal injection or by natural causes in prison. The decision concerning whether a person’s life is irredeemable is too important to adopt a one-size-fits-all statutory provision that does not allow a court to consider whether each offender deserves to die in state custody. It is impossible to create a rule that can account for every situation in which death in the custody of the state is the appropriate sentence.

Even more damaging, the practical consequence of abdicating the role of courts in such decisions is that, as discussed above, mandatory sentences delegate this decision to the prosecutor. While a prosecutor certainly has the authority to charge an offender as he or she sees fit, it seems inappropriate to assign the sentencing decision of whether an offender will die in state custody to the prosecutor. Indeed, usurping the role of courts in sentencing such serious cases is, in the words of the Eighth Amendment, cruel and unusual.

Second, the *Lockett* principle—the prohibition against restricting the use of mitigating evidence by offenders—also counsels against the use of mandatory death-in-custody sentences. The purpose of such evidence is to allow an offender his day in court—an opportunity to plead for his life before the court determines his sentence. A mandatory sentence, by definition, precludes introduction of such evidence, as it cannot affect the sentencing outcome.

Ultimately, consideration of mitigating evidence humanizes the offender before deciding whether his life is irredeemable. In this light, mandatory death-in-custody sentences undermine the Eighth Amendment concept of according

\[72\text{ It is outside the scope of this article, but presuming one agrees with the logic advanced above, should } Miller\text{ also extend to decisions by prosecutors?}\]
offenders “human dignity.”

Third, Miller and Graham challenge the bright line separation between capital and non-capital safeguards at sentencing. By limiting the use of juvenile life-without-parole sentences, the Court has opened the door to consideration of similar limitations on adult offenders in death-in-custody cases. To be sure, Miller and Graham only apply these restrictions to juveniles, but neither case forecloses the application of heightened restrictions to life-without-parole sentences. On the contrary, both cases suggest that life-without-parole sentences are, in many ways, like death sentences.

Further, both cases cast doubt on the continuing vitality of Harmelin. Graham implicitly suggests that the divide between capital and non-capital cases is no longer absolute. The principle the Court uses in its evolving standards of decency approach is that certain sentences—here, juveniles sentenced to life without parole in non-homicide cases—are excessive in light of the purposes of punishment. That is, neither retributive nor utilitarian justifications support the use of a particular non-capital sentence in a certain situation. By applying this principle to life-without-parole sentences, Graham calls into question the very principle that Harmelin rests upon—capital cases are categorically different from non-capital cases.

Miller was more explicit on this point, openly dismissing the applicability of Harmelin to mandatory juvenile life-without-parole sentences. The Miller decision is particularly threatening to the vitality of Harmelin precisely because the offender in Harmelin received a mandatory life-without-parole sentence. It is easy to see the Court continuing to cross the capital / non-capital case divide where it finds certain categories of sentences excessive in light of the purposes of punishment.

Based on these three principles—the need for individualized sentencing, the requirement of mitigating evidence, and the blurring of the bright line between capital and non-capital cases—Miller appears to mandate expansion of the Eighth Amendment to mandatory death-in-custody sentences.

Nonetheless, there are three intellectual hurdles in moving from the holding in Miller to the claim advanced here. First, the Woodson-Lockett

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73 Trop v. Dulles, 356 U.S. 86, 100 (barring sentences that are “degrading in severity”); see Berry supra note 61.
74 See Barkow, supra note 9.
75 The Seventh Circuit does not agree with this assessment, but primarily on stare decisis grounds. United States v. Ousley, 100 F.3d 75 (2012) (holding that Harmelin forecloses Eighth Amendment challenges to adult life-without-parole sentences).
76 One can certainly distinguish Harmelin from Graham and Miller because it involved adults, not juveniles. This distinction, though, may be weaker than it appears on the surface. See discussion infra Part III-C.
principles must extend beyond capital cases. They must apply to death-in-custody cases. In other words, “death-is-different” must mean “death-in-custody-is-different” after Miller.

At the core of this argument is the paradox that while death sentences are different from other sentences, some other sentences—namely life-without-parole sentences and term sentences exceeding the life expectancy of the offender—share in the differentness of death. This is because what makes death different, its severity and irrevocability, also distinguishes other death-in-custody sentences from all other sentences.

Second, the corollary principle must also be true, that the death-is-different protections of Woodson and Lockett—individualized sentencing and mitigating evidence—also apply to death-in-custody cases. To establish this article’s central claim, the emphasis of these principles—to accord the offender his day in court—must apply equally to death-in-custody cases.

Third, and perhaps most importantly, the holdings of Graham and Miller must apply equally to adults and juveniles to sustain this article’s claim. The underlying rationales for categorically excluding juveniles from certain types of life-without-parole sentences cannot be significantly different when applied to adult offenders.

As with the death-in-custody-is-different argument above, this argument likewise rests on paradoxical conceptions of similarity and differentness. While juveniles are different from adults, the reasons for according juveniles heightened Eighth Amendment protection from mandatory death-in-custody sentences are no different from those for adults—the right to one’s day in court and the need to consider an adult’s possibility for rehabilitation and redemption. Thus, while juveniles are different from adults, their sameness outweighs their differentness in this context.

In the next section, then, the article develops the justifications for these three prerequisites—the broadening of death-is-different to include death-in-custody, the application of death-is-different protections to death-in-custody cases, and the application of Graham and Miller to adults—demonstrating the connection between the holding in Miller and the expansion of the Eighth Amendment advocated here.

B. Three Prerequisites to Miller’s Mandate

1. Death is Different Means Death in Custody

Because death is different, it requires considered decision-making before a court imposes it as a sentence. The irrevocable nature of the death penalty makes the accuracy of this decision paramount, as the state cannot revisit a death sentence after an execution occurs. As a result, the Supreme Court has established the need to give greater scrutiny to the process by which states
sentence offenders in capital cases. This includes, of course, a ban on the use of mandatory death penalty sentences.

This sentiment also applies to life-without-parole sentences. While not as different as the death penalty, life without parole is its own kind of different, as it constitutes a decision to sentence an offender to death in prison. In essence, a life-without-parole sentence is a death sentence without an execution date.

Indeed, a sentence of life without parole is a decision that the life of the offender is irredeemable—and thus, no one will revisit the decision to keep the offender in custody until his death. Life-without-parole sentences and capital sentences thus share the reality that one has no legitimate hope of escaping confinement prior to death.

The Court in Graham recognized the similarity of the death penalty and life without parole, explaining:

As for the punishment, life without parole is “the second most severe penalty permitted by law.” It is true that a death sentence is “unique in its severity and irrevocability”; yet life-without-parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender’s life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration…

Further, in certain ways, a sentence of life without parole can be worse

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78 See, e.g., Naovarath v. State, 779 P.2d 944, 944 (Nev. 1989) (“[Life without parole] means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.”); Berry, supra note 17.
79 See, e.g., Catherine Appleton & Bent Grover, The Pros and Cons of Life Without Parole, 47 BRIT. J. CRIMINOLOGY 597, 611 (2007) (“[Life without parole] removes any prospect of reward for change and is therefore fundamentally inhumane. If society is going to announce baldly that we don’t care what you do, we don’t care what programmes you engage in, you’re never going to be released, it’s the equivalent of providing a death sentence.” (quoting another source)).
81 See Appleton & Grover, supra note 79, at 610.
82 Graham, 130 S. Ct. at 2027.
than a sentence of death. A death sentence has an end date during which one's imprisonment will end, which for some may be less traumatic than imprisonment until one dies of natural causes. To the extent that living in prison constitutes suffering, life without parole allows for greater suffering, or at least a longer time for suffering. One example of the desirability of ending one's time in prison as soon as possible is the prevalence of “volunteers” in capital cases—individuals who choose to waive their appeals and accelerate their execution date.

Practically, a sentence of life without parole can also be worse than a death sentence in that the possibility of reversal is dramatically less. Precisely because death is different, capital cases often receive far more extensive and careful review than life-without-parole sentences. The reversal rate in life-without-parole cases is far less than in capital cases, and even where error is present, courts are more likely to consider it harmless in a life-without-parole case than in a capital case.
One more category of sentences also fits within the same group as the death penalty and life without parole: sentences that do not mandate death in custody, but have the practical effect of ordaining the same result. Sentences with a term of forty years or more in most cases will result in a term in excess of the life expectancy of the offender. While the courts have not uniformly addressed whether a long term of years can circumvent the holdings in *Graham* and *Miller*, a sentence that approaches an offender’s life expectancy is not any different in practice than a life-without-parole sentence.

Iowa governor Terry Branstad’s recent actions demonstrate the importance of including such sentences in this analysis. In response to the Court’s decision in *Miller*, Branstad commuted the life sentences of 38 juvenile murderers in Iowa, giving them each a 70-year sentence. His actions demonstrate the recognition that a long-term sentence achieves the same goal as life without parole.

Recently, the California Supreme Court recognized this same idea in the case of *People v. Caballero*, where it held that a juvenile sentence for 110 years violated the Eighth Amendment in light of the *Graham* decision. The court explained that

> *Graham*’s analysis does not focus on the precise sentence meted out. Instead, as noted above, it holds that a state must provide a juvenile offender “with some realistic opportunity to obtain release” from prison during his or her expected lifetime.

For the California Supreme Court, then, there is no functional difference between a life-without-parole sentence and a sentence for a term of years approaching one’s life expectancy.

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90 In practice, courts could use evidence of the individual offender’s life expectancy or in the alternative, use the actuarial prediction for the average life expectancy. The use of subjective indicia at sentencing, particularly in considering the impact of potential suffering has been the subject of much recent academic debate. See, e.g., Dan Markel, Chad Flanders & David Gray, *Beyond Experience: Getting Retributive Justice Right*, 99 CAL. L. REV. 605 (2011); John Bronstein, Christopher J. Buccafusco, & Jonathan Masur, *Retribution and the Experience of Punishment*, 98 CAL. L. REV. 1463 (2010).


93 *Id.*

94 Given the practical similarity between a life-without-parole sentence and a 70 year sentence, the courts should strike down the Governor’s commutations under the Eighth Amendment and resentence the “commuted” offenders.


96 *Id.* (slip op. at 6-7).

97 *Id.*
It makes sense that the Court, as the Governor, would equate a term of life sentence exceeding life expectancy with a life-without-parole sentence. Functionally, they have the same practical outcome—death in the custody of the state.

Ultimately then, as the consequence of each of these three categories of sentences—death, life without parole, and a term sentence approaching life expectancy—is functionally the same, the Eighth Amendment should treat them as such. As a result, the death that is different must be any sentence to death in the custody of the state.

The best way to understand why this is a better line of demarcation than the death penalty itself is the distinction between hope and no hope. A prisoner with a death-in-custody sentence, unlike other offenders, has no hope of ever living freely again, irrespective of whether a death sentence, a life-without-parole sentence, or a term of years sentence that will exceed the life of the prisoner. Indeed, the Court's decisions in Graham and Miller seem to recognize this and provide a basis for broadening the Eighth Amendment in this way.

2. Individualized Consideration and Mitigation Matter

As described above, the Court’s cases require consideration of the individualized characteristics of the offense and offender in capital cases and juvenile life-without-parole cases because of the seriousness of the potential sentence. Likewise, the Court mandates the opportunity to present mitigating circumstances in such cases.

At the heart of these principles of individualized consideration and mitigation is the understanding that the offender deserves his day in court. When one’s life is at stake, it seems unjust and cruel to deny an offender careful ex post consideration of his actions and character. A mandatory sentence does exactly that, by making the ex ante decision that offenders who commit certain crimes deserve certain sentences. The Supreme Court’s cases emphasize the possibility that in some cases, the characteristics of the offender might warrant a lesser sentence.

Similarly, the circumstances of the crime might counsel a lesser sentence, particularly when the legislature groups crimes in broad categories. Felony

98 Indeed, one might argue that there is always hope that a court will reverse the sentence, but barring such an occurrence, all three types of death-in-custody sentences have the same consequence of ending one’s life in state custody. Ironically, the life-without-parole and lengthy term of life sentences are much less likely to have a court reverse them than a capital case. See James S. Liebman et al., A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States, 1 J. EMPIRICAL LEGAL STUD. 209 (2004) (reporting that almost two-thirds of capital cases have reversible errors).
murder provides perhaps the best example of this, with a petty theft accompanying a murder categorized with a brutal rape-murder involving physical torture.

Both the inherent danger of getting it wrong and the irreversibility of the sentence motivated the Supreme Court to mandate that a capital offender receive consideration of these individualized characteristics. Allowing consideration may not change, in many cases, the outcome of the sentence, but it does significantly reduce the possibility of error at sentencing.

The same concepts apply equally to the corollary principle, prohibiting limitation on mitigating evidence. In order to provide an offender with a genuine opportunity to plead for his life, a court must allow consideration of mitigating evidence. A mandatory sentence, by definition, denies this opportunity by limiting the discretion of the judge, making such evidence irrelevant to the outcome of the case. Because the Court found this right to be so fundamental in Lockett, it prohibited any restriction on mitigating evidence at capital sentencing because such a rule was necessary to prevent the evil Woodson sought to remedy.

If, as argued above, death is different means death in custody, then the principles of individualized consideration and mitigation should apply to all death-in-custody cases. Certainly, the seriousness of a death-in-custody sentence and its meaning—that the offender is, as a person, irredeemable—seems to necessitate both consideration of individual offender and offense characteristics and a complete investigation into all potential mitigating evidence. Indeed, a limitation on an offender’s ability to include evidence concerning why his life still has value seems to be cruel and unusual.

Based on these principles, a court should not make such a serious determination without thoughtful and thorough consideration of all relevant information. Instead, a court, and not a legislature or prosecutor, should carefully weigh the aggravating and mitigating circumstances of the case before deciding whether the offender should die in the custody of the state.

In addition, the Court has made clear that the kind of consideration needed is the review of mitigating evidence. As the Court in Lockett emphasized, the seriousness of the sentence requires providing the offender an opportunity to make his best arguments—without limitation—as to why he does not deserve to die in the custody of the state.99 Miller echoes this principle, emphasizing the significance of considering “the character and record of the individual offender or the circumstances of the offense,” including “the possibility of compassionate or mitigating factors.”100

Further, consideration of mitigation also requires the availability of a non-death-in-custody sentence. This is because the question of mitigation is

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99 Lockett, 438 U.S. at 598.
100 Miller, 132 S.Ct. at 2473 (quoting Woodson, 428 U.S. at 304).
broader than whether an offender should receive death. As life-without-parole sentences and term sentences approaching one’s life expectancy have a similar serious consequence, courts must measure mitigating evidence against the question of whether an offender merits a death-in-custody sentence, not simply whether an offender merits the death penalty.

In sum, the seriousness of a death-in-custody sentence demands that an offender have his day in court, and the ability to plead for his life. It is for this reason that the principles of Woodson, Lockett, and Miller should extend to all death-in-custody cases.

3. Miller Applies Equally to Adults

Having explained why death is different should include all death-in-custody sentences and why individualized consideration and mitigation matter, the final prerequisite to establishing the central claim of this article is to demonstrate why the holding in Miller, a limit on juvenile sentencing, should apply equally to adults. To understand why this is true, it is necessary to explore the reasoning of the Court in Miller.

The Court’s opinion in Miller focused on the undue consequence of imposing a life-without-parole sentence on a juvenile offender. Part of this sentiment included the idea that the length of a life-without-parole sentence would be particularly harsh for an offender under the age of eighteen. The Court also supposed that, given such a potentially lengthy time in prison, the opportunity for rehabilitation was also longer. Finally, the Court recognized that some juvenile offenders might be less culpable given their lack of development, again giving rise to the possibility of maturation and redemption. These three ideas together—the time of the sentence, the time to transform, and the possibility of diminished culpability—cast doubt on the wisdom of a mandatory life-without-parole sentence for such offenders.

The Court thus recognized the possibility that some of these offenders might be redeemable as individuals at some future point in time. It seemed harsh, then, to allow a bright-line rule to persist given this possibility that some offenders might not fit the presumption of incurability embedded in the mandatory sentencing scheme.

Again, the Court’s extension of the Eighth Amendment in Miller does not prohibit a juvenile life-without-parole sentence, but it does require careful consideration by a court of all of the germane facts and circumstances before making such a determination. Thus, it was the possibility, or even likelihood, that some offenders might be redeemable at some later point in their lives that motivated the Court to bar mandatory juvenile life-without-parole sentences.

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101 See, e.g., Lockett, 438 U.S. at 598.
102 Miller, 132 S.Ct. at 2473.
While the propensity of adult offenders to possess characteristics suggesting a possibility of rehabilitation and redemption may be less than that of juvenile offenders, it does not mean it is non-existent. To the contrary, there is a strong likelihood that at least some offenders facing a death-in-custody sentence can make a persuasive case that their lives still have worth and meaning. But mandatory sentences deny offenders this opportunity.

Put another way, adults are no less human than juveniles are. And they possess no less dignity. Indeed, it would be odd to conclude that a consequence of aging is that one’s life automatically loses its purpose and meaning. While this may be true for some, it seems misguided to suggest that all adult individuals who commit a certain category of crime must receive a death-in-custody sentence, without any careful consideration of the details of their crime, their personal characteristics, and any mitigating evidence they might be able to offer.

Looking at the reasoning behind the Miller decision described above helps to demonstrate the myopia of drawing a bright-line between adults and juveniles in this context. If anything, Graham and Miller suggest that juveniles and adults are similar for many purposes under the Eighth Amendment.

To begin with, the length of time spent by an adult offender serving a life-without-parole sentence may not be significantly different from a juvenile offender. This is obviously true when comparing seventeen and eighteen-year-old offenders, but most criminal offenders are under the age of twenty-five. Thus, the difference in length between a juvenile life-without-parole sentence and an adult life-without-parole sentence is, on average, less than ten years.

Consequently, the length of time for rehabilitation may not be much different for adult offenders. Even if there were a significant difference in the length of time for rehabilitation, there is no reason to think that there is a correlation between length of prison sentence and likelihood of rehabilitation. If anything, increasing the length of a prison sentence may, for some offenders, diminish the likelihood of rehabilitation. Certainly, mandating a life-without-parole sentence eliminates much of the incentive for rehabilitation by condemning the offender to permanent exclusion from society.

Further, while juveniles may be, by definition, less culpable in certain ways, such a determination has no bearing on the culpability of adult offenders. Depending on the case, an adult offender may be less culpable than some juvenile offenders may be. At the very least, it is possible, if not likely, that adult offenders will not uniformly be categorically different from juvenile offenders in the degree to which they deserve death-in-custody sentences.

Therefore, while juveniles may be different because they possess an increased likelihood of having a diminished capacity, this truism does not foreclose the possibility that some adult offenders might likewise possess intellectual shortcomings that warrant investigation at sentencing. As many death penalty cases have demonstrated, offenders who commit serious crimes
do, in many cases, exhibit mental disabilities or other mitigating characteristics that affect sentencing decisions of courts.

For purposes of mandatory sentences, then, adults ought to receive the same individual consideration and opportunity to mitigate their offenses that juveniles do in life-without-parole cases. There is no functional difference that justifies according adult offenders less of an opportunity to plead for their lives than juveniles when faced with the possibility of death in the custody of the state.

IV. WHERE MILLER’S MANDATE MATTERS

Miller’s central mandate, then, is that the Eighth Amendment requires courts to provide individualized consideration of offenders in death-in-custody cases. The corollary of this principle is that the Eighth Amendment should bar any death-in-custody sentence in which the mandatory nature of the sentence did not allow for the consideration of mitigating evidence by the court. The normative consequences of this mandate follow below.

A. Capital Cases

From Woodson and Lockett, it is clear that the Eighth Amendment prohibits the mandatory death penalty and requires consideration of all mitigating evidence in capital cases.103 In other words, a state cannot impose a death penalty on an offender without a sentencing determination made by a judge or jury.104

But the Miller principle goes even further in capital cases. It provides that courts must weigh death-in-custody sentences against lesser sentences when making sentencing determinations. As indicated above, the question is not simply whether the offender deserves the death penalty, but also whether the offender merits a life-without-parole sentence or term of years approaching life expectancy.

Because life-without-parole sentences deserve their own heightened sentencing scrutiny, life without parole cannot serve as a default sentence in cases where the jury or judge elects not to give the offender the death penalty. On the contrary, the decision to give a sentence of life without parole requires the court to weigh carefully the aggravating and mitigating circumstances of the case before it chooses to impose a death-in-custody sentence.

In this context, then, the practical application of the mandate of Miller requires a third sentencing option besides capital punishment and life without

104 Id.
parole in aggravated murder cases. The third option could be a life with the possibility of parole, as many states provide. The only caveat with such a sentence is that consideration of parole must not be beyond the life expectancy of the offender.\(^{105}\) A life sentence with the option of parole after seventy years would not comport with the *Miller* principle.\(^{106}\) On the other hand, a sentence with the option of parole after twenty-five years would comply with the *Miller* principle in most cases, but would depend on the age and the health of the offender.\(^{107}\)

If the Court applies this principle, it would strike down state sentencing schemes that do not allow consideration of alternative sentences to death and life without parole in capital cases. The practical consequence of this change, then, would be the more careful consideration of the use of life without parole in capital cases.\(^{108}\)

While avoiding the death penalty is a victory of sorts for an offender guilty of aggravated murder, the alternative of life-without-parole still means that he will die in the custody of the state. Indeed, life-without-parole sentences and capital sentences share the reality that one has no legitimate hope of escaping confinement prior to death.\(^{109}\) Both sentences are determinations that the offender no longer possesses the ability to offer anything positive to society and should remain apart from society until death.\(^{110}\) In addition, as mentioned above, a life-without-parole sentence can be worse than a sentence of death. Often in capital cases, the seriousness of the life-without-parole sentence goes unnoticed because it pales in comparison to execution.\(^{111}\) The application of the mandate of *Miller* will thus serve to reverse this trend of ignoring the seriousness of life without parole by mandating the court’s consideration of mitigating evidence in terms of a life-without-parole sentence, not just a death sentence. For all these reasons, then, application of the mandate of *Miller* to capital cases requires that legislatures make non-death-in-custody sentence available as a sentencing option.

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\(^{105}\) As discussed above, term sentences that approach one’s life expectancy are no different from life-without-parole sentences.

\(^{106}\) See *supra* notes 92-94 and accompanying text (describing recent commutations of the Iowa governor); notes 95-97 and accompanying text (describing the recent California Supreme Court decision).

\(^{107}\) It would not be difficult for courts to calculate an offender’s life expectancy at sentencing using actuarial tables and expert testimony.

\(^{108}\) It is an open question whether this would require bi-furcation of the sentencing hearing in capital cases. Because the evidence goes to the same type of question—deservedness of one of two kinds of death (by lethal injection or in prison)—a separate hearing seems unnecessary.

\(^{109}\) See, e.g., Appleton & Grover, *supra* note 79, at 610.

\(^{110}\) *Id.*

\(^{111}\) See Barkow, *supra* note 9; Berman, *supra* note 9.
B. Non-Capital Cases

1. Life without Parole

The Court in *Graham* held that life-without-parole sentences for juveniles in non-homicide cases categorically violated the Eighth Amendment, whether mandatory or not. In *Miller*, the Court prohibited mandatory life-without-parole sentences for juveniles in all cases. The *Miller* principle enunciated above clearly extends beyond the Court’s cases.

At the very least, the mandate of *Miller* requires that courts, not legislatures, impose all life-without-parole sentences. In other words, the Eighth Amendment should bar the mandatory imposition of life-without-parole sentences.

For instance, the federal drug statute, 21 U.S.C. §841(b), requires a sentence of life imprisonment without parole for a repeat offender using above a certain amount of drugs where “death or serious bodily injury results from the use of such substance.” In such a case, the Eighth Amendment, based on the mandate of *Miller*, should prohibit the imposition of such a sentence because it imposes a mandatory sentence of death-in-custody.

Interestingly, the mandatory imposition of such sentences can sometimes occur even though the legislature did not decide to impose that sentence. Rather, in many cases, the legislature simply determined that the crime warranted a mandatory life sentence. Many such states subsequently abolished parole, and as a result, a mandatory life sentence became a mandatory life-without-parole sentence.

Further, states must provide a sentencing alternative to life without parole that does not mandate the offender serve a sentence beyond his life expectancy without some later consideration of the possibility of parole. In other words, as with capital cases in this paradigm, cases involving a life-without-parole sentencing option must also have a life-with-parole option (or some lesser option) in which parole could occur before the offender reaches his life expectancy.

Thus, the states must allow, at the very least, for the possibility of the court imposing a life with the possibility of parole sentence in every case. Mandatory sentencing statutes that did not allow for this possibility would violate the Eighth Amendment.

As indicated in the next section, the possibility of parole must occur at some point prior to the end of the offender’s life expectancy. A sentence allowing the possibility of parole after 75 years would not satisfy this

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113 These schemes are often the product of truth-in-sentencing reforms. *See supra* note 24 and accompanying text.
requirement. Providing for the possibility of parole after 25 years would suffice in most cases, as most offenders are under the age of 35.  

Importantly, this remedy need not require the striking down of a plethora of state statutes. Much like in the right to jury trial context, courts could simply consider statutes with mandatory sentences as advisory. In other words, the court would have the discretion to depart from the statutorily mandated sanction if it so chose, and impose a lesser sentence of a term of years. Part of this consideration of whether to depart would include, of course, whatever mitigating evidence the offender chose to offer. As with the federal sentencing guidelines after Booker, such an approach would have the advantage of promoting consistency while enabling the flexibility to decrease the sentence when appropriate.

2. Longer than Life Expectancy Sentences

Another application of the mandate of Miller is a limitation on mandatory sentences that approach or exceed the life expectancy of the offender. As explained above, such sentences violate the Eighth Amendment because they mandate death in custody without consideration by a court of mitigating circumstances.

The most common example of such a sentence occurs where a state has adopted a habitual offender law that significantly increases the mandatory minimum sentence. Such sentences invite Eighth Amendment scrutiny when the number of years approaches the life expectancy of the offender. Further, where such laws count each violation of the statute as a separate crime, the cumulative amount of the sentence can far exceed the life expectancy of the offender.

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116 In theory, the court could also require consideration of parole after a certain time period, but this may be more difficult in states that have abolished parole.
117 In Booker, the Supreme Court held the mandatory nature of the Federal Sentencing Guidelines violated the Sixth Amendment because they required enhancement of a defendant’s sentence based on facts neither admitted by defendant nor found by a jury. The Guidelines were effectively deemed “advisory.” Booker, 543 U.S. at 233. See also Giles R. Bissonnette, “Consulting” the Federal Sentencing Guidelines after Booker, 53 UCLA L. REV. 1497, 1498 (2008).
118 A good example of this is the California three strikes law. See Ewing v. California, 538 U.S. 11 (2003).
119 Sometimes courts can go to wild extremes in imposing sentences that would take many lifetimes to serve. See, e.g., http://sentencing.typepad.com/sentencing_law_and_policy/2012/07/record-long-sentence-of-1256-years-imposed-on-colorado-bank-robber.html.
In other cases, the minimums for several different crimes committed as part of the same criminal act will cumulatively result in a sentence that approaches or exceeds the life expectancy of the offender. Finally, the minimum for a new crime, whether committed in prison or on probation, may approach the life expectancy of the offender when coupled with a current sentence.

Irrespective of the underlying circumstances, the mandate of *Miller* in this context suggests that the Eighth Amendment require consideration of mitigating evidence. The Eighth Amendment should not allow an automatic or required sentence with such a length—the court ought to have the discretion to determine whether (1) a sentence of that length is appropriate and (2) whether parole should be available.

To remedy this constitutional problem (assuming that Court adopts the mandate of *Miller*), the legislature has two options: allow the court discretion to impose a lower sentence in such cases or make parole available. Again, the central premise here is that the legislature cannot make the decision to sentence all individuals who commit a certain crime or set of crimes to a death-in-custody sentence; a court must do so, and only after considering any mitigating evidence offered by the offender.

While this consequence may seem a greater departure in theory, in practice it is addressing the same outcome.\(^\text{120}\) And it does not mean that the guilty go free. The expansion of the Eighth Amendment advocated here simply requires opportunity for offender mitigation at sentencing.\(^\text{121}\)

### V. Why *Miller’s* Mandate Matters

Given the prior description of the mandate of *Miller* and its possible normative consequences, this paper concludes by arguing why the mandate matters, that is, why this approach is a good one. Three main arguments support this expansion of the Eighth Amendment to mandatory sentences in death-in-custody cases: (1) the need to limit delegation of sentencing decisions to prosecutors, (2) the potential for injustice in individual cases, and (3) the current approach to life-without-parole sentences in the United States.

#### A. Prosecutorial Delegation

First, as emphasized by the Court in *Woodson*, one of the common consequences of mandatory sentencing schemes is jury nullification, where the

\(^\text{120}\) People v. Caballero, No. S190647 (Cal. Aug. 18, 2012).

jury elects to find a defendant not guilty based on the harsh nature of the punishment. While this is probably less true in non-capital cases, it is foreseeable that a jury could find a guilty defendant innocent to avoid giving the offender a life-without-parole sentence, particularly in a state with a habitual offender statute where the crime before the court is non-violent.

The bigger problem, however, with a mandatory scheme is the practical effect of delegating the sentencing decision to the prosecutor. Where a sentence for a particular crime is mandatory, a prosecutor has the leverage to enter plea bargains in such a way that effectively chooses the sentence. If the offender committed a crime with lesser-included offenses, the prosecutor can decide, through the charging decision, what the sentence will be.

It becomes an even more troubling situation when a mandatory sentencing scheme effectively delegates the sentencing discretion to a prosecutor in cases involving the possibility of a death-in-custody sentence. Allowing the prosecutor instead of a court to choose whether an offender will receive a death in custody sentence raises separation of powers concerns, impedes consistency in sentencing, and opens the door for abuses of power. Given this truism, expanding the Eighth Amendment to proscribe mandatory sentences in death-in-custody cases would have the value of restricting the influence of prosecutorial discretion on the sentencing outcomes in the most serious cases.

B. Injustice in Individual Cases

Rules often create harsh outcomes at the margins. Mandatory sentencing


123 It has often been said that “hard cases make bad law.” Winterbottom v. Wright, 10 M & W 109 (1842) (“[t]his is one of those unfortunate cases . . . in which, it is, no doubt, a hardship upon the plaintiff to be without a remedy but by that consideration we ought not to be influenced. Hard cases, it has frequently been observed, are apt to introduce bad law”); Northern Securities Co. v. United States, 193 U.S. 197(1904) (“[g]reat cases like hard cases make bad law. For great cases are called great, not by reason of their importance... but because of some accident of immediate overwhelming interest which appeals to the feelings and
schemes are no different. While a certain sentence may be appropriate for many violators of a particular criminal statute, there also will be cases in which the legislatively ascertained mandatory sentence is excessive.

Given the sentencing experience of the courts, it seems unnecessary to remove judicial discretion entirely in the name of consistency in sentencing. This is particularly true in the cases for which the sentence does not comport with the actions of the offender. It is not an isolated occurrence when a judge believes a particular sentence is excessive but cannot do anything because his or her hands are tied.

Cases involving death-in-custody sentences exacerbate this problem. The injustice of an excessive sentence amplifies when the consequence is death in custody. Such sentences, as explained above, are determinations that the offender’s life no longer has any value—that the offender is irredeemable as a person.

When an offender receives such a harsh sentence without consideration of whether his case may be the exception to the mandatory sentencing rule dictated by the legislature, the possibility for serious injustice is high. The automatic nature of such mandatory sentences seems to minimize the significance of a determination that for the offender is one of ultimate consequence. The failure to consider carefully in every case whether a death in custody sentence is appropriate dehumanizes the offender through its devaluation of his life.

Indeed, it seems particularly cruel in such cases not to afford the offender an opportunity to provide mitigating evidence—to make his case for why his life still has value, and why he should not die in state custody. And to mandate a death-in-custody sentence without deeper consideration of both the facts and circumstances of the case as well as the character of the offender seems an unusual approach to humane punishment.

Eliminating mandatory sentences which mandate death-in-custody sentences will also give judges the ability to depart downward from death-in-custody sentences in less serious cases, particularly those involving illegal drugs. Indeed, the mandatory imposition of harsh drug sentences creates some distorts the judgment").


of the greatest injustices in our criminal justice system.\(^{126}\)

As indicated above, expanding the Eighth Amendment to proscribe mandatory sentences in death-in-custody cases could effectively remedy this serious problem. Providing a court the opportunity to consider mitigating evidence would allow it to make exceptions to the legislatively defined sentence for a particular crime.

\(\text{C. The Need to Re-examine Life without Parole}\)

Perhaps most importantly, an explicit Eighth Amendment incorporation of the mandate of \textit{Miller} could significantly reduce the use of life-without-parole in the United States. While often ignored because of its place in the shadow of the death penalty, life-without-parole sentences increasingly undermine the American criminal justice system.

The United States currently leads the world in imprisoning its citizens, with one of every 100 citizens in prison.\(^{127}\) Put another way, the United States has five percent of the world’s population and twenty-five percent of its prison population.\(^{128}\) A large part of this excessive use of imprisonment results from the imposition of life-without-parole sentences.\(^{129}\)

The United States is in the minority in the world in having life without parole as a sentencing option. Only twenty percent of the countries in the

\(\footnotesize{\text{\textsuperscript{126} See Illegal Drugs: Economic Impact, Societal Costs, Policy Responses: Hearings Before the J. Economic Comm., 110th Cong. 1 (2008) (statement of Sen. Jim Webb, Member, Joint Econ. Comm.). As Senator Webb has argued, “Either we have the most evil people in the world, or we are doing something wrong with the way that we handle our criminal justice system. And I choose to believe the latter.” Id.}}\)


\(\footnotesize{\text{\textsuperscript{129} See CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT, available at www.usfca.edu/law/docs/criminalsentencing/}.}}\)
world allow life without parole sentences.\textsuperscript{130} Sixty-five percent restrict sentences to a maximum of twenty years.\textsuperscript{131} And the number of life-without-parole sentences in the United States far exceeds the other countries that use it.\textsuperscript{132}

For instance, England has 41 life-without-parole cases, the Netherlands has 37 life-without-parole cases, and Australia has 59 life-without-parole cases.\textsuperscript{133} The United States has 41,000 prisoners serving a life-without-parole sentence, of which 2,000 are juveniles. Amazingly, almost half of these individuals did not commit a violent crime.\textsuperscript{134}

And those who did commit more serious crimes, like aggravated murder, in many cases received life-without-parole as a lesser alternative to the death penalty. Given the admittedly harsher sanction, though, the availability of the death penalty increases the use of life without parole. This is because some state statutes provide life without parole as the only alternative to the death penalty.\textsuperscript{135} In addition, the presence of the death penalty results in many offenders opting to accept a life-without-parole sentence in a plea bargain rather than risk the death penalty at trial.

Expanding the Eighth Amendment consistent with the mandate of \textit{Miller} can help to cure these problems. Eliminating mandatory sentences requires a court to consider all mitigating evidence before sentencing an offender to a death-in-custody sentence. Serious consideration of such evidence will reduce the likelihood of life-without-parole sentences in some cases. At the very least, such a change will ensure serious consideration of the facts and circumstances of the case and the character of the offender before a court imposes a death-in-custody sentence.

\section*{Conclusion}

In light of the Supreme Court’s recent decision in \textit{Miller}, this article has argued that the mandate of the case is the extension of the Eighth Amendment to require individualized sentencing determinations and complete consideration of mitigating evidence in all death-in-custody cases. In doing so, the article has demonstrated both how such an approach is a logical extension of \textit{Miller}. Further, it showed why the relevant intellectual prerequisites—including death-in-custody within the concept of death is different, expanding the application of individualized consideration and mitigation, and explaining

\begin{flushleft}
\textsuperscript{130} \textit{Id.}\\
\textsuperscript{131} \textit{Id.}\\
\textsuperscript{132} \textit{Id.}\\
\textsuperscript{133} \textit{Id.}\\
\textsuperscript{134} \textit{Id.}\\
\textsuperscript{135} \textit{See generally} DEATH PENALTY INFO. CTR., http://www.deathpenalty.info.org/.
\end{flushleft}
why the holding of Miller applies equally to adults—are met by the doctrinal underpinnings of the Court’s Eighth Amendment cases.

Having advanced its central premise, the article then explored the possible consequences of the Miller mandate. In particular, the article highlighted three areas of potential reform: (1) capital sentencing hearings that do not offer a sentence option of life-with-parole, (2) mandatory sentences of life-without parole, and (3) mandatory sentences that approach or exceed the life expectancy of the offender.

Finally, the article offered three policy reasons for such an expansion: (1) the delegation of sentencing decisions to prosecutors, (2) injustice in individual cases from mandatory sentences that are excessive, and (3) the need to reconsider the use of life-without-parole in the United States.

In the final analysis, offenders ought to receive individualized consideration and have the opportunity to present mitigating evidence when facing a possible sentence of death-in-custody. Expansion of the Eighth Amendment to limit the use of mandatory sentences appears to be a reasonable vehicle to accomplish this purpose.

Continuing to allow mandatory sentences to impede the ability of an offender to plead for his life when facing a death-in-custody sentence seems nothing short of cruel and unusual. The Supreme Court, for the last decade, has opened the door to increased scrutiny of unjust sentences through its Eighth Amendment jurisprudence. It only seems appropriate that ensuring that offenders receive their day in court by barring mandatory death-in-custody sentences is the next step in the expansion of the Eighth Amendment.