Cruel and Unusual Youth Confinement

Cara H. Drinan*

In a series of cases known as the Miller *trilogy, the Supreme Court recognized that children are both less culpable and more amenable to rehabilitation than adults, and that those differences must be considered at sentencing. Relying on the principle that kids are different for constitutional purposes, the Court abolished capital punishment for minors and significantly limited the extent to which minors can be subject to life-without-parole ("LWOP") terms. Equally important, the* Miller *trilogy was predicated on the concept of inherent human dignity, and it recognized the youthful prisoner's need for "hope" and "reconciliation with society." While scholars have grappled with the implementation of these cases for nearly a decade, there has been no comprehensive analysis of what these cases mean for conditions of confinement. That is, if children are different for constitutional purposes at the moment of sentencing, surely, they are still different when transported to a correctional facility and confined by the state. This Paper seeks to close that gap in the literature by making two specific contributions: first, by arguing that the Court's juvenile sentencing decisions impose affirmative obligations upon states regarding youth conditions of confinement; and second, by articulating a standard for measuring when youth conditions of confinement violate the Eighth Amendment. As long as the United States persists in its extreme juvenile sentencing practices, the project of articulating what constitutes cruel and unusual youth confinement remains crucial.*

---

* Professor of Law, The Catholic University of America. Thank you to Sharon Dolovich for her groundbreaking work on prison cruelty. Thank you to William W. Berry III for being in ongoing dialogue with me about this article and Eighth Amendment issues more broadly. And finally, thank you to Terrence J. Graham for opening my eyes to the cruelty of American incarceration and for inspiring my efforts to challenge that cruelty.

INTRODUCTION

In a series of cases known as the *Miller* trilogy, the Supreme Court recognized that children are both less culpable and more amenable to rehabilitation than adults, and that those differences must be taken into consideration at sentencing.[1] Relying on the principle that "kids are different" and that these differences are of constitutional significance,[2] the Court abolished capital punishment for minors and significantly limited the extent to which minors can be subject to life-without-parole ("LWOP") terms.[3] Moreover, juveniles who commit non-homicide crimes must be afforded a "meaningful opportunity to obtain release,"[4] and even those convicted of homicide crimes can only be sentenced to die in prison if they are among the rare youth whose crimes reflect "irreparable corruption."[5] Equally important, the *Miller* trilogy was predicated on the concept of inherent human dignity,[6] and it recognized the youthful prisoner's need for "hope" and "reconciliation with society."[7]

For nearly a decade and a half, courts have grappled with the implementation of the trilogy, and in parallel fashion, scholars have written extensively on the *Miller* line of cases. This academic work has addressed substantive sentencing questions,[8] remedies and enforcement provisions,[9]

---

1. The trilogy refers to Roper v. Simmons, 543 U.S. 551 (2005), Graham v. Florida, 560 U.S. 48 (2010), and Miller v. Alabama, 567 U.S. 460 (2012).

2. *See* Perry L. Moriearty, Miller v. Alabama *and the Retroactivity of Proportionality Rules*, 17 U. PA. J. CONST. L. 929, 949 (2015) (stating that, with the *Roper* decision, "[t]he Court's modern 'kids are different' jurisprudence was born").

3. *See infra* Part I.

4. *Graham*, 560 U.S. at 75.

5. *Miller*, 567 U.S. at 479–80.

6. *See generally* Meghan J. Ryan, *Taking Dignity Seriously: Excavating the Backdrop of the Eighth Amendment*, 2016 U. ILL. L. REV. 2129 (2016).

7. *Graham*, 560 U.S. at 79.

8. *See, e.g.*, Alice Reichman Hoesterey, *Confusion in* Montgomery's *Wake: State Responses, the Mandates of* Montgomery*, and Why a Complete Categorical Ban on Life Without Parole for Juveniles Is the Only Constitutional Option*, 45 FORDHAM URB. L.J. 149, 169–71 (2017) (addressing de facto life sentences for minors and aggregated term-of-year sentences).

9. *See, e.g.*, Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices and the Eighth Amendment*, 89 IND. L.J. 373, 396–43 (2014) (reviewing state parole mechanisms and assessing their legitimacy as applied to JLWOP prisoners post-Miller); Alexandra Harrington, *The Constitutionalization of Parole: Fulfilling the Promise of Meaningful Review*, 106 CORNELL L. REV. 1173, 1191–1231 (2021).

logical extensions of the *Miller* trilogy,[10] and the ways in which the Court's case law might transform juvenile justice practices entirely.[11] To date, though, there has been no comprehensive discussion of the trilogy's implications for youth conditions of confinement.[12] That is, to the extent that children are different—that they are vulnerable, fluid in their moral character, and likely to mature and reform under the right circumstances[13]—then those differences should matter not just at the moment when the state imposes a sentence, but equally so in the years after sentencing when the state confines that child. This Paper seeks to close that gap in the literature by making two specific contributions: first, by arguing that the Court's juvenile sentencing decisions impose affirmative obligations upon states regarding youth conditions of confinement; and second, by articulating a standard for measuring when youth conditions of confinement violate the Eighth Amendment.

As a preliminary matter, it is worth noting why this gap exists in the first place. Rather than developing a coherent approach to what constitutes cruel and unusual punishment, the Supreme Court over time has explored that question in various silos.[14] The Court has created one body of law dealing

---

10. *See, e.g.,* William W. Berry III, *More Different than Life, Less Different than Death*, 71 OHIO ST. L.J. 1109, 1138–43 (2010) (arguing for extension of *Graham* rationale to LWOP more generally and other logical implications of *Graham*); William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627, 1655–58 (2021) (relying upon *Miller* to attack non-capital punishments under the Eighth Amendment).

11. *See, e.g.*, Cara H. Drinan, *The* Miller *Trilogy and the Persistence of Extreme Juvenile Sentences*, 58 AM. CRIM. L. REV. 1659, 1667–81 (2021) (arguing for abolition of automatic transfer laws and mandatory minimums as applied to youth based on *Miller* trilogy).

12. One example of a proposal consistent with the one I develop herein, though articulated prior to *Miller* and its progeny, can be found in Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J. L. & SOC. CHANGE 285, 285 (2011). Others have explored how this line of cases might forbid particular practices regarding juveniles in confinement. *See, e.g.*, Sara McDermott, *Calibrating the Eighth Amendment:* Graham*,* Miller *and the Right to Mental Health Care in Juvenile Prison*, 63 UCLA L. REV. 712, 744–746 (2016) (discussing post-adjudication implications of *Miller* cases regarding mental health claims in juvenile facilities); Meg Gould, Note, *Cruel and Unusual Trauma: How Eighth Amendment Principles Governing Conditions of Confinement Should Apply to Juvenile Strip Searches*, 52 COLUM. HUM. RTS. L. REV. 1009, 1050 (2021) (arguing that Supreme Court's juvenile sentencing decisions apply to the standard for strip searches of incarcerated youth). I seek to offer a comprehensive framework for challenging conditions of confinement for young people in light of the *Miller* trilogy.

13. *See* Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

14. This paper works within the siloed reality of the Court's decisions in this space; my project here is not to offer a more holistic approach to Eighth Amendment jurisprudence. For an

with capital punishment, limiting the death penalty along two axes: the nature of the defendant and the nature of the defendant's crime.[15] At the same time, it has employed a separate lens for analyzing the lawfulness of term-of-year sentences.[16] Yet another test exists for measuring whether a method of execution comports with the Eighth Amendment.[17] And finally, most relevant to this Paper, the Court has generated a distinct body of law addressing when conditions of confinement are cruel and unusual.[18]

As one might expect, this siloed approach to assessing the cruelty of state-imposed punishment has also taken root in the *Miller* context, leading to absurd outcomes that undermine the promise of the *Miller* trilogy.[19] Most juveniles sentenced to LWOP or similarly extreme term-of-year sentences endured years of trauma, abuse, and violence before they entered the criminal system.[20] At the same time, because of their physical and emotional immaturity, young people entering the adult correctional system are incredibly vulnerable and experience high rates of abuse, violence, and suicide.[21] Youth serving extreme sentences are regularly denied access to educational or rehabilitative services, despite their proven efficacy, and instead they "learn" to navigate the gruesome reality of American

---

example of such a contribution, see William W. Berry III & Meghan J. Ryan, *Cruel Techniques, Unusual Secrets*, 78 OHIO ST. L.J. 403, 408–11 (2017) (offering an Eighth Amendment framework for type, method and technique of punishment). *See also* Rachael Rezabek, Note, *(De)Volving Standards of Decency: The Unworkability of Current Eighth Amendment Jurisprudence as Illustrated by* Kosilek v. Spencer, 87 S. CAL. L. REV. 389, 399–400 (2014) (arguing for consistent reliance upon objective evidence in Eighth Amendment punishment and medical care claims).

15. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding Eighth Amendment bars death penalty for intellectually disabled); Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (holding Eighth Amendment bars execution for rape of a child where defendant did not kill or intend to kill victim).

16. *Compare* Solem v. Helm, 463 U.S. 277, 277 (1983) (holding unconstitutional life without parole sentence for defendant's seventh nonviolent felony of passing a bad check) *with* Harmelin v. Michigan, 501 U.S. 957, 957–58 (1991) (upholding life sentence for defendant convicted of possessing large quantity of cocaine).

17. *See, e.g.*, Bucklew v. Precythe, 139 S. Ct. 1112, 1130–33 (2019) (upholding Missouri's lethal injection method of execution against prisoner as-applied challenge arguing that method would cause severe pain).

18. *See infra* Part III.

19. *Id.*

20. *See* Gene Griffin & Sarah Sallen, *Considering Child Trauma Issues in Juvenile Court Sentencing*, 34 CHILD.'S LEGAL RTS. J. 1, 6–14 (2014) (discussing prevalence of trauma among children in the system and its impacts).

21. Jessica Lahey, *The Steep Costs of Keeping Juveniles in Adult Prisons*, ATLANTIC (Jan. 8, 2016), https://www.theatlantic.com/education/archive/2016/01/the-cost-of-keeping-juveniles-in-adult-prisons/423201/ [https://perma.cc/FQ6N-S9UF].

correctional institutions from older, more seasoned prisoners.[22] Then, in order to vindicate their rights under the *Miller* trilogy, those individuals who come of age amid the horrors of our penal system are required to demonstrate to a judge or parole board how they have "matured" and "rehabilitated" themselves.[23] Not surprisingly, this is an uphill battle, and it often results in denied release.[24] This is a Kafkaesque reality for the thousands of minors sentenced as adults to extreme terms in America, and, as I argue in this Paper, it is also unconstitutional in light of the *Miller* trilogy.

This Paper proceeds in four parts. Part I addresses the *Miller* trilogy itself, highlighting the bedrock principles of youth development animating those cases. Part II exposes the appalling reality of confinement for youth coming of age in prison, arguing that this status quo cannot coexist with the Court's insistence that "kids are different." Part III then draws on the theory of the state's carceral burden[25] to argue that, because the Supreme Court has announced new substantive rules governing juvenile sentencing, those rules impose affirmative obligations upon the states in terms of *how* they incarcerate minors. At a minimum, states must guarantee physical, sexual, and mental safety. Beyond that, states must provide educational opportunities, rehabilitative services, and healthy relationship-building. Without these conditions in place, the state itself becomes complicit in the minor facing a potentially disproportionate sentence.[26] Part IV addresses how youth coming of age in prison might seek redress in court. Currently, a prisoner challenging a condition of confinement must demonstrate that the condition poses a substantial risk of serious harm and that prison officials are deliberately indifferent to the harms associated with that condition.[27] Moreover, before seeking relief in court, a prisoner must exhaust prison administrative protocols.[28] This is an onerous requirement for most prisoners, but a potentially life-threatening one for young people in adult prisons.

---

22. *See id.*

23. *See* Kristen Bell, *A Stone of Hope: Legal and Empirical Analysis of California Juvenile Lifer Parole Decisions*, 54 HARV. C.R.-C.L. L. REV. 455, 463 (2019) (describing the constitutional infirmity of the state's parole procedure, despite the state being a leader on this front).

24. *Id.* at 464–65.

25. *See generally* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 911–23 (2009).

26. *Cf.* Graham v. Florida, 560 U.S. 48, 74 ("For juvenile offenders, who are most in need of and receptive to rehabilitation, the absence of rehabilitative opportunities or treatment makes the disproportionality of the sentence all the more evident.") (citation omitted).

27. *See infra* Parts III and IV.

28. *Id.*

Accordingly, Part IV argues for a modified standard for young people challenging their conditions of confinement in adult prisons.

By way of Conclusion, I address questions of feasibility given the Court's composition today and its most recent decision in the juvenile sentencing arena.

I. THE *MILLER* TRILOGY

Legal scholars have described and critiqued the *Miller* trilogy extensively.[29] I do so here briefly for purposes of context. The trilogy refers to three Supreme Court decisions limiting extreme juvenile sentences: *Roper v. Simmons*,[30] *Graham v. Florida*,[31] and *Miller v. Alabama*.[32]

In *Roper*, the Court began to limit the extent to which states could impose the most serious sanctions available—capital punishment and LWOP—on children.[33] Christopher Simmons had been convicted of committing a brutal homicide at age seventeen, and the jury handed down a death sentence.[34] On appeal before the Supreme Court, Simmons argued that execution of those who were minors at the time of their offense violated the Eighth Amendment ban on cruel and unusual punishment.[35] In making this claim, Simmons asked the Court to overrule its 1989 decision in *Stanford v. Kentucky*, in which the Court had upheld execution of individuals who were sixteen or older at the time of their crime.[36] Writing for the majority, Justice Kennedy explained that "[c]apital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"[37] Further, the Court explained that, because of three general differences between minors and adults, juveniles *as a group* cannot be classified "among the worst offenders."[38] Specifically, the science of adolescent development indicates that youth are immature and less responsible than adults.[39] Second, juveniles

29. *See generally* Cara H. Drinan, *The* Miller *Revolution*, 101 IOWA L. REV. 1787 (2016); CARA H. DRINAN, THE WAR ON KIDS: HOW AMERICAN JUVENILE JUSTICE LOST ITS WAY (2018) [hereinafter WAR ON KIDS]; s*ee also supra* notes 8–11 and accompanying text.

30. Roper v. Simmons, 543 U.S. 551 (2005).

31. Graham v. Florida, 560 U.S. 48 (2010).

32. Miller v. Alabama, 567 U.S. 460 (2012).

33. *Roper*, 543 U.S. at 551.

34. *Id.* at 557–58.

35. *See id.* at 559–60.

36. *See id.* at 564.

37. *Id.* at 568.

38. *Id.* at 569.

39. *Id.*

are more susceptible to external influences and often lack the capacity to free themselves from negative environments.[40] And finally, juveniles' moral character is fluid, and thus they are uniquely amenable to reform.[41] Given these categorical distinctions, the Court held that the penological justifications for execution lose their moral force as applied to children.[42] As such, the *Roper* Court overruled *Stanford* and held that the Constitution forbids execution for crimes committed by minors.[43]

Five years later, in *Graham v. Florida,* the Court considered the question whether juveniles who commit non-homicide crimes may be sentenced to LWOP, the second most serious sentence on the books.[44] Terrence Graham had been given this death-in-custody sentence based on his involvement in a burglary and attempted armed robbery of a barbeque restaurant at age sixteen.[45] In a significant methodological departure, the Court employed an approach previously reserved for capital cases to ask whether LWOP was ever permissible in the context of minors who commit non-homicide crimes.[46] Again writing for the majority, Justice Kennedy explained that individuals like Terrence Graham have "twice diminished" culpability in that they are children and they have been convicted of a crime that is less serious than the life-ending crime of homicide.[47] Further, drawing on the science of adolescent development that animated the *Roper* decision, the *Graham* Court held that this group of minors has not only diminished culpability, but also unique capacity for rehabilitation and growth.[48] As such, while the Court left open the possibility that some juveniles who commit horrific non-homicide crimes may ultimately remain incarcerated for life, it made clear that the state cannot impose a sentence that forecloses the possibility of return to society.[49] Instead, the state must "give defendants like Graham some meaningful

---

40. *Id.*

41. *Id.* at 570.

42. *Id.* at 570 ("These differences render suspect any conclusion that a juvenile falls among the worst offenders.").

43. *Id.* at 574–75.

44. Graham v. Florida, 560 U.S. 48, 59–62 (2010).

45. *Id.* at 53–55.

46. *Id.* at 59–62 (explaining the two prior approaches to proportionality review—one for term-of-years sentences and the other for death penalty cases—and then adopting the latter approach in Graham's case).

47. *Id.* at 69.

48. *Id.* at 74.

49. *Id.* at 75. ("The Eighth Amendment does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does prohibit States from making the judgment at the outset that those offenders never will be fit to reenter society.").

opportunity to obtain release based on demonstrated maturity and rehabilitation."[50]

While the *Graham* decision was a significant methodological decision and further cemented the Court's "kids are different" jurisprudence,[51] its immediate practical impact was small on a national scale.[52] As the *Graham* Court itself noted, approximately 124 individuals nationwide were serving a LWOP sentence for a juvenile non-homicide crime, and the super-majority of that group were confined in Florida.[53] At first glance, *Graham* appeared to have addressed a small set of cases largely concentrated in one state. Yet, lurking in the background was the question whether the Eighth Amendment foreclosed LWOP for juveniles convicted of *homicide* offenses. Nationwide, there were approximately 2,500 individuals who had been sentenced to die in prison for homicide crimes they committed as children.[54]

Two years after *Graham*, in *Miller v. Alabama*, the Court addressed that question.[55] At age fourteen, Evan Miller and a friend beat Miller's neighbor and set fire to his trailer, leaving him to die.[56] A jury found Miller guilty of murder in the course of arson, and that conviction carried a mandatory sentence of LWOP under state law.[57] Before the Supreme Court, Miller argued that this mandatory LWOP sentence violated the Eighth Amendment, and the Court agreed.[58]

As Justice Kagan explained, Miller's case implicated two distinct lines of precedent: one which rendered certain kinds of punishment inapplicable to certain categories of defendants, and a second which required individualized sentencing in the death penalty context.[59] As to the first category, the *Miller* Court noted that the Eighth Amendment bars some sentences for entire categories of defendants.[60] For example, based on proportionality principles, the Court held states cannot impose the death penalty on juveniles as a group,

---

50. *Id.*

51. *Cf.* Stephen St. Vincent, *Kids Are Different*, 109 MICH. L. REV. FIRST IMPRESSIONS 9, 9 (2010) (describing the Court's move from "death is different" jurisprudence to "kids are different" post-*Graham*).

52. *Graham*, 560 U.S. at 64.

53. *Id.*

54. Josh Rovner, *Juvenile Life Without Parole: An Overview*, SENTENCING PROJECT (May 24, 2021), https://www.sentencingproject.org/policy-brief/juvenile-life-without-parole-an-overview/ [https://perma.cc/3FSF-MTZQ].

55. Miller v. Alabama, 567 U.S. 460, 465 (2012).

56. *Id.* at 468.

57. *Id.* at 468–69.

58. *Id.* at 465.

59. *Id.* at 470.

60. *Id.*

nor can they impose execution on adults for the crime of rape of a child.[61] Similarly, the Court had extended this proportionality rationale to the LWOP context in *Graham*, finding that, because of their diminished culpability and greater capacity for change, juveniles who commit non-homicide crimes may not be sentenced to LWOP.[62] And the *Miller* Court recognized that the rationale for *Graham* applied with equal force in a case like Evan Miller's: "[N]one of what [the *Graham* Court] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. . . . So *Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses."[63]

As to the second line of cases, the Court has required consideration of each capital defendant and the details of his crime before imposing a death sentence since 1976.[64] Because the *Graham* Court treated LWOP as tantamount to a death sentence for minors, the *Miller* Court viewed this requirement for individualized sentencing as equally compelled in the juvenile life-without-parole ("JLWOP") context.[65] Before sentencing a child to die in prison, per *Miller*, a sentencing body must consider youth and all of its mitigating attributes, and, in dicta, the Court predicted that appropriate occasions for JLWOP would be "rare" given juveniles' capacity for change.[66] In sum, while *Miller* did not impose a categorical ban on JLWOP, the Court held that the Eighth Amendment bars mandatory LWOP sentences for juveniles.[67]

While the term "*Miller* trilogy" typically refers to the three original decisions limiting extreme sentences for youth—*Roper*, *Graham and Miller*—two subsequent cases are of paramount importance for understanding the trajectory of the trilogy: *Montgomery v. Louisiana*[68] and *Jones v. Mississippi*.[69] Immediately after *Miller*, lower courts confronted the question whether *Miller* was a retroactive ruling.[70] If so, then *Miller* entitled the thousands of individuals nationwide who had once been given a

61. *Id.*
62. *Id.*
63. *Id.* at 473.
64. *Id.* at 475 (citing Woodson v. North Carolina, 428 U.S. 280, 305 (1976)).
65. *Id.* at 476–77.
66. *See id.* at 477–79.
67. *Id.* at 479–80.
68. Montgomery v. Louisiana, 577 U.S. 190 (2016).
69. Jones v. Mississippi, 141 S. Ct. 1307 (2021).
70. *See, e.g.*, State v. Mantich, 842 N.W.2d 716, 723 (Neb. 2014) (examining whether *Miller* applied retroactively to cases on collateral review); Petition of State, 166 N.H. 659, 667 (2014) (examining same); *In re* Morgan, 713 F.3d 1365, 1367 (11th Cir. 2013) (examining same).

mandatory JLWOP sentence to a new sentencing hearing; if not, the *Miller* ruling only barred future mandatory LWOP sentences for minors.

In 2016, the Court took up this question in *Montgomery* and determined that *Miller* was, in fact, a retroactively applicable decision.[71] The *Montgomery* Court applied its retroactivity analysis established in *Teague v. Lane*.[72] That framework states that, in general, new rules of criminal procedure apply only on a prospective basis, whereas new "watershed" rules of criminal procedure and new substantive rules of constitutional law apply retroactively to cases that were final when the new rule was announced.[73] Substantive rules are those that limit the states' power to criminalize certain conduct or to impose certain punishment.[74] "Procedural rules, in contrast, are designed to enhance the accuracy of a conviction or sentence by regulating 'the *manner of determining* the defendant's culpability.'"[75] At its core, the *Teague* framework recognizes that, notwithstanding procedural errors, final convictions or sentences may still be accurate or fair; a procedural error raises only the *possibility* that they are not.[76] On the other hand, when the Court determines that an entire category of defendants is ineligible for a certain punishment or that an entire category of conduct is beyond the state's power to criminalize, the final judgment cannot stand because it has been declared unlawful.[77]

Writing for the majority in *Montgomery*, Justice Kennedy explained that *Miller* announced a substantive rule and thus was retroactively applicable.[78] In particular, the Court explained that "[t]he 'foundation stone' for *Miller*'s analysis was [the] Court's line of precedent holding certain punishments disproportionate when applied to juveniles."[79] This line included *Roper* and *Graham*, both of which held that "children are constitutionally different from adults for purposes of sentencing."[80] And it was these constitutional differences between adults and minors that meant mandatory JLWOP would

---

71. *Montgomery*, 577 U.S. at 208–09.

72. *Id.* at 198–205.

73. *Id.* at 198.

74. *Id.* ("Substantive rules include 'rules forbidding criminal punishment of certain primary conduct,' as well as 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.'") (citing Penry v. Lynaugh, 492 U.S. 302, 330 (1989)).

75. *Id.* at 201.

76. *See id.*

77. *See, e.g.*, *In re* Sparks, 657 F.3d 258, 262 (5th Cir. 2011) (discussing the retroactivity of *Roper* and *Atkins*).

78. Montgomery v. Louisiana, 577 U.S. 190, 208–09 (2016).

79. *Id.* at 206.

80. *Id.*

"pos[e] too great a risk of disproportionate punishment."[81] Further, the Court explained that *Miller* announced a substantive proportionality rule in the following sense: even if a sentencing body considered a child's age before imposing LWOP, that sentence would still violate the Eighth Amendment for a child whose crime reflects "unfortunate yet transient immaturity."[82] This is because, according to *Miller*, "sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption.'"[83] Having determined that *Miller* announced a substantive rule of proportionality that barred JLWOP for the vast majority of juvenile defendants, the *Montgomery* Court held that *Miller* applied retroactively.[84] As a result, thousands of people once told they would die in prison became entitled to a second look at their initial JLWOP sentence.[85]

Five years later, the Court revisited *Miller* and its constitutional requirements.[86] In *Jones v. Mississippi*, the Court addressed the question whether a sentencing body needed to make a factual finding regarding a juvenile defendant's "permanent incorrigibility" before imposing JLWOP.[87] Because *Miller* had declared that JLWOP was barred for all but the "rare" juvenile whose crime reflected permanent incorrigibility, Brett Jones argued that he was entitled to a fact-finding on that count before he could be re-sentenced to JLWOP.[88] And, in his case, as he argued in state and federal court, Jones had already demonstrated that his crime was a function of

81. *Id.* at 195.

82. *Id.* at 208.

83. *Id.*

84. *See id.* at 212.

85. Beth Schwartzapfel, *Was Evan Miller the 'Rare Juvenile' Who Deserved Life Without Parole?*, THE MARSHALL PROJECT (Mar. 12, 2017, 10:00 PM), https://www.themarshallproject.org/2017/03/12/was-evan-miller-the-rare-juvenile-who-deserved-life-without-parole [https://perma.cc/ATH7-663X] (noting that 2,500 youth had been sentenced to life without parole prior to *Miller v. Alabama*).

86. Jones v. Mississippi, 141 S. Ct. 1307, 1311 (2021).

87. *Id.* at 1313.

88. *See id.* While Jones wanted the chance to prove that he was *not* permanently incorrigible, it is worth noting that there is broad scientific and legal consensus that any such inquiry is fraught if not impossible—unless and until an individual has aged significantly from the time at which they committed a crime. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 73 (2012) ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."). *See also* Mary Marshall, Note, Miller v. Alabama *and the Problem of Prediction*, 119 COLUM. L. REV. 1633, 1654–64 (2019) (discussing legal and social science evidence that suggests predicting incorrigibility is impossible).

transient youth, that he was on a path of rehabilitation, and that he had demonstrated maturity and growth.[89]

With Justice Kennedy gone from the Court and three new Justices solidifying a conservative majority,[90] the *Jones* Court definitively announced an end to juvenile sentencing limits coming from the Supreme Court.[91] Not only did the Court reject Mr. Jones's request for *some* fact-finding regarding his capacity for change,[92] the *Jones* majority reframed *Miller* to require only a discretionary sentencing scheme in JLWOP cases.[93] Ignoring the logic of the *Miller* trilogy and the substantive proportionality rule announced in *Miller* and reinforced in *Montgomery*, the Court made clear its new anemic reading of the trilogy.[94] Because the *Jones* Court only required a discretionary sentencing scheme in name, rather than in fact, it signaled to lower court judges, like the one who re-imposed JLWOP on Brett Jones, that they are free to largely ignore the science and rationale of the *Miller* trilogy.[95] Going forward, states cannot sentence children to LWOP under a mandatory sentencing scheme, but not much more is required either in method or substance.[96]

For juvenile advocates, the only bright spot in the *Jones* opinion, ironically, is its intellectual dishonesty. While the Court turned its back on a decade and a half of juvenile sentencing precedent in deed, it claimed to have done no such thing in word.[97] Thus, as Justice Sotomayor noted in dissent,

---

89. *Jones*, 141 S. Ct. at 1339 (Sotomayor, J., dissenting) ("This significant body of evidence does not excuse Jones' crime. It does mean, however, that under *Miller* and *Montgomery*, there is a strong likelihood that Jones is constitutionally ineligible for LWOP.").

90 Morgan Marietta, *A Seismic Change Has Taken Place at the Supreme Court – but It's Not Clear if the Shift Is About Principle or Party*, AZ MIRROR (Sep. 29, 2022), https://www.azmirror.com/2022/09/29/a-seismic-change-has-taken-place-at-the-supreme-court-but-its-not-clear-if-the-shift-is-about-principle-or-party/ [https://perma.cc/2JHJ-XY3S].

91. *See generally* Cara H. Drinan, Jones v. Mississippi *and the Court's Quiet Burial of the* Miller *Trilogy*, 19 OHIO ST. J. CRIM. L. 181, 181–82 (2021).

92. *Jones*, 141 S. Ct. at 1318–21.

93. *Id.* at 1316 ("Instead, *Miller* cited *Roper* and *Graham* for a simple proposition: Youth matters in sentencing. And because youth matters, *Miller* held that a sentencer must have discretion to consider youth before imposing a life-without-parole sentence, just as a capital sentencer must have discretion to consider other mitigating factors before imposing a death sentence.").

94. *Id.* at 1331–34 (Sotomayor, J., dissenting); *see also* Drinan, *supra* note 91, at 186 ("The *Jones* majority eviscerated the *Miller* trilogy while pretending not to.").

95. Drinan, *supra* note 91, at 188.

96. *Cf. id.* at 196–97.

97. *Jones*, 141 S. Ct. at 1322–23; *see also id*. at 1331–34 (Sotomayor, J., dissenting) (discussing the ways in which the majority effectively overruled *Montgomery* while purporting to not do that).

the core of the *Miller* trilogy is still good law, and juvenile advocates should proceed accordingly.[98] This Paper takes her invitation at its word and does just that. Specifically, in the following sections of this Paper, I am less focused on the way in which the *Jones* Court hemmed in the *Miller* trilogy and more focused on the core of those cases—which the Court itself insists is intact.

A few foundational principles flow from this point of departure. First, I assume that the science of adolescent brain development as adopted by the Court is still relevant to the Supreme Court's analysis of youth sentencing and corrections. Second, and related, I assume that the Court continues to accept that children are both less culpable and more amenable to rehabilitation than adults. Third, because of these defining characteristics of youth, I assume that states must treat children differently—rather than as if they were just "miniature adults."[99] And finally, I assume that, precisely because of these differences, few children will persist in being "corrupt" if given the resources and tools of rehabilitation.

The next two Parts of this Paper argue that the *Miller* trilogy implies the following: to the extent that children are different, those differences must matter, not just at the moment of sentencing, but for years to come in the state's manner of incarceration.

II. COMING OF AGE INSIDE AMERICA'S PRISONS

In order to appreciate why the *Miller* trilogy must have implications for conditions of confinement, one must first comprehend the reality of prison conditions in America, especially for youth coming of age inside these prisons.[100] This Part of the Paper documents that appalling reality to highlight

98. *Id.* at 1337 (Sotomayor, J., dissenting) ("For present purposes, sentencers should hold this Court to its word: *Miller* and *Montgomery* are still good law.").

99. J.D.B. v. North Carolina, 564 U.S. 261, 274 (2011) (citing a history "'replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults").

100. Two important notes are warranted at the outset of this Part of the Paper. First, American prison conditions are barbaric and dehumanizing for *all* individuals, and nothing in this Paper is meant to suggest that current prison conditions are constitutional for adults. *See, e.g.*, Matt Ford, *The Everyday Brutality of America's Prisons*, NEW REPUBLIC (Apr. 5, 2019), https://newrepublic.com/article/153473/everyday-brutality-americas-prisons [https://perma.cc/V5L3-BJ7]. Second, in this Paper I am focused on youth who are within the purview of the *Miller* trilogy, which by and large means minors convicted in adult court and sentenced to extreme terms, which are then served in adult correctional facilities. This group of individuals is a small subset of minors confined in America. *See* Wendy Sawyer, *Youth*

the fact that these conditions cannot coexist with the idea that children are different in the eyes of the Constitution.

Even before a minor is sentenced to an extreme term of years or a death-in-custody sentence, a child facing such a sentence is transferred to adult criminal court and prosecuted as if they were an adult.[101] This transfer process is damaging in several respects, but for purposes of this Paper, I am focused on what the transfer means for confinement. Specifically, a child transferred to adult criminal court loses the federal protections designed to safeguard children from exposure to adult prisoners and adult correctional facilities.[102] While awaiting trial and sentencing, a minor can thus be held in an adult jail,[103] and American jails are their own unique nightmare.

On any given day, there are more than half a million people in American jails, and more than ten million people "churn" in and out of jails in a typical year.[104] This is because American jails house a wide array of people: those awaiting trial who are either deemed too dangerous for pretrial release or

---

Confinement: The Whole Pie 2019, PRISON POL'Y INITIATIVE (Dec. 19, 2019), https://www.prisonpolicy.org/reports/youth2019.html [https://perma.cc/28PL-WEA5]. At the same time, because I am focused on people who are coming of age inside a state facility, the group is not static. If a child was sentenced to decades in prison, for purposes of this Paper, I still consider them to be within the purview of the *Miller* trilogy whether they are 16, 19, 25, 30 or 40. This is consistent with the Court's own recognition that maturity and growth happen with the passage of time, see generally *supra* Part I, and with voices arguing for a more expansive notion of maturity and transition to adulthood. *See, e.g.*, Clifford L. Powers, Miller *and Young Adults: Fighting for Inclusion*, 46 HARBINGER 75, 76–78 (2022) (exploring *Miller*'s implications for those in the 18–25 year-old range); Mugambi Jouet, *Juveniles Are Not So Different: The Punishment of Juveniles and Adults at the Crossroads*, 33 FED. SENT'G R. 278, 278–79 (2021) (arguing that "kids are different" jurisprudence should lead to greater humanity in sentencing of adults); Clare Ryan, *The Law of Emerging Adults*, 97 WASH. U. L. REV. 1131, 1148–59 (2020) (evaluating public and private law developments for those in the 18–25 year old range).

101. Every state in America has at least one provision that allows a child to be transferred to criminal court and prosecuted as if they were an adult. Most states have several such provisions. *See* S*tatistical Briefing Book: Juveniles Tried as Adults*, U.S. DEP'T OF JUST. OFF. OF JUV. JUST. & DELINQ. PREVENTION (2019) https://www.ojjdp.gov/ojstatbb/structure_process/qa04115.asp?qaDate=2019 [https://perma.cc/W8T3-QJFU]. Twenty-two states have at least one provision that permits prosecution of a child in adult court with no minimum age requirement. *Id.*

102. *See* WAR ON KIDS, *supra* note 29, at 72–73 (2017) (discussing how and why kids are housed in adult facilities despite federal laws designed to keep kids separate from adults).

103. *See id.*

104. *Local Jails: The Real Scandal Is the Churn*, PRISON POL'Y INITIATIVE (2022), https://www.prisonpolicy.org/graphs/pie2022_jail_churn.html [https://perma.cc/YKL4-7V8K].

more likely cannot afford to pay for cash bail;[105] those who are serving short-term sentences that do not justify the costs of transfer to a prison facility;[106] and those who are having a medical or mental health crisis.[107] As Congresswoman Alexandria Ocasio-Cortez described, American jails have become "garbage bins for human beings."[108]

Rikers Island Jail in New York City is only the most recent example of the unspeakable horrors inside American jails. In the last few years, both journalists and jail detainees have reported that the jail is a place of "lawlessness" where the detained are controlling entire portions of the facility;[109] where violent beatings by both correctional staff and detainees are common;[110] where food is scarce and may be controlled by gang-affiliated detainees rather than staff; [111] where the physical plant itself is barely functional;[112] and where dangerous, unsanitary conditions are

105. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2022*, PRISON POL'Y INITIATIVE (Mar. 14, 2022), https://www.prisonpolicy.org/reports/pie2022.html#datasection [https://perma.cc/A4K7-USMA].

106. *See* BRIAN ALBERT, STATE PRISONERS IN COUNTY JAILS 3 (2010), https://www.naco.org/sites/default/files/documents/State%20Prisoners%20in%20County%20Jails%20Updated.pdf [https://perma.cc/X3GB-49NV].

107. Ailsa Chang, *'Insane': America's 3 Largest Psychiatric Facilities Are Jails*, NPR (Apr. 25, 2018), https://www.npr.org/sections/health-shots/2018/04/25/605666107/insane-americas-3-largest-psychiatric-facilities-are-jails [https://perma.cc/R5CQ-W95F].

108. Carl Campanile, *AOC's Answer to Reducing Violent Crime? Stop Building Jails*, N.Y. POST (June 4, 2021, 4:35 PM), https://nypost.com/2021/06/04/aocs-answer-to-reducing-violent-crime-stop-building-jails/ [https://perma.cc/D35L-BSX3].

109. Jan Ransom et al., *Inside Rikers: Dysfunction, Lawlessness, and Detainees in Control*, N.Y. TIMES (Nov. 8, 2021), https://www.nytimes.com/2021/10/11/nyregion/rikers-detainees-correction-officers.html [https://perma.cc/439V-Q6PW].

110. *Id.*

111. *Id.*

112. *Id.*

commonplace.[113] Makeshift weapons are rampant;[114] fires are burning;[115] and screams of the victimized and suffering are ignored.[116] Rikers is not an outlier; American jails are dehumanizing and often deadly.[117] And this is where a minor facing an extreme sentence *begins* their experience in the correctional system.

If convicted in adult court, a minor is typically confined in an adult prison.[118] Prisons in America are notoriously brutal.[119] To begin, they are

---

113. Jonah E. Bromwich, *Hundreds at Rikers Protest Conditions, Citing Covid and the Cold*, N.Y. TIMES (Jan. 11, 2022), https://www.nytimes.com/2022/01/11/nyregion/rikers-island-hunger-strike.html [https://perma.cc/2T63-4GQU] (citing detainees cleaning blood and feces from floor; black mold in bathrooms and mildew on food carts).

114. Nina Pullano, *Rikers Reforms in Spotlight as Closure Plan Pushes Forward*, COURTHOUSE NEWS SERV. (May 13, 2022), https://www.courthousenews.com/rikers-reforms-in-spotlight-as-closure-plan-pushes-forward/ [https://perma.cc/NRE4-R3YL] ("As the buildings themselves fall apart, shards of metal and plexiglass can be pried from the wall and used as weapons.").

115. Graham Rayman, *Detainees in Rikers Teen Jail Start Fire, Use Electronic Tablets, Mattress as Fuel*, N.Y. DAILY NEWS (Dec. 1, 2021, 7:19 PM), https://www.nydailynews.com/new-york/nyc-crime/ny-rikers-teens-fire-barricade-20211202-bciuy4ruznch7l45yukqzteb2e-story.html [https://perma.cc/ESW7-MK2F].

116. Robby Soave, *Rikers Teen Inmate Dies in Agony After Officials Ignore Torn Artery for Months*, REASON (Aug. 18, 2014, 2:47 PM), https://reason.com/2014/08/18/rikers-teen-inmate-dies-in-agony-after-o/ [https://perma.cc/5KRA-MLQL]; *see also* Ransom et al., *supra* note 109.

117. *See, e.g.*, Kelly Davis, *Attorneys Seek Emergency Order To Force Changes at San Diego County Jails,* SAN DIEGO TRIB. (May 2, 2022, 7:24 PM), https://www.sandiegouniontribune.com/news/watchdog/story/2022-05-02/attorneys-seek-emergency-order-to-force-changes-at-san-diego-county-jails [https://perma.cc/USJ9-ZYA4]; Tom Ferguson, *Organizers, Residents Voice Concerns over Conditions at Oklahoma County Detention Center*, KOKH (June 6, 2022), https://okcfox.com/news/local/organizers-residents-voice-concerns-over-conditions-at-detention-center-jodie-poplin-mark-faulk-oklahoma-county-ok-jail-prison-criminal-justice-bed-bugs-razors-inmate-trust- [https://perma.cc/F42E-UTWZ]; Jim Salter, *Lawsuit Alleges Inhumane Conditions at Missouri Jail*, A.P. NEWS (Dec. 21, 2020), https://apnews.com/article/michael-brown-prisons-st-louis-lawsuits-united-states-4c9a971af16ba871600d8a65255260cf [https://perma.cc/WFW2-H767].

118. Sawyer, *supra* note 100 (showing that about ten percent of detained youth are confined in adult jails and prisons). This number has dramatically declined since the beginning of the 21st century due to federal laws recognizing the inherent dangers of incarcerating youth with adults and state legislative efforts to curb the practice. Still, it persists in several states. *See generally* SENT'G PROJECT, YOUTH IN ADULT COURTS, JAILS AND PRISONS (2021), https://www.sentencingproject.org/app/uploads/2022/09/Youth-in-Adult-Courts-Jails-and-Prisons.pdf [https://perma.cc/EJD2-7VPJ].

119. *See, e.g.*, Shon Hopwood, *How Atrocious Prison Conditions Make Us All Less Safe*, BRENNAN CTR. (Aug. 9, 2021), https://www.brennancenter.org/our-work/analysis-opinion/how-atrocious-prisons-conditions-make-us-all-less-safe [https://perma.cc/3V6E-SGGW]; Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L.J. 1385, 1388–93 (2022) (describing basic protections free people enjoy in all facets of life which prisoners are routinely denied).

institutions of dehumanization. Upon entering a prison, individuals undergo an intake process that entails a strip search, issuance of a prison uniform, designation by correctional number, and classification based on a cursory examination of mental health and other criteria.[120] Prisoners enjoy little to no privacy and must quickly adapt to showering and using the toilet in front of strangers.[121] They are "fed" at hours that work for correctional staff shift changes, rather than at times when most healthy adults eat meals.[122] Prisoners in solitary confinement may eat only twice a day with an eighteen-hour stretch between the final meal of one day and the first meal of the next day.[123] The food itself is meager and often inedible.[124] Routine medical care is hard to obtain because prisons define what is "medically necessary."[125] In Texas, for example, people may be left toothless, forced to gum their tray of food or receive a blended version of it rather than receive dentures.[126] In recent years, it has become increasingly difficult for incarcerated people to maintain any sense of connection to the outside world. Not only are most prisons located in remote places that make in-person visits challenging and costly,[127] but several states have eliminated physical mail, only allowing prisoners to see

120. *See, e.g.*, MICH. DEP'T CORR., *Reception Center Processing: New Prisoners*, https://www.michigan.gov/corrections/services/family-information/reception-center-processing-new-prisoners [https://perma.cc/VCE3-RSZU]; *see also* Terrence J. Graham, *Growing Up on the Inside*, *in* MASS INCARCERATION IN THE 21ST CENTURY (Routledge forthcoming 2023) (on file with author).

121. Graham, *supra* note 120; *see also Episode 1, Cellies*, EAR HUSTLE, at 5:40 (June 14, 2017), https://www.earhustlesq.com/episodes/2017/6/14/cellies?rq=cellies [https://perma.cc/G97D-KSL5] (describing the reality of sharing a 4' by 9' prison cell and its lack of privacy).

122. WAR ON KIDS, *supra* note 29, at 80 ("[W]hen inmates describe meals they do not speak of breakfast, lunch or dinner; they refer to feedings, as in 'they wake us and the feeding process begins.'" (citation omitted)).

123. *Cf.* LESLIE SOBLE ET AL., IMPACT JUSTICE, EATING BEHIND BARS: ENDING THE HIDDEN PUNISHMENT OF FOOD IN PRISON 103 (2020), https://impactjustice.org/wp-content/uploads/IJ-Eating-Behind-Bars.pdf [https://perma.cc/8JR6-FZQF].

124. *See generally id.* at 22–28, 49–51.

125. *Cf.* Victoria W. v. Larpenter, 205 F. Supp. 2d 580, 600 (E.D. La. 2002) (offering the following examples of court-determined serious medical needs: broken jaw, herniated disc, heart attack, and bed sores on a paraplegic).

126. Keri Blakinger, *Toothless Texas Inmates Denied Dentures in State Prison*, CHRON (Sept. 23, 2018, 8:10 AM), https://www.chron.com/news/houston-texas/houston/article/Toothless-Texas-inmates-denied-dentures-in-state-13245169.php [https://perma.cc/E8Q3-XMJL].

127. *See* Bernadette Rabuy & Daniel Kopf, *Separation by Bars and Miles: Visitation in State Prisons*, PRISON POL'Y INITIATIVE (Oct. 20, 2015), https://www.prisonpolicy.org/reports/prisonvisits.html [https://perma.cc/9QG7-4GQ2].

digital copies of letters and cards from loved ones—for a fee.[128] In these ways, American prisons strip individuals of any sense of dignity and self-worth.

And yet the stripping of personhood is only the beginning. By far, the most lethal and destructive aspect of prison is its violence, which has only increased in recent years.[129] In the last two decades, suicide, homicide, and death by alcohol and drug overdose have all increased markedly inside prisons.[130] Incarcerated individuals may experience violence at the hands of correctional staff—beating beaten, tased, and attacked by dogs.[131] Prisoners at the federal penitentiary in Thomson, Illinois, refer to the scars left by wrist, ankle, and abdomen shackles as the "Thomson tattoo."[132] At the same time, those on the inside have to be constantly wary of threats from fellow prisoners. About one-third of incarcerated men report physical victimization in prison,[133] and undoubtedly this number undercounts the actual occurrence of violence given the stigma of weakness associated with reporting violence. Incarcerated individuals interviewed for a 2020 study on prison violence described prison as "going through a nuclear war," "a jungle where only the strong survive," "needing to be ready to go to war constantly," and "gladiator school."[134]

While significantly underreported, sexual violence is also a common occurrence inside prisons. In 2018, there were nearly 30,000 reports of sexual

---

128. Nazish Dholakia, *More and More Prisons Are Banning Mail*, VERA INST. OF JUST. (Mar. 1, 2022), https://www.vera.org/news/more-and-more-prisons-are-banning-mail [https://perma.cc/99E6-BT3Z]; *see also* Mia Armstrong, *Prisons Are Increasingly Banning Physical Mail*, SLATE (Aug. 9, 2021, 5:40 AM), https://slate.com/technology/2021/08/prisons-banning-physical-mail.html [https://perma.cc/Q952-TGS2].

129. *See generally* Leah Wang & Wendy Sawyer, *New Data: State Prisons Are Increasingly Deadly Places*, PRISON POL'Y INITIATIVE (June 8, 2021), https://www.prisonpolicy.org/blog/2021/06/08/prison_mortality/ [https://perma.cc/UYT7-BVRX].

130. *Id.*

131. Emily Widra, *No Escape: The Trauma of Witnessing Violence in Prison*, PRISON POL'Y INITIATIVE (Dec. 2, 2020), https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence/ [https://perma.cc/2PZZ-YKAX].

132. Christie Thompson & Joseph Shapiro, *How the Newest Federal Prison Became One of the Deadliest*, NPR (May 31, 2022, 6:00 AM), https://www.npr.org/2022/05/31/1100954134/federal-prison-deaths-usp-thomson-illinois-prison [https://perma.cc/98JC-7M5S].

133. Widra, *supra* note 131.

134. *Id.*

abuse in jails and prisons.[135] And while reporting has improved since federal legislation was enacted to curb sexual assault in prison nearly twenty years ago, reporting remains risky whether a prisoner is victimized by staff or a fellow prisoner.[136] One does not want to be marked as easily victimized by other incarcerated people, nor does one want to draw the wrath of correctional staff who control everything from movement within the facility to visits, showers and commissary access.[137] In addition to experiencing violence, many formerly incarcerated people report PTSD symptoms from the regular *witnessing* of sexual and physical violence in prison.[138]

At the same time, American prisons rely heavily and uniquely on solitary confinement—a practice that has been deemed tantamount to torture.[139] Solitary confinement may be referred to as administrative separation, lockdown, segregation, or the "box," but it typically entails physical isolation of a prisoner inside a cell the size of a parking space for approximately 23 hours a day.[140] Food is served through a slot in the door that staff can open from the outside;[141] human contact is almost non-existent. Professor Craig Haney described his first visit to a solitary unit at the Pelican Bay Prison in California as follows: "[I]t gave no indication that it was a place that housed actual human beings. Although I had been inside many prisons before my first visit to Pelican Bay, I had never seen one like this, resembling a massive storage facility where inanimate objects are housed. The sights and sounds of human activity or evidence that real people lived there . . . were nowhere to be found."[142] Time in solitary confinement "comes perilously close to a penal tomb."[143]

---

135. Val Kiebala, *'It's an Emergency': Tens of Thousands of Incarcerated People Are Sexually Assaulted Each Year*, THE APPEAL (Apr. 18, 2022), https://theappeal.org/cynthia-alvarado-sexual-assault-in-prisons/ [https://perma.cc/BA9X-37BJ].

136. *Id.*

137 *See id.*

138. Widra, *supra* note 131.

139. *Cf.* Atul Gawande, *Hellhole*, NEW YORKER (Mar. 23, 2009), https://www.newyorker.com/magazine/2009/03/30/hellhole [https://perma.cc/9BJV-D4MU].

140. Tiana Herring, *The Research Is Clear: Solitary Confinement Causes Long-Lasting Harm*, PRISON POL'Y INITIATIVE (Dec. 8, 2020), https://www.prisonpolicy.org/blog/2020/12/08/solitary_symposium/ [https://perma.cc/NX6Y-DTWE].

141. *See* SOBLE ET AL., *supra* note 123, at 103.

142. Craig Haney, *The Science of Solitary: Expanding the Harmfulness Narrative*, 115 NW. U.L. REV. 211, 218 (2020).

143. Apodaca v. Raemisch, 139 S. Ct. 5, 10 (2018) (statement of Sotomayor, J. respecting the denial of certiorari).

While there is no single source of data regarding solitary confinement, various government studies reveal its prevalence.[144] In fall 2017, for example, there were approximately 61,000 people who had been in solitary confinement for fifteen days or more.[145] Over the course of a year, as much as twenty percent of the incarcerated population may be kept in solitary confinement.[146] And solitary is not reserved for those individuals who pose a serious risk of harm to themselves or others. Instead, solitary housing is also employed for prisoners in mental health crisis, for those who need protection given their vulnerability, and as a disciplinary measure.[147] Based on its examination of eight states and their restrictive housing practices, the Vera Institute determined that non-violent, often minor disciplinary infractions—things like profanity, tobacco use and disobedience—were among the top reasons prisoners were sent to solitary confinement.[148]

This heavy reliance on solitary confinement is deeply disturbing given that scientists have documented the profound, long-lasting harms of the practice.[149] Specifically, those who are confined in a solitary setting experience a host of adverse psychological and physical effects, including depression, anxiety, paranoia, hypersensitivity, loss of identity, and psychosis.[150] Individuals in solitary may clog their toilets, bang on doors and walls, cut themselves, and flood their cells, knowing that they will be extracted from the cell by a SWAT-like team and punished further simply because they are desperate for human contact.[151]

In short, American prisons are horrific, and yet everything horrific about them is exponentially worse for young people. By definition, incarcerated young people are more vulnerable to violence than confined adults both

144. *See* VERA INST. OF JUST., WHY ARE PEOPLE SENT TO SOLITARY CONFINEMENT? THE REASONS MIGHT SURPRISE YOU 1 (2021), https://www.vera.org/downloads/publications/why-are-people-sent-to-solitary-confinement.pdf [https://perma.cc/9E9J-LN96].

145. *Id.*

146. *Id.* at 2.

147. *Id.* at 2–4.

148. *See Id.* at 3.

149. *See generally* Haney, *supra* note 142, at 220.

150. KAYLA JAMES & ELENA VANKO, VERA INST. OF JUST., THE IMPACTS OF SOLITARY CONFINEMENT 1–2 (2021), https://www.vera.org/downloads/publications/the-impacts-of-solitary-confinement.pdf [https://perma.cc/8SCT-S36Y].

151. *See, e.g.*, *Frontline: Solitary Nation* (PBS television broadcast Apr. 22, 2014), https://www.pbs.org/wgbh/frontline/documentary/solitary-nation/ [https://perma.cc/7D9D-5MRT]

because of their psychological and physical immaturity.[152] According to a federal government report on prison rape, "[m]ore than any other group of incarcerated persons, youth incarcerated with adults are probably at the highest risk for sexual abuse."[153] According to that same report, eighty percent of boys sentenced to LWOP in Michigan, Illinois, and Missouri reported at least one sexual assault by another male prisoner within the first year of their sentence.[154] Terrence Graham, who entered Florida's correctional system as a teen, wrote about first entering prison as a minor: "[Older men] warned me to make an example out of the first guy that tried to rape me or take my food by either stabbing him or hitting him in the head with a lock. After hearing that, I couldn't sleep . . . . I walked around with a lock in my pocket just like the guys at the jail had told me to do in case I needed to fight off an attacker."[155]

In addition to confronting the danger of physical and sexual assault, young people inside prisons must navigate a complex, and often conflicting, set of rules. There is one set of rules imposed by the institution, and that set of rules is vast. But yet another set of rules is enforced by those who are incarcerated.[156] For example, fighting is a serious infraction in the eyes of a correctional institution, whereas if one is attacked and does not fight back, one may be viewed as an easy target going forward.[157] This leaves a young person in a no-win situation, choosing between discipline at the hands of staff or fellow prisoners. At the same time, if a young person is victimized, he cannot safely report that experience without being labeled a "snitch."[158] This is an unmanageable situation for anyone, let alone for a young person. The same immaturity that the Court has recognized hampers a young person's ability to navigate the legal process and to assist in their own defense,[159]

---

152. Lilah Wolf, *Purgatorio: The Enduring Impact of Juvenile Incarceration and a Proposed Eighth Amendment Solution to Hell on Earth*, 14 STAN. J.C.R. & C.L. 89, 96–97 (2018) (describing youth vulnerability to physical and sexual assault in adult facilities).

153. OFF. JUST. PROGRAMS, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 18 (2009), https://www.ojp.gov/pdffiles1/226680.pdf [https://perma.cc/U6BC-D78W].

154. *Id.* at 19.

155. Graham, *supra* note 120, at 2–3.

156. WAR ON KIDS, *supra* note 29, at 77–78.

157. *Id.*

158. *Cf.* George T. Wilkerson, *It's Surprisingly Tough To Avoid Snitching in Prison*, THE MARSHALL PROJECT (July 19, 2018, 10:00 PM), https://www.themarshallproject.org/2018/07/19/it-s-surprisingly-tough-to-avoid-snitching-in-prison [https://perma.cc/DC7F-2WN6].

159. *In re* Gault, 387 U.S. 1, 36 (1967) ("The child 'requires the guiding hand of counsel at every step in the proceedings against him.'") (quoting Powell v. Alabama, 287 U.S. 45, 69

makes navigating the subtle and life-threatening dynamics of prison near to impossible.

Moreover, as a group, young people enter the correctional system with extensive trauma history.[160] Professor Samantha Buckingham defines trauma as "an experience that threatens a person's life, safety, or well-being, overwhelming the ability to cope."[161] She further explains how trauma, especially chronic or complex trauma, can drive youth incarceration: "[W]hile 34% of all children in the U.S. report experiencing at least one traumatic event, between 75%–93% of children entering the juvenile justice system report that they have experienced at least one traumatic event."[162] Among children sentenced to LWOP, the incidence of trauma is even more alarming. Nearly eighty percent of kids sentenced to LWOP grew up with violence in their home, and more than half witnessed regular violence in their communities.[163] In addition, eighty percent of girls, and almost half of all kids sentenced to LWOP, were physically abused.[164] A disturbingly high number of these young people were also sexually abused.[165] This trauma history undoubtedly exacerbates an already terrible baseline prison experience.

Finally, the young people within the purview of the *Miller* trilogy are serving lengthy sentences,[166] and, because of their sentence length, in many states they are ineligible for vocational and educational services.[167] This is a

---

(1932)), *abrogated by* Allen v. Illinois, 478 U.S. 364 (1986); J.D.B. v. North Carolina, 564 U.S. 261, 271–74 (2011) (cataloging ways in which legal system recognizes differences between minors and adults).

160. It is important to acknowledge that *most* people enter American correctional facilities with some kind of trauma history and adverse social experiences. *See, e.g.*, Steven Zeidman, *Rotten Social Background and Mass Incarceration: Who Is a Victim?* 87 BROOK. L. REV. 1299, 1301–03 (2022) (explaining the confluence of inadequate housing, employment, schooling, and healthcare that poor people of color, who comprise the majority of prisoners, experience before incarceration).

161. Samantha Buckingham, *Trauma Informed Juvenile Justice*, 53 AM. CRIM. L. REV. 641, 649 (2016).

162. *Id.* at 654. She further explains the causal link between trauma-induced behaviors and admission to correctional facilities. *Id.* at 656–59.

163. *Facts About Juvenile Life Without Parole*, CAMPAIGN FOR THE FAIR SENT'G OF YOUTH, https://cfsy.org/media-resources/facts-infographics/ [https://perma.cc/WV63-5254].

164. *Id.*

165. *Id.* (citing 77% of girls and 20% of all juvenile lifers as having experienced sexual abuse).

166. This is definitionally true. The *Miller* line of cases only dealt with the nation's two most extreme sentences: the death penalty and LWOP. *See supra* Part I.

167. Graham v. Florida, 560 U.S. 48, 74 (2010) ("[D]efendants serving life without parole sentences are often denied access to vocational training and other rehabilitative services that are available to other inmates.").

travesty given that the science of adolescent brain development tells us this group is particularly amenable to rehabilitation and maturity.[168] Moreover, it means that young people coming of age inside prisons are left with a daily routine that is a strange mix of monotony and boredom with a lurking sense of terror and unpredictability.[169] The day may hold nothing more than repeated counts of prisoners; awful, meager meals; and perhaps time in a recreation yard or TV room. But the day also could bring a surprise assault, witnessing violence, or a disciplinary ticket from a correctional officer who is having a bad day and decides to issue one for an improperly made bed or possession of one too many books.[170]

"No one is safe in prison,"[171] and this is especially true for young people coming of age inside. This reality simply cannot co-exist with the Supreme Court's determination that "children are different" for constitutional purposes.[172] Children cannot be more vulnerable in the interrogation room;[173] more vulnerable at the defense table;[174] more vulnerable at sentencing;[175] and yet on equal footing with adults, left to eke out their own survival, once imprisoned. Instead, there must be a constitutional floor for youth in confinement. The next Part of the Paper turns to making that case.

III. EIGHTH AMENDMENT IMPLICATIONS FOR YOUTH CONDITIONS OF CONFINEMENT

The *Miller* trilogy was premised on core principles of human dignity and the differentness of youth. Yet, as described in Part II, current prison conditions for those within the purview of the *Miller* line of cases are so appalling that they would shock the conscience of most citizens. There is, then, a massive disconnect between the premise of the *Miller* trilogy and current prison realities. In this Part of the Paper, I argue that, as long as this disconnect persists, states are complicit in unconstitutional punishments for minors coming of age in prison.

---

168. Brief for J. Lawrence Aber et al. as *Amicus Curiae* at 28–31, Graham v. Florida, 560 U.S. 48 (2010) (Nos. 08-7412 & 08-7621) [hereinafter Aber Brief].

169. WAR ON KIDS, *supra* note 29, at 72–81.

170. *See id.* at 74–78.

171. *Id.* at 75.

172. Miller v. Alabama, 567 U.S. 460, 480 (2012).

173. J.D.B. v. North Carolina, 564 U.S. 261, 272, 274–75 (2011).

174. *Cf. In re* Gault, 387 U.S.1, 34–39 (1967) (Children "require[] the guiding hand of counsel at every step in the proceeding against [them].") (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)), *abrogated by* Allen v. Illinois, 478 U.S. 364 (1986).

175. *See supra* Part I.

I make this argument in four steps. First, I illuminate the ways in which the *Miller* trilogy was predicated on the differentness of children, and how those differences demand differential treatment when the state punishes a minor. I then examine two lenses for thinking about conditions of confinement: the traditional Eighth Amendment approach, employed by the Supreme Court, which I refer to as the "individual actor approach," and an alternative approach advocated by Professor Sharon Dolovich, which I refer to as the "institutional approach."[176] Finally, I explain why the institutional approach is doctrinally more appropriate, and I apply that lens of "institutional cruelty" to youth coming of age in prison. It is here that I make explicit how the *Miller* trilogy imposes affirmative obligations upon states confining such youth.

A. The Premise of Miller

The *Miller* line of cases is predicated on the fact that youth are *different* from adults in several key respects.[177] First, as a group, youth are less culpable than adults.[178] Because their brains are still developing, and they lack the same impulse control, planning, and risk assessment as adults, they are categorically less morally blameworthy. Second, the same fluidity that makes youth less culpable also makes them more amenable to rehabilitation than adults.[179] This is not to say that no adult can reform themselves or change; certainly, many can and do. But the Court emphasized that, precisely because the late adolescent brain is in such flux, it is a period during which young people are uniquely susceptible to rehabilitation and education.[180] Brain elasticity is the young person's friend in the maturation process if given the right environment.[181] Third, the Court recognized that young people are highly susceptible to negative external influences, whether that is peer pressure or coercion by adults; they simply cannot override group-think in the way that an adult can.[182] And last, because they are legally, economically and often physically bound to adults, youth cannot "extricate themselves"

176. *See* Dolovich, *supra* note 25, at 893.

177. *See generally supra* Part I.

178. *See supra* notes 39–41 and accompanying text.

179. *See supra* note 48 and accompanying text.

180. *See* Graham v. Florida, 560 U.S. 48, 74 (2010) (citing Aber Brief, *supra* note 168, at 28–31).

181. *See* Aber Brief, *supra* note 168, at 25–31.

182. *See supra* note 40 and accompanying text.

from often horrific and criminogenic environments.[183] According to the Supreme Court, these differences are of constitutional significance.

Related, because young people are different from adults in such profound ways, the *Miller* line of cases concluded that youth are entitled to different protections in both the substance and process of criminal punishment.[184] In terms of substance, the *Miller* trilogy abolished certain punishments for youth.[185] States may no longer impose capital punishment on minors; they cannot impose LWOP on a minor convicted of a non-homicide crime; and they cannot impose mandatory LWOP even when a minor commits homicide.[186] These are substantive bars.

Further, the Court announced procedural protections for young people facing lengthy sentences in both *Graham* and *Miller*. In *Graham v. Florida*, the Court conceded that states may ultimately determine some minors who commit non-homicide crimes are never fit to return to society, but it may not make that determination at the outset.[187] And the reason that this sentence is forbidden for minors at the outset is precisely because LWOP "gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope."[188] According to the *Graham* Court, these elements—hope and the possibility of redemption—were deemed essential for the incarcerated minor because "[a] young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual."[189] Rather, states must "give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[190] And this means more than a periodic review of their sentence. The Court noted that many prisons "withhold counseling, education, and rehabilitation programs" based on the nature and length of a minor's sentence, and when the states do that, they "becom[e] complicit in the [minor's] lack of development."[191] In sum, the *Graham* Court did more than abolish a kind of sentence (LWOP) for a kind of defendant (a minor convicted of a non-homicide crime). It also obligated states to consider the *process* and *manner* in which they punish minors.[192]

---

183. Miller v. Alabama, 567 U.S. 460, 471 (2012).
184. *See supra* notes 51, 52, 59–67 and accompanying text.
185. *See supra* notes 60–63 and accompanying text.
186. *See generally supra* Part I (setting out holdings of *Roper*, *Graham*, and *Miller*).
187. Graham v. Florida, 560 U.S. 48, 75 (2010).
188. *Id.* at 79.
189. *Id.*
190. *Id.* at 75.
191. *Id.* at 79.
192. *See id.* at 82.

The Court also determined that youth are entitled to certain protections in the punishment process in *Miller v. Alabama*.[193] Again, that decision announced a substantive rule: it outlawed an entire category of punishment (mandatory LWOP) for a class of defendants (minors convicted of homicide).[194] But in doing so, the *Miller* Court required sentencing bodies to consider a host of youth-related factors before imposing a sentence.[195] The Court urged examination of variables such as the defining features of youth, the minor's family and home environment, the circumstances of the homicide offense, and the possibility of rehabilitation.[196] Lower courts have come to refer to these as the *Miller* factors—the variables that a sentencing body must consider as part of the sentencing process before imposing LWOP.[197]

In sum, the premise of the *Miller* trilogy is that minors are different in ways that are constitutionally significant. Already, the Court has made clear that both substantive and procedural implications flow from this premise. I argue that there is yet another implication, this one related to conditions of confinement. At the very least states cannot *hinder* the young defendant's potential for growth and rehabilitation, and, in some basic respects, the state must foster that capacity for maturity—otherwise the state is "complicit" in the minor facing an unconstitutional punishment.[198] But, first, it is imperative to discuss the threshold issue of how courts measure conditions of confinement generally and when they are "cruel" for constitutional purposes.

B. The Individual Actor Approach to Cruel Conditions of Confinement

The Eighth Amendment bars "cruel and unusual punishment."[199] As discussed in the Introduction,[200] this term calls for different analytical inquiries depending on the nature of an individual's claim, but here I am focused on the Supreme Court's analysis of prisoners' claims that conditions of confinement violate the Eighth Amendment. The Court has recognized that, when the state confines a human being and deprives that person of the

193. Miller v. Alabama, 567 U.S. 460, 470 (2012).

194. *Id.* at 465.

195. *Id.* at 477–78 (identifying relevant considerations that are lost in a mandatory sentencing scheme and that are relevant to sentencing body before imposing LWOP).

196. *Id.*

197. *See, e.g.*, Davis v. State, 415 P.3d 666, 696 (Wyo. 2018) (finding that trial court abused its discretion in application of "*Miller* factors").

198. *See supra* note 191 and accompanying text.

199. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

200. *See supra* Introduction.

ability to meet their own basic needs, the state assumes the responsibility to meet those needs on their behalf.[201] It is a settled principle of Eighth Amendment doctrine that the Constitution does not require "comfortable prisons," but it does forbid "inhumane ones."[202] This means at least two things: prison officials may *not* do some things, such as employ excessive force, and prison officials are *required* to provide basics like adequate food, clothing, shelter, and medical care.[203]

The leading case in this space is *Farmer v. Brennan*.[204] In *Farmer*, a transgender female, who was beaten and raped while housed in the general prison population, sued federal prison officials for their failure to keep her safe while in confinement.[205] The Court acknowledged that "prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners."[206] However, it then went on to hold that not every injury suffered at the hands of one's fellow prisoners translates into constitutional liability for prison officials.[207] Instead, such liability is only implicated when two criteria are met.[208] First, the alleged injury must be "sufficiently serious,"[209] and second, "a prison official must have a 'sufficiently culpable state of mind.'"[210] In cases challenging prison conditions, that culpable state of mind is one of "deliberate indifference."[211]

Further, the *Farmer* Court went on to define "deliberate indifference" as consistent with the modern criminal concept of recklessness:

> a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official *knows of and disregards* an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn

201. Farmer v. Brennan, 511 U.S. 825, 832–33 (1994).

202. *Id.* at 832.

203. *Id.*

204. *Farmer*, 511 U.S. 825.

205. *Id.* at 829–30.

206. *Id.* at 833 (quoting Cortes-Quinones v. Jimenez-Nettleship, 842 F.2d 556, 558 (1st Cir. 1988)).

207. *Id.* at 834.

208. *Id.*

209. *Id.* (quoting Wilson v. Seiter, 501 U.S. 294, 298 (1991)).

210. *Id.* (quoting Wilson, 501 U.S. at 298).

211. *Id.* (quoting Wilson, 501 U.S. at 302–03).

> that a substantial risk of serious harm exists, and he must also draw the inference.[212]

In sum, among other requirements,[213] an individual alleging that their conditions of confinement violate the Eighth Amendment must demonstrate that they have suffered a serious injury and that prison officials were aware of that risk of injury and disregarded the risk.

The *Farmer* test for assessing the cruelty of prison conditions is focused on prison officials as *individuals,* rather than the prison-industrial complex and the harms it inflicts. The Court referred to "the officials" and their *subjective* awareness of risk.[214] Employing this approach, the Court noted that prison officials may escape liability in any number of ways.[215] They may show that they were genuinely unaware of dangers to prisoner safety; that they thought any such risk was minimal; or that they had taken reasonable measures to mitigate the known risk even if those measures were unsuccessful.[216] Going forward, I refer to the Court's traditional lens for conditions of confinement cases as set out in *Farmer* as "the individual actor approach."[217]

In practical terms, the individual actor approach set out in *Farmer* has made it incredibly difficult for prisoners to prevail in challenging their conditions of confinement. The Supreme Court's most recent case of this kind, *Taylor v. Riojas*, demonstrates the point well.[218] Trent Taylor, a Texas prisoner, sued state officials, alleging that he had been confined for six days in two "shockingly unsanitary cells."[219] "The first cell was covered, nearly floor to ceiling in '"massive amounts" of feces.'"[220] Because of the potential for contamination, Taylor refused food and water for four days.[221] Taylor was

---

212. *Id.* at 837 (emphasis added); *cf.* MODEL PENAL CODE § 2.02(2)(c) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.").

213. *See infra* Part IV.

214. *Farmer*, 511 U.S. at 844 ("[P]rison officials who lacked knowledge of a risk cannot be said to have inflicted punishment.").

215. *Id.*

216. *Id.* at 844–45.

217. *Id.* at 838 (rejecting approach whereby Eighth Amendment claims could be based on objectively inhumane prison conditions and requiring subjective awareness of risk on prison officials' part).

218. Taylor v. Riojas, 141 S. Ct. 52 (2020).

219. *Id.* at 53.

220. *Id.* (quoting Taylor v. Stevens, 946 F.3d 211, 218 (5th Cir. 2019), *vacated*, 141 S. Ct. 52).

221. *Id.*

then moved to a second cell, this one "frigidly cold" and "equipped with only a clogged drain in the floor to dispose of bodily wastes."[222] Taylor tried to hold his bladder for over 24 hours, and when he involuntarily relieved himself, the drain overflowed and sewage spilled across the floor.[223] Prison officials had stripped Taylor of clothing and a bunk, so he had no choice but "to sleep naked in sewage."[224] To any reasonable reader, these conditions sound inhumane, degrading and simply unthinkable.

Yet it took nearly seven years of litigation and a Supreme Court decision overruling the Fifth Circuit to vindicate Taylor's claim of cruel confinement.[225] According to the Fifth Circuit, the Texas prison officials enjoyed qualified immunity against suit because they lacked notice that "prisoners couldn't be housed in cells teeming with human waste" "for only six days."[226] In other words, the federal appellate court accepted as plausible the claim that any correctional officer would see those cell conditions and be unaware of the inherent risks they posed.[227] To be sure, the Supreme Court reversed and held that "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time."[228] Yet, this case took more than half a decade to litigate, and the Court cabined its ruling with the "extended period of time" aspect of the facts, suggesting that brief stays in similar cells may *not* violate the Eighth Amendment.[229] Finally, for every case like this in which the Supreme Court sets a limit on deplorable prison conditions, there are "hundreds if not thousands of cases"[230] decided by the courts of appeals every year that permit shameful conditions, as the Fifth Circuit had done in *Taylor*. In sum, the *Farmer* test and its requirement of

---

222. *Id.*

223. *Id.*

224. *Id.*

225. The Fifth Circuit had found that Taylor articulated questions of fact regarding the unconstitutionality of his cell, but it also found the law regarding his cell condition claim was not "clearly established," and thus prison officials enjoyed qualified immunity. *Taylor*, 946 F.3d at 218. Specifically, according to the Fifth Circuit, "Taylor stayed in his extremely dirty cells for only six days. Though the law was clear that prisoners couldn't be housed in cells teeming with human waste for months on end . . . we hadn't previously held that a time period so short violated the Constitution." *Id.* at 222.

226. *Id.* at 222.

227. *Cf. id.* (determining that the correctional staff did not have clear notice that the conditions and time of confinement were unconstitutional).

228. *Taylor*, 141 S. Ct. at 53.

229. *Id.*

230. *Id.* at 55 (Alito, J., concurring).

demonstrable recklessness on the part of prison officials regularly insulates appalling prison conditions from judicial review.[231]

Taylor is not a complete outlier; sometimes prisoners do prevail under the *Farmer* test. But it is worth noting that those prevailing claims share a few common features: they are cases of extreme risk and injury; they are often very narrow in their claim; and they tend to entail proof of officials targeting a particular prisoner. For example, in *Hope v. Pelzer*, Alabama prison officials handcuffed Mr. Hope to a hitching post for "disruptive conduct"[232] long after he had been subdued.[233] Mr. Hope was made to take his shirt off while attached to the post for seven hours in the sun; he was offered water only once or twice; he was denied any bathroom breaks; and he was taunted for his thirst.[234] The Supreme Court held that this punishment demonstrated "deliberate indifference" per *Farmer* because the nature of the violation was so obvious: tying the prisoner to the hitching post served no legitimate correctional goal, and it clearly entailed a risk of physical harm and humiliation.[235] Similarly, in *United States v. Georgia*, the Eleventh Circuit agreed with a paraplegic prisoner that the state had violated the Eighth Amendment by confining him in a cell so small that he could not maneuver his wheelchair; by denying him wheelchair-accessible facilities; and by refusing him assistance and leaving him to sit in his own feces and urine.[236] Again, like *Taylor*, these are extreme cases that the average citizen would probably be shocked to learn required federal litigation, and they are narrow in that they tend to claim particular, often isolated, harms regarding one prisoner.

---

231. *See, e.g.*, Beck v. Hamblen Cnty., 969 F.3d 592, 597, 604 (6th Cir. 2020) (rejecting prisoner's claim that sheriff failed to prevent jail violence in face of overcrowding and staff shortages); Williams v. Branker, 462 F. App'x. 348, 350–51, 356 (4th Cir. 2012) (rejecting prisoner's claim that years of solitary confinement and restricted movement exacerbated his mental illness and was thus cruel per *Farmer*); Cope v. Cogdill, 3 F.4th 198, 202–03, 212 (5th Cir. 2021) (rejecting claim of prisoner's estate that jail officers violated prisoner's rights per *Farmer* by confining him in cell with phone with which he committed suicide and by short staffing given his underlying mental illness); Vandevender v. Sass, 970 F.3d 972, 974–75 (8th Cir. 2020) (rejecting prisoner's claim that prison officials were liable per *Farmer* after fellow prisoner beat and seriously injured him with 4x4 wooden board because, while prison officials were aware of pervasive prison violence, they were not aware of the specific risk posed by wooden boards).

232. Hope v. Pelzer, 536 U.S. 730, 733 (2002).

233. *Id.* at 734–35.

234. *Id.*

235. *Id.* at 730–31.

236. United States v. Georgia, 546 U.S. 151, 155–57 (2006).

In contrast, the individual actor approach of the *Farmer* test has largely shielded prison officials from responsibility when the claim is less extreme and more diffuse. For example, prisoners often sue over unsanitary and unhealthy living conditions within prison facilities, and they routinely lose these claims.[237] This reality was on full display at the peak of the COVID-19 pandemic. For example, in *Valentine v. Collier*, two geriatric prisoners argued that Texas had violated the Eighth Amendment by confining them in unsanitary and potentially lethal conditions.[238] The prisoners were housed with other geriatric prisoners, many of whom had underlying conditions that made them especially vulnerable to COVID-19.[239] "The District Court held a weeks-long trial that revealed rampant failures by the prison,"[240] including the following: correctional staff failed to wear masks; communal bathrooms were not cleaned; disabled inmates had to sit shoulder-to-shoulder waiting for showers; and prisoners were required to clean the dorms, but not provided training or cleaning supplies.[241] Based on these findings, the District Court entered a permanent injunction, requiring the facility to implement minimum safety protocols.[242] The Fifth Circuit stayed the injunction pending appeal,

237. *See, e.g.*, Jones v. Ward, No. 5:20-cv-00336-TES-MSH, 2021 WL 2936133, at *4–5, *7 (M.D. Ga. July 13, 2021) (rejecting prisoner's claims that standing water and exposure to human waste were violation per *Farmer* and finding failure to show prison officials were the cause of said conditions); Lindell v. Pollard, 558 F. Supp. 3d 734, 751 (E.D. Wis. 2021) (rejecting prisoner's claim per *Farmer*, noting that "[t]here are degrees of filth, ranging from conditions that are simply unpleasant to conditions that pose a grave health risk," and prisoner's claim was not severe enough); Randolph v. Dozier, No. 5:16-cv-02920-MBS-KDW, 2017 WL 8222364 at *4 (D.S.C. Nov. 20, 2017) (rejecting prisoner's claim that black mold posed *Farmer* violation and discussing when environmental mold does and does not present an objective harm per *Farmer*); Edge v. Mahlman, No. 1:20-cv-892, 2021 WL 3725988, at *2, *5 (S.D. Ohio Aug. 23, 2021) (rejecting prisoner's claim that "filthy and unsanitary" cell was *Farmer* violation and holding conditions were "garden variety" dirty rather than constitutional violation); LeMaire v. Maass, 12 F.3d 1444, 1456 (9th Cir. 1993) ("Because a temporary Nutraloaf diet does not deny 'the minimal civilized measure of life's necessities,' its use falls short of the threshold deprivation necessary to form the basis of an Eighth Amendment violation." (quoting Hudson v. McMillian, 503 U.S. 1, 9 (1992))); Hamm v. De Kalb Cnty., 774 F.2d 1567, 1575 (11th Cir. 1985) ("The fact that [prison] food occasionally contains foreign objects or sometimes is served cold, while unpleasant, does not amount to a constitutional deprivation."); Skandha v. Savoie, 811 F. Supp. 2d 535, 540–41 (D. Mass. 2011) (rejecting prisoner's claim that low cell temperature was constitutional violation and stating that low temperature claims must be extreme, such as prisoner stripped of clothing, in a concrete cell without heat, mattress, or bedding of any kind for extended period of time).

238. Valentine v. Collier, 141 S. Ct. 57, 57–58 (2020).

239. *Id.* at 58 (Sotomayor, J., dissenting).

240. *Id.*

241. *Id.* at 58–59.

242. *Id.* at 59.

citing the prisoners' failure to exhaust internal administrative remedies.[243] When the prisoners asked the Supreme Court to vacate the stay in light of the critical, time-sensitive need for safety precautions, the Supreme Court denied the application to vacate the stay over Justice Sotomayor's adamant dissent.[244] The *Farmer* test itself, among other administrative burdens on prisoners' seeking relief,[245] often impedes access to courts when prisoners are seeking safe, healthy, and reasonable conditions that a *system* fails to provide.[246]

In sum, the Supreme Court and lower courts applying *Farmer* have consistently rejected prisoners' claims that conditions of confinement violate the Eighth Amendment in cases where any reasonable individual living in free society would be horrified by the challenged prison conditions.[247] As a result, American prisons and jails are a truly nightmarish experience for those within their walls. They are violent and turbulent; they are overcrowded and filthy; they are hot or frigid; they are places where blended food loaves count as a meal, and many prisoners exist in a perpetual state of hunger.[248] In short, they are inhumane in large part because the judicial system and its application of the *Farmer* test allows them to be.[249]

---

243. *Id.*

244. *Id.* at 63 ("The people incarcerated in the Pack Unit are some of our most vulnerable citizens. They face severe risks of serious illness and death from COVID–19, but are unable to take even the most basic precautions against the virus on their own. If the prison fails to enforce social distancing and mask wearing, perform regular testing, and take other essential steps, the inmates can do nothing but wait for the virus to take its toll. Twenty lives have been lost already. I fear the stay will lead to further, needless suffering.").

245. *See infra* Part IV.

246. *See supra* notes 231, 237 and accompanying text.

247. It is worth noting that the United States is an outlier not just in the scale of its correctional system, but also in the cruelty of its prison conditions. Other nations recognize that, in order to be rehabilitative, prisons must afford dignity and health to those whom it confines. *See, e.g.*, RAM SUBRAMANIAN & ALISON SHAMES, VERA INST. FOR JUST., SENTENCING AND PRISON PRACTICES IN GERMANY AND THE NETHERLANDS: IMPLICATIONS FOR THE UNITED STATES 11–14 (2013), https://www.vera.org/downloads/publications/european-american-prison-report-v3.pdf [https://perma.cc/3AX4-ESLH] (describing conditions of incarceration that are focused on dignity and rehabilitation).

248. *See generally supra* Part II.

249. David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2036–37 (2018) (discussing the legal and practical variables that make federal challenges to prison conditions virtually impossible to win).

C. The Institutional Approach to Cruel Conditions of Confinement

Recognizing the infirmity of the *Farmer* approach, Professor Sharon Dolovich has theorized an alternative approach, what I refer to as an institutional approach, to considering when prison conditions violate the Eighth Amendment.[250] In her seminal article on conditions of confinement, Dolovich argues forcefully that *Farmer's* reasoning "does not withstand scrutiny."[251] For purposes of this Paper and its claims, Dolovich makes three crucial contributions.

First, she attacks head-on the Supreme Court's conception of "punishment." In assessing the work of the Eighth Amendment, the Court has historically read its prohibitions on cruel and unusual "punishment" to apply to sentences imposed rather than general conditions of prison life.[252] This approach is reflected in the *Farmer* test itself, which holds that a condition of confinement is not even "punishment" that triggers the Eighth Amendment unless it is sufficiently serious *and* something of which a prison official was aware and disregarded.[253] Dolovich reframes the punishment issue altogether. She widens the aperture and explains, "[i]n the most concrete sense, whatever conditions a prisoner is subjected to while incarcerated, whatever treatment he receives from the officials charged with administering his sentence, is the punishment the state has imposed."[254] And because that is the more accurate definition of punishment, "all the conditions to which an offender is subjected at the hands of state officials over the course of his incarceration are appropriately" subject to constitutional limits.[255] In Dolovich's framework, it is of no consequence whether those conditions persist for years, whether they are imposed by myriad officials over time, or whether they were known to the original sentencing judge. According to her, because the state imposes a sentence with all of its defining features, the *entirety of that experience* constitutes "punishment" subject to Eighth Amendment scrutiny.

---

250. *See generally* Dolovich, *supra* note 25, at 881; *see also* Sharon Dolovich, *The Coherence of Prison Law*, 135 HARV. L. REV. F. 301, 303–04 (2022) [hereinafter Dolovich, *Prison Law*] (exploring what she calls "dispositional favoritism" as explanation for courts consistently finding for the state in cases challenging prison conditions despite awful reality of prisons).

251. Dolovich, *supra* note 25, at 890.

252. *Id.* at 896–97.

253. *Id.* at 895.

254. *Id.* at 899.

255. *Id.*

Second, Dolovich exposes the central flaw with the *Farmer* approach when she defines what she calls the "state's carceral burden."[256] According to her theory, the state has a burden to do more than simply meet a prisoner's basic human needs, such as food, shelter and medical care. Rather, as she explains:

> People in prison are both wholly dependent on the state for the means of their survival and deeply vulnerable to harm. Should the state fail to meet prisoners' needs, their suffering—and thus the burdens of their incarceration—would increase markedly, changing the character of the punishment itself . . . We are used to thinking of prison sentences in terms of length—five years or fifteen years or life. But in fact, the severity of the punishment ultimately depends on the conditions of confinement.[257]

And thus, according to her theory of the "state's carceral burden," prison officials must do more than provide certain basics; they must also safeguard *against* certain risks. As she argues, the state's carceral burden "may be understood as that of ensuring the minimum conditions for maintaining prisoners' physical and psychological integrity and well-being—those basic necessities of human life, including protection from assault, without which human beings cannot function and that people in prison need just by virtue of being human."[258] This is clearly a much more expansive view than the *Farmer* test which acts as a bar against individual, culpable acts of risk or injury. Instead, Dolovich offers a model of "institutional cruelty" and captures two important realities: (1) punishment tasks are delegated to actors within massive bureaucratic institutions; and (2) prisoners may suffer as much, if not more, from institutional failures as they do from institutional acts.[259]

Third, having reframed punishment and cruelty in these ways, she argues for a modification of the mens rea standard set forth in *Farmer*. Specifically, as she explains, the current "deliberate indifference" standard is "woefully underinclusive" for at least two reasons.[260] To begin, it insulates state actors from risks of injury of which they *should* have been aware but were, in fact, not.[261] Related, as courts continually apply that recklessness standard, the

256. *Id.* at 911–24.
257. *Id.* at 913.
258. *Id.* at 921.
259. *Id.* at 928–30.
260. *Id.* at 936.
261. *Id.* at 946–48.

judiciary itself incentivizes ignorance on the part of state actors.[262] Again, Dolovich's theory of the state's carceral burden is key to justifying a mens rea standard other than recklessness. Once one accepts, as this author does, that "officials at all levels must take *affirmative* steps to monitor, investigate, discover, and avert potential problems before those problems manifest themselves in prisoners' actual suffering,"[263] one can see the central flaw with *Farmer's* deliberate indifference prong. Prison cruelty is not only "episodic," but rather is often systemic.[264] And *Farmer's* recklessness standard encourages both "micro level and macro level" "failures of care."[265] Accordingly, Dolovich explores the alternatives of a heightened negligence standard and a modified strict liability approach.[266] I will return to these suggested alternatives in greater detail in Part IV of this Paper. For now, suffice it to say that Dolovich exposes the meagerness of the "deliberate indifference" standard when it comes to the task of curtailing prison cruelty, and she urges its reconsideration.

D. Institutional Cruelty as Applied to Miller *Individuals*

Professor Dolovich's institutional approach to cruelty is far superior to the current individual actor approach set out in *Farmer*. This is true for all prisoners and their claims that conditions of confinement violate the Constitution, for her approach recognizes what *Farmer* obscures. More often than not, Eighth Amendment claims of cruel confinement are not isolated cases of diabolical correctional officers. Rather, American prison conditions are so routinely and casually horrific that they are emblematic of a culture that has dehumanized incarcerated people altogether. Cruelty is not a bug of the system; it is the system. The only way to counter that kind and degree of cruelty is to hold state actors accountable for risks of which they should be aware, not just those risks obvious to them in a given encounter.

In the context of this Paper, I seek to draw upon Dolovich's theory in a very specific way, one that applies to those within the purview of the *Miller* trilogy. I begin from the premise that Dolovich is right when she defines the state's carceral burden as the duty to "ensur[e] the minimum conditions for maintaining prisoners' physical and psychological integrity and well-being."[267] Next, I argue that, given what the Court has held about youth and

262. *Id.* at 947.
263. *Id.* at 945 (emphasis added).
264. *Id.*
265. *Id.* at 946–47.
266. *Id.* at 948–72.
267. *See id.* at 921.

their defining differences, this carceral burden is a heightened one regarding young prisoners. Recall again what those differences are according to the Court.[268] Youth are less blameworthy; more amenable to rehabilitation; more susceptible to negative peer influences; less capable of extricating themselves from bad environments; and generally more vulnerable and more traumatized than the average person entering a prison system.[269] Accordingly, the state's carceral burden regarding youth will be much more onerous.

If the state's carceral burden in an adults-only prison requires a certain set of procedural safeguards to ensure prisoners' safety and well-being, then very likely those safeguards will need to be more expansive and perhaps different altogether regarding young people in prisons. For example, perhaps in an adults-only prison, when new individuals enter the facility, a screening process may seek to identify those who would be at risk of physical harm in the general population, and the facility may determine that some period of administrative separation is warranted for the individual's protection. However, given what we know about the young person's developing brain, while that young person surely is vulnerable in the general population, solitary confinement may be equally if not more damaging than physical attack by other prisoners.[270] So the state's carceral burden is thus more complicated as applied to youth. The state may need to reconsider the minor's presence at that particular facility altogether; it may need to expand the jurisdiction of juvenile facilities; or it may need to create safer units within adult facilities for young people so that they are in an age-appropriate environment. The point is that the state's carceral burden will look different, and likely be more burdensome, when it comes to imprisoned youth.

To recap, I have argued that the typical experience for youth coming of age in prison is wildly out of step with Supreme Court jurisprudence on the differentness of youth,[271] and I have argued that the institutional approach to assessing cruel confinement is superior to the *Farmer* test.[272] Here, I put those two pieces together to argue that *Miller* has implications for conditions of confinement, both negative and positive in nature. At the very least, states cannot *hinder* the young person's potential for growth and rehabilitation, and, in some basic respects, the state must foster that capacity for maturity—

268. *See generally supra* Parts I and II.

269. *See generally supra* Parts I and II.

270. *See, e.g.,* Clare Huntington & Elizabeth S. Scott, *The New Restatement of Children and the Law: Legal Childhood in the Twenty-First Century*, 54 FAM. L. Q. 91, 103–04 (2020) (discussing particular harms of solitary confinement for children given the importance of social context for development).

271. *See supra* Parts I and II.

272. *See supra* Part III.

otherwise the state is "complicit"[273] in the minor facing an unconstitutional punishment.

It makes sense to begin with what the state must prevent. Because prisoners, especially young prisoners, are vulnerable to physical and sexual assault, the state must first safeguard against violence and the physical and psychological toll that it inflicts. The Court's juvenile sentencing case law specifically refers to the juvenile's capacity for change and growth,[274] but no such growth can occur if a young person is regularly fearing and fending off attack. In fact, that reality, which requires perpetual watchfulness and even preemptive attack, is criminogenic; it is a hindrance to the natural maturation that would likely happen outside prison walls.[275] So, when the state sentences a young person to a term of years such that they will come of age inside prison walls, at the very least the state must guarantee the absence of violence. Only in the absence of violence and its imminent threat, can anyone experience the physical, sexual, and mental safety necessary to mature. If a young person's experience in confinement is so violent and turbulent—so lacking in basic protections that the only choices are to be raped or to fight—then the state has imposed an unconstitutional sentence, one that hinders the very same maturity and chance at redemption that the *Miller* trilogy afforded.

Beyond guaranteeing that young people in prison are free from violence and its related harms, the *Miller* line of cases also imposes affirmative obligations upon states in terms of *how* they incarcerate.[276] Recall that the *Graham* Court insisted that minors have a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[277] *Miller* further held that few juveniles in the criminal system "develop entrenched patterns of problem behavior"[278] and noted that juvenile LWOP should be "uncommon,"[279] appropriate only for those deemed "incorrigible."[280] *Montgomery* confirmed the substantive nature of *Miller's* holding: "[*Miller*] rendered life without parole an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes

273. Graham v. Florida, 560 U.S. 48, 79 (2010).

274. *See generally supra* Part 1.

275. *See generally* Miriam S. Gohara, *In Defense of the Injured: How Trauma-Informed Criminal Defense Can Reform Sentencing*, 45 AM. J. CRIM. L. 1, 2–25 (2018) (defining trauma, including exposure to violence, and discussing its impact on brain development and behavior).

276. *See generally* Roper v. Simmons, 543 U.S. 551, 571–72 (2005); *Graham*, 560 U.S. at 82; Miller v. Alabama, 567 U.S. 460, 489 (2012).

277. *Graham*, 560 U.S. at 75.

278. *Miller*, 567 U.S. at 471.

279. *Id.* at 479.

280. *Id.* at 473, 479.

reflect the transient immaturity of youth."[281] And this is where, I argue, affirmative obligations are imposed upon the states.

After *Miller* and *Montgomery*, states are not free to say, on the one hand, "incorrigibility is inconsistent with youth,"[282] and young prisoners have a constitutional right to seek release based on "demonstrated maturity and rehabilitation."[283] But, on the other hand, we are going to confine young people during pivotal developmental years in a Hobbesian state of nature.[284] To do so all but guarantees that the young person will further devolve into survival-driven violence and antisocial coping mechanisms.[285] To do so also guarantees that those same coping mechanisms will hinder the young person's prospects of release. And in this way, the state itself becomes complicit in the young person serving an unconstitutional sentence.

Instead, states need to create the conditions, beyond safety, that permit maturity and rehabilitation.[286] This requires a whole host of practical measures, including educational and vocational opportunities;[287] therapeutic and rehabilitative services;[288] substance abuse disorder treatment;[289] mental

---

281. Montgomery v. Louisiana, 577 U.S. 190, 208 (2016) (citation omitted).

282. *Miller*, 567 U.S. at 473 (citation omitted).

283. Graham v. Florida, 560 U.S. 48, 75 (2010).

284. *See generally* THOMAS HOBBES, LEVIATHAN (1651) (describing humans ungoverned by a sovereign as living in anarchy and perpetual state of self-preservation).

285. The *Miller* Court itself recognized that a child's "environment" is not something from which he can "usually extricate himself—no matter how brutal or dysfunctional," and that such an environment should be a mitigating variable at sentencing. *Miller*, 567 U.S. at 477. Surely, the Court would not sanction a similarly brutal and dysfunctional environment imposed as part of the state's punishment.

286. *Cf.* Katherine Hunt Federle, *Exploring the Parameters of a Child's Right to Redemption: Some Thoughts*, 68 S.C. L. REV. 487, 489–90 (2017) ("As the Court declared, "juvenile[s] should not be deprived of the *opportunity* to achieve maturity of judgment and self-recognition of human worth and potential.").

287. *See generally* Grant Duwe & Makada Henry-Nickie, *A Better Path Forward for Criminal Justice: Training and Employment for Correctional Populations*, BROOKINGS (2021), https://www.brookings.edu/research/a-better-path-forward-for-criminal-justice-training-and-employment-for-correctional-populations/ [https://perma.cc/6VEG-L49C].

288. *See, e.g.*, Amy Barch, *A Better Way to Keep People from Going Back to Prison*, STAN. SOC. INNOVATION REV. (July 7, 2021), https://ssir.org/articles/entry/a_better_way_to_keep_people_from_going_back_to_prison# [https://perma.cc/KAR4-VMZR] (discussing efficacy of cognitive behavioral therapy in correctional context).

289. *See, e.g.*, William D. Bales et al., *Substance Abuse Treatment in Prison and Community Reentry: Breaking the Cycle of Drugs, Crime, Incarceration and Recidivism?*, 13 GEO. J. ON POVERTY L. & POL'Y 383, 400–01 (2006) (discussing need for and efficacy of substance abuse treatment in correctional settings).

health treatment;[290] and chances to build and develop healthy relationships.[291] This is indeed a tall order compared to the current experience of coming of age in America's prisons. But the *Miller* trilogy necessitates these conditions, despite their practical and political challenges.

In the next Part of the Paper, I address the following question: assuming young people coming of age in prison are entitled to the conditions I articulate in Part III, how do they prevail on claims to this effect in federal court?

IV. ENFORCING *MILLER'S* PROMISE

In Part II of this Paper, I demonstrated the disconnect between the *Miller* trilogy's conceptions about youth rehabilitation and the reality for individuals coming of age in America's prisons. I further argued in Part III that the current framework for conditions of confinement litigation is not up to the task of enforcing the Court's basic assumptions about youth rehabilitation. In this Part of the Paper, I revisit the mechanics of Eighth Amendment litigation and the modified mens rea standards explored by Professor Dolovich and discussed *supra* in Part III. Specifically, I extrapolate from her work to suggest that, while her argument is strong as applied to all prisoners, it has special purchase in the realm of youthful prisoners challenging conditions of confinement given their vulnerability and unique capacity for change.

---

290. Most experts agree that two things are simultaneously true: the correctional setting is never the best site for mental health treatment, and the mental health services offered in jails and prisons are well below what is required to serve the population. *See, e.g.*, Christie Thompson et al., *Mentally Ill and Languishing in Jail*, THE MARSHALL PROJECT (June 6, 2019), https://www.themarshallproject.org/2019/06/06/mentally-ill-and-languishing-in-jail [https://perma.cc/G6N5-QN7W] (discussing jails as holding space for the mentally ill); Leah Wang, *Chronic Punishment: The Unmet Health Needs of People in State Prisons*, PRISON POL'Y INITIATIVE (June 2022), https://www.prisonpolicy.org/reports/chronicpunishment.html#mentalhealth [https://perma.cc/2RLR-QYQK] (noting that more than half people in state prisons report mental health problems but only 1 in 4 receive treatment).

291. Evidence suggests that people who are welcomed back into the community are less likely to reoffend, and best practices within juvenile justice recognize the importance of trauma-informed and group-based correctional models. *See, e.g.*, WAR ON KIDS, *supra* note 29, at 146–50, (discussing rehabilitative models for youth incarceration). And there are non-profit organizations attempting to bring community inside correctional facilities in order to offer relationship-building opportunities. *See, e.g.*, THE FREE MINDS BOOK CLUB, https://freemindsbookclub.org [perma.cc/WDY8-93LJ]; THE FREDERICK DOUGLASS PROJECT FOR JUST., https://www.douglassproject.org [perma.cc/5RW3-2J8C].

A. Recalling the Standard Burden

As discussed in Part III *supra*, the current test for prisoners challenging their conditions of confinement requires two showings. First, the prisoner must allege an injury or deprivation that is "objectively, 'sufficiently serious,'"[292] and that alleged injury must "result in the denial of 'the minimal civilized measure of life's necessities.'"[293] When a prisoner alleges that the injury resulted from the state's failure to prevent harm, "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm."[294] Second, "a prison official must have a 'sufficiently culpable state of mind'" in order for the prisoner to state a claim under the Eighth Amendment.[295] Specifically, the state actor must be reckless with respect to the injury or risk the prisoner experiences; this means the correctional officer or warden must have been actually aware of the risk and must have chosen to disregard that risk.[296] Otherwise, according to the Court, no "punishment" has been imposed.[297] Finally, federal legislation requires a prisoner to exhaust prison administrative remedies before seeking judicial relief.[298]

This approach is grossly insufficient as a tool for constraining state-sanctioned cruelty in prisons. Recall the geriatric prisoners in Texas who feared death because the state was failing to follow even the most minimal protective measures advised during COVID-19 outbreaks.[299] Their Eighth Amendment claims failed because they had not exhausted administrative remedies within the Texas state correctional system.[300] Never mind that doing so likely would have been fruitless and would have taken so long that lives would have been lost to the novel virus in the interim.[301] Similarly, consider the litigation that generated the Supreme Court decision in *Brown v. Plata*.[302]

---

292. Farmer v. Brennan, 511 U.S. 825, 834 (1994).

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at 839–40.

297. *Id.* at 841.

298. Porter v. Nussle, 534 U.S. 516, 532 (2002) (upholding exhaustion portion of Prison Litigation Reform Act and describing its breadth); *see also* Brandon Garrett & Lee Kovarsky, *Viral Injustice*, 110 CAL. L. R. 117, 138–40 (2022) (discussing administrative exhaustion requirements).

299. *See supra* notes 238–244 and accompanying text.

300. *See supra* note 243 and accompanying text.

301. *See* Valentine v. Collier, 141 S. Ct. 57, 59–60 (Sotomayor, J., dissenting) (describing the Fifth's Circuit's erroneous analysis of the exhaustion issue because "[g]iven the speed at which the contagion spread, the 160-day grievance process offered no realistic prospect of relief").

302. Brown v. Plata, 563 U.S. 493 (2011).

There the Supreme Court held that California's prisons were so overcrowded that prisoners were routinely denied basic medical and mental health services, constituting an Eighth Amendment violation.[303] At nearly double the capacity for which the prisons had been designed, the state was unable to meet the basic needs of those within its care.[304] "Prisons ha[d] backlogs of up to 700 prisoners waiting to see a doctor;"[305] overcrowded living quarters and bathrooms created "breeding grounds for disease."[306] The overcrowding led to increased turmoil and violence, often necessitating lockdowns that further delayed medical care;[307] because mental health services were outstripped by demand, "suicidal inmates [were] held for prolonged periods in telephone-booth-sized cages without toilets."[308] Now, the Supreme Court ultimately held that these conditions were cruel for constitutional purposes, and it upheld an appellate court ruling that California must reduce its prison population to address this institutional cruelty.[309] Yet, that result took fifteen years to accomplish in federal court.[310] Consider the suicides, the unmet medical needs, the turbulence, the terror, and the needless suffering that occurred over those two decades. These cases, as well as those discussed in Part III.B *supra*, demonstrate the obstacles prisoners face when challenging conditions of confinement.

And yet for young people in prison, the prospect of mounting this kind of challenge borders on the preposterous. Recall from Parts I and II of this Paper that late adolescence by definition is a period of vulnerability, fluid moral character, and susceptibility to negative influences.[311] This makes young people in prisons especially ripe for abuse, not just at the hands of fellow prisoners, but also at the hands of correctional staff.[312] At the same time, revealing that one has been abused may expose one to even further vulnerability and abuse. Add to this, prison culture values silent suffering over "snitching," and snitching can trigger retribution whether one is reporting a fellow prisoner or a correctional officer.[313] Given these power dynamics, it is hard to imagine how a young prisoner would even feel safe filing an administrative complaint within their own facility, which is often

303. *Id.* at 545.
304. *Id.* at 501–02.
305. *Id.* at 519.
306. *Id.* at 519–20.
307. *Id.* at 521.
308. *Id.* at 503.
309. *Id.* at 545.
310. *Id.* at 506.
311. *See generally supra* Parts I and II.
312. *See supra* notes 238–244 and accompanying text.
313. *See supra* note 157 and accompanying text.

required before filing a lawsuit. Finally, recall that young people who enter adult prisons statistically bring complex trauma history and interrupted educational histories.[314] These variables further reduce the chances that a young person suffering from cruel prison conditions would be in a position to file a complaint with a warden, let alone a lawsuit.[315]

B. Modification Along Dimensions of Difference

Given everything that the Court has said about children and their unique vulnerabilities, a framework for assessing institutional cruelty when it comes to young people must take into account what I call dimensions of difference.[316] That is, there are a few ways in which young people's differences will specifically impact confinement and what constitutes cruelty. I offer three dimensions of difference as a starting point. First, young people in prison are more *vulnerable* because of their physical stature and psychological immaturity.[317] Second, young people have different *physical* needs as compared to older adults, including things like a higher caloric intake and more sleep.[318] Finally, and perhaps most importantly, late adolescents have significant *social and emotional* needs as compared to their adult counterparts because this is a period when young people solidify a sense of personal identity, understand and process complex emotions, and master coping skills, such as conflict resolution and decision-making.[319] If these dimensions of difference are attended to during confinement, young people may actually experience the Court's promise of a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[320] On the other hand, if the state ignores these dimensions of difference—or actually creates hurdles that makes these differences more like penalties—then that

---

314. *See supra* notes 238–244 and accompanying text.

315. *Cf.* Wolf, *supra* note 152, at 100–03 (2018) (describing challenges of prison conditions litigation for young clients).

316. This "dimensions of difference" framework requires further exploration, and it is the subject of a separate work in progress.

317. *See generally supra* Parts I and II.

318. *See e.g.*, Catherine A. Gallagher, *Health Care for the Juvenile Justice Population*, 16 GEO. J. ON POVERTY L. & POL'Y 611, 614–17 (2009) (discussing unique physical health concerns of at-risk youth and ways in which correctional systems fail to meet them).

319. *See e.g.*, Helyn Kim & Katherine M. Ross, *How Do Social and Emotional Skills Develop in Youth?*, BROOKINGS INST. (Aug. 9, 2019), https://www.brookings.edu/blog/education-plus-development/2019/08/09/how-do-social-and-emotional-skills-develop-in-youth [https://perma.cc/ETQ2-W5PZ]; *Raising Teens*, MASS. INST. TECH., https://hr.mit.edu/static/worklife/raising-teens/ten-tasks.html [https://perma.cc/24TE-QWF2].

320. Graham v. Florida, 560 U.S. 48, 75 (2010).

promise of "hope" and "reconciliation with society"[321] becomes a mere fantasy.

In order for the promise of *Miller* to have practical meaning, a different test must apply to young people coming of age in prison who challenge their conditions of confinement. In this section, I sketch out the contours of what such a test would need to look like in order to address the defining features of young people in prison. To begin, there needs to be a relaxation of the requirement that the prisoner exhaust administrative remedies before seeking judicial relief.[322] As the case law demonstrates,[323] it is often correctional staff who torment prisoners. Thus, a requirement that a young prisoner seek redress first from those very same staff is absurd. At the same time, sometimes the danger that a prisoner faces is time sensitive, and the administrative exhaustion requirement perpetuates the ongoing injury or risk of injury. Imagine a young prisoner who is sexually assaulted by a correctional officer on a regular basis. If that prisoner must exhaust administrative remedies before seeking relief in court, and if during that time period (however long that may be), they are assaulted again, the injury is compounded precisely because of the administrative requirement. It is not just a *delay in relief*; it is an *expansion of the harm* suffered. It may not always be the case that a prisoner is suffering at the hands of correctional staff or that their claim of injury is especially time sensitive.[324] But if and when that is the case, I argue that there should be a relaxing of the exhaustion requirement for young people coming of age in prison.

Next, the objective prong of *Farmer* requires a prisoner to demonstrate an "objectively 'sufficiently serious'" risk to his health or safety.[325] There are at least three ways in which this prong in practice fails to account for the Court's recognition that children are different for constitutional purposes. Here I want to address: (1) the kind of harm that is recognized; (2) the quantity of harm that is recognized and; (3) the issue of aggregating harms. While these issues are interrelated, they each warrant separate discussion. Regarding *kinds* of harm contemplated by the first prong, the Court has held that hot or cold cells,

---

321. *Id.* at 79.

322. *Cf.* Porter v. Nussle, 534 U.S. 516, 523–25 (2002) (discussing history of exhaustion requirements before Prison Litigation Reform Act of 1996 and alternative approach where exhaustion was only required when "appropriate and in the interests of justice").

323. *See generally supra* Part III.

324. For example, prisoners may file suit arguing that the state provides them with inadequate and sometimes unsanitary food. While this may rise to the level of a constitutional claim, it is neither directly related to the actions of correctional officers, nor is it as time sensitive as, say, the threat posed by ongoing assault.

325. Farmer v. Brennan, 511 U.S. 825, 834 (1994).

negligent medical care, lack of "yard time" and filth in one's cell—on their own—are not sufficiently serious problems to satisfy the objective prong of *Farmer*.[326] But again, *Miller* suggests that children are different, and thus the analysis might be different for a minor. For example, even if the Court assumes that an adult can survive on two meals a day,[327] it is not clear that a minor can, or should be asked to tolerate that. Similarly, the Court has yet to declare that the use of lengthy solitary confinement is in itself an Eighth Amendment violation,[328] but the evidence regarding minors suggests that solitary confinement is always dangerous and often *fatal*.[329] Thus, it may be that the first prong of *Farmer* as applied to young people needs to be modified in the *kinds* of harm it contemplates. Some routine, albeit cruel, aspects of confinement that courts have upheld regarding adults may not pass constitutional muster as applied to young people.

In many instances when a prisoner challenges an aspect of their confinement, it is not the *kind* of harm alleged, but rather a court's assessment of the *quantity* or degree of that harm that hinders legal relief.[330] Perhaps a prisoner can be denied yard time for 10 days, but not 100 days.[331] Perhaps a prisoner may be required to endure two weeks in a cell that hovers around 90

---

326. *See supra* note 236 and accompanying text.

327. Alysia Santo et al., *What's in a Prison Meal?*, THE MARSHALL PROJECT (July 7, 2015), https://www.themarshallproject.org/2015/07/07/what-s-in-a-prison-meal [https://perma.cc/L9P7-ND4T] (describing hungry prisoners given only two meals per day).

328. Justices have expressed deep concerns about the constitutionality, let alone humanity, of the practice. *See e.g.*, Ruiz v. Texas, 137 S. Ct. 1246, 1247 (2017) (Breyer, J., dissenting from denial of stay of execution); Davis v. Ayala, 576 U.S. 257, 288–89 (2015) (Kennedy, J., concurring). *See also* Note, *The Psychology of Cruelty: Recognizing Grave Mental Harm in American Prisons*, 128 HARV. L. REV. 1250, 1263 (2015) (urging Court to take a more expansive view of harms that count for constitutional claims of cruelty including mental harms of solitary confinement).

329. *See e.g.*, Amy Roe, *Solitary Confinement Is Especially Harmful to Juveniles and Should Not Be Used To Punish Them*, AM. CIV. LIB. UNION (Nov. 17, 2017), https://www.aclu-wa.org/story/solitary-confinement-especially-harmful-juveniles-and-should-not-be-used-punish-them [https://perma.cc/R485-YKRQ] (discussing unique dangers for youth); Ian M. Kysel, *Solitary Confinement Makes Teenagers Depressed and Suicidal. We Need to Ban the Practice*, WASH. POST (June 17, 2015), https://www.washingtonpost.com/posteverything/wp/2015/06/17/solitary-confinement-makes-teenagers-suicidal-we-need-to-ban-the-practice/ [https://perma.cc/8UVZ-XZYP] (discussing correlation between solitary confinement of youth and their suicide).

330. *See supra* note 236 and accompanying text.

331. *Cf.* Norwood v. Nance, 591 F.3d 1062, 1070 (9th Cir. 2010) (collecting cases where courts upheld months-long denial of exercise on grounds of prison safety needs).

degrees, but not two years in that heat.[332] Here, too, the claims for young people may differ along the three dimensions identified earlier. This is especially relevant to claims about the social aspects of confinement. Efforts to solidify a sense of identity and to engage in abstract thinking and decision-making, for example, require group settings. Thus, an institution-wide lockdown that prohibits any social interaction for one month may not constitute serious injury for the average adult prisoner, whereas for the young person, one week in lockdown may trigger constitutional safeguards.

Still other prisoners argue that their conditions are cruel not because of one isolated variable, but rather because of a confluence of smaller injuries. In these cases, the courts are routinely hostile and hold that "[g]enerally speaking, challenges to conditions of confinement cannot be aggregated and considered in combination unless 'they have a mutually enforcing effect that produces the deprivation of a single, identifiable need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets.'"[333] In *Saunders v. Sheriff of Brevard County*, the Eleventh Circuit recently rejected a claim in which the prisoner alleged the following combined variables: overcrowding, a lack of ventilation and air conditioning, unsanitary conditions, a lack of "rec time," and toilet paper and soap available only upon request.[334] Reversing the District Court, the appellate court held that "[n]othing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." Here, the prisoner and the District Court failed to identify the "single human need" that the prisoner was denied.[335] And applying Supreme Court precedent, the appellate court rejected the notion that, in the aggregate, the prisoner's various claims may amount to cruel conditions.[336]

As with kinds of harms and quantity of harm, so too, aggregated harms may need to be viewed differently when it comes to minors. Imagine a minor in the same facts before the Eleventh Circuit in *Saunders*. That young person may experience the combination of what the court called "unpleasant"[337]

---

332. *Cf.* Chandler v. Crosby, 379 F.3d 1278, 1297 (11th Cir. 2004) (finding summer temperatures in un-air-conditioned Florida facility unpleasant but not constitutionally excessive based on temperatures reached on given number of days).

333. Wilson v. Seiter, 501 U.S. 294, 304 (1991); Johnson v. Prentice, 29 F.4th 895, 904 (7th Cir. 2022) ("Generally speaking, challenges to conditions of confinement cannot be aggregated and considered in combination.").

334. Saunders v. Sheriff of Brevard County, 735 Fed. App'x. 559, 565–67 (11th Cir. 2018).

335. *Id.* at 571.

336. *Id.*

337. *Id.* at 570. ("While surely unpleasant, this episode does not describe clearly unconstitutional conditions.").

factors differently from an adult. Because the Supreme Court does not determine specific criteria for cells and units,[338] sometimes a facility at capacity or even minimally overcrowded means that prisoners are sleeping in very close proximity to a shared toilet.[339] This was the case in *Saunders*. Then add that, when a person uses the toilet, they must ask for toilet paper and may have to wait for the paper for 45 minutes.[340] Consider how disputes may erupt over who is using the shared toilet and for how long. Then add heat and lack of ventilation, and one can imagine that tempers would flare.[341] And then imagine who is most at risk when tempers flare—the prisoner who is small, immature, and less capable of navigating a web of potentially conflicting cues from prisoners and staff. It is the young prisoner who is most vulnerable in that situation—not because any one of those factors in its own right is cruel under current case law, but because the confluence of factors make confinement cruel for that young person. In sum, courts' wholesale rejection of aggregated cruelty claims may need to be reconsidered as applied to young people.

Having considered exhaustion requirements and the objective prong of *Farmer*, I turn to *Farmer*'s deliberate indifference standard. For all of the reasons set out in Part III of this Paper,[342] the deliberate indifference standard simply cannot capture the state-sanctioned cruelty that is part of the American prison experience.[343] And it is therefore far too meager an instrument as applied to minors coming of age in prison.[344] Dolovich explores a range of alternative culpability standards and concludes that a modified strict liability approach strikes the proper balance between enforcing the Eighth

---

338. Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (rejecting lower court conclusion that "double-celling" prisoners was cruel and unusual and stating that "[n]o static 'test' can exist by which courts determine whether conditions of confinement are cruel and unusual").

339. In *Saunders*, cell occupancy varied from three to eight prisoners in the 9 by 5 foot cell. *Saunders*, 735 Fed. App'x. at 561. Because of this density, "inmates' sleeping mats would unavoidably overlap, or . . .urine would splash from the cell's communal toilet onto an inmate's sleeping space." *Id.* at 561–62.

340. *Id.* at 567.

341. *Id.* at 561–62.

342. *See generally supra* Part III.

343. *See supra* Part III; *See also* Brandon Garrett & Lee Kovarsky, *Viral Injustice*, 110 CAL. L. R. 117, 163–64 (2022) (discussing ways in which courts restrict the rights articulated in *Farmer* by shifting meaning of deliberate indifference standard).

344. *See supra* Parts I and II (setting out the differentness of youth and the Court's adoption of those differences in sentencing cases); *see also* Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J.L. & SOC. CHANGE 285, 313 (2012) (proposing a modified intent standard for juveniles).

Amendment and safeguarding against unfairness to defendants.[345] It is worth revisiting her conclusion as applied to young prisoners.

To begin, why not a pure strict liability approach? Why not argue that, given what the Court has said about youth, and given the routine dangers and harms of prison life, when the state chooses to incarcerate a child in an adult setting, the state is strictly liable for any and all harms that the young prisoner suffers? There is much to be said for that approach when one considers, for example, the use of solitary confinement and its known risks to young people even on a short-term basis. After all, the argument would not be that the state is responsible on the basis of say, prisoner suicide, without *any* showing of culpability.[346] The argument would be that by confining youth in solitary knowing its dangers, the state *has* demonstrated culpability. This is akin to the doctrine of felony murder where the defendant's underlying felony serves as a proxy for the mental culpability associated with any attendant homicide—even an accidental one.[347] Thus, the pure version of strict liability may work well in the context of discrete practices, for example housing minors with adults in the first place, or confining minors in a solitary setting.

But, consistent with Dolovich's analysis, there will be some contexts in which a strict liability approach unfairly punishes defendants. For example, a prisoner may die quietly in his sleep despite a regular night watch,[348]or two prisoners may harbor truly secret animosity and kill each other without warning.[349] In these cases, she concludes "constitutional liability would seem inappropriate" on a strict liability basis.[350] But doctrinal modifications like robust causation analysis and contributory negligence can resolve the issue without rejecting strict liability altogether.[351] And the real appeal of the strict

345. Dolovich, *supra* note 25, at 964–72.

346. *See id.* at 965 ("The notion of strict liability that would apply in this context is importantly distinct from strict liability in the ordinary case. Typically, on a strict liability standard, defendants may be held liable despite an absence of culpability, even in cases where defendants exercised due care and were thus not even negligent. In the prison conditions context, however, the Eighth Amendment operates against the backdrop of a heightened official obligation to take care as regards the health and safety of prisoners.").

347. *See e.g.*, People v. Lewis, 22 P.3d 392, 414 (Cal. 2001) (explaining that liability for first degree murder based on felony murder theory requires the state "to establish that the defendant, either before or during the commission of the acts that caused the victim's death, had the specific intent to commit one of the listed felonies" and no further intent regarding the death of the victim). To be sure, one may argue that the doctrine of felony murder is unduly harsh to defendants, but it is good law in most jurisdictions and thus may serve as precedent for considering states' responsibilities when confining minors.

348. *See* Dolovich, *supra* note 25, at 941.

349. *Id.*

350. *Id.*

351. *Id.* at 966–69.

liability approach is that it reinforces the claim at the heart of Dolovich's work: that the state, having made the decision to incarcerate a human being, assumes responsibility to meet that person's basic needs, including self-preservation. If that proposition is true, as I believe it is, then it only applies with greater force to young people in prison.

CONCLUSION

In this Paper, I have argued that the Supreme Court's juvenile sentencing decisions necessarily have implications for youth conditions of confinement. The Court has already held that children are different for constitutional purposes at the moment of sentencing, and my claim is that those salient differences—vulnerability, diminished culpability, and amenability to rehabilitation—still apply after sentencing, when the state confines a minor. Despite the relative modesty of this claim from a doctrinal perspective, I am cognizant of the fact that the Court's recent changes in composition, and its most recent juvenile sentencing decision, make my claim seem ambitious from a practical perspective. By way of conclusion, I will address those practical concerns.

Advocates and scholars have noted that the ethos of the *Miller* trilogy has already disappeared from the Court and that today's Court embraces a much more "diminished normative vision of the Eighth Amendment."[352] Indeed, we may look back on *Montgomery v. Louisiana* as "the high-water mark of the Supreme Court's 'evolving standards of decency' jurisprudence;"[353] and we may even agree that "after *Jones* [*v. Mississippi*], there is reason for despair over the federal Eighth Amendment."[354] So one may fairly ask: if the Court is retreating from its "kids are different jurisprudence"—or worse, if the Court is newly hostile to that case law—why promote an expansion of the *Miller* trilogy? Why argue for a logical extension of case law that the current Court seems ready to disavow?

To begin, the Court has insisted that the *Miller* trilogy remains good law and that its most recent juvenile sentencing decision in *Jones v. Mississippi* reflected an effort to "carefully follo[w]

352. Sharon Dolovich, *Evading the Eighth Amendment: Prison Conditions and the Courts*, in THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 133, 160 (Meghan J. Ryan and William W. Berry, III eds. 2020).

353. David M. Shapiro & Monet Gonnerman, *To the States: Reflections on* Jones v. Mississippi, 135 HARV. L. REV. F. 67, 69 (2021).

354. *Id.* at 73.

both *Miller* and *Montgomery*."[355] Responding to the dissenting Justices, the majority maintained that its decision in *Jones* reflected nothing more than "good-faith disagreement" over the interpretation of precedent, and it went on to recognize the "consequential" nature of the *Miller* trilogy.[356] While I find the Court's framing of the *Jones* decision disingenuous, I share Justice Sotomayor's view: "For present purposes, sentencers should hold this Court to its word: *Miller* and *Montgomery* are still good law. Sentencers are thus bound to continue applying those decisions faithfully . . . . Failing to do so violates the Eighth Amendment."[357] While those cases are still good law, it is fair and appropriate for scholars and advocates to articulate the logical implications of those decisions as I have tried to do in this Paper.

Second, the Court's recent decision in *Taylor v. Riojas* may provide some grounds for optimism when it comes to litigating conditions of confinement cases.[358] There, in a somewhat unusual move given the procedural posture of the case,[359] the Court drew a line in the sand regarding cruel confinement. In a very brief per curiam opinion, the Court overruled the Fifth Circuit's conclusion that correction officers were entitled to qualified immunity and held that "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for such an extended period of time."[360] As legal scholars have documented,[361] this decision marked a significant departure from the Court's qualified immunity precedent, and it may signal "that the Court is open to a less defense-protective recalibration" of qualified immunity doctrine.[362] While it is too early to know exactly what *Taylor* signals, the opinion very clearly favors reasonableness over blind deference to officials. In short, *Taylor* is useful for those challenging their conditions of confinement, whether minors or adults.

Finally, even if the Court continues to betray the legacy of the *Miller* trilogy, and even if *Taylor* proves to be just a one-off in prison conditions

355. Jones v. Mississippi, 141 S. Ct. 1307, 1321 (2021) ("Today's decision does not overrule *Miller* or *Montgomery*.").

356. *Id. at* 1321–22.

357. *Id. at* 1337 (Sotomayor, J., dissenting).

358. Taylor v. Riojas, 141 S. Ct. 52, 52 (2020); *see also supra* notes 218–229 and accompanying text.

359. Taylor v. Riojas, 141 S. Ct. at 54–56 (Alito, J., concurring) (explaining the unusual posture of the case and expressing confusion as to why Court granted certiorari given the posture).

360. *Id.* at 53 (majority opinion).

361. *See e.g.*, Jennifer E. Laurin, *Reading Taylor's Tea Leaves: The Future of Qualified Immunity*, 17 DUKE J. CONST. L. & PUB. POL'Y 241, 246 (2022).

362. *Id.* at 269.

cases, this Paper's central thesis is valuable when considered in the context of state constitutionalism. In recent years, scholars and jurists have read state constitutions to provide greater protections for those in the correctional system, especially youth in the system.[363] In 2014, the Supreme Court of Iowa read its state constitution to bar mandatory minimum sentencing schemes as applied to children.[364] More recently, in 2021, the Washington Supreme Court held that the state's constitutional ban on "cruel punishment" barred mandatory LWOP sentences for those 18–20 years old.[365] Massachusetts appears poised to come to a similar conclusion based on state constitutional provisions.[366] In sum, the argument that I make in this Paper has merit in the federal courts, but if the worst case scenario comes to pass and the Supreme Court abandons the promise of *Miller* altogether, then the claims I make herein may very well prove fruitful in state court litigation.

As long as the United States persists in its extreme, outlier juvenile sentencing and correctional practices, it remains worthwhile to challenge cruel and unusual youth confinement.

---

363. *See e.g.*, Shapiro & Gonnerman, *supra* note 353*,* at 70 (discussing renewed litigation and scholarship leveraging state constitutional language to protect prisoners and those within correctional system); William W. Berry III, *Cruel State Punishments*, 98 N.C. L. Rev. 1201, 1214 (2020) (arguing that, even if the Supreme Court ceases to offer expanded protections under Eighth Amendment, state constitutions may offer broader protection and fruitful space for litigation).

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

365. *In re* Monschke & Bartholomew, 482 P.3d 276, 279 (Wash. 2021); *see generally* Francis X. Shen et al., *Justice for Emerging Adults After* Jones*: The Rapidly Developing Use of Neuroscience to Extend Eighth Amendment* Miller *Protections to Defendants Ages 18 and Older*, 97 N.Y.U. L. REV. ONLINE 101, 116 (2022).

366. Shen et al., *supra* note 365, at 117.