

JUST GROW UP ALREADY: THE DIMINISHED CULPABILITY OF JUVENILE GANG MEMBERS AFTER *MILLER v. ALABAMA*

Abstract: In *Miller v. Alabama*, the U.S. Supreme Court held that statutes imposing mandatory sentences of life without parole on juvenile offenders violate the Eighth Amendment. In doing so, the Court applied the Eighth Amendment analysis normally reserved to review capital sentences. The extension of this analysis to a term-of-years sentence rested on the Court’s recognition of developmental differences that make juveniles categorically less culpable than adults. This Note argues that based on *Miller*, statutory provisions that impose lengthy sentence enhancements on juveniles who commit gang-related crimes, such as those found in California’s STEP Act, should also be struck down. Such provisions should be struck down because the gang setting magnifies many of the developmental differences highlighted in *Miller*, and penological justifications fail to explain the application of gang enhancements to juvenile offenders.

INTRODUCTION

In 2012, in *Miller v. Alabama*, the U.S. Supreme Court held that mandatory sentences of life without parole (LWOP) for juveniles violate the Eighth Amendment.¹ Historically, the Court has been extremely reluctant to strike down noncapital sentences as violations of the Eighth Amendment unless they are “grossly disproportional” to the underlying crime.² The Court in *Miller*, however, struck down a noncapital sentencing scheme after applying the more rigorous Eighth Amendment analysis normally reserved for capital sentences.³ It focused on physiological and developmental differences that set juvenile

¹ 132 S. Ct. 2455, 2460, 2469 (2012); see U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

² See Rachael E. Barkow, *Categorizing Graham*, 23 FED. SENT’G REP. 49, 49 (2010) (noting that before 2010, it had been almost thirty years since the Supreme Court struck down a noncapital sentence); Dan Markel, *May Minors Be Retributively Punished After Panetti (and Graham)?*, 23 FED. SENT’G REP. 62, 63 (2010); Carol S. Steiker & Jordan M. Steiker, *Graham Lets the Sun Shine in: The Supreme Court Opens a Window Between Two Formerly Walled-Off Approaches to Eighth Amendment Proportionality Challenges*, 23 FED. SENT’G REP. 79, 80 (2010).

³ See 132 S. Ct. at 2464; see also *id.* at 2455 (noting that the Court has developed two different tests to review Eighth Amendment challenges); *Graham v. Florida*, 560 U.S. 48, 68 (2010) (indicating that the approach later used in *Miller* was previously reserved for death penalty cases).

offenders apart from adults to justify extending the use of this analysis.⁴ By using its more rigorous Eighth Amendment analysis, the Court was able to review whether it was constitutional for *any* juvenile offenders—regardless of the particular circumstances of their conviction—to ever be sentenced to mandatory LWOP.⁵

After *Miller*, it is possible that the Court will extend this approach to other types of mandatory sentences imposed on juvenile defendants.⁶ One set of laws that may be subject to the Court's *Miller* analysis are those that impose lengthy mandatory sentence enhancements on juveniles who commit gang-related crimes.⁷ Under California's Street Terrorism Enforcement and Prevention (STEP) Act, for instance, juveniles who commit felonies as part of a criminal street gang are subject to term-of-years sentence enhancements when tried in the adult system.⁸ One consequence of this approach to gang violence is that juvenile offenders can now face heavy jail sentences for committing crimes connected to gang activity.⁹

The STEP Act's gang enhancements implicate the *Miller* Court's concern that harsh sentencing schemes might fail to account for developmental differ-

⁴ *Miller*, 132 S. Ct. at 2464; see also *Graham*, 560 U.S. at 68 (discussing scientific research that explains how children are cognitively different than adults); *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (explaining how developmental differences between juveniles and adults make juveniles less culpable for their actions than adults).

⁵ See *Miller*, 132 S. Ct. at 2463–64. This more rigorous approach is often referred to as a “categorical analysis” because the Court will make general rules relating to the category of crime or offender to which a sentence may be applied. See *infra* notes 53–58 and accompanying text. This approach, typically reserved for death penalty cases, can be contrasted with the traditional term-of-years Eighth Amendment analysis, which focuses on the circumstances surrounding the specific crime, as well as an individual's attributes, to decide if the punishment is grossly disproportionate to the underlying crime. See *infra* notes 47–52 and accompanying text.

⁶ See *Miller*, 132 S. Ct. at 2466–67 (explaining that the holding is tied to the harshness of mandatory LWOP); Douglas A. Berman, *Graham and Miller and the Eighth Amendment's Uncertain Future*, 27 CRIM. JUST. 19, 23 (2013) (explaining that after *Miller* it is hard to predict how far the Court will be willing to expand the use of its categorical analysis); see also *Graham*, 560 U.S. at 69–70 (explaining that LWOP is similar to the death penalty); *Roper*, 543 U.S. at 568 (explaining that the harshness of the death penalty makes it deserving of extra attention under the Eighth Amendment).

⁷ See *infra* notes 146–186 and accompanying text (discussing how one statute that imposes lengthy mandatory sentence enhancements for juveniles who commit gang-related activities implicates *Miller*); see also Street Terrorism Enforcement and Prevention (STEP) Act, CAL. PENAL CODE § 186.22 (West 2012) (amended 2013) (imposing lengthy mandatory sentence enhancements for juveniles who commit gang-related activities).

⁸ See CAL. PENAL CODE § 186.22.

⁹ See Sara Lynn Van Hofwegen, Note, *Unjust and Ineffective: A Critical Look at California's STEP Act*, 18 S. CAL. INTERDISC. L.J. 679, 696 (2009) (explaining that juveniles make up a large percentage of gang members and that the STEP Act imposes lengthy sentences on gang members); see, e.g., *People v. Delatorre*, No. C052953, 2008 WL 748433, at *1, *18 (Cal. Ct. App. 2008) (demonstrating how the STEP Act has been applied to one juvenile offender).

ences between juveniles and adults.¹⁰ In *Miller*, the Court explained that juvenile offenders are less culpable than adults because: (1) they are less able to assess risk; (2) they are more susceptible to outside influences; and (3) they do not have a fully developed character.¹¹ The gang setting magnifies all of these concerns.¹² Accordingly, *Miller*'s categorical Eighth Amendment analysis should be extended to review the STEP Act's gang enhancements.¹³

After applying the categorical analysis used in *Miller*, the Court should hold that the STEP Act's gang enhancements are unconstitutional when applied to any juvenile.¹⁴ The Categorical Eighth Amendment analysis is typically used to review the application of capital sentences to certain categories of offenders or types of crimes.¹⁵ In reviewing a sentence under this analysis, the Court normally examines: (1) objective factors (e.g., the national consensus regarding the punishment); and (2) subjective factors (e.g., the penological objectives of the punishment) to decide if the sentence is proportional to the crime committed, as required by the Eighth Amendment.¹⁶ In *Miller*, the Court sidestepped the objective analysis after classifying the challenge of the application of mandatory LWOP sentences to juveniles as procedural, allowing the Court to rest its holding almost entirely on the subjective prong of the analysis.¹⁷ A challenge to the gang enhancements would be considered procedural because the Court—rather than striking down a type of punishment all together—would only be reviewing the procedure used for applying such a sen-

¹⁰ See *infra* notes 146–186 and accompanying text (explaining how the STEP Act's gang enhancements implicate the *Miller* Court's concerns).

¹¹ 132 S. Ct. at 2464.

¹² See *infra* notes 150–171 and accompanying text.

¹³ See *infra* notes 146–186 and accompanying text.

¹⁴ Compare *Miller*, 132 S. Ct. at 2465 (observing that penological objectives do not justify the application of mandatory LWOP sentences to juveniles because of their developmental deficiencies), and *Graham*, 560 U.S. at 71–74 (observing that penological objectives do not justify the application of LWOP sentences to juveniles who committed non-homicide crimes), with *infra* notes 225–279 and accompanying text (illustrating how penological objectives do not justify the application of gang enhancements to juveniles).

¹⁵ Steiker & Steiker, *supra* note 2, at 80.

¹⁶ See, e.g., *Graham*, 560 U.S. at 61; *Atkins v. Virginia*, 536 U.S. 304, 312 (2002); see also *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989), *abrogated on other grounds by Atkins*, 536 U.S. 304 (“The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures . . . [and] data concerning the actions of sentencing juries.”); *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (“[T]he attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.”).

¹⁷ See 132 S. Ct. at 2471; *infra* notes 211–219 and accompanying text (explaining the factors the Court considers to determine if a challenge is procedural).

tence.¹⁸ Therefore, the Court should focus its analysis of the enhancements on the subjective prong.¹⁹ In light of the unique developmental forces at play for juvenile offenders, the Court should hold that penological objectives do not justify the application of gang enhancements to juvenile offenders.²⁰

This Note assesses the constitutionality of gang enhancements as applied to juveniles in light of the Court's evolving Eighth Amendment jurisprudence.²¹ Part I explains how *Miller* lays a new framework for assessing juvenile culpability and punishments.²² This Part also explains that the Court has demonstrated a willingness to extend its recognition of the differences between juveniles and adults beyond its review of the harshest sentencing schemes.²³ Part II provides an overview of the gang problem in the United States and explains the basic components of gang enhancement legislation.²⁴ It further explains why the categorical Eighth Amendment framework applied in *Miller* should be extended to a review of the STEP Act's gang enhancements as applied to juvenile offenders.²⁵ Finally, Part III applies the *Miller* framework to gang enhancements, concluding that the application of gang enhancements to juvenile offenders should be held unconstitutional.²⁶

I. *MILLER*: JUVENILES' DIMINISHED CULPABILITY GIVES RISE TO A CATEGORICAL APPROACH TO EIGHTH AMENDMENT PROPORTIONALITY ANALYSIS

Miller followed closely in the wake of the Supreme Court's 2010 decision in *Graham v. Florida*, which held that juveniles could not be sentenced to LWOP for non-homicide crimes, and its 2005 decision in *Roper v. Simmons*, which struck down the death penalty for juveniles.²⁷ Taken together, these cases show a growing recognition that juvenile offenders are categorically less culpable than adults and that this difference should be appropriately reflected in their punishments.²⁸ In *Miller*, the Court employed a new form of Eighth

¹⁸ See *infra* notes 211–219 and accompanying text (illustrating that a challenge to gang enhancements satisfies the factors indicative of a procedural challenge).

¹⁹ See *infra* notes 200–224 and accompanying text (explaining that the Court should minimize the importance of national consensus in a challenge to the STEP Act).

²⁰ See *infra* notes 225–279 and accompanying text.

²¹ See *infra* notes 27–279 and accompanying text.

²² See *infra* notes 27–120 and accompanying text.

²³ See *infra* notes 106–120 and accompanying text.

²⁴ See *infra* notes 121–186 and accompanying text.

²⁵ See *infra* notes 146–186 and accompanying text.

²⁶ See *infra* notes 187–279 and accompanying text.

²⁷ See *Miller*, 132 S. Ct. at 2460; *Graham*, 560 U.S. at 74–75; *Roper*, 543 U.S. at 569–70.

²⁸ See *Miller*, 132 S. Ct. at 2460; *Graham*, 560 U.S. at 74–75; *Roper*, 543 U.S. at 569–70.

Amendment analysis, which incorporated concerns about juveniles' diminished culpability, to review the mandatory LWOP sentencing statutes at issue.²⁹ Normally, term-of-years sentences, such as LWOP, are reviewed on a case-by-case basis to determine only if the punishment was grossly disproportionate to the underlying offense—a highly deferential standard.³⁰ In *Miller*, however, the Court reviewed a term-of-years sentencing scheme under a categorical approach.³¹ The categorical approach assesses the constitutionality of applying the sentencing practice to *any* juvenile offenders—not just those in the particular case.³² This approach applies the more rigorous constitutional review that the Court has traditionally reserved only for challenges to capital sentences.³³

This Part discusses how the *Miller* Court's use of the categorical approach to Eighth Amendment challenges allowed it to strike down the use of mandatory LWOP sentencing for juvenile offenders.³⁴ Section A explains how the Court expanded the categorical Eighth Amendment analysis beyond the context of capital punishment.³⁵ Section B illustrates how the *Miller* Court applied the categorical analysis to hold that mandatory LWOP sentences for juveniles are unconstitutional.³⁶ Finally Section C explains that the Court has demonstrated a willingness to continue expanding its recognition of the differences between juveniles and adults beyond cases involving capital punishment and mandatory LWOP sentences.³⁷

²⁹ See *Miller*, 132 S. Ct. at 2463–64 (explaining that this new analysis stemmed from capital sentence cases); Berman, *supra* note 6, at 23 (arguing that *Miller* and *Graham* adopted this analysis from capital cases); Steiker & Steiker, *supra* note 2, at 80–81 (explaining that *Graham* first expanded this type of analysis beyond the death penalty context).

³⁰ See *Ewing v. California*, 538 U.S. 11, 21 (2003) (plurality opinion) (explaining that successful challenges to sentences are rare outside the context of capital punishment cases); Barkow, *supra* note 2, at 49 (“Before *Graham*, it had been almost three decades since the Court had found a noncapital sentence unconstitutional . . .”); Markel, *supra* note 2, at 63; Steiker & Steiker, *supra* note 2, at 80.

³¹ See 132 S. Ct. at 2463–64; Berman, *supra* note 6, at 23.

³² See *Miller*, 132 S. Ct. at 2463; Barkow, *supra* note 2, at 49.

³³ See *Miller*, 132 S. Ct. at 2463 (explaining how this analysis has been used in the past); *Graham*, 560 U.S. at 60–61 (explaining that the Court had not previously addressed a challenge to a particular type of sentence as it applies to a whole class, except in the context of the death penalty); Barkow, *supra* note 2, at 49 (explaining the differences between the analysis traditionally used to review capital sentences and the analysis used to review term-of-years sentences); Steiker & Steiker, *supra* note 2, at 80–81 (explaining that *Graham* articulated a new type of Eighth Amendment analysis which looks categorically to determine if a punishment is constitutional when applied to juveniles as a class).

³⁴ See *infra* notes 38–120 and accompanying text.

³⁵ See *infra* notes 38–77 and accompanying text.

³⁶ See *infra* notes 78–105 and accompanying text.

³⁷ See *infra* notes 106–120 and accompanying text.

A. *The Categorical Approach to Eighth Amendment Analysis*

Like all forms of punishment, the LWOP sentences reviewed in *Miller* were subject to the Eighth Amendment's prohibition of "excessive sanctions."³⁸ This constrains the power to punish because it requires sentences to be proportionate to their underlying crimes.³⁹ The Eighth Amendment analysis employed by the Court generally varies depending on whether the challenged sentence is a capital sentence or a term-of-years sentence.⁴⁰ In challenges to term-of-years sentences, the Court overturns only sentences that are grossly disproportionate to the underlying offense.⁴¹ Challenges to capital offenses, however, are reviewed categorically to determine if the sentence is appropriately applied either to a class of offenders or a type of crime.⁴² The Court traditionally justified its two different approaches to the Eighth Amendment by emphasizing the severity of the death penalty as compared to other sentences.⁴³ *Graham* changed this analysis, applying the death penalty analysis to a term-of-years sentence.⁴⁴ The *Graham* Court held that LWOP sentences could not be given to juveniles for *non-homicide* crimes.⁴⁵ *Miller* extended this new analysis, using the categorical approach to closely review a term-of-years sentence (mandatory LWOP) as applied to juvenile *homicide* offenders.⁴⁶

³⁸ See *Miller*, 132 S. Ct. at 2463 (quoting *Roper*, 543 U.S. at 560). In *Miller*, the Court reviewed the convictions of fourteen-year-olds Kuntrell Jackson and Evan Miller. *Id.* at 2461–63. Both minors had been tried as adults and, after being found guilty of homicide, were sentenced to LWOP as a minimum sentence. *Id.* at 2462–63. Jackson was found guilty of capital felony murder and aggravated robbery after he and a group of boys attempted to rob a video store. *Id.* at 2461. Miller killed an adult neighbor (his mother's drug dealer) after robbing him of three hundred dollars and beating him with a baseball bat. *Id.* at 2462. The neighbor died when Miller and a friend burned down his trailer in an effort to cover up their crime. *Id.*

³⁹ *Id.* at 2463; *Graham*, 560 U.S. at 59; *Atkins*, 536 U.S. at 311.

⁴⁰ See Barkow, *supra* note 2, at 49; Markel, *supra* note 2, at 63; Steiker & Steiker, *supra* note 2, at 80.

⁴¹ See *Graham*, 560 U.S. at 59–60; *Ewing*, 538 U.S. at 21 (plurality opinion); Barkow, *supra* note 2, at 49; Markel, *supra* note 2, at 63; Steiker & Steiker, *supra* note 2, at 80.

⁴² *Graham*, 560 U.S. at 60–61; Barkow, *supra* note 2, at 49; Steiker & Steiker, *supra* note 2, at 81; see *Kennedy v. Louisiana*, 554 U.S. 407, 413 (2008) (holding that the death penalty is unconstitutional when imposed for a non-homicide crime); *Atkins*, 536 U.S. at 312 (holding that the death penalty cannot be given to offenders below a certain intellectual function).

⁴³ See *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) ("Proportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides."); Barkow, *supra* note 2, at 49; Markel, *supra* note 2, at 63.

⁴⁴ *Graham*, 560 U.S. at 68; see *Miller*, 132 S. Ct. at 2463; Steiker & Steiker, *supra* note 2, at 80 (explaining how *Graham* changed the Court's Eighth Amendment analysis).

⁴⁵ 560 U.S. at 74–75.

⁴⁶ See 132 S. Ct. at 2463–64 (explaining its Eighth Amendment precedent and implying that it would follow the approach traditionally used in reviewing capital sentences); Berman, *supra* note 6, at 22–23 (arguing that *Miller* created a new type of Eighth Amendment procedural challenge); see also,

When the Court reviews a challenge to a noncapital sentence, it generally assesses all of the circumstances of the case to determine if the punishment is grossly disproportionate to the underlying offense.⁴⁷ This approach compares the gravity of the sentence to the particular circumstances of the defendant's crime.⁴⁸ The proportionality test is met as long as the state has a "reasonable basis" to believe that the sentence is supported by penological objectives.⁴⁹ For instance, in 2003, in *Ewing v. California*, the Supreme Court upheld a sentence of twenty-five years to life that was given to a repeat offender who attempted to steal three golf clubs.⁵⁰ This sentence was given under California's three strikes law, which imposes lengthy sentences on repeat offenders.⁵¹ In *Ewing*, Justice Sandra Day O'Connor explained how reluctant the Court is to find that a sentence is grossly disproportionate to the underlying crimes, explaining that the test would be satisfied only in extreme circumstances, such as "if a legislature made overtime parking a felony punishable by life imprisonment."⁵²

Challenges to capital sentences, however, have been far more likely to succeed than challenges to noncapital sentences.⁵³ When reviewing capital sentences, a court's Eighth Amendment analysis does not focus on the specific defendant's case, but follows categorical rules limiting either the nature of the offenses or the category of defendants to which the death penalty may be applied.⁵⁴ For example, the Court has decided that the death penalty is disproportionate and thus unconstitutional when imposed for non-homicidal crimes or when imposed on defendants with an especially low level of intelligence.⁵⁵ In determining whether to make a broad categorical rule, the Court considers whether objective

e.g., *Graham*, 560 U.S. at 60–61 (first adopting this type of approach); Barkow, *supra* note 2, at 49 (explaining how *Graham* changed traditional Eighth Amendment analysis).

⁴⁷ See *Graham*, 560 U.S. at 60–61; Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 LAW & INEQ. 263, 296 (2013); Steiker & Steiker, *supra* note 2, at 80.

⁴⁸ See *Graham*, 560 U.S. at 59–60; *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).

⁴⁹ *Ewing*, 538 U.S. at 28 (plurality opinion) ("We do not sit as a 'superlegislature' to second-guess [states'] policy choices."); Barkow, *supra* note 2, at 49.

⁵⁰ 538 U.S. at 28, 30–31 (plurality opinion); see Steiker & Steiker, *supra* note 2, at 80 (explaining how difficult it is to win an Eighth Amendment proportionality challenge to a noncapital sentence).

⁵¹ *Ewing*, 538 U.S. at 24 (plurality opinion); see CAL. PENAL CODE § 667(e)(2)(A) (West 2012).

⁵² 538 U.S. at 21 (plurality opinion); see Markel, *supra* note 2, at 63 (explaining how reluctant the Court has been to strike down noncapital sentences); Steiker & Steiker, *supra* note 2, at 80 (same).

⁵³ Barkow, *supra* note 2, at 49; Steiker & Steiker, *supra* note 2, at 80; see, e.g., *Roper*, 543 U.S. at 578 (holding that the Eighth Amendment prohibits sentencing juveniles to death); *Atkins*, 538 U.S. at 321 (holding that cognitively impaired offenders cannot be sentenced to death).

⁵⁴ *Graham*, 560 U.S. at 60–61; Markel, *supra* note 2, at 63; see, e.g., *Roper*, 543 U.S. at 578; *Kennedy*, 554 U.S. at 413 (holding that the death penalty cannot be applied for non-homicide crimes); *Atkins*, 536 U.S. at 321.

⁵⁵ *Kennedy*, 554 U.S. at 413; *Atkins*, 536 U.S. at 321.

(e.g., national consensus) and subjective (e.g., penological objectives) factors support the application of the challenged sentence.⁵⁶ The Court will generally find that a sentence is unconstitutional if it is not supported by national consensus and penological justifications.⁵⁷ When the Court adopts this categorical approach, it is more likely to overturn a challenged sentence.⁵⁸

In *Roper*, the Court helped set the stage to expand the use of the categorical approach in reviewing juvenile sentencing, holding that the Eighth Amendment bars the application of the death penalty to juvenile offenders.⁵⁹ The Court applied the categorical analysis and held that because juveniles have a diminished culpability, traditional penological objectives provided weak justification for applying the death penalty to juveniles.⁶⁰ The Court recognized three factors that contribute to this diminished culpability: juvenile offenders are (1) less able to assess risk; (2) more susceptible to outside influences; and (3) do not have a fully developed character.⁶¹ Although the Court recognized key differences between juvenile and adult offenders, it should be noted that the Court's willingness to scrutinize the challenged sentence under the categorical analysis rested on the fact that it was reviewing a capital sentence—not because the sentence was issued to a juvenile.⁶²

In *Graham*, the Court built on *Roper*'s recognition of juveniles' diminished culpability, holding that juveniles who commit non-homicidal crimes cannot be sentenced to LWOP.⁶³ This was significant because it was the first

⁵⁶ See *Graham*, 560 U.S. at 61; *Atkins*, 536 U.S. at 312.

⁵⁷ See Barkow, *supra* note 2, at 49 (explaining the Court's Eighth Amendment analysis).

⁵⁸ See *id.* (explaining the two tracks of Eighth Amendment analysis and highlighting the differences between them).

⁵⁹ 543 U.S. at 568, 578–79. The Court reconsidered its 1989 decision in *Stanford v. Kentucky*, in which the Supreme Court held that the death penalty was unconstitutional when applied to defendants who committed their crimes at age sixteen or below. *Id.* at 555–56; see *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989). The *Roper* Court reasoned that “evolving standards of decency that mark the progress of a maturing society” compelled the Court to rethink its holding in *Stanford* and revise the age to 18. *Roper*, 543 U.S. at 560–61.

⁶⁰ *Roper*, 543 U.S. at 569; see *Miller*, 132 S. Ct. at 2460 (observing the diminished culpability of juveniles); *Graham*, 560 U.S. at 61, 71–74 (same).

⁶¹ *Roper*, 543 U.S. at 569–70 (“These differences render suspect any conclusion that a juvenile falls among the worst offenders.”). The Court highlighted that these are the precise reasons that juveniles are not entrusted with important societal responsibilities, such as voting, serving on juries, or getting married without parental consent. *Id.* at 569. By stating that juveniles' characters are not fully formed, the Court meant that juveniles are still forming their identity, and even those who commit violent crimes at a young age can grow up to be moral, law abiding citizens. See *id.* at 570.

⁶² See *id.* at 568; Steiker & Steiker, *supra* note 2, at 80.

⁶³ See *Graham*, 560 U.S. at 74–75; Barkow, *supra* note 2, at 49; Markel, *supra* note 2, at 63; Steiker & Steiker, *supra* note 2, at 80–81. The defendant in *Graham* was first arrested at age sixteen after attempting to rob a restaurant with three young friends. 560 U.S. at 52. After this first offense, Graham was released on probation by a judge who was willing to offer him a second chance. *Id.* at 54.

time the Court was willing to overturn a noncapital sentence without a showing of gross disproportionality between the sentence and the underlying crime.⁶⁴ The Court's willingness to categorize the challenge in this way, however, was tied to the Court's belief that juveniles are categorically less culpable than adult offenders.⁶⁵ In addition, the Court's willingness to extend the categorical analysis was also linked to the type of crime the defendants had committed.⁶⁶ Because they were reviewing a LWOP sentence for a non-homicide crime, the Court explained that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability" based on the twin factors of the juvenile's age and the nature of the crime committed.⁶⁷ Adhering to this notion of twice diminished culpability, the Court reviewed the challenged sentence with the same critical eye it had previously reserved only for capital sentences.⁶⁸

The *Miller* Court held that the Eighth Amendment does not allow juveniles to be sentenced to mandatory LWOP sentences, even where they committed homicide offenses.⁶⁹ *Miller* therefore expanded the categorical analysis to review juvenile sentences to cases in which only a single *Graham* factor—the juvenile's age—demonstrated the offender's diminished culpability.⁷⁰ Reflecting on *Roper* and *Graham*, the *Miller* Court reiterated that juveniles are categorically less culpable than adult offenders because of developmental factors.⁷¹ Their diminished culpability, the Court held, justified close scrutiny of the mandatory LWOP sentencing scheme at issue in the case.⁷² The Court drew

Shortly after being released, Graham was an accomplice in a series of home invasion robberies. *Id.* at 54–55. In his second trial, the judge sentenced him to the maximum term: life imprisonment plus fifteen years, without parole. *Id.* at 57.

⁶⁴ See *Graham*, 560 U.S. at 61 (implying that the Court applied a new type of Eighth Amendment analysis); Markel, *supra* note 2, at 63; Steiker & Steiker, *supra* note 2, at 81. The Court's willingness to use this approach may have rested in part on how the parties framed the challenge. Barkow, *supra* note 2, at 49–50 (arguing that after *Graham*, whether or not categorical analysis is applied depends on "whether a defendant frames his challenge in categorical or case-specific terms."); see *Graham*, 560 U.S. at 61. *But see id.* at 103 (Thomas, J., dissenting) (arguing that the Court's new practice of allowing a categorical challenge outside of the death penalty context has no natural stopping point).

⁶⁵ Barkow, *supra* note 2, at 50; see *Graham*, 560 U.S. at 68 (demonstrating that the Court recognized three differences between juvenile and adult offenders).

⁶⁶ See *Graham*, 560 U.S. at 69.

⁶⁷ *Id.*

⁶⁸ *Id.* at 60–61; Steiker & Steiker, *supra* note 2, at 81.

⁶⁹ See *Miller*, 132 S. Ct. at 2463–64.

⁷⁰ See *id.* at 2469 (quoting *Graham*, 560 U.S. at 69).

⁷¹ *Id.* at 2463–65.

⁷² *Id.* at 2464.

these distinctions from scientific studies that indicated fundamental differences in brain and psychological development between adults and children.⁷³

The *Miller* Court's decision to apply a categorical analysis also rested, in part, on the Court's recognition of the severity of LWOP.⁷⁴ The Court drew comparisons between LWOP and the death penalty, focusing on the fact that both sentences leave the offender with no real hope of returning to normal life.⁷⁵ The impact of LWOP is especially severe when given to juvenile offenders because juvenile offenders will spend, on average, a much greater percentage of their life in prison than adult offenders facing LWOP.⁷⁶ This analysis illustrates that the Court borrowed the individualized sentencing consideration normally applied in death penalty cases because of the similarities between that punishment and LWOP.⁷⁷

B. *In Miller, the Challenged Sentence Was Unconstitutional Under the Categorical Analysis*

After establishing that juveniles have diminished culpability, the *Miller* Court extended *Graham*'s categorical Eighth Amendment analysis to juveniles convicted of homicide crimes and held that mandatory LWOP sentences for juveniles are unconstitutional.⁷⁸ Under the categorical approach, the Court bases its determination of whether a punishment is proportional on (1) objective indicia of societal standards, as well as (2) a subjective examination of whether it meets a penological justification.⁷⁹ In *Miller*, the Court's holding relied almost entirely on the subjective prong of this analysis.⁸⁰

⁷³ *Id.* at 2464 (citing *Roper*, 543 U.S. at 569–70); see *Roper*, 543 U.S. at 569–70 (citing Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 350 (1992); Lawrence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)). See generally ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* (1968) (explaining how the personality traits of juveniles change over time).

⁷⁴ 132 S. Ct. at 2466–67.

⁷⁵ *Id.* at 2466; see also *Graham*, 560 U.S. at 70 (noting that the emotional impact of LWOP is elevated because there is no realistic chance of restoration).

⁷⁶ *Miller*, 132 S. Ct. at 2466; see *Graham*, 560 U.S. at 70–71 (“A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.”). See generally HUMAN RIGHTS WATCH, *WHEN I DIE . . . THEY’LL SEND ME HOME* (2012), available at <http://www.hrw.org/sites/default/files/reports/crd0112webwcover.pdf>, archived at <http://perma.cc/SNV6-VWLN> (discussing the effects of LWOP on juvenile defendants).

⁷⁷ See *Miller*, 132 S. Ct. at 2467–68.

⁷⁸ See *id.* at 2464, 2468–69; Barkow, *supra* note 2, at 49; Berman, *supra* note 6, at 23.

⁷⁹ See, e.g., *Atkins*, 536 U.S. at 312. The Court makes determinations of proportionality in light of the changing moral views of society. See *id.* at 311–12.

⁸⁰ See 132 S. Ct. at 2470–71 (explaining that the Court put less emphasis on the objective prong); Berman, *supra* note 6, at 24–25.

1. The Objective Prong: National Consensus Did Not Justify the Mandatory Sentencing Scheme

Normally, a categorical Eighth Amendment analysis begins with the Court determining if there is a broad national consensus in favor of the sentence in question.⁸¹ In *Miller*, the states argued that the challenged scheme was not cruel and unusual because it was possible for juveniles to be subjected to mandatory LWOP sentences in many states.⁸² In rejecting this argument, the Court minimized the importance of national consensus in informing its constitutional analysis.⁸³ The Court justified bypassing national consensus by categorizing this challenge as a procedural challenge, rather than a substantive challenge.⁸⁴ The Court then went on to discuss that even if it considered national consensus, it would not be determinative in this case.⁸⁵

By classifying the challenge to the mandatory sentencing requirements as procedural, the Court minimized the role of national consensus in informing its Eighth Amendment analysis.⁸⁶ The Court classified this as a procedural challenge based on two factors: (1) the challenge did not require the Court to impose a categorical ban on a form of punishment, and (2) the decision flowed directly from precedent.⁸⁷ This allowed the Court to bypass national consensus considerations, which had traditionally been a central factor in the Court's categorical Eighth Amendment analysis.⁸⁸

⁸¹ See *Miller*, 132 S. Ct. at 2471; *Atkins*, 536 U.S. at 312; see also Beth Caldwell, *Twenty-Five to Life for Adolescent Mistakes: Juvenile Strikes as Cruel and Unusual Punishment*, 46 U.S.F. L. REV. 581, 617 (2012) (demonstrating how national consensus might be used in a challenge to the application of California's three strikes program to juvenile offenders).

⁸² 132 S. Ct. at 2470.

⁸³ See *id.* at 2471–72; *id.* at 2490 (Alito, J., dissenting) (“What today’s decision shows is that our Eighth Amendment cases are no longer tied to any objective indicia of society’s standards.”); Ian P. Farrell, *Strict Scrutiny Under the Eighth Amendment*, 40 FLA. ST. U. L. REV. 853, 854 (2013) (“[F]or the first time, in *Miller v. Alabama*, [the Court indicated] that it is poised to abandon the objective indicia approach.”).

⁸⁴ See *Miller*, 132 S. Ct. at 2471–72; Berman, *supra* note 6, at 22–23.

⁸⁵ *Miller*, 132 S. Ct. at 2471–72 (illustrating that LWOP sentencing for juveniles may be an unintended consequence of the interaction between two sets of statutes); see *infra* notes 89–91 and accompanying text (explaining why national consensus would not be determinative when analyzing LWOP sentences for juveniles).

⁸⁶ See *Miller*, 132 S. Ct. at 2471–72; Berman, *supra* note 6, at 22–23.

⁸⁷ *Miller*, 132 S. Ct. at 2471. The Court relied on its cases dealing with individual sentencing requirements in the death penalty context to justify drawing a distinction between procedural challenges and substantive challenges. *Id.* For example, in the death penalty context, the Court has bypassed national consensus to determine what types of factors must be considered at the sentencing phase. See *id.*

⁸⁸ See *Miller*, 132 S. Ct. at 2490 (Alito, J., dissenting); Berman, *supra* note 6, at 22–23.

Alternatively, the Court held that even if the objective indicia of national consensus were scrutinized, they were not determinative.⁸⁹ Mandatory minimum sentences of LWOP, though available in many states, were applied to juveniles as a consequence of the intersection between statutes that allow the transfer of juveniles into adult courts and statutes that require LWOP for adult offenders.⁹⁰ In this respect, the Court held that the prevalence of mandatory LWOP sentencing possibilities for juveniles did not reflect a national consensus because it was often an unintended side effect of the interaction of the two sets of statutes.⁹¹

2. The Subjective Prong: Penological Objectives Did Not Justify the Mandatory Sentencing Scheme

The *Miller* Court's holding, therefore, rested almost entirely on the subjective prong of the traditional categorical analysis.⁹² Under this prong, the Court found that penological objectives provided only a weak justification for applying LWOP to juvenile defendants.⁹³ Because of the dubious theoretical justification for juvenile LWOP sentences, the Court held that the mandatory nature of these sentences was especially troubling.⁹⁴

The penological objectives traditionally relied upon to justify punishment are retribution, deterrence, rehabilitation, and incapacitation.⁹⁵ The Court found that retribution failed to justify the mandatory sentence because juveniles have a diminished culpability and are therefore inherently less blameworthy than other offenders.⁹⁶ The Court also held that a deterrence theory of punishment failed to justify the punishment.⁹⁷ Juveniles are less likely to be deterred by harsh pun-

⁸⁹ *Miller*, 132 S. Ct. at 2471–72.

⁹⁰ *Id.* at 2472–73.

⁹¹ *Id.*

⁹² *See id.* at 2471.

⁹³ *Id.* at 2465.

⁹⁴ *Id.* at 2465–66.

⁹⁵ *Id.* at 2465; *see Caldwell*, *supra* note 81, at 629–30.

⁹⁶ *Miller*, 132 S. Ct. at 2465. The theory of retribution justifies punishment as a form of revenge and relies heavily on the “blameworthiness” of the defendant. *Id.*; *see H.L.A. Hart, Punishment and Responsibility*, in *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 91, 91 (S. Kadish et al. eds., 8th ed. 2007).

⁹⁷ *Miller*, 132 S. Ct. at 2465. Deterrence justifies increasing the punishment for crimes to discourage illegal conduct. *See id.*; Jeremy Bentham, *Principles of Penal Law*, in *CRIMINAL LAW AND ITS PROCESSES*, *supra* note 96, at 92, 92 (arguing that individuals always calculate the pleasure or pain associated with their actions). *But see* Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Code Rules*, in *CRIMINAL LAW AND ITS PROCESSES*, *supra* note 96, at 93, 93 (arguing that deterrence is a weak justification for punishment because individuals do not necessarily calculate effects of their actions).

ishments because they are less able to assess risk and adjust their behavior in consideration of potential punishment.⁹⁸ The *Miller* Court next held that rehabilitation was insufficient to support sentencing a juvenile to mandatory LWOP because this punishment necessarily foreclosed any possibility that the offender could re-enter society with a changed character.⁹⁹ Lastly, the *Miller* Court held that incapacitation was not a convincing justification because it is inconsistent with juveniles' great capacity for change.¹⁰⁰

Because none of the penological objectives provided sufficient theoretical justification for applying LWOP to juvenile defendants, the *Miller* Court struck down the mandatory nature of the punishment.¹⁰¹ The Court found that the harshness of LWOP and its dubious theoretical justifications meant that the circumstances of each defendant should be carefully considered by the trial court before LWOP could be applied to any juvenile defendant.¹⁰² Otherwise, the Court held, there is too high of a risk that the sentence would be disproportionate to the underlying offense.¹⁰³

Overall, the Court's holding that juvenile offenders are categorically less culpable than adults contributed heavily to its inability to find a satisfying penological justification for the mandatory sentencing scheme.¹⁰⁴ In bypassing the national consensus prong of the categorical analysis, the Court emphasized the need for punishment to be grounded in theoretical logic that considers the age of the offender.¹⁰⁵

C. The Supreme Court Has Shown a Willingness to Differentiate Between Juveniles and Adults More Expansively

After *Miller*, it is an open question whether the Court will be willing to apply this categorical approach to other types of mandatory sentences imposed on juvenile defendants.¹⁰⁶ The Court has, however, recognized the importance

⁹⁸ *Miller*, 132 S. Ct. at 2465; see Arnett, *supra* note 73, at 350 (explaining how juveniles distort risk).

⁹⁹ See 132 S. Ct. at 2465. Rehabilitation seeks to use punishment to change offenders' future behavior by changing their character. See *id.*

¹⁰⁰ See *id.*; see also Arnett, *supra* note 73, at 365–66 (explaining how juveniles' behavior changes as they reach adulthood); Steinberg & Scott, *supra* note 73, at 6 (same). Punishment is justified under incapacitation theory because removing the offender makes society safer. See *id.*; Michael Moore, *Law and Psychiatry*, in CRIMINAL LAW AND ITS PROCESSES, *supra* note 96, at 98, 98.

¹⁰¹ *Miller*, 132 S. Ct. at 2465–66.

¹⁰² *Id.*

¹⁰³ *Id.* at 2466.

¹⁰⁴ See *id. passim* (placing repeated emphasis on juvenile offenders' diminished culpability).

¹⁰⁵ *Id.* at 2464–65, 2471.

¹⁰⁶ See, e.g., Berman, *supra* note 6, at 24 (speculating on whether the Court will continue to rely so heavily on penological justifications for punishment); Steiker & Steiker, *supra* note 2, at 81 (ques-

of age for purposes other than the application of the death penalty or LWOP to juvenile offenders.¹⁰⁷ For example, the Court has considered the defendant's age a relevant factor when analyzing issues surrounding *Miranda* rights and the felony murder rule.¹⁰⁸

In 2011, in *J.D.B. v. North Carolina*, the Supreme Court held that age is an important consideration in determining whether a defendant is in custody for purposes of *Miranda* rights.¹⁰⁹ Although the Supreme Court decided *J.D.B.* before *Miller*, the Court's holding demonstrates its increasing willingness to treat juveniles categorically differently than adults.¹¹⁰ The *J.D.B.* Court relied on the scientific analysis in *Graham*, holding that a juvenile's age is relevant to the *Miranda* custody analysis because a juvenile faced with custodial interrogation may be more likely than an adult to feel pressure to answer questions.¹¹¹ The Court held that juveniles should be treated differently than adults because their decision-making skills are less developed, and they are more susceptible to pressure from others.¹¹² Thus, *J.D.B.* demonstrates the Court's willingness to view juveniles as categorically different than adults for purposes other than assessing whether they are deserving of the harshest forms of punishment.¹¹³

Similarly, Justice Stephen Breyer's concurrence in *Miller* indicates that the majority's reasoning could justify a categorical approach to reviewing situations in which the felony murder rule is applied to juveniles.¹¹⁴ Justice Brey-

tioning whether the Court's categorical approach in *Graham* might be more broadly applied in the future).

¹⁰⁷ See *Miller*, 132 S. Ct. at 2475–76 (Breyer, J., concurring) (discussing how age is relevant in the context of the felony murder rule); *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403–05 (2011) (discussing how age is relevant when analyzing *Miranda* rights); see also Caldwell, *supra* note 81, at 606 (arguing that the Court has shown a willingness to apply *Graham* broadly).

¹⁰⁸ *Miller*, 132 S. Ct. at 2475–76 (Breyer, J., concurring); see, e.g., *J.D.B.*, 131 S. Ct. at 2403–05; see also Francine T. Sherman, *Justice for Girls: Are We Making Progress?*, 28 CRIM. JUST. 9, 12 (2013) (noting how the consideration of developmental factors has also been incorporated by juvenile justice systems into their policies and practices).

¹⁰⁹ *J.D.B.*, 131 S. Ct. at 2403–05; see *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (“[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.”).

¹¹⁰ See *J.D.B.*, 131 S. Ct. at 2403–05 (discussing the importance of age for the purposes of the Court's *Miranda* analysis); Caldwell, *supra* note 81, at 609 (“Given the broad approach the Supreme Court has taken, it seems likely that the Court would respond favorably to extending *Graham* to apply to other sentencing practices involving juveniles.”).

¹¹¹ *Id.* at 2403.

¹¹² *Id.* The Court held that these psychological considerations apply even to juveniles who might have had prior encounters with law enforcement and may know their rights in the context of a custodial interrogation. *Id.* at 2404.

¹¹³ See *id.* at 2399, 2403–05; Caldwell, *supra* note 81, at 604–05.

¹¹⁴ *Miller*, 132 S. Ct. at 2475 (Breyer, J., concurring).

er's concurrence would have held that sentencing a juvenile to LWOP for felony murder violates the Eighth Amendment.¹¹⁵

The felony murder rule traditionally allows prosecutors to charge all participants in a felony with murder if a murder occurs during the commission of the crime.¹¹⁶ The doctrine of transferred intent, which allows a defendant's intent to commit any felony to satisfy the intent requirement for murder, justifies the felony murder rule.¹¹⁷ As Justice Breyer noted, however, transferred intent assumes that a person engaging in felonious conduct understands the additional risks of his or her behavior, including the risk that a co-conspirator could kill someone.¹¹⁸ The majority's recognition that juveniles have an impaired ability to recognize the risks associated with their behavior, Justice Breyer wrote, calls this assumption into question for juveniles.¹¹⁹ Therefore, Justice Breyer concluded that the felony murder rule should not apply to juveniles because of their inability to fully appreciate the riskiness of their conduct.¹²⁰

II. THE GANG PROBLEM IN AMERICA AND STATUTORY ATTEMPTS TO DETER CRIMINAL GANG ACTIVITY

Although the Supreme Court now recognizes juveniles' diminished culpability, anti-gang initiatives still attach sizable sentence enhancements that are applied without consideration of the offender's age.¹²¹ In 1988, the California legislature passed the STEP Act in an effort to combat the growing influence of criminal street gangs.¹²² Among other things, the STEP Act includes a gang

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 2476.

¹¹⁷ *Id.*

¹¹⁸ *See id.* at 2476–77.

¹¹⁹ *See id.* In the case of Kuntrell Jackson, Justice Breyer would have held that an LWOP sentence violates Jackson's Eighth Amendment rights because he did not kill the victim and was found guilty under a statute that did not require the jury to find that he intended to kill the victim. *Id.* at 2477 (explaining that the statute only required the jury to find that he acted with "extreme indifference to the value of human life").

¹²⁰ *Id.* at 2476. Judge Breyer's conclusion lends support to the prediction that some members of the Court might be willing to broaden *Miller's* categorical approach to the Eighth Amendment by calling into question whether juveniles can be charged with certain types of crimes. *Id.* (illustrating that Justice Breyer is particularly concerned with the harshness of LWOP). Justice Sonia Sotomayor joined Justice Breyer's opinion. *Id.* at 2475.

¹²¹ *See* Street Terrorism Enforcement and Prevention (STEP) Act, CAL. PENAL CODE § 186.22 (West 2012) (amended 2013) (demonstrating California's legislative effort to combat gangs through gang enhancements); *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (recognizing the factors that contribute to juvenile's diminished culpability); *supra* notes 38–77 and accompanying text (explaining how the Court has treated juveniles differently than adults for Eighth Amendment purposes).

¹²² 2011 Cal. Stat. 5594.

enhancement component, whereby prosecutors can seek to have a defendant's sentence increased by a term of years if the underlying crime was committed to benefit a criminal street gang.¹²³ Additionally, federal legislation (though rarely prosecuted) mimics California's STEP Act gang enhancement, as do many state statutes.¹²⁴ Today, juveniles facing felony charges in California and other states risk heavy sentences if their crime was committed as part of a criminal street gang.¹²⁵

This Part provides a brief overview of the STEP Act and explains how its gang enhancement provisions implicate the Supreme Court's analysis in the 2012 case *Miller v. Alabama*.¹²⁶ Section A explains how the Step Act's enhancements are applied.¹²⁷ Section B illustrates why the *Miller* framework should be utilized to categorically review the application of gang enhancements to juvenile offenders.¹²⁸ This is because the gang setting magnifies the developmental differences between juveniles and adults that were highlighted in *Miller* and the mandatory nature of the enhancements gives sentencing judges very little discretion.¹²⁹

¹²³ PENAL § 186.22. The Act also includes provisions that require a sentence of an indeterminate life term, with a minimum of seven or fifteen years to be served before the offender is eligible for parole. *Id.* § 186.22(b)(4); see *People v. Sengpadychith*, 27 P.3d 739, 742 (Cal. 2001) (clarifying that this is not an enhancement to the underlying penalty, but rather the minimum amount of time offenders must serve before they are eligible for parole).

¹²⁴ See, e.g., Criminal Street Gang Statute, 18 U.S.C. § 521 (2006); ARK. CODE ANN. § 5-74-108 (2013) (providing enhanced penalties for "violence while acting in concert with two or more other persons"); IOWA CODE §§ 723A.1–2 (2013) (criminalizing active participation or membership in a criminal street gang); LA. REV. STAT. ANN. § 15:1403 (2013) (providing for a gang enhancement); MINN. STAT. § 609.229 (2013) (same); MONT. CODE ANN. § 45-8-404 (2013) (same); Beth Bjerregaard, *The Constitutionality of Anti-Gang Legislation*, 21 CAMPBELL L. REV. 31, 32 & n.10 (1999) (explaining that California was the first state to pass a gang enhancement statute and that many states have followed); Rodrigo M. Caruco, Note, *In the Trenches of Florida's War on Gangs: A Framework for Prosecuting Florida's Anti-Gang Sentence Enhancement Provision*, 14 BARRY L. REV. 97, 114–119 (2010) (comparing the gang enhancement provisions of several states); Jennifer E. Fleming, Note, *Your Honor, I Seen Him with That Gang: The Constitutionality of the Federal Criminal Street Gang Statute in the Wake of Apprendi v. New Jersey*, 18 WM. & MARY BILL RTS. J. 249, 251 (2009) (explaining the federal statute).

¹²⁵ See Van Hofwegen, *supra* note 9, at 696. In 2007, the California legislature declared a "war on gangs," in part increasing the likelihood that prosecutors will seek to use the STEP Act's gang enhancements. See *id.* at 692.

¹²⁶ See *infra* notes 130–186 and accompanying text.

¹²⁷ See *infra* notes 130–145 and accompanying text.

¹²⁸ See *infra* notes 146–186 and accompanying text.

¹²⁹ See *infra* notes 146–186 and accompanying text.

A. Overview of the STEP Act

The gang enhancement is one component of the STEP Act.¹³⁰ It allows for a term-of-years sentence enhancement if: (1) the defendant is convicted of a felony; (2) the felony was commissioned for the benefit of, at the direction of, or in association with a criminal street gang; and (3) the defendant possessed the specific intent to further the gang's purpose.¹³¹ Federal law similarly provides for enhanced sentencing of up to ten years if a defendant commits one of several named offenses while participating in a criminal street gang under the Criminal Street Gang Statute ("CSGS").¹³² Because the CSGS is not utilized to prosecute gang-related offenses as frequently as the STEP Act and other similar state statutes are, this Note focuses on the STEP Act.¹³³

The gang enhancement component of the STEP Act applies if the defendant is convicted of an underlying felony.¹³⁴ Accordingly, the statute allots enhancements of five years for "serious" felonies and ten years for "violent" felonies.¹³⁵ The Act also enumerates specific felonies for which the enhancement is especially severe.¹³⁶ These crimes include home invasions, robberies, carjackings, and

¹³⁰ See Street Terrorism Enforcement and Prevention (STEP) Act, CAL. PENAL CODE § 186.22(b) (West 2012) (amended 2013). Another component of the STEP Act criminalizes active participation in a criminal street gang, which is punishable by up to three years in prison. *Id.* Prosecutions under this component of the STEP Act are rare. Erin R. Yoshino, Note, *California's Criminal Gang Enhancement*, 18 S. CAL. REV. L. & SOC. JUST. 117, 118–19 (2008).

¹³¹ See PENAL § 186.22(b).

¹³² See 18 U.S.C. § 521 (2012); Fleming, *supra* note 124, at 262 (explaining the enhancement provision of the CSGS).

¹³³ See Fleming, *supra* note 124, at 262 (explaining that prosecutors rarely use the GSGS); *infra* notes 134–186 (discussing the STEP Act and why it implicates *Miller*).

¹³⁴ PENAL § 186.22(b). The enhancement requires that the underlying crime was commissioned for the benefit of, at the direction of, or in association with a criminal street gang; a crime committed by gang members outside the context of the gang would not satisfy the requirement. See *id.*; *Osika v. Patrick*, 472 F. App'x 441, 443 (9th Cir. 2012) (explaining that the defendant does not actually need to be a member of the gang to be subject to the gang enhancements); *People v. Abillar*, 244 P.3d 1062, 1072 (Cal. 2010) ("[I]t is conceivable that several gang members could commit a crime together, yet be on a frolic and detour unrelated to the gang."); *People v. Arroyas*, 118 Cal. Rptr. 2d 380, 382 (Ct. App. 2002) (explaining that the enhancements do not apply to misdemeanors that turn into felonies by virtue of enhanced penalty provisions found elsewhere in the Act). The enhancement also requires that the defendant possessed "the specific intent to promote, further, or assist in any criminal conduct by gang members." PENAL § 186.22(b). Accordingly, the prosecution must prove that the defendant intended to commit the underlying crime and knew that his or her accomplices were members of a gang. See *Abillar*, 244 P.3d at 1075.

¹³⁵ PENAL § 186.22(b)(1). "Serious" felonies include crimes such as mayhem, rape, and attempted murder. *Id.* § 1192.7(c). "Violent" felonies include crimes such as murder, voluntary manslaughter, and certain forms of rape. *Id.* § 667.5(c).

¹³⁶ Street Terrorism Enforcement and Prevention (STEP) Act, CAL. PENAL CODE § 186.22(b)(4)(B) (West 2012) (amended 2013).

drive-by shootings.¹³⁷ A defendant convicted of one of these felonies (assuming the gang requirements are met) must be sentenced to an “indeterminate term of life imprisonment” with a minimum term of fifteen years.¹³⁸ Similarly, for the crime of extortion, the gang enhancement provides for an indeterminate term of life imprisonment with a minimum term of seven years.¹³⁹ For all other felonies, the Act provides enhancements of two to four years.¹⁴⁰ Lastly, if the crime was commissioned in the vicinity of a school, it is considered an aggravating factor in determining the appropriate enhancement.¹⁴¹

As a result of the STEP Act’s gang enhancement provision, juvenile offenders face heightened sentences for criminal activity that satisfies the statute’s requirements.¹⁴² Although there is sometimes leeway for the judge to choose the appropriate level of enhancement, for certain crimes, sentences are increased by a term of years without judicial discretion.¹⁴³ Thus, the consequences of committing a felony in association with a gang could be grave, especially for juveniles who are often the subject of gang recruitment.¹⁴⁴ This danger is magnified in light of Proposition 21, a referendum passed by California voters in March 2000 that makes it easier for prosecutors to try juvenile cases in adult court.¹⁴⁵

¹³⁷ *Id.*; see *id.* § 246 (shooting at an inhabited house, punishable by up to seven years); *id.* § 12022.55 (discharging a firearm from a motor vehicle in commission of a felony, punishable by up to five, six, or ten years).

¹³⁸ *Id.* § 186.22(b)(4)(B).

¹³⁹ *Id.* § 186.22(b)(4)(C).

¹⁴⁰ *Id.* § 186.22(b)(1)(A).

¹⁴¹ *Id.* § 186.22(b)(2).

¹⁴² See Street Terrorism Enforcement and Prevention (STEP) Act, CAL. PENAL CODE § 186.22(b) (West 2012) (amended 2013) (explaining the enhancements).

¹⁴³ See *id.* Judges have discretion to choose between an enhancement of two, three, or four years for felonies classified under section (b)(1). *Id.* § 186.22(b)(1)(A). Judges have no discretion when issuing enhancements for serious or violent felonies, and must enhance the sentences for these crimes by five years and ten years, respectively. *Id.* § 186.22(b)(1)(B)–(C). Finally, for certain crimes, the judge must set the sentence at an indeterminate life sentence with a minimum term of seven or fifteen years, depending on the crime committed. *Id.* § 186.22(b)(4)(A)–(C).

¹⁴⁴ See *id.* § 186.22; Van Hofwegen, *supra* note 9, at 696 (explaining the relationship between age and gang membership).

¹⁴⁵ See 2000 Cal. Stat. A-263; Jennifer Taylor, *California’s Proposition 21: A Case of Juvenile Injustice*, 75 S. CAL. L. REV. 983, 984 (2002) (explaining the changes made by Proposition 21). Proposition 21, otherwise known as the Gang Violence and Juvenile Crime Prevention Initiative, makes it more likely that a juvenile will be tried as an adult. See Taylor, *supra* at 990–91. This is significant because juvenile courts in California only have the authority to order offenders to be held until age twenty-five, whereas adult courts can sentence them to full criminal sentences, including life sentences. *Id.* at 990. Prior to Proposition 21, a juvenile could be tried as an adult only if the prosecutor could prove that the juvenile’s actions met certain qualifications or that the juvenile was unsuited to be tried as a child. Joshua Tiffée, Note, *Addressing Misconceptions: The Real Effects of Proposition 21*, 5 U.C. DAVIS J. JUV. L. & POL’Y 33, 34, 36 (2000). After Proposition 21, a prosecutor can simply file a

B. The STEP Act Implicates the Miller Court's Concerns

The STEP Act could warrant application of a categorical analysis because it highlights two of the *Miller* Court's primary concerns.¹⁴⁶ First, the STEP Act targets juvenile offenders who commit crimes in a context where the factors leading to diminished juvenile culpability are magnified.¹⁴⁷ Second, the gang enhancement sentencing scheme resembles the challenged sentencing scheme in *Miller* because it requires courts to impose harsh sentences on juvenile offenders without accounting for mitigating factors associated with their age.¹⁴⁸ Therefore, applying gang enhancements to juveniles implicates *Miller's* concern that juvenile sentencing will ignore the factors that make them less culpable than adults.¹⁴⁹

1. The Gang Setting Magnifies the Miller Court's Concerns

The gang setting is similar to other contexts in which the Court has extended *Miller's* categorical treatment of juveniles because it is a setting that magnifies the three underlying differences between juveniles and adults.¹⁵⁰ The three developmental differences that have a substantial impact on juvenile behavior are their: (1) inability to assess the riskiness of their behavior; (2) susceptibility to negative influences; and (3) the incomplete development of their

case against the juvenile directly in an adult criminal court without proving that the juvenile's actions meet certain qualifications or that the juvenile is unsuited to be tried as a child. *See id.* at 35–37. The result of these changes is that a juvenile is now more likely to be tried in adult court, making the gang enhancements of the STEP Act a more serious concern for juvenile offenders. *See* PENAL § 186.22(b); Taylor, *supra*, at 990–91 (discussing how the Proposition 21's reforms increase the stakes for juvenile offenders).

¹⁴⁶ *See* 132 S. Ct. at 2464, 2465–66 (stating that sentencing should account for a juvenile's diminished culpability and that lengthy sentences should not be applied in a mandatory fashion).

¹⁴⁷ *See id.* at 2464 (discussing the factors that make juveniles less culpable than adults); Van Hofwegen, *supra* note 9, at 689–90 (noting that gang members are less culpable for their actions because of their life circumstances).

¹⁴⁸ *See Miller*, 132 S. Ct. at 2466 (discussing the importance of accounting for age when applying an LWOP sentence to a juvenile offender); *supra* notes 130–145 and accompanying text (illustrating the various permutations of the STEP Act's sentencing scheme); *infra* notes 172–186 and accompanying text (explaining the mandatory nature of the STEP Act's gang enhancements).

¹⁴⁹ *See Miller*, 132 S. Ct. at 2466. *But see* Barkow, *supra* note 2, at 50 (arguing that the Court has intentionally limited its categorical analysis to LWOP sentences).

¹⁵⁰ *See Miller*, 132 S. Ct. at 2464 (highlighting these three differences); Robert G. Schwartz, *Age-Appropriate Charging and Sentencing*, 27 CRIM. JUST. 49, 49 (2012) (arguing that *Miller* represents "a constitutional mandate to hold juvenile offenders accountable in developmentally appropriate ways"); *infra* notes 153–171 and accompanying text (explaining how the gang setting magnifies the *Miller* Court's concerns).

personality.¹⁵¹ Because the gang setting magnifies these weaknesses, *Miller* is especially relevant when the STEP Act's gang enhancements are applied to juveniles.¹⁵²

The gang context magnifies juveniles' inability to accurately assess the riskiness of their behavior.¹⁵³ In *Miller*, the Court recognized that this difference between juveniles and adults was a product of both life experience and physiological differences in brain development.¹⁵⁴ This is grounded in a growing scientific recognition that the part of the brain that assesses risk is not fully developed in adolescents.¹⁵⁵ The gang setting magnifies this effect by adding variables to risk calculation that make it more difficult for a juvenile to make well-reasoned decisions.¹⁵⁶ For example, gang membership tends to correlate with factors such as low self-esteem, which already make youths more likely to engage in antisocial behavior.¹⁵⁷ Additionally, the promise of acceptance as a gang member may cause juveniles to lower their moral standards.¹⁵⁸ Furthermore, youths may gravitate toward the protection a gang offers if they are from an area in which gangs are prevalent.¹⁵⁹ Finally, gang members tend to justify their actions by deflecting their responsibility onto others.¹⁶⁰

¹⁵¹ See *Miller*, 132 S. Ct. at 2464; *infra* notes 153–171 and accompanying text (providing additional support for these assertions).

¹⁵² See 132 S. Ct. at 2464; *infra* notes 153–171 and accompanying text; see also Caldwell, *supra* note 81, at 616 (arguing that the *Graham* framework should be applied to the application of California's three strikes law to juveniles); Emily C. Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper, Graham, & J.D.B.*, 11 CONN. PUB. INT. L.J. 297, 308–09 (2012) (arguing that the framework of *Graham*, *Roper*, and *J.D.B.* should be used when reviewing the application of the felony murder rule to juveniles).

¹⁵³ See Emma Alleyne & Jane L. Wood, *Gang Involvement: Psychological and Behavioral Characteristics of Gang Members, Peripheral Youth, and Nongang Youth*, 36 AGGRESSIVE BEHAV. 423, 424 (2010) (providing examples of how the gang environment might contribute to juveniles' inability to assess risk).

¹⁵⁴ *Miller*, 132 S. Ct. at 2464. In a footnote, the Court noted the growing scientific consensus that an adolescent's cognitive ability to avoid risk is not fully developed. *Id.* at 2464 n.5.

¹⁵⁵ *Id.*; see also Arnett, *supra* note 73, at 350 (articulating that adolescents “distort the perceived risk of a given behavior in their favor”); Steinberg & Scott, *supra* note 73, at 5 (explaining that the “immediate and concrete rewards, along with the reward of peer approval, weigh more heavily in [a juvenile's] decision than the abstract and temporally remote possibility of apprehension by the police,” and that “[t]he last thing that the adolescent considers is the long-term costs associated with the conviction of a serious crime”).

¹⁵⁶ See Alleyne & Wood, *supra* note 153, at 424.

¹⁵⁷ See *id.* at 425; Finn-Aage Esbensen, *Preventing Adolescent Gang Involvement*, JUV. JUST. BULL., Sept. 2000, at 1, 5. Gangs provide stability to juveniles who are looking for an identity. Alleyne & Wood, *supra* note 153, at 425. This identity is often associated with “alcohol and drug use, conflict, and violence.” *Id.*

¹⁵⁸ See Alleyne & Wood, *supra* note 153, at 425–26.

¹⁵⁹ *Id.* at 426.

¹⁶⁰ See *id.* at 432.

The gang context also magnifies the effects of juveniles' susceptibility to negative influences.¹⁶¹ *Miller* noted that juveniles are highly susceptible to negative influences from their peers and family and cannot control their own environment.¹⁶² This is especially true in the gang setting because gang members often have more exposure to negative influences.¹⁶³ For example, gang members often lack strong family structures and come from households that reinforce criminal behavior.¹⁶⁴ Additionally, joining a gang brings juveniles into an environment in which peers are more likely to be engaging in delinquent behavior, including clashes with rival gangs.¹⁶⁵ Furthermore, older gang members are likely to become role models in the gang's social structure.¹⁶⁶ Thus, this reliance on older gang members increases the presence of negative influences in the lives of juvenile gang members.¹⁶⁷

Lastly, *Miller* differentiated juveniles from adults on the basis that their characters are not fully formed.¹⁶⁸ Accordingly, *Miller* held that juvenile acts are less likely to be predictive of the offender's future conduct.¹⁶⁹ This remains true in gang settings, where juveniles often decide to terminate their participation and move on to participate in other types of peer groups.¹⁷⁰ This willingness to move away from gang activity shows that juvenile gang members have characters that are still forming.¹⁷¹

¹⁶¹ See *Miller*, 132 S. Ct. at 2464 (discussing juveniles' susceptibility to negative influences); Esbensen, *supra* note 157, at 5 (“[T]he strongest predictors of sustained gang affiliation . . . [are] a high level of interaction with antisocial peers and a low level of interaction with prosocial peers.”).

¹⁶² 132 S. Ct. at 2464; see also Arnett, *supra* note 73, at 354 (“It has long been recognized that adolescence is the time of greatest susceptibility to peer influences.”); Steinberg & Scott, *supra* note 73, at 6 (explaining that “[b]ecause of their developmental immaturity, normative (i.e., ‘ordinary’) adolescents may respond adversely to external pressures that adults are able to resist”).

¹⁶³ See Alleyne & Wood, *supra* note 153, at 424.

¹⁶⁴ See *id.* (showing that family factors such as “poor parental management, familial criminality, and gang-involved family members” correlate with gang participation).

¹⁶⁵ See Rachel A. Gordon et al., *Antisocial Behavior and Youth Gang Membership: Selection and Socialization*, 42 CRIMINOLOGY 55, 59 (2004).

¹⁶⁶ *Id.*

¹⁶⁷ See *id.* (explaining that when boys become part of a gang structure, they learn when, where, and how to engage in criminal behavior).

¹⁶⁸ See 132 S. Ct. at 2464.

¹⁶⁹ *Id.*; see also Steinberg & Scott, *supra* note 73, at 6 (“Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.”).

¹⁷⁰ Gordon et al., *supra* note 165 at 69; James C. Howell, *Menacing or Mimicking? Realities of Youth Gangs*, JUV. & FAM. CT. J., Spring 2007, at 39, 44. Delinquent activity is likely to decline after the juvenile leaves a gang. Gordon et al., *supra* note 165, at 69.

¹⁷¹ See Howell, *supra* note 170, at 44 (dispelling the myth that once juveniles join a gang, they are lost forever).

2. STEP Act Sentencing Is Mandatory and Ignores the Characteristics That Set Juveniles Apart from Adults

The *Miller* framework also applies to the STEP Act's gang enhancement provision because, like the statutes struck down in *Miller*, the gang enhancement requires the imposition of substantial minimum sentences without allowing judges to account for the mitigating effects of youth.¹⁷² Although the STEP Act is different from the statute rejected in *Miller*—because the STEP Act's required punishment is not as harsh as LWOP—the ramifications of the gang enhancements can be profound.¹⁷³ Under the STEP Act, judges have little discretion to consider mitigating factors related to the defendant's age and can be required to impose a sentence of at least fifteen years.¹⁷⁴

The *Miller* Court explained its concern regarding mandatory sentencing schemes is particularly acute when the juvenile defendant is facing LWOP.¹⁷⁵ Concededly, some of the STEP Act's gang enhancements increase the sentence for the underlying crime by only two to four years.¹⁷⁶ Serious felonies and violent felonies, however, are enhanced by five and ten years, respectively.¹⁷⁷ These enhancements can more than double the maximum sentence for the underlying felony.¹⁷⁸ Likewise, certain crimes enumerated by the Act require a minimal sentence of at least fifteen years before the offender is eligible for pa-

¹⁷² See Street Terrorism Enforcement and Prevention (STEP) Act, CAL. PENAL CODE § 186.22(b) (West 2012) (amended 2013) (explaining how the length of the sentence enhancement is determined); *Miller*, 132 S. Ct. at 2466 (explaining the importance of allowing a judge to consider factors related to youth before imposing LWOP on juveniles).

¹⁷³ See PENAL § 186.22(b) (stating that the statute requires a minimum sentence of fifteen years); *Miller*, 132 S. Ct. at 2466.

¹⁷⁴ See PENAL § 186.22(b)(4)(b); see also *supra* note 145 and accompanying text (explaining how Proposition 21 made it easier for juveniles to be tried as adults subject to these mandatory sentences).

¹⁷⁵ See 132 S. Ct. at 2466; Barkow, *supra* note 2, at 50.

¹⁷⁶ See PENAL § 186.22(b)(1)(A).

¹⁷⁷ See *id.* § 186.22(b)(1)(B)–(C).

¹⁷⁸ See Martin Baker, *Stuck in the Thicket: Struggling with Interpretation and Application of California's Anti-Gang STEP Act*, 11 BERKELEY J. CRIM. L. 101, 105 (2006) (explaining that for serious felonies, the maximum sentence for the underlying crime is often less than three years, but that the STEP Act adds an enhancement of five years, more than doubling the sentence); see Street Terrorism Enforcement and Prevention (STEP) Act, CAL. PENAL CODE § 186.22(b)(1)(B)–(C) (West 2012) (amended 2013); Van Hofwegen, *supra* note 9, at 680 (suggesting that the gang enhancements are often combined with other felony enhancements, resulting in a sentence that is three times as long as it otherwise would have been). In addition to the underlying felony, any felony violation under section 186.22 also counts as a strike under California's three strikes program. Baker, *supra*, at 105. This means that a defendant convicted of an underlying felony in association with a gang could be given two strikes for one offense. See *id.* If the defendant is convicted of any subsequent felony, he or she would be subject to a sentence of twenty-five-years-to-life under the three strikes program. *Id.*

role.¹⁷⁹ Although the *Miller* Court's holding only addressed LWOP sentences, the sentences available under the STEP Act's gang enhancements illicit similar concerns about the imposition of extremely lengthy sentences on juvenile offenders.¹⁸⁰

Further, like the sentencing scheme in *Miller*, the STEP Act leaves little or no room for the judge to weigh mitigating factors associated with the defendant's youth.¹⁸¹ In *Miller*, the Court rejected the mandatory sentencing scheme at issue because it required the judge to impose an LWOP sentence without being able to consider a defendant's status as a juvenile.¹⁸² Similarly, the STEP Act creates a sentencing scheme that does not allow a judge to consider the defendant's status as a juvenile.¹⁸³ For example, under the violent felony provision of the gang enhancement, a judge is required to impose a ten-year enhancement.¹⁸⁴ The Act leaves no room for the judge to account for the defendant's age.¹⁸⁵ This lack of discretion means that the mandatory nature of the STEP Act's enhancements implicates *Miller*.¹⁸⁶

¹⁷⁹ See PENAL § 186.22(b)(4)(B)–(C).

¹⁸⁰ Compare *Miller*, 132 S. Ct. at 2466 (explaining the Court's concern with mandatory LWOP sentences for juveniles), with PENAL § 186.22(b) (demonstrating the severity of the gang enhancements), Baker, *supra* note 178, at 105 (discussing the severity of the length of the enhancements), Van Hofwegen, *supra* note 9, at 680 (discussing the severity of gang enhancements), and Jason Zolle, Note, *Transforming Juvenile Justice: Making Doctrine Out of Dicta in Graham v. Florida*, 112 MICH. L. REV. FIRST IMPRESSIONS 30, 32 (2013), <http://www.michiganlawreview.org/articles/transforming-juvenile-justice-making-doctrine-out-of-dicta-in-em-graham-v-florida-em>, archived at <http://perma.cc/NH64-FEGW> (explaining that there is “room for advocates to argue . . . that the holdings of [*Miller* and *Graham*] extend beyond the LWOP context to all sentencing for youth”).

¹⁸¹ See PENAL § 186.22(b)(1)(a) (demonstrating the mandatory nature of the gang enhancements); *Miller*, 132 S. Ct. at 2466 (illustrating the Court's concern with the mandatory nature of the sentencing scheme at issue). Proposition 21 further exacerbates this effect by increasing the likelihood that a juvenile will be subject to a lengthy sentence as a consequence of being tried as an adult. See *supra* note 145 and accompanying text (discussing Proposition 21).

¹⁸² 132 S. Ct. at 2466.

¹⁸³ See PENAL § 186.22(b) (demonstrating that there is little room for judicial discretion in determining the length of the enhancements).

¹⁸⁴ See Street Terrorism Enforcement and Prevention (STEP) Act, CAL. PENAL CODE § 186.22(b)(1)(C) (West 2012) (amended 2013); see also Baker, *supra* note 178, at 105 (explaining that the ten-year enhancement come close to tripling the maximum sentence for many of the felonies that are categorized as violent).

¹⁸⁵ See PENAL § 186.22(b). Enhancements may be shorter in juvenile court because juvenile courts can only hold offenders until age twenty-five. See Taylor, *supra* note 145, at 990. But see *supra* note 145 and accompanying text (explaining that Proposition 21 has made it easier for juveniles to be tried as adults).

¹⁸⁶ Compare PENAL § 186.22(b) (demonstrating the mandatory nature of the enhancements), and Baker, *supra* note 178, at 105 (discussing the severity of the sentence enhancements), with *Miller*, 132 S. Ct. at 2466 (noting the Court's concern with sentencing schemes that impose harsh sentences to juveniles without allowing the judge to consider the age of the defendant).

III. A CATEGORICAL REVIEW OF THE STEP ACT'S GANG ENHANCEMENTS SUGGESTS THAT THEY VIOLATE THE EIGHTH AMENDMENT

Miller v. Alabama, decided by the Supreme Court in 2012, suggests that mandatory gang enhancements, such as those found in California's STEP Act, likely violate the Eighth Amendment when they are applied to juvenile defendants.¹⁸⁷ *Miller* recognized that juveniles have diminished culpability because of their: (1) inability to assess the risks associated with their behavior; (2) susceptibility to negative influence; and (3) capacity for change.¹⁸⁸ Importantly, the STEP Act applies to juveniles in a gang setting where these factors limiting their culpability are likely magnified.¹⁸⁹ Furthermore, the STEP Act's gang enhancements also implicate *Miller* because they require judges to impose harsh sentences without being able to consider a juvenile's diminished culpability.¹⁹⁰

In light of these concerns about juveniles' diminished culpability, the *Miller* Court held that mandatory LWOP sentences granted to juveniles are unconstitutional.¹⁹¹ In *Miller*, the Court applied the categorical Eighth Amendment analysis traditionally used in assessing the constitutionality of the imposition of the death penalty.¹⁹² Because the STEP Act's gang enhancements implicate the same concerns as *Miller*, this framework should be extended to review the Act as it applies to juveniles.¹⁹³

Under this categorical framework, the Court should hold that the STEP Act's gang enhancements are unconstitutional when applied to juvenile offenders.¹⁹⁴ In reaching this conclusion, the Court should categorize a challenge to the STEP Act as procedural, allowing it to bypass the national consensus prong of the categorical analysis.¹⁹⁵ Furthermore, under the subjective prong of

¹⁸⁷ See PENAL § 186.22; *Miller v. Alabama*, 132 S. Ct. 1455, 2464, 2469 (2012) (expanding the reach of Eighth Amendment review of term-of-years sentences and holding that a mandatory LWOP sentencing scheme is unconstitutional when applied to juvenile offenders).

¹⁸⁸ 132 S. Ct. at 2464.

¹⁸⁹ See *supra* notes 150–171 and accompanying text.

¹⁹⁰ See *supra* notes 172–186 and accompanying text.

¹⁹¹ 132 S. Ct. at 2464.

¹⁹² See *id.* at 2463–64; see also *Graham v. Florida*, 560 U.S. 48, 74–75 (2010) (illustrating a similar application of the categorical analysis to a noncapital case); Berman, *supra* note 6, at 20–21 (discussing *Graham* and *Miller*); Steiker & Steiker, *supra* note 2, at 80–81 (explaining how *Graham* changed the Court's Eighth Amendment analysis).

¹⁹³ See *supra* notes 146–186 and accompanying text (explaining how the STEP Act implicates *Miller*'s concerns).

¹⁹⁴ See *supra* notes 200–279 and accompanying text.

¹⁹⁵ See *supra* notes 200–219 and accompanying text.

the analysis, the Court should hold that the gang enhancements are not sufficiently justified by any penological objectives.¹⁹⁶

This Part applies the *Miller* framework and concludes that the STEP Act's gang enhancements are unconstitutional when applied to juveniles.¹⁹⁷ Section A explains why the Court should classify this as a procedural challenge and therefore bypass the national consensus prong of the categorical analysis.¹⁹⁸ Section B explains why no penological objectives justify the application of the STEP Act's gang enhancements to juveniles.¹⁹⁹

A. *Bypassing National Consensus*

Because the challenge of the application of the STEP Act's gang enhancements to juveniles would be a procedural one, the Court's analysis should bypass national consensus considerations.²⁰⁰ Ordinarily, categorical Eighth Amendment analyses first turn to national consensus to determine if the challenged punishment is generally acceptable to society.²⁰¹ Under this standard, the Supreme Court looks to a variety of factors, including the prevalence of legislation allowing for the type of punishment at issue, legislative intent, actual sentencing practices, and sometimes international norms.²⁰² Normally, the Court is hesitant to strike down a sentence that is supported by national consensus.²⁰³ A review of national consensus could be fatal to an Eighth Amendment challenge to the STEP Act, as many states have enacted similar legislation.²⁰⁴ National consensus, however, is not always a major considera-

¹⁹⁶ See *Miller*, 132 S. Ct. at 2465, 2470–71 (assessing penological objectives in light of the age of juvenile offenders); *Graham*, 560 U.S. at 71–72; *Atkins v. Virginia*, 536 U.S. 304, 312 (2002); *infra* notes 225–279 and accompanying text.

¹⁹⁷ See *infra* notes 200–279 and accompanying text.

¹⁹⁸ See *infra* notes 200–224 and accompanying text.

¹⁹⁹ See *infra* notes 225–279 and accompanying text.

²⁰⁰ See *Miller*, 132 S. Ct. at 2471–72 (implicitly reasoning that a challenge to mandatory LWOP sentences, as applied to juveniles, was procedural); *infra* notes 201–224 and accompanying text (illustrating that a challenge to the STEP Act's gang enhancements, as applied to juveniles, is procedural).

²⁰¹ See, e.g., *Graham*, 560 U.S. at 62; *Atkins*, 536 U.S. at 312.

²⁰² See *Miller*, 132 S. Ct. at 2471–73 (explaining the role of legislation and legislative intent); *Graham*, 560 U.S. at 62–63 (explaining the role of legislation, legislative intent, and actual sentencing practices); *Roper v. Simons*, 543 U.S. 551, 567, 575 (2005) (explaining the role of international consensus).

²⁰³ *Graham*, 560 U.S. at 67 (explaining that national consensus is given “great weight”); see *Roper*, 543 U.S. at 564; *Atkins*, 536 U.S. at 313. *But see Miller*, 132 S. Ct. at 2490 (Alito, J., dissenting) (arguing that the Court has moved away from considering objective factors—such as national consensus—as part of its Eighth Amendment analysis).

²⁰⁴ See Bjerregaard, *supra* note 124, at 32 & n.10, 33 (explaining that many states have followed California's lead by enacting gang enhancement statutes); Caruco, *supra* note 124, at 114–19 (com-

tion.²⁰⁵ In *Miller*, the Court largely sidestepped national consensus considerations because the Court viewed the challenge as a procedural—as opposed to a substantive—one.²⁰⁶ Under the same reasoning, an Eighth Amendment challenge to the STEP Act should also sidestep national consensus considerations.²⁰⁷

In *Miller*, the Court avoided the hurdle of national consensus in just a few sentences by declaring that the Court gives less weight to factors relating to national consensus when the challenge is to a procedural element of a punishment.²⁰⁸ A challenge to the STEP Act's gang enhancements as applied to juveniles should also be considered procedural because: (1) the court would not be imposing a categorical ban on a certain type of punishment; and (2) the decision would flow directly from precedent.²⁰⁹ Therefore, consideration of the STEP Act under the categorical Eighth Amendment analysis should also sidestep consideration of national consensus.²¹⁰

A constitutional challenge to the application of gang enhancements to juvenile defendants would not require a categorical ban on any type of punishment.²¹¹ This is because a review of the mandatory gang enhancements would not require the Court to ban lengthy sentences for juveniles altogether.²¹² Rather, a successful challenge to the gang enhancements would only require the Court to impose rules on the types of factors that *must* be considered before

paring the gang enhancement provisions of several states); *see also* Criminal Street Gang Statute, 18 U.S.C. § 521 (2006) (providing a federal analog to California's STEP Act).

²⁰⁵ *See Miller*, 132 S. Ct. at 2471–72 (placing little importance on the national consensus prong as part of its analysis of mandatory LWOP sentences for juveniles); Farrell, *supra* note 83, at 901.

²⁰⁶ *See Miller*, 132 S. Ct. at 2471; Berman, *supra* note 6, at 22.

²⁰⁷ *See infra* notes 208–219 and accompanying text (explaining how the *Miller* Court bypassed the national consensus prong of its Eighth Amendment analysis and arguing that the same approach should be taken to a review of the STEP Act).

²⁰⁸ *See* 132 S. Ct. at 2471; Berman, *supra* note 6, at 22; *supra* note 87 and accompanying text (explaining how the Court determines whether a challenge is procedural).

²⁰⁹ *See Miller*, 132 S. Ct. at 2471; *infra* notes 211–219 and accompanying text.

²¹⁰ *See Miller*, 132 S. Ct. at 2471. Recall that the *Miller* Court maintained that even if national consensus were considered, it would be unpersuasive because the sentencing scheme at issue was an unintended result of the overlap of two statutes. *See id.* at 2471–72. Such reasoning would not apply to the STEP Act because the statute specifically targets juveniles. *See* CAL. PENAL CODE § 186.21 (West 2012) (expressing the legislature's intent to combat criminal street gangs); Alleyne & Wood, *supra* note 153, at 224 (explaining that juveniles between the ages of twelve and eighteen are the individuals at the highest risk of joining a gang).

²¹¹ *See Miller*, 132 S. Ct. at 2471; *infra* notes 212–215 and accompanying text.

²¹² *See Miller*, 132 S. Ct. at 2471 (“Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*.”); *see also* CAL. PENAL CODE § 186.22(b) (demonstrating that the gang enhancements do not affect the sentence that would otherwise be given for the underlying crime).

courts can sentence juveniles to such lengthy prison terms.²¹³ For example, gang participation could be considered in sentencing, along with mitigating factors such as the defendant's age.²¹⁴ Thus, the Court would not be imposing a categorical ban on a certain type of punishment.²¹⁵

Striking down the STEP Act's gang enhancements would also flow directly from precedent.²¹⁶ A challenge to gang enhancements would flow squarely from the Court's growing recognition that juvenile defendants are categorically less culpable than adults, and that sentences should account for these differences.²¹⁷ In *Miller*, the Court explained that: "Our decision flows straightforwardly from our precedents: specifically, the principle of *Roper*, *Graham*, and our individualized sentencing cases that youth matters for purposes of meting out the law's most serious punishments."²¹⁸ Like the challenge in *Miller*, a challenge to the STEP Act would merely be asking the court to build upon past cases requiring for the factor of youth to be accounted for at the sentencing stage.²¹⁹

Even if a challenge to the STEP Act did not fit so squarely into *Miller*'s procedural exception, the Court has been arguably minimizing the importance of national consensus in its categorical Eighth Amendment analysis.²²⁰ In 2010, in *Graham v. Florida*, for example, the Supreme Court held that there

²¹³ See *Miller*, 132 S. Ct. at 2471 ("Our decision . . . mandates only that a sentencer follow a certain process—considering an offender's youth and attendant characteristics—before imposing a particular penalty."). Similarly, in 1982 in *Eddings v. Oklahoma*, the Supreme Court vacated a death sentence imposed on a defendant who was sixteen when he killed a police officer. See 455 U.S. at 105. In that case, the Court held that a sentencing judge cannot refuse to consider relevant mitigating factors when deciding whether to issue the death penalty. *Id.* at 114–15. The Court noted that the challenge did not require the Court to prohibit the use of the death penalty; it simply required the Court to issue instructions as to the types of procedures that must be followed before a trial court could issue a death sentence. See *id.* at 111–12.

²¹⁴ See *Miller*, 132 S. Ct. at 2471 (differentiating between procedural challenges and substantive challenges); *supra* notes 172–186 and accompanying text (discussing the mandatory nature of the gang enhancements).

²¹⁵ See *Miller*, 132 S. Ct. at 2471.

²¹⁶ See *id.* (explaining that a challenge to mandatory LWOP as applied to juveniles was consistent with precedent illustrating that juveniles are less culpable than adults); *infra* notes 217–219 and accompanying text.

²¹⁷ See, e.g., *Miller*, 132 S. Ct. at 2469 (holding that mandatory LWOP sentences violate the Eighth Amendment when applied to juveniles); *Graham*, 560 U.S. at 74–75 (holding that juveniles cannot be sentenced to LWOP for non-homicidal crimes); *Roper*, 543 U.S. at 575 (banning the death penalty for juveniles).

²¹⁸ 132 S. Ct. at 2471.

²¹⁹ See *id.* at 2469, 2471; *Graham*, 560 U.S. at 74–75; *Roper*, 543 U.S. at 575.

²²⁰ See Berman, *supra* note 6, at 23–24 (arguing that the Court has been relying more heavily on penological theories); Farrell, *supra* note 83, at 901 (arguing that "[t]here are . . . several reasons that suggest the Court will—and should—disavow Objective Indicia Analysis across the Eighth Amendment board").

was no national consensus in favor of the challenged sentence, even though thirty-seven out of fifty states permitted it.²²¹ In reaching this decision, the *Graham* Court focused on two obscure aspects of national consensus: the deliberate intentions of the legislatures and the frequency with which the sentences were actually imposed.²²² After *Graham*, it is possible that even a popularly adopted sentencing scheme could fail to satisfy the national consensus prong so long as some indicia of national consensus indicate a lack of support.²²³ Thus, the Court has arguably shifted the weight of its Eighth Amendment analysis away from national consensus and toward the Court's subjective interpretation of the theoretical justifications for the punishment at issue.²²⁴

B. *The Court's Subjective Judgment: Underlying Theories of Punishment*

Because national consensus would be unlikely to bear on the Court's analysis, the Court would focus on a subjective analysis of the punishment.²²⁵ The Court should conclude under this prong of the analysis that the STEP Act's gang enhancements are unconstitutional because they do not serve any penological objectives.²²⁶ Under the subjective prong, the Court would evaluate whether the gang enhancements are justified under any theories of punishment.²²⁷ The Court does this by assessing the underlying penological justifications for the challenged punishment.²²⁸ Because the penological justifications

²²¹ See 560 U.S. at 107 (Thomas, J., dissenting); Richard M. Ré, *Can Congress Overturn Graham v. Florida?*, 34 HARV. J.L. & PUB. POL'Y 367, 370 (2011) (arguing that the *Graham* Court relied primarily on its subjective assessment of traditional penological justifications); Steiker & Steiker, *supra* note 2, at 83 (discussing how *Graham* relied on obscure indicators of national consensus, essentially bypassing this objective prong).

²²² See 560 U.S. at 66–67; Ré, *supra* note 221, at 368.

²²³ See 560 U.S. at 62–67; Ré, *supra* note 221, at 368; see also Bruce J. Winick, *The Supreme Court's Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier*, 50 B.C.L. REV. 785, 799–800 (2009) (explaining that the Court might be willing to rely on a wide variety of factors, such as the frequency with which prosecutors seek a particular sentence, when evaluating the extent of national consensus regarding a punishment).

²²⁴ See *supra* notes 220–223 and accompanying text.

²²⁵ See *Miller*, 132 S. Ct. at 2465 (demonstrating that the Court relied heavily on its subjective analysis); Ré, *supra* note 221, at 370 (arguing that the Court in *Graham* was persuaded by its own subjective analysis even though its holding relied, in part, on national consensus considerations).

²²⁶ See *Miller*, 132 S. Ct. at 2465–66 (explaining that mandatory LWOP for juveniles does not adequately serve any penological objectives); *Graham*, 560 U.S. at 74–75 (explaining that penological objectives do not support imposing LWOP sentences on non-homicide juvenile offenders); *infra* notes 233–279 and accompanying text (analyzing the penological justifications for mandatory gang enhancements as applied to juveniles).

²²⁷ *Graham*, 560 U.S. at 67 (explaining that the Constitution requires the court to exercise its own independent judgment to determine if it thinks the punishment is justified).

²²⁸ See *id.* at 71–75; *Atkins*, 536 U.S. at 321.

for applying gang enhancements to juveniles are weak, the Court should not uphold the STEP Act.²²⁹

When considered in light of the unique characteristics of juvenile offenders, penological justifications are as unpersuasive for the STEP Act as they were for the sentencing scheme reviewed in *Miller*.²³⁰ *Miller* explained that juveniles are different from adults in three key ways: they are (1) less able to assess risk; (2) more susceptible to outside influences; (3) and do not have a fully developed character.²³¹ In light of these differences, the STEP Act's gang enhancements do not adequately serve deterrent, retributive, rehabilitative, or incapacitation penological objectives and, therefore, fail to satisfy the subjective prong of the Court's analysis.²³²

1. Deterrence

Gang enhancement statutes are commonly justified as deterrent measures taken in response to public fears about the perpetuation of gang violence.²³³ Under a deterrent theory of punishment, the STEP Act would make juveniles less likely to commit felonies in association with a criminal street gang because they will be averse to enhanced sentences.²³⁴ Nevertheless, deterrence fails to justify subjecting juveniles to gang enhancements because the assumptions underlying deterrence theory do not apply in the context of juvenile gang activity.²³⁵

The deterrence theory of punishment is based on the idea that increased punishments create a disincentive for actors to break the law.²³⁶ The deterrence

²²⁹ See *Miller*, 132 S. Ct. at 2465–66.

²³⁰ Compare *id.* (explaining that mandatory LWOP for juveniles does not adequately serve any penological objectives), with Van Hofwegen, *supra* note 9, at 689–91 (arguing that penological justifications fail to explain the STEP Act's gang enhancements and that the STEP Act was not designed to punish effectively).

²³¹ See 132 S. Ct. at 2464.

²³² See Van Hofwegen, *supra* note 9, at 689–91.

²³³ See CAL. PENAL CODE § 186.21 (West 2012) (demonstrating the legislative intent behind the STEP Act); Van Hofwegen, *supra* note 9, at 691. The legislative findings in the STEP Act articulate a goal of “eradicating” criminal street gangs. PENAL § 186.21.

²³⁴ See Bentham, *supra* note 97, at 92 (arguing that individuals calculate their actions based on the potential for pleasure or pain). *But see Miller*, 132 U.S. at 2465 (demonstrating that the Court was skeptical of the deterrent value of punishment as applied to juveniles).

²³⁵ See *Miller*, 132 U.S. at 2465 (holding that juveniles are unlikely to be deterred by mandatory sentencing schemes); Van Hofwegen, *supra* note 9, at 686–89 (arguing that instead of leading to a decrease in crime—as would be expected if deterrence worked—the STEP Act has led to an increase in crime).

²³⁶ See Bentham, *supra* note 97, at 92; Robinson & Darley, *supra* note 97, at 93.

model is based on three assumptions.²³⁷ First, the actor must know the punishment for breaking the law.²³⁸ Next, the actor must perceive the cost of breaking the law as greater than the benefit of breaking the law.²³⁹ Finally, the actor must be able to apply this calculation at the time of deciding whether or not to commit the offense.²⁴⁰

The gang enhancements fail to deter juvenile gang crime in part because it is unlikely that juveniles accurately account for the role of sentence enhancements and alter their behavior accordingly.²⁴¹ Even if juveniles are aware of the sentence enhancements, the perceived benefits of being in a gang may cause juveniles to overlook the enhancements' negative ramifications.²⁴² Put simply, juvenile offenders do not think critically about the consequences of their actions.²⁴³

Lastly, the deterrent effect of the enhancements should be calculated in light of the deterrent effect of alternative sentencing schemes.²⁴⁴ Even without the enhancements, juvenile offenders would still face felony sentences.²⁴⁵ Just as the Supreme Court in 2005 in *Roper v. Simmons* found it unlikely that the death penalty would deter juvenile offenders any more than a life sentence would, it is unlikely that the gang enhancements would add any deterrent value

²³⁷ Robinson & Darley, *supra* note 97, at 93; *see infra* notes 237–240 and accompanying text.

²³⁸ Robinson & Darley, *supra* note 97, at 93.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *See Miller*, 132 U.S. at 2465 (holding that juveniles are unlikely to be deterred by mandatory sentencing schemes); Arnett, *supra* note 73, at 350–54 (observing that adolescents inaccurately assess risk and are particularly susceptible to peer influences); Van Hofwegen, *supra* note 9, at 689 (arguing that enhancements may strengthen gangs, rather than deter involvement, by increasing gang solidarity); *see also* Caldwell, *supra* note 81, at 34 (arguing that juveniles are unlikely to be deterred by California's three strikes law).

²⁴² *See* Van Hofwegen, *supra* note 9, at 690 (arguing that lengthy sentences may increase gang participation by encouraging juveniles to turn to prison gangs in order to survive in jail).

²⁴³ *See Miller*, 132 S. Ct. at 2465; Arnett, *supra* note 73, at 350–54 (explaining why adolescents are more likely to engage in "reckless" behavior); *see also* Schwartz, *supra* note 150, at 49 (explaining that the Supreme Court has recognized that neuroscience explains some of the differences between juveniles and adults). The Supreme Court in *Miller* explained that the deterrence model failed to justify mandatory sentences of LWOP for juveniles because juvenile defendants are unlikely to consider their potential punishment. 132 S. Ct. at 2465. Likewise in *Roper*, the Court explained that although it was generally willing to defer to the legislature to decide if a statute effectively deters, it was especially concerned that juveniles were not susceptible to deterrence. 543, U.S. at 571.

²⁴⁴ *See Roper*, 543 U.S. at 572 (comparing the deterrent effect of the challenged sentence to the next most severe sentence).

²⁴⁵ *See* Street Terrorism Enforcement and Prevention (STEP) Act, CAL. PENAL CODE § 186.22 (West 2012) (amended 2013) (demonstrating that the enhancements are added to the underlying penalty); Baker, *supra* note 178, at 105 (explaining that the enhancements are given in addition to the punishment for the underlying felony).

that is not captured by the already lengthy penalties associated with the underlying felonies.²⁴⁶

2. Retribution

Retribution also fails to justify the enhancements.²⁴⁷ The theory of retribution is based on the idea that criminals should be punished because they are blameworthy.²⁴⁸ Therefore, the punishment should be proportional to the “wickedness” of the offense.²⁴⁹ The retributive model fails to justify gang enhancements in the context of juveniles because, not only is it unclear that a felony committed as part of a gang is any more “wicked” or deserving of punishment than one committed outside of the gang context, it is also widely recognized that juveniles are less culpable for their actions.²⁵⁰

The retributive model assumes that the punishment should fit the crime.²⁵¹ By tripling the punishment for some felonies, under a theory of retribution, the STEP Act assumes that juvenile gang members convicted of felonies are far more culpable than unaffiliated offenders.²⁵² This conflicts with the Court’s reasoning in *Miller*, which recognized that juveniles are less blameworthy than adults.²⁵³ Furthermore, the STEP Act targets offenders that commit crimes in association with a gang, a context in which the characteristics that make them less culpable are magnified.²⁵⁴ For this reason, juvenile gang members could even arguably be viewed as less culpable than unassociated juvenile offenders.²⁵⁵ Because of this diminished culpability, retributive theory

²⁴⁶ See *Roper*, 543 U.S. at 572.

²⁴⁷ See Van Hofwegen, *supra* note 9, at 689 (arguing that the increased penalty does not align with the culpability of juvenile gang members).

²⁴⁸ Hart, *supra* note 96, at 236.

²⁴⁹ *Id.*

²⁵⁰ See *Roper*, 543 U.S. at 571 (highlighting that juveniles’ diminished culpability should be accounted for under a theory of retribution); see also Hart, *supra* note 96, at 236 (explaining that punishment should be proportioned to the “wickedness” of the crime).

²⁵¹ See Hart, *supra* note 96, at 236.

²⁵² See Baker, *supra* note 178, at 105 (noting that the enhancements can more than double the maximum punishment for the underlying offense and arguing that the length of the enhancements is out of line with the original legislative intent of the statute); Hart, *supra* note 96, at 236.

²⁵³ See 132 S. Ct. at 2464–65; see also Arnett, *supra* note 73, at 350–54 (observing that adolescents inaccurately assess risk and are particularly susceptible to peer influences); Steinberg & Scott, *supra* note 73, at 5–6 (suggesting that although adolescents do not seriously take into account the negative repercussions of their actions and are susceptible to negative influences due to their developmental immaturity, they rarely develop “entrenched patterns of problem behavior”).

²⁵⁴ See Van Hofwegen, *supra* note 9, at 689–90 (arguing that gang members could be considered less culpable than other offenders); *supra* notes 150–171 and accompanying text.

²⁵⁵ See Van Hofwegen, *supra* note 9, at 689–90. Proponents of the STEP Act might argue that juvenile defendants who are involved in a gang are more culpable than their uninvolved peers because

suggests that these juvenile gang members should not be subject to enhanced sentences by virtue of their gang membership.²⁵⁶

3. Rehabilitation

Rehabilitation also fails to justify the application of the STEP Act's gang enhancements to juvenile offenders.²⁵⁷ Rehabilitation uses punishment as a way to change the criminal's character.²⁵⁸ It serves a utilitarian purpose because it reforms criminals and protects the public against further infractions.²⁵⁹ This theory also posits that punishment can be used to prepare criminals to lead more successful lives once they are released from prison.²⁶⁰ In *Miller*, the Court rejected rehabilitation as a justification for mandatory LWOP sentences because such a long sentence ignores juveniles' unique capacity for change.²⁶¹

The STEP Act's gang enhancements are not as severe as the LWOP sentences challenged in *Miller*, but the harshest enhancement imposes an indeterminate life sentence with a minimum term of fifteen years before the offender is eligible for parole.²⁶² Like LWOP sentences, these gang enhancements foreclose the possibility that juvenile offenders could become functional members of society until after they have reached middle age.²⁶³

The irreversible harm that many juveniles suffer in prison may also effectively deny them the opportunity to lead normal lives even once they are released.²⁶⁴ For instance, they are at a high risk of being sexually or physically

they put themselves in a situation in which they are more likely to commit crimes. See Cheryl L. Maxson et al., *Differences Between Gang and Nongang Homicides*, 23 CRIMINOLOGY 209, 212, 215 (1985) (explaining that gang homicides are more visible and more violent than nongang homicides; gang members are twice as likely to have no prior contact with the homicide victim; and gang members charged with homicide are, on average, five years younger than unaffiliated homicide suspects). This argument, however, fails to account for the social and economic factors that drive gang involvement. See Alleyne & Wood, *supra* note 153, at 424.

²⁵⁶ See *Miller*, 132 S. Ct. at 2465; Hart, *supra* note 96, at 236; Van Hofwegen, *supra* note 9, at 689–90.

²⁵⁷ See *infra* notes 258–268 and accompanying text.

²⁵⁸ See Moore, *supra* note 100, at 98.

²⁵⁹ See *id.*

²⁶⁰ See *id.*

²⁶¹ 132 S. Ct. at 2465.

²⁶² Compare Street Terrorism Enforcement and Prevention (STEP) Act, CAL. PENAL CODE § 186.22(b)(4) (West 2012) (amended 2013) (demonstrating the length of the most severe gang enhancement), with *Miller*, 132 S. Ct. at 2465 (discussing the severity of an LWOP sentence).

²⁶³ Compare PENAL § 186.22(b) (demonstrating the length of the enhancements), with *Miller*, 132 S. Ct. at 2465 (explaining how long sentences—specifically LWOP—might foreclose rehabilitation).

²⁶⁴ See EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON 14 (2008), available at [http://www.eji.org/files/Cruel%20and%](http://www.eji.org/files/Cruel%20and%20)

assaulted by older prisoners and prison staff.²⁶⁵ Long prison sentences also deny juvenile offenders the opportunity to develop the social skills needed to mature.²⁶⁶ Instead, many will begin using drugs or turn to prison gangs as a means of surviving, making it less likely that they will ultimately become functioning members of society.²⁶⁷ The notion that gang enhancements better society by rehabilitating juvenile offenders is dubious in light of the realities of prison life for juvenile offenders.²⁶⁸

4. Incapacitation

Finally, incapacitation does not support applying the STEP Act's gang enhancements to juveniles.²⁶⁹ Incapacitation justifies punishment as a way of restraining criminals who would otherwise be likely to commit crimes.²⁷⁰ Incapacitation assumes that juvenile offenders would otherwise be a danger to

20Unusual%202008_0.pdf, archived at <http://perma.cc/9A5J-KHQD> (demonstrating that juveniles are treated poorly in adult prisons); *infra* notes 265–268 and accompanying text.

²⁶⁵ See EQUAL JUSTICE INITIATIVE, *supra* note 264, at 14 (discussing the prevalence of sexual and physical assault of juveniles in adult prisons); HUMAN RIGHTS WATCH, AGAINST ALL ODDS: PRISON CONDITIONS FOR YOUTH OFFENDERS SERVING LIFE WITHOUT PAROLE IN THE UNITED STATES 9 (2012), available at http://www.hrw.org/sites/default/files/reports/us0112ForUpload_1.pdf, archived at <http://perma.cc/C3AJ-WVLD> (“[D]ue to [juvenile prisoners’] unique vulnerabilities, rape, assault, and assignment to various forms of isolated segregation are common, as are depression and suicidal thought and attempts”). *But see* 28 C.F.R. § 115.14 (2012) (stating that imprisoned juveniles may not be “placed in a housing unit in which [they] will have sight, sound, or physical contact with any adult inmate”). Statistics suggests that up to one-half of the victims of sexual abuse by other inmates in prisons are under the age of twenty-five. HUMAN RIGHTS WATCH, *supra*, at 14. Youth victims rarely report these assaults. *Id.* at 19.

²⁶⁶ See HUMAN RIGHTS WATCH, *supra* note 265, at 10.

²⁶⁷ See *id.* at 12 (suggesting that the harshness of long sentences makes juvenile offenders feel less motivated to develop positive skills); Matthew J. Cannata, Note, *Achieving Peace in the Streets: How Legislative Efforts Fail in Combating Gang Violence in Comparison to Successful Local Community-Based Initiatives*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 243, 252 (2009) (arguing that juveniles released from jail often come out having honed their criminal skills after turning to prison gangs to survive).

²⁶⁸ See HUMAN RIGHTS WATCH, *supra* note 265, at 26 (explaining that most prison programs do not actively foster the skills necessary to prevent recidivism); *supra* notes 264–267 and accompanying text.

²⁶⁹ See *Miller*, 132 S. Ct. 2465 (explaining that long sentences ignore the fact that juveniles have a great capacity to change); *infra* notes 270–276 and accompanying text.

²⁷⁰ See John J. DiIulio, Jr., *Prisons Are a Bargain, By Any Measure*, in CRIMINAL LAW AND ITS PROCESSES, *supra* note 96, at 102, 102 (arguing that keeping convicts in prison is a cost-effective way of preventing them from committing other crimes).

society during the length of their sentence.²⁷¹ Such a judgment is inconsistent with the understanding that juveniles have a strong capacity for change.²⁷²

Incapacitation also does not justify the STEP Act's gang enhancements because for many offenders, gang membership is isolated to their teenage years.²⁷³ As many as two-thirds of juvenile gang members terminate their gang membership within one year of joining.²⁷⁴ In fact, there is evidence that extended sentences serve to prolong gang membership because juveniles turn to gangs while in prison in order to survive.²⁷⁵ Thus, whereas children have an enormous capacity to change, gang enhancements actually impair that ability by imposing lengthy prison sentences.²⁷⁶

In sum, the STEP Act's gang enhancements are contrary to *Miller's* recognition that juveniles have diminished culpability.²⁷⁷ The STEP Act and others like it impose mandatory minimum sentence enhancements on juveniles who commit crimes in a gang context, a setting in which factors that diminish juvenile culpability are magnified.²⁷⁸ Therefore, the Supreme Court should hold that the STEP Act's gang enhancements, when applied to juveniles, violate the Eighth Amendment's requirement that punishment be grounded in penological theory.²⁷⁹

CONCLUSION

In 2012, in *Miller v. Alabama*, the Supreme Court recognized that juveniles are categorically less culpable than adult offenders. In light of these dif-

²⁷¹ See *Miller*, 132 S. Ct. 2465; *Graham*, 560 U.S. at 72–73; DiIulio, *supra* note 270, at 102.

²⁷² See *Miller*, 132 S. Ct. at 2465 (explaining that long sentences ignore the fact that juveniles have a great capacity to change). See generally Jeffrey D. Colman, *From Death Row to Rehabilitation and Redemption*, LITIG., Summer 2013 (telling the story of a man who was on death row after being convicted of a murder he committed as a juvenile but was able to rebuild his life after spending twenty-seven years in prison).

²⁷³ See *Miller*, 132 S. Ct. 2465; see also Van Hofwegen, *supra* note 9, at 694 (arguing that the STEP Act's gang enhancements cause increased gang activity by giving the defendants a longer sentence in prison, where they are likely to become involved with a prison gang in order to survive).

²⁷⁴ See Esbensen, *supra* note 157, at 4.

²⁷⁵ See HUMAN RIGHTS WATCH, *supra* note 265, at 12; Van Hofwegen, *supra* note 9, at 694.

²⁷⁶ See *Miller*, 132 S. Ct. at 2464; HUMAN RIGHTS WATCH, *supra* note 265, at 12; Van Hofwegen, *supra* note 9, at 694.

²⁷⁷ See *Miller*, 132 S. Ct. at 2464; *supra* notes 226–276 and accompanying text.

²⁷⁸ See Street Terrorism Enforcement and Prevention (STEP) Act, CAL. PENAL CODE § 186.22(b) (West 2012) (amended 2013); *supra* notes 150–171 and accompanying text (explaining how concerns regarding juveniles' diminished culpability are magnified in the gang setting).

²⁷⁹ See *Miller*, 132 S. Ct. at 2465, 2471 (discussing the legal significance of the factors that make juveniles different than adults and holding that penological objectives do not justify sentencing juveniles to mandatory LWOP sentences); *supra* notes 233–279 and accompanying text (arguing that no penological objectives justify the STEP Act's gang enhancements when applied to juveniles).

ferences, the Court chose to adopt a categorical approach when reviewing Eighth Amendment challenges to life-without-parole (LWOP) sentences for juvenile offenders. This approach marked a departure from the Court's former reluctance to critically review term-of-years sentences. The Court chose to expand this approach to review term-of-years sentences applied to juveniles because it recognized that developmental differences make juveniles categorically less culpable than adults. The Court's new approach calls into question the constitutionality of California's STEP Act—and others like it—that mandate enhanced sentences for juveniles who commit felonies commissioned in association with a criminal street gang. The *Miller* Court's categorical analysis implicates the STEP Act because the gang setting magnifies the developmental differences that the Court has held make juveniles less culpable than adults. Under the *Miller* analysis, the Court would likely conclude that subjecting juveniles to mandatory gang enhancements serves no penological objectives. Therefore, the Court should hold that the STEP Act's gang enhancements are unconstitutional when applied to children. It is time for the Court's Eighth Amendment analysis to mature.

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