Answering the Unanswered Questions: How States Can Comport with *Miller v. Alabama*

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In *Miller v. Alabama*, the United States Supreme Court held that the Eighth Amendment prohibits a sentencing scheme that requires life in prison without the possibility of parole for juvenile homicide offenders. Although numerous articles have been written about this landmark decision, a majority of these were written prior to the Supreme Court's decision. A few more recent articles, post-*Miller*, have discussed *Miller*'s lack of reliance on international law,[1] its influence on Eighth Amendment Jurisprudence,[2] the unconstitutionality of juvenile life without parole ("LWOP") generally,[3] and the differences between juveniles and adults and homicide and non-homicide[4]. This Note attempts to break new ground by proposing recommendations on how states may implement the decision. Because the Supreme Court left many questions unanswered in the *Miller* decision, it is of upmost importance that states take the time to decode the decision. This has been briefly addressed in Craig S. Lerner's article entitled *Sentenced to Confusion: Miller v. Alabama and the Coming Wave of Eighth Amendment Cases*[5], but Lerner focused almost exclusively on the decision and only briefly touched upon state approaches in his conclusion. Lerner also did not make any recommendations on how states should implement *Miller*. While in the final stretch of drafting this Note, in early 2013, Brian Fuller released an article for the Wyoming Law Review entitled *Criminal Law-A Small Step Forward in Juvenile Sentencing, but is it Enough? The United States Supreme Court Ends Mandatory Life*

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[1] Jonathan Levy, *The Case of the Missing Argument: The Mysterious Disappearance of International Law from Juvenile Sentencing in* Miller v. Alabama*, 132 S. Ct. 2455 (2012)*, 36 HARV. J.L. & PUB. POL'Y 355 (2013).

[2] Douglas A. Berman, Graham *and* Miller *and the Eighth Amendment's Uncertain Future*, 27 CRIM. JUST. 19, 19–24 (2013).

[3] Aryn Seiler, *Buried Alive: The Constitutional Question of Life Without Parole for Juvenile Offenders Convicted of Homicide*, 17 LEWIS & CLARK L. REV. 293, 295 (2013).

[4] Beth A. Colgan, *Constitutional Line Drawing at the Intersection of Childhood and Crime*, 9 STAN. J. C.R. & C.L. 79, 81 (2013).

[5] *See generally* Craig S. Lerner, *Sentenced to Confusion:* Miller v. Alabama *and the Coming Wave of Eighth Amendment Cases*, 20 GEO. MASON L. REV. 25 (2012).

Without Parole Sentences; Miller v. Alabama 132 S. Ct. 2455.[6] Although Fuller's article does seek to propose two approaches that states can take to comply with *Miller*, he does not delve too deeply into this topic. Rather, he approaches this issue in regards to Wyoming law specifically. In addition, his article touches mainly on the issue of whether the Court will or should consider a categorical ban in the future. Because of his in depth analysis, there is only a brief discussion of this in Part V of this Note.

I. INTRODUCTION

Research shows that the differences between juveniles and adults go far beyond just age.[7] Juveniles lack developmental maturity, which results in decision-making deficiencies, increased vulnerability, and the possibility of character change.[8] The Supreme Court has repeatedly recognized this deficiency and, in their most recent decision in *Miller v. Alabama*, attempts to put an end to ignorance of such scientific research. Unfortunately, their decision leaves open more questions than it answers.[9]

In 1988, a plurality of the Supreme Court in *Thompson v. Oklahoma* recognized that "a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty."[10] In *Thompson*, the Supreme Court held that the Eighth and Fourteenth Amendments prohibited execution of a defendant convicted of first-degree murder for an offense committed before the age of sixteen.[11] The Court went further, stating that "[t]he reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult."[12] This was the first true step towards the Court's recognition and acceptance of treating juveniles differently than adults.

In 2005, a juvenile's lack of moral culpability was first recognized by a Supreme Court majority. In *Roper v. Simmons*, the Court held that the

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[6] Brian J. Fuller, Note, *Criminal Law-A Small Step Forward in Juvenile Sentencing, But Is It Enough? The United States Supreme Court Ends Mandatory Juvenile Life Without Parole Sentences;* Miller v. Alabama*, 132 S. Ct. 2455 (2012),* 13 WYO. L. REV. 377, 395 (2013).

[7] Colgan, *supra* note 4, at 82–83 ("Advances in brain imaging technology have allowed scientists to reveal that the human brain, and the prefrontal cortex in particular, "continues to mature, both structurally and functionally, throughout adolescence in regions of the brain responsible for controlling thoughts, actions, and emotions.").

[8] Laurence Steinberg & Elizabeth S. Scott, *Less Guilty By Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Death Penalty,* 58 AM. PSYCHOLOGIST 1009, 1011–14 (2003).

[9] Berman, *supra* note 2, at 19 ("the full meaning and future development of the Supreme Court's Eighth Amendment work in *Graham* and *Miller* are anything but clear"); Lerner, *supra* note 5, at 27 ("The opinion is riddled with uncertainties that will spawn more litigation.").

[10] Thompson v. Oklahoma, 487 U.S. 815, 823 (1988).

[11] *Id.* at 838.

[12] *Id.* at 835.

Eighth and Fourteenth Amendments forbid the imposition of the death penalty on juvenile offenders who were under the age of eighteen when they committed the offense.[13] Most significantly, in *Roper*, the Court recognized not only the fact that juveniles were distinct from adults, but also acknowledged that they are treated differently than adults because of these inherent dissimilarities, stating "[i]n recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under eighteen years of age from voting, serving on juries, or marrying without parental consent."[14]

Then in 2010, in *Graham v. Florida*, the Supreme Court extended these differences beyond the context of capital punishment.[15] In *Graham*, the Court held that a sentence of life imprisonment without the possibility of parole for a juvenile convicted of a non-homicide offense was unconstitutional. This past summer, the Court nearly completed what it began in *Thompson* and held that mandatory life without parole for juveniles is unconstitutional under the Eighth Amendment, irrelevant as to the offense.[16]

This Note will discuss the court's recent decision in *Miller v. Alabama* including its possible implications. Part II will discuss the majority's opinion in *Miller v. Alabama*. Part III will discuss how various states, specifically Pennsylvania, Iowa, North Carolina, Michigan and Colorado, have begun implementing the court's decision into their existing law and how they are dealing with appeals. Looking at how various jurisdictions are implementing this decision shows how unhelpful the Court's decision in *Miller* has been in that it leaves open numerous questions. Part IV will attempt to close the various gaps present in the Court's decision and recommend four actions that a state should take in order to comply with *Miller*. These include: (1) applying the Supreme Court's decision retroactively in all circumstances; (2) providing a meaningful opportunity for release to juveniles; (3) improving and strengthening parole systems; and (4) providing a hearing where a juvenile's age and background is meaningfully taken into consideration. Lastly, Part V will discuss the possibility of the Supreme Court ever taking up the issue of whether LWOP, when imposed on a juvenile, is categorically unconstitutional.

II. YOUTH MUST BE CONSIDERED

Miller v. Alabama was a consolidation of two cases; one case from Arkansas and the other from Alabama. In the Arkansas case, petitioner

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[13] Roper v. Simmons, 543 U.S. 551, 578 (2005).
[14] *Id.* at 569.
[15] Graham v. Florida, 130 S. Ct. 2011, 2034 (2010).
[16] Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012).

Kuntrell Jackson had been convicted of felony murder and aggravated robbery.[17] These offenses occurred when Kuntrell was fourteen years old. Although Kuntrell would typically be tried in juvenile court because of his age, Arkansas law permits prosecutors to charge fourteen-year-olds as adults if they are charged with certain serious offenses, including the two charges for which Kuntrell was charged.[18] After conviction, the Court, "noting that in view of the verdict, there's only one possible punishment," sentenced Kuntrell to life without the possibility of parole.[19] Likewise, in Alabama, Evan Miller was convicted of murder in the course of arson at the age of fourteen. Miller was also tried in adult court after a prosecutor, acting under Alabama law, made the decision to transfer Miller to adult court.[20] Miller was sentenced to life without the possibility of parole, pursuant to an Alabama law, which, like the Arkansas law, required the punishment under a mandatory scheme.[21]

In a 5-4 decision written by Justice Kagan, the Supreme Court reversed both petitioners' sentences and held that imposing a mandatory life sentence without the possibility of parole on a juvenile violated the Eighth Amendment's prohibition of cruel and unusual punishment.[22]

In reaching their decision, the Court looked to the research that was used in *Thompson, Roper,* and *Graham*, which established the proposition that "children are constitutionally different than adults."[23] In support of this proposition, the Court cited numerous distinguishing characteristics of juveniles, including a diminished culpability, greater potential for reform, lack of maturity, an underdeveloped sense of responsibility, greater vulnerability to negative influences and outside pressures, and an underdeveloped character, making them "less fixed."[24]

The Court also examined the sentence's effect on the various penological goals,[25] concluding that penological goals are not properly served by imposing a mandatory sentence of life without parole.[26] First,

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[17] *Id.* at 2461.

[18] *Id.;* ARK. CODE ANN. § 9-27-318 (1987).

[19] *Miller*, 132 S. Ct. at 2461. Even though the Arkansas law allowed the court to impose the death penalty upon such a conviction, due to the Supreme Court's decision in *Thompson v. Oklahoma* the death penalty was off the table. Thompson v. Oklahoma, 487 U.S. 815, 838 (1988).

[20] *Miller*, 132 S. Ct. at 2462.

[21] *Id.* at 2463.

[22] *Id.* at 2464.

[23] *Id.*

[24] *Id.*

[25] When courts approach Eighth Amendment categorical challenges, they must first determine whether there is a national consensus against a certain sentencing practice. Then the Court must consider three factors, including "the culpability of the offenders, the severity of the punishment in question, and whether the challenged sentencing practice serves legitimate penological goals." Kathryn McEvilly, *Crying Mercy: Life Without Parole for Fourteen-Year-Old Offenders in* Miller v. Alabama *and* Jackson v. Hobbs, 7 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 231, 234–35 (2012).

[26] *See Miller*, 132 S. Ct. at 2465–66.

retribution is not furthered "[b]ecause '[t]he heart of the retribution rationale' relates to an offender's blameworthiness, the case for retribution is not as strong with a minor as with an adult."[27] Second, deterrence is not served because "the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishments."[28] Third, incapacitation is not served as "[d]eciding that a juvenile offender forever will be a danger to society would require making a judgment that he is incorrigible but incorrigibility is inconsistent with youth."[29] Lastly, rehabilitation is not furthered because "[l]ife without parole 'forswears altogether the rehabilitative ideal.'"[30]

In reaching their decision in *Miller*, the Supreme Court also reexamined their long line of precedent, beginning with *Woodson v. North Carolina,* recognizing the requirement of individualized sentencing. In *Woodson*, the court struck down a North Carolina sentencing scheme that permitted mandatory death sentences following a conviction for first-degree murder.[31] The Court held that the Eighth Amendment required individualized sentencing when imposing the death penalty.[32] A mandatory sentence "failed to curb arbitrary and wanton jury discretion with objective standards to guide, regularize and make rationally reviewable the process for imposing a sentence of death" and was overall inconsistent with the "fundamental respect for humanity underlying the Eighth Amendment."[33] In *Johnson v. Texas*, the Court held that a sentence must have the ability to consider the mitigating qualities of youth as youth's "signature qualities are all transient."[34] Similarly, in *Edding v. Oklahoma,* the Court recognized that a juvenile's age and background must be considered, stating that "youth is more than a chronological fact." [35] The necessity of individual determinations in the capital punishment context has been consistently affirmed, as the court in *Miller* recognized.[36] The *Miller* court also acknowledged the importance of individualized sentencing in the context of LWOP for a juvenile, stating that "imposition

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[27] *Id.* at 2465.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] Woodson v. North Carolina, 428 U.S. 280, 305 (1976).
[32] *Id.* at 304.
[33] *Id.*
[34] Johnson v. Texas, 509 U.S. 350, 368 (1993).
[35] Eddings v. Oklahoma, 455 U.S. 104, 115 (1982).
[36] Miller v. Alabama, 132 S. Ct. 2455, 2467 (2012) ("Subsequent decisions have elaborated on the requirement that capital defendants have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses.").

of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."[37] The application of individualized sentencing in the context of LWOP is also appropriate as both the death penalty and LWOP share similar traits that make them almost equally severe sanctions,[38] and this similarity was in fact recognized by the Supreme Court in *Graham*.[39]

As it stands now, *Miller v. Alabama* has left states in disarray as to how to conform to the ruling. When *Miller* was decided, about 2,000 juveniles were serving LWOP sentences pursuant to a mandatory sentencing scheme and numerous others were awaiting sentencing.[40] Some states have just begun to address *Miller*, some states have not yet started, and others have already passed new laws. In total, there are twenty-nine states that will be faced with amending their existing laws to conform to the Supreme Court's decision.[41]

It is critical that state implementation be immediate, as until the law has settled, defense attorneys will be left unsure as to how to counsel their clients who are under the age of eighteen and are facing homicide charges.

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[37] *Id.* at 2466.

[38] Ashley Nellis, *Tinkering with Life: A Look at the Inappropriateness of Life Without Parole As an Alternative to the Death Penalty*, 67 U. MIAMI L. REV. 439, 457 (2013):

> Life without parole is effectively a death sentence; to consider it as anything less severe is a mistake. Even though one's death may not occur for a few decades or more does not mean that the government has not decided how and where the individual will die. When looked at from this view, LWOP is not so different from the death penalty. Moreover, in both an execution and a life sentence without the possibility of parole, there is no hope for redemption or reform, despite the reality that many people turn away from their criminal pasts and go on to lead law-abiding lives where they could contribute in a positive way to society. Neither of these two sentences allow for this possibility, however. Both the death penalty and LWOP are terminal sentences and guarantee that the prisoner will die in prison.

[39] Graham v. Florida, 130 S. Ct. 2011, 2027 (2010) (citations omitted):

> Life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence. As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence "means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.

[40] *Miller*, 132 S. Ct. at 2477 (Scalia, J., dissenting) ("The parties agree that nearly 2,500 prisoners are presently serving life sentences without the possibility of parole for murders they committed before the age of 18. The Court accepts that over 2,000 of those prisoners received that sentence because it was mandated by a legislature.") (citation omitted).

[41] *Pennsylvania's Legislative Response to the June 25, 2012 U.S. Supreme Court Decisions in* Miller v. Alabama *and* Jackson v. Arkansas *Before the P.A. Senate Judiciary Comm.,* Public Hearing, 1 (2012) (statement of Atty. Ernest D. Preate, Jr.), *available at* http://perma.cc/0jULYmwVeaN.

With the law in limbo, juveniles facing trial for homicide charges are left waiting, which causes problems with these juveniles' right to a speedy trial.[42] Moreover, it is critical that the law be settled so that prisoners serving such sentences and their families may accept their fate or challenge it. As Attorney Tom Farrell, who represents inmates from Allegheny County challenging their life sentences, states: "[i]f you're in prison for life and you were sentenced as a juvenile, it gives you hope…[w]hether it's false hope, we don't know."[43]

III. STATE APPROACHES TO *MILLER V. ALABAMA*

With the recent decision of *Miller v. Alabama*, individuals incarcerated as juveniles pursuant to mandatory sentencing schemes have already begun to file appeals and habeas petitions, and states are faced with the question of how to best implement the Supreme Court's decision into both their existing juvenile code and into their courtrooms. As of the opinion, twenty-nine jurisdictions mandated LWOP for juveniles convicted of homicide.[44] Thus far, jurisdictions have taken a variety of different approaches to conform their conflicting sentencing schemes to the Supreme Court's decision. The variety of these approaches reflects the holes left open by the Supreme Court's majority opinion. Thus far, Pennsylvania, Iowa, North Carolina, Michigan, and Colorado have taken the lead on addressing *Miller*.

A. Pennsylvania

Pennsylvania has about 480 juvenile homicide offenders currently serving life without parole sentences.[45] Under Pennsylvania law, these inmates were required to file for post-conviction relief within sixty days of the Supreme Court's decision.[46] Thus, the state was forced to make quick decisions about how the law and the courts would deal with the implications of *Miller*.

In October of 2012, the Pennsylvania General Assembly passed Senate Bill 850, which ended mandatory LWOP sentences for juveniles convicted of first- or second-degree murder. Under S.B. 850, a juvenile above the age of fifteen who is convicted of first-degree murder can now be sentenced to either life without parole, or a term of imprisonment that is at least thirty-five years, with juveniles becoming parole eligible after thirty-

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[42] *Id.*

[43] Moriah Balingit, *Other States Watch How Pennsylvania Handles Life Terms for Juveniles,* PITTSBURGH POST-GAZETTE (Sept. 23, 2012), http://perma.cc/07RMVqwV8m5.

[44] *Senate Judiciary Comm., supra* note 41.

[45] *Id.* at 3.

[46] 42 PA. CONS. STAT. ANN. § 9545(b) (West 2007).

five years.[47] S.B. 850 also sets out the procedures that the court must follow prior to imposing a life without parole sentence on a juvenile. It states:

> In determining whether to impose a sentence of life without parole under subsection (a), the court shall consider and make findings on the record regarding the following: (1) The impact of the offense on each victim, including oral and written victim impact statements made or submitted by family members of the victim detail[ing] the physical, psychological and economic effects of the crime on the victim and the victim's family . . . ; (2) The impact of the offense on the community; (3) The threat to the safety of the public or any individual posed by the defendant; (4) The nature and circumstances of the offense committed by the defendant; (5) The degree of the defendant's culpability; (6) Guidelines for sentencing and resenting adopted by the Pennsylvania Commission on Sentencing; (7) Age-related characteristics of the defendant including: (i) Age; (ii) Mental capacity; (iii) Maturity; (iv) The degree of criminal sophistication exhibited by the defendant; (v) The nature and extend of any prior delinquent or criminal history, including the success or failure of any previous attempts by the court to rehabilitate the defendant; (vi) Probation or institutional reports; (vii) Other relevant factors.[48]

This Amendment has received criticism from the Pennsylvania Chapter of the American Civil Liberties Union (ACLU) for failing "to strike a balance between holding children accountable for terrible acts and recognizing the reality that children have the potential for growth and redemption."[49] The Pennsylvania Chapter indicates that the Supreme Court "suggested" in their *Miller* opinion that "LWOP for children must be 'rare' and 'uncommon.'"[50]

The legislature, in this Amendment, does not address whether juveniles already serving LWOP sentences and whose convictions are final will be

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[47] 18 PA. CONS. STAT. ANN. § 1102.1 (West 2007).

[48] *Id.* § 1102.1(d).

[49] Memorandum from Andy Hoover, Legislative Director, ACLU of Pennsylvania to the Pa. House Judiciary Comm. (Sept. 23, 2012) (on file with the Pa. ACLU), *available at* http://www.aclupa.org/downloads/memoSB850HJudSept12.pdf.

[50] *Id.*

able to seek relief through collateral review.[51] However, the Pennsylvania Supreme Court recently decided in the case of *Commonwealth v. Cunningham* that, in Pennsylvania, the *Miller* decision should not be applied retroactively to "those whose judgments of sentence were final as of the time of *Miller*'s announcement."[52] The court found that the *Miller* decision did not meet the requirements for either of the two exceptions to the rule of non-retroactivity set out in *Teague v. Lane*.[53]

As will be discussed in greater length in Part IV of this Note, Pennsylvania's approach seems to be a great model of proper state implementation. However, as will be argued in Part IV(A) of this Note, states should decline to follow *Cunningham* and find that *Miller v. Alabama* should be applied retroactively.

B. Iowa

In Iowa, Governor Terry Branstad took a direct, but more controversial, approach. Just one week after the Supreme Court handed down their decision in *Miller v. Alabama,* Governor Branstad commuted all thirty-eight affected juvenile offenders' sentences to life with parole after sixty years.[54] Although attempting to conform with the *Miller* decision, the Governor misses by a longshot.

States, judges, and advocates alike have heavily criticized this decision. Not long after Governor Branstad commuted the sentences, an Iowa judge sharply criticized the governor for not providing juvenile offenders with any meaningful opportunity to obtain release. The judge, Hon. Timothy O'Grady, stated that "[a] blanket sentence for 38 juvenile offenders that provides no eligibility for parole for sixty years is not the sort of individualized sentencing envisioned under Miller v. Alabama."[55] The Governor's approach has also been criticized as being open to another constitutional challenge. Jody Kent Lavy, the director of the Campaign for the Fair Sentencing of Youth, states that "these quick fixes (like the Branstad commutation) that are politically motivated are likely to get challenged in court and are what got us here to begin with."[56] From the beginning, Iowa's approach was open to constitutional challenge in that,

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[51] For a discussion of retroactivity, see *infra* Part IV(A).

[52] Commonwealth v. Cunningham, No. 38 EAP 2012, 2013 Pa. LEXIS 2546 (Pa. Oct. 30, 2013).

[53] Teague v. Lane, 489 U.S. 288 (1989).

[54] Steve Eder, *Iowa Governor Commutes Sentences of Teen Killers*, WALL ST. J. (July 16, 2012, 3:56PM), http://perma.cc/0shv6Qwzr9z.

[55] Maggie Mulgihill, *Juvenile Life Without Parole: Massachusetts Moves Cautiously Toward Reform*, CTR. FOR PUB. INTEGRITY, http://perma.cc/0sk3WcZzUaV (last updated Nov. 29, 2012, 2:44PM).

[56] Maggie Clark, *States Reconsider Juvenile Life Sentences*, STATELINE (July 27, 2012), http://perma.cc/0MPZPueGWzf.

rather than sentencing juveniles to life without parole, the state is sentencing juveniles to *de facto* life without parole, without consideration of mitigating factors such as age. Laws from other states that create a similar situation have been struck down in the past as not conforming to the Supreme Court's decision in *Graham v. Florida*. For example, the California Supreme Court in *People v. Caballero* held that a sentence of 110 years was effectively a *de facto* life without parole sentence and thus when given to a juvenile who committed a non-homicide crime violated the Supreme Court's decision in *Graham v. Florida*, where they held that life without parole for juveniles convicted of non-homicide offenses violated the Eighth Amendment.[57] Governor Branstad created a similar situation where juveniles will be serving sixty-year sentences past their life expectancy, and way past their ability to have a meaningful life outside of the prison walls. An interesting analogy of this situation is portrayed in Craig Lerner's article entitled, *Sentenced to Confusion:* Miller v. Alabama *and the Coming Wave of Eighth Amendment Cases*:

> Consider two statutes and two young offenders, both dispatched to prison for essentially the entirety of their lives by judges who had no discretion in the matter:
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> - 18 U.S.C. § 924(c)/Wayne Angelos, age twenty-four. A first-time offender, Angelos was convicted of three small drug deals while possessing a firearm. Convicted of three 924(c) violations, the mandatory statutory penalty was fifty-five years in prison, which means he will not be eligible for release until he turns seventy years old.
> - Ark. Code Ann. § 5-10-101/Jason Baldwin, age sixteen. Along with two other young men, Baldwin abducted, sexually assaulted, castrated, and murdered three eight-year-old boys. Convicted of capital murder, under Ark. Code Ann. § 5-10-101, he was mandatorily sentenced to LWOP.
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> …So the puzzle is why Angelos's mandatory sentence, which effectively denies him a "meaningful opportunity to obtain release" until long after he is a member of AARP, is

[57] Matt Mangino, *The Cautionary Instruction: States scramble to Deal With Supreme Court Ruling on Sentencing of Juvenile Killers*, CMTY. VOICES (Nov. 30, 2012, 6:00 AM), http://perma.cc/0WuiMDT5etG.

> constitutional, but Baldwin's (and Miller's and Jackson's) are not.[58]

This makes the Iowa approach to *Miller* a good example of how states should *not* comport with the decision. The Governor's decision, however, was praised as protecting victim's rights, complying with the Supreme Court ruling, saving taxpayers money by preventing numerous appeals, and protecting public safety.[59]

In the summer of 2013, the Supreme Court of Iowa put an end to the controversy and handed down its opinion in *State v. Ragland*.[60] In this case, the court denounced the Governor's commutation finding that it amounted to nothing more than another mandatory sentence.[61]

However, the court went further, stating that the sixty-year sentence was considered a "practical equivalent of life-without-parole sentences" and thus was subject to review under *Miller*.[62] Ragland argued that he would "not be eligible for parole until he is seventy-eight years old [and] [u]nder standard mortality tables, his life expectancy is 78.6 years." Thus, Ragland argued, "his sentence [was] the functional equivalent of life without parole."[63] The State, in response, argued that "the dictates of *Miller* [did] not apply because Ragland has a chance of becoming eligible for parole during his natural lifetime under the commuted sentence.[64] Relying on *Graham*, the Court held:

> [T]he rationale of *Miller*, as well as *Graham*, reveals that the unconstitutional imposition of a mandatory life-without-parole sentence is not fixed by substituting it with a sentence with parole that is the practical equivalent of a life sentence without parole. Oftentimes, it is important that the spirit of the law not be lost in the application of the

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[58] Lerner, *supra* note 5, at 39–40.

[59] *Implementing* Miller *Supreme Court Ruling*, NAT'L ORG. OF VICTIMS OF JUVENILE LIFERS, http://perma.cc/0y6pZBk95vo (last visited Mar. 12, 2013).

[60] State v. Ragland, 836 N.W.2d 107 (Iowa 2013).

[61] *Id.* at 119 (citation omitted):

> The commutation by the Governor of Ragland's sentence to a term of years did not affect the mandatory nature of the sentence or cure the absence of a process of individualized sentencing considerations mandated under Miller. Miller protects youth at the time of sentencing. Even with the commutation in 2012 by the Governor, Ragland has been deprived of the constitutional mandate that youths be sentenced pursuant to the Miller factors.

[62] *Id.*

[63] *Id.*

[64] *Id.* at 119–20.

> law. This is one such time. The spirit of the constitutional mandates of *Miller* and *Graham* instruct that much more is at stake in the sentencing of juveniles than merely making sure that parole is possible.[65]

Subsequently, the Supreme Court of Iowa relied on this *de facto* life sentence finding to strike down sentences in two other juvenile cases. In *State v. Null*, the court struck down a 52.5-year minimum prison term when the sentence was a result of aggregate sentences and the juvenile was not afforded an individualized sentencing hearing to determine the issue of parole eligibility.[66] In *State v. Pearson*, the court struck down seventeen-year-old Desirae's sentence of fifty years, with parole eligibility at age thirty-five.[67] The court held that she was entitled to a hearing where the court considered her rehabilitation potential and lessened culpability.[68]

C. North Carolina

In North Carolina, the legislature has passed Senate Bill 635, which replaces mandatory life sentences for juveniles with "a minimum of 25 years imprisonment prior to becoming eligible for parole."[69] However, life without the possibility of parole is not foreclosed, as, under this law, it is an option and can be imposed after a special hearing in which the court considers:

> (1) Age at the time of the offense.
> (2) Immaturity.
> (3) Ability to appreciate the risks and consequences of the conduct.
> (4) Intellectual capacity.
> (5) Prior record.
> (6) Mental health.
> (7) Familial or peer pressure exerted upon the defendant.
> (8) Likelihood that the defendant would benefit from rehabilitation in confinement.
> (9) Any other mitigating factor or circumstance.[70]

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[65] *Id.* at 121.
[66] State v. Null, 836 N.W.2d 41 (Iowa 2013).
[67] State v. Pearson, 836 N.W.2d 88 (Iowa 2013).
[68] *Id.*
[69] N.C. GEN. STAT. § 15A-1340.19A (2012).
[70] *Id.* § 15A-1340.19B.

Though the sentencing scheme has been quickly addressed, it remains unknown whether North Carolina will apply the *Miller* ruling retroactively to cases on collateral review, allowing the many "lifers" already in their prison system to appeal their mandatory sentences. Senate Bill 635 makes the new sentencing hearing procedures, effective July 12, 2012, applicable to any sentencing hearings held on or after that date, but includes "procedures for addressing any post-conviction motions seeking relief" under the statute."[71] "Such motions are assigned in a manner consistent with the amendments to the Criminal Procedure Act found in Session Law 2012-168. The judge who presided at trial will consider the motion unless unavailable. If relief is awarded, resentencing is to be conducted in accordance with [the statute]."[72] However, this does not automatically mean that the statute *will* apply retroactively. In clarifying the statute's reference to retroactivity, the North Carolina Sentencing and Policy Advisory Commission stated:

> Senate Bill 635 thus accommodates but does not require the retroactive application of Miller v. Alabama to juvenile offenders who were previously sentenced to LWOP in cases that were final as of June 25, 2012. As a general matter, the retroactivity of a new rule of federal constitutional jurisprudence is determined by the courts based on analytical framework in Teague v. Lane, 489 U.S. 288 (1989) and State v. Zuniga, 336 N.C. 508, 513 (1994).[73]

In a North Carolina Sentencing and Policy Advisory Commission meeting on the new bill, the Commission was asked by the Special Sentencing Issues Subcommittee to "request a memorandum opinion from the Attorney General's Office on the retroactive effect, if any, of the *Miller v. Alabama* decision."[74] In that same meeting, Professor James E. Coleman, Jr., from Duke University School of Law, recommended that the Commission make S.B. 635 apply retroactively, noting "that the Supreme Court provided retroactive relief to the petitioner in Miller's companion

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[71] N.C. SENTENCING & POLICY ADVISORY COMM'N, *Report on Sentencing of Minors Convicted of First Degree Murder Pursuant to Session Law 2012-148 Section 2* (2013), *available at* http://perma.cc/XE4N-42JB.

[72] *Id.*

[73] *Id.*

[74] *North Carolina Sentencing and Policy Advisory Commission Meeting Minutes*, Dec. 14, 2012, *available at* http://perma.cc/U5L5-CP5B.

case, *Jackson v. Hobbs*."[75] However, the retroactivity of *Miller* is still undecided in North Carolina.

D. Michigan

In November of 2012, a Michigan appellate court made clear that, at least in Michigan, the Supreme Court's ruling would not apply retroactively to offenders who have already exhausted the direct appeals process.[76] The court concluded that the decision was "procedural and not substantive in nature and does not comprise a watershed ruling."[77] The court did make clear, however, that *Miller* is applicable to those cases currently pending or on direct review.

In addition to finding that the ruling did not apply retroactively, the court addressed the constitutionality of the current sentencing scheme in Michigan and found that M.C.L. § 791.234(6)(a),[78] the statute providing for the current mandatory sentencing scheme, was unconstitutional as currently written and applied to juvenile homicide offenders.[79] The court urged the legislature to act, but in an attempt to guide lower courts, the court also clarified the procedures that Michigan courts should be implementing during direct appeals in regards to sentencing juvenile homicide offenders, stating:

> [T]he sentencing court must, at the time of sentencing, evaluate and review those characteristics of youth and the circumstances of the offense as delineated in *Miller* and this opinion in determining whether following the imposition of a life sentence the juvenile is to be deemed eligible or not for parole.[80]

An interesting discrepancy was also discussed and addressed by the Michigan Appellate Court in *People v. Carp*. The Supreme Court's decision in *Miller* defines a juvenile as including "those under the age of eighteen at the time of their crimes."[81] However, in Michigan, M.C.R.

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[75] *Id.*

[76] Jonathon Oosting, *Appeals Court: No Resentencing for Michigan Juvenile Lifers, But State Law Is 'Unconstitutional,'* MLIVE, http://perma.cc/0uQJeYFZ2fb (last updated Nov. 16, 2012, 2:45 PM).

[77] People v. Carp, No. 307758, 2012 Mich. App. LEXIS 2270, at *5 HN18 (Mich. Ct. App. Nov. 15, 2012).

[78] MICH. COMP. LAWS § 791.234(6)(a).

[79] *Carp*, at *5 HN19.

[80] *Id.*

[81] Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012).

6.903(E) defines a juvenile as anyone below the age of seventeen.[82] In their decision, the Michigan Appellate Court dealt with this discrepancy by stating that "to adhere to *Miller*, sentencing of a juvenile requires that those individuals between 17 and 18 years of age also be subject to the strictures as outlined herein."[83]

Carp's significance is called into question by the Federal District Court for the Eastern District of Michigan's decision in *Hill v. Snyder*. Although originally filed by the Michigan Chapter of the American Civil Liberties Union in 2010, the case has turned into a fight to supersede *Carp*. In *Hill*, the plaintiffs challenged the constitutionality of M.C.L. § 791.234(6)(a), which prohibited the Michigan Parole Board from considering juveniles sentenced to life in prison for first-degree murder for parole. It effectively created life without parole for those who committed their crimes as juveniles.[84] While the decision was pending, *Miller* was decided by the Supreme Court, and subsequently the plaintiffs in *Hill* argued that it should apply to the current case.[85] The Court found that *Miller* did apply retroactively to the current case, which was a section 1983 challenge to a state statute, but did not rule on whether the decision should be applied retroactively to cases on collateral review, as the case was not before the court on collateral review.[86] However, in footnote 2 of the decision, the Court stated that *Miller v. Alabama* should be retroactive on collateral review.[87] In addition, although the Court could not provide a new hearing as relief to the plaintiffs, the Court held that the plaintiffs should be granted parole hearings.[88] In a recent clarifying order, the Court further held that not only should the plaintiffs receive parole hearings, but "every person convicted of first-degree murder in the State of Michigan as a juvenile and who was sentenced to life in prison shall be eligible for parole."[89] Thus, although Michigan might be constrained by *Carp* as far as allowing individuals to collaterally challenge their sentences in light of *Miller*, *Hill* makes them at least entitled to a parole hearing.

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[82] MICH. COMP. LAWS ANN. Michigan Court Rules of 1985 6.903(E) ("'Juvenile" means a person 14 years of age or older, who is subject to the jurisdiction of the court for having allegedly committed a specified juvenile violation on or after the person's 14th birthday and before the person's 17th birthday.').

[83] People v. Carp, No. 307758, 2012 Mich. App. LEXIS 2270, at *5 HN17 (Mich. Ct. App. Nov. 15, 2012).

[84] Hill v. Snyder, No. 10-14568, 2013 WL 364198 *2 n.2 (E.D. Mich. Jan. 30, 2013).

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] Hill v. Snyder, No. 10-14568, 2013 WL 4826482, at *1 (E.D. Mich. Aug. 12, 2013).

E. Colorado

Colorado courts have taken a more modest approach in their reaction to *Miller*. In the case of *People v. Banks,* a Colorado Appellate Court found the current Colorado statute, Colo. Rev. Stat. § 18-1.3-401(4)(b), to be unconstitutional under *Miller*.[90] However, the Court simply severed the unconstitutional provision and "engaged in some statutory analysis, and when the dust had settled, discovered that the appropriate sentence was life with the possibility of parole after forty calendar years."[91] The Supreme Court of Colorado granted certiorari in this case on June 24, 2013 to decide (1) "[w]hether, after Miller v. Alabama . . . the Eighth Amendment to the U.S. Constitution is violated by the imposition on a juvenile of a . . . mandatory life sentence with the potential for parole after forty years;" and (2) "[w]hether the court of appeals exceeded its judicial authority by re-writing the criminal sentence statutes in a way not authorized or compelled by Colorado statutes or sound "severability" analysis."[92]

Though this "new" statutory scheme seems more in line with *Miller* than Iowa's original approach, it is still questionable whether parole after forty years provides juveniles with a meaningful opportunity to obtain release. This is something courts in the future will struggle with if sentencing schemes such as the one in Colorado continue to be implemented.

IV. A PROPOSED MODEL FOR STATE IMPLEMENTATION

The Supreme Court in *Miller*, similar to *Graham v. Florida*, "left it to the states to 'explore the means and mechanisms for compliance.'"[93] Lessons regarding compliance can be learned from watching how states have reacted thus far to the Supreme Court's recent decision. Most helpful, however, is the actual Supreme Court decision, which although seems vague and narrow, actually provides useful insight into how states can successfully implement *Miller*. In order to do this, states should (1) apply the *Miller* decision retroactively to cases on both direct and collateral review; (2) provide a meaningful opportunity for juvenile offenders to obtain release; (3) strengthen and clarify parole standards that will apply to these juvenile offenders seeking parole in the future; and (4) provide juveniles with a hearing prior to sentencing that significantly addresses their age and other mitigating circumstances.

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[90] People v. Banks, No. 08CA0105, 2012 WL 4459101, at *20 (Colo. App. Sept. 27, 2012).

[91] Lerner, *supra* note 5, at 25 n.87.

[92] Banks v. People, No. 12SC1022, 2013 WL 3168752, at *1 (Colo. June 24, 2013).

[93] Aaron Sussman, *The Paradox of* Graham v. Florida *and the Juvenile Justice System*, 37 VT. L. REV. 381, 385 (2012).

A. Miller v. Alabama *Should Be Applied Retroactively*

Prior to the Supreme Court's decision in *Teague v. Lane* in 1989, whether a new law established by the Supreme Court would be applied retroactively rested primarily on the finality of a decision.[94] Only those individuals whose convictions were pending on direct review were entitled to the benefit of any new law.[95] Those individuals whose convictions were final and were bound to collateral channels such as habeas petitions, were not so lucky. This distinction between direct review appellants and collateral review appellants stemmed from the issue of *res judicata*, which barred defendants from raising issues collaterally.[96] However, in 1989, the Supreme Court created two exceptions to this collateral-direct distinction and general rule of nonretroactive application to cases on collateral review.[97]

In *Teague v. Lane,* the Supreme Court adopted Justice Harlan's approach from *Mackey v. United States* and stated that new rules should always be applied retroactively to cases on direct review, but not to criminal cases on collateral review. [98] Justice Harlan, however, proposed two exceptions in his opinion in *Mackey*, which were accepted by the Court in *Teague*. First, there should be an exception for "new substantive due process rules, that is, those that place, as a matter of constitutional interpretation, certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." [99] Second, a new rule should be applied retroactively if it requires the observance of "those procedures that…are implicit in the concept of ordered liberty." [100]

Some jurisdictions have already concluded that *Miller* should be applied retroactively, but courts are split as to what exception is applicable. An Illinois Appellate Court in November of 2012 concluded that *Miller* should be retroactively applied to a final conviction under the second exception.[101] The court stated:

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[94] L. Anita Richardson, *Retroactivity, the Supreme Court and You When Does the Court Give Retroactive Effect to New Law?,* CRIM. JUST., Summer 1990, at 13.

[95] *Id.* at 13–14.

[96] *Id.* at 14:

> If the collateral-review defendant had failed to assert a later-announced new right or rule, one prong of *res judicata* barred him from raising it in a habeas or other collateral proceeding. In other words, he had waived the issue that the Court subsequently decided in his favor. If the litigant had asserted the right or rule, the second prong of res judicata barred her from relitigating it, because the issue had been decided adversely to her in the prior—now final—adjudication.

[97] *Id.*

[98] Teague v. Lane, 489 U.S. 288, 303 (1989).

[99] Mackey v. United States, 401 U.S. 667, 692 (1971).

[100] *Id.* at 693.

[101] People v. Williams, 982 N.E.2d 181, 196 (Ill. App. 1st 2012).

> [D]efendant was denied a "basic 'precept of justice' " by not receiving any consideration of his age from the circuit court in sentencing. Further, "'the concept of proportionality is central to the Eighth [*sic*] Amendment.'" Applying the rule of Miller to the case at bar shows that the rule requires the observance of procedures that are implicit in the concept of ordered liberty.[102] (internal citations omitted).

The Illinois Appellate Court concluded that "Miller not only changed procedures, but also made a substantial change in the law in holding under the eighth amendment that the government cannot constitutionally apply a mandatory sentence of life without parole for homicides committed by juveniles."[103] The court thus found *Miller* to be a "watershed rule of criminal procedure."[104]

Interestingly, a second panel in Illinois reached a similar conclusion in that *Miller* should be retroactive, but found that *Miller* fell into the first of Justice Harlan's exceptions.[105] The court concluded that *Miller* created a new substantive rule of law as it does not forbid a sentence of LWOP for a minor, but requires courts to hold a sentencing hearing for every minor convicted of first-degree murder at which a non-LWOP option must be available.[106]

Various state courts have reached adverse conclusions concerning the retroactivity of *Miller*, including a case from a Florida Court of Appeals, *Geter v. State*.[107] However, in *Geter*, the Florida court relied on the Supreme Court's analysis set forth in *Danford v. Minnesota* rather than the analysis set forth in *Teague*. In *Danford*, the Supreme Court clarified that *Teague* was only intended to extend to federal courts applying a federal statute, thus states are not bound by the standard set out by the Supreme Court in that decision. In his majority opinion in *Danford*, Justice Stevens refused to hold that *Teague* restrains the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion.[108] Justice Stevens stated:

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[102] *Id.* at 197.
[103] *Id.*
[104] *Id.*
[105] State v. Morfin, 981 N.E.2d 1010, 1022 (Ill. App. 1st 2012).
[106] *Id.*
[107] Geter v. State, 115 So.3d 375, 385 (Fla.App. 3 Dist. 2012); People v. Carp, No. 307758, 2012 Mich. App. LEXIS 2270, at *192 (Mich. Ct. App. Nov. 15, 2012) (finding that *Miller* is not to be applied retroactively to cases on collateral review because the decision is procedural and not substantive in nature and does not comprise a watershed ruling).
[108] Danforth v. Minnesota, 552 U.S. 264, 266 (2008).

> While finality is, of course, implicated in the context of state as well as federal habeas, finality of state convictions is a *state* interest, not a federal one. It is a matter that States should be free to evaluate, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts.[109]

In addition, a Circuit Court declined to apply the decision retroactively.[110] The court in *Craig v. Cain* concluded that *Miller* did not fall under either *Teague* exception. With respect to the first exception, the court found that "*Miller* does not satisfy the test for retroactivity because it does not categorically bar all sentences of life imprisonment for juveniles; *Miller* bars only those sentences made mandatory by a sentencing scheme. Therefore, the first *Teague* exception does not apply."[111] With regards to the second exception, the court found that "[t]he Supreme Court's decision in *Miller* is an outgrowth of the Court's prior decisions that pertain to individualized-sentencing determinations. The holding in *Miller* does not qualify as a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."[112] This may prove as a barrier to further states finding that *Miller* should be retroactive.

However, despite the apparent split among jurisdictions, *Miller* should be applied retroactively. Not only does it seem fair, but it is "tempt[ing] to find that any defendant who received such a mandatory life sentence should have the right to have that sentence vacated."[113] In *Miller v. Alabama,* the Supreme Court, by reversing and remanding both cases, implied that their decision in that case should and would apply retroactively. "[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."[114] *Miller v. Alabama* arose on a direct appeal while *Jackson v. Norris* arose on collateral review, thus making *Miller* retroactive, irrelevant of finality.[115] The Supreme Court's retroactive application of the *Miller* decision was even recognized by the

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[109] *Id.* at 280.
[110] Craig v. Cain, No. 12-30035, 2013 WL 69128, at *2 (5th Cir. Jan. 4, 2013).
[111] *Id.*
[112] *Id.*
[113] Laurie Levenson, *Retroactivity of Cases on Criminal Defendants' Rights*, NAT'L L.J., Aug. 13, 2012.
[114] Teague v. Lane, 489 U.S. 288, 300 (1989).
[115] *See generally* Jackson v. Norris, 378 S.W.3d 103 (Ark. 2011).

dissent as an "invitation" to overturn 2,000 sentences.[116]

In addition, courts should find that *Miller* falls under Justice Harlan's first exception in that it made a substantive change in the law, similar to the conclusion reached in *State v. Morfin*.[117] This first exception has been expanded and now applies "not only to rules forbidding criminal punishment of certain primary conduct, but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense."[118] Thus *Miller,* because it just does that and forbids mandatory life without parole when imposed on juveniles, should be applied retroactively.[119]

B. States Must Provide a Meaningful Opportunity to Obtain Release

In their decision, the Supreme Court offered little guidance as to how jurisdictions with such unconstitutional sentencing schemes might choose to alter their schemes and merely stated "discretionary sentencing in adult court would provide different options: There a judge or jury could choose, rather than a life-without-parole sentence, a lifetime prison term *with* the possibility of parole or a lengthy term of years."[120] Thus the Court left open the possibility that a juvenile could still spend their life in prison. However, imposing a sentencing scheme such as that taken by Iowa does not comply with the Supreme Court's decision, which states that "[a] State is not required to guarantee eventual freedom, but must provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[121]

If courts do find that *Miller v. Alabama* can be applied retroactively, then on both direct and collateral appeals, the courts should not hand down new sentences that render the Supreme Court's decision in *Miller* obsolete, such as the commuted sentences that the Iowa Governor originally handed down. If Iowa's approach had been interpreted to be in compliance with *Miller,* juveniles would not be given a meaningful opportunity to obtain release as it is unrealistic to believe that all juveniles sentenced pursuant to such a scheme will reach the age where release is promised. Any sentencing scheme that exceeds life expectancy does not provide meaningful release. As stated by the Supreme Court of Iowa:

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[116] Miller v. Alabama, 132 S. Ct. 2455, 2481 (2012) (Roberts, C.J., dissenting) ("Indeed, the Court's gratuitous prediction appears to be nothing other than an invitation to overturn life without parole sentences imposed by juries and trial judges.")

[117] State v. Morfin, 981 N.E.2d. 1010 (Ill. App. 1st 2012).

[118] *In re* Sparks, 657 F.3d 258, 261 (2011).

[119] Levenson, *supra* note 113 ("Miller prohibits mandatory life without parole as a punishment for a specific class of defendants — juveniles.")

[120] *Miller*, 132 S. Ct. at 2474–75.

[121] *Id.* at 2469 (internal quotations omitted).

> [A] government system that resolves disputes could hardly call itself a system of justice with a rule that demands individualized sentencing considerations common to all youths apply only to those youths facing a sentence of life without parole and not to those youths facing a sentence of life with no parole until age seventy-eight.[122]

As recognized in *Ragland*, the problem now facing roughly twenty-nine states is the same problem that states were forced to address following the Supreme Court's decision in *Graham v. Florida*.[123] In *Graham*, the Supreme Court held that sentencing a juvenile to life without parole for a non-homicide offense violated the Constitution's Eighth Amendment.[124] After that decision, courts began issuing sentences that exceeded the life expectancy of the juvenile offenders. For example, in *People v. Mendez,* a case involving a juvenile non-homicide offender in California, sixteen-year-old Victor Mendez was sentenced to eighty-four years in prison after being convicted of carjacking, assault with a firearm, and seven counts of second-degree robbery.[125] In *Graham,* Justice Kennedy, besides holding that a state could not sentence a juvenile to life without parole, also specified that a state must give a juvenile defendant "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation," similar to the language used by Elena Kagan in *Miller*.[126] In *Mendez,* a California Appellate Court held that Victor's sentence, although not *per se* life without parole, was *de facto* life without parole since he was not given this meaningful opportunity to obtain release.[127] Similarly, states such as Iowa, who are changing juvenile offender's sentences to lengthy prison sentences in place of LWOP, are merely ceasing to hand down *per se* LWOP, but still continue to hand down *de facto* LWOP. Although the Supreme Court's decision might not reflect these words, their reliance on *Graham* and on the changing nature of juveniles weighs in favor of such an interpretation.[128]

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[122] State v. Ragland, 836 N.W.2d 107, 121 (Iowa 2013).
[123] *See generally* Graham v. Florida, 130 S. Ct. 2011 (2010).
[124] *Id.* at 2034.
[125] People v. Mendez, 114 Cal. Rptr. 3d 870, 873 (2010).
[126] *Graham*, 130 S. Ct. at 2030.
[127] *Mendez*, 114 Cal. Rptr. 3d at 883.
[128] In their decision in *Miller*, the Court repeatedly emphasized a juvenile's capacity for change. *See* Miller v. Alabama, 132 S. Ct. 2455, 2460 (2012) ("Such a scheme prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,'"); s*ee id.* at 2465 ("It reflects 'an irrevocable judgment about [an offender's] value and place in society,' at odds with a child's capacity for change."); *see id.* at 2469 ("But given all we have said in *Roper, Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this

Rather than handing down long prison sentences with no parole in place of LWOP, courts should allow for parole after a term of lesser years. This reflects the concept that the Supreme Court recognized in *Miller*: that juveniles can be reformed. In her majority opinion, Justice Kagan restated the important juvenile traits heavily emphasized by the Court in *Roper* and *Graham,* in that it is difficult to distinguish between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[129] Thus, juveniles should be given a chance to grow and change their ways. As prominent conservative leaders Newt Gingrich and Pat Nolan stated in an article they published in the *San Diego Times, "*...they will not be automatically released. They must show the parole board that they have participated in programs that prepare them to support themselves and stay on the straight and narrow when they are released. They must convince the parole board that they are remorseful and have changed so they no longer pose a threat to the community. Only then might they be given a parole date."[130]

It is evident, however, that the Supreme Court cannot rest peacefully after *Miller* as they will most likely be faced with writs asking to clarify whether sentencing schemes, such as the one that was at issue in Iowa and the current scheme in Colorado, truly afford juveniles a meaningful opportunity to obtain release.[131] Therefore, states should now seek to eliminate both life without parole and *de facto* life without parole in an effort to avoid the inevitable. To do this, states should allow for shorter sentences for juveniles, or at the very least, allow for parole after a shorter amount of time.

States have already begun to provide for short periods of incarceration before eligibility. Colorado now permits juveniles to become eligible for parole after serving forty years,[132] North Carolina now sets a minimum of twenty-five years of imprisonment prior to becoming eligible for parole,[133] and Pennsylvania recently amended their law to provide for parole once a juvenile serves 35 years.[134] A great new proposal for reform can be seen in Connecticut. Currently, a bill is being considered by the Judiciary

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harshest possible penalty will be uncommon.").

[129] *Id.* at 2469.

[130] Newt Gingrich & Pat Nolan, *Giving Teen Offenders Chance at Parole is Just,* U-T SAN DIEGO (Sept. 20, 2012, 6:00PM), http://perma.cc/0bnfKK3GRaN.

[131] Lerner, *supra* note 5, at 38 ("At some point the Supreme Court may condescend to clarify whether long prison sentences should be deemed LWOP for purposes of Graham and Miller. Until then, we can expect the issue to fester (or "percolate," in the Court's preferred nomenclature) in the lower courts.").

[132] *Id.* at 38 n.87.

[133] N.C. GEN. STAT. § 15A-1340.19A (2012).

[134] 18 PA. CONS. STAT. ANN. § 1102.1 (West 2007).

Committee which, if passed, would allow a juvenile offender who is currently serving a sentence to be eligible for parole halfway through their sentence.[135] For example, a fourteen-year-old who was sentenced to the maximum sixty years in prison would be eligible for parole after thirty years, thus when he or she is forty-four years old.[136] Similarly, a seventeen-year-old who was sentenced to forty years would be eligible for parole after twenty years, thus when he or she was thirty-seven years old.[137] The latest a juvenile would be eligible for parole would be forty-seven years old, which would be the case for a seventeen-year-old sentenced to the maximum sixty years. [138]

C. Stricter Parole Statutes

"Miller…cannot expect judges and juries to perform ex ante sorting of redeemable from hopeless children when differentiation is a daunting task even for experts."[139] Rather, a greater emphasis should be on improving the parole system, by increasing reliance on the system and improving parole statutes. Following the Supreme Court's decision in *Miller*, the ACLU of Michigan recommended abolishing juvenile LWOP completely and amending current state parole statutes to require:

1) Presumptive parole of any child sentenced to a life offense for acts committed prior to the age of 18
2) The parole board to give greater weight to a youth's institutional record after maturation
3) The parole board to take into consideration an individual's youthful status at the time of the offense, as a mitigating factor
4) The parole board to waive an individual's lack of programming, education or work as a negative factor where lack of programming, work or education was due to a life without parole sentence and/or the individual's youthful status.[140]

By strengthening parole board decisions, states will prevent the

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[135] Jacqueline Rabe Thomas, *Life Terms for Juveniles: Change is on the Way,* CT MIRROR (Mar. 12, 2013), http://perma.cc/0Evt6TboPXj.
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *The Supreme Court, 2011 Term--Leading Cases*, 126 Harv. L. Rev. 176, 284 (2012).
[140] *Basic Decency: Protecting the Human Rights of Children-An Examination of Natural Life Sentences for Michigan's Children*, SECOND CHANCES FOR YOUTH & ACLU (2012), *available at* http://perma.cc/R6T8-RRVM.

morally reprehensible offenders from walking free while allowing those offenders who have outgrown their immature ways to get out of prison and contribute to society. Parole boards are better suited to make such determinations, as their job is to asses an individual's potential.

However, this recommendation runs contrary to the parole system currently in place in the United States. Unfortunately, the use of parole continues to dwindle and "[a]s of 1987, parole was ended in the federal system and by 1990, 14 other states had abolished it as well."[141] In places where parole continues to exist, its role has been questioned as the parole process has become "overwhelmingly politicized" and it "has become increasingly difficult for persons serving a life sentence to be released on parole."[142] Thus it follows that parole boards must also not be too strict as to ignore *Miller's* ultimate goal. As the Michigan Appellate Court stated in *Michigan v. Carp*, "logic dictates that to effectuate the sentence that the sentencing court imposes, the Parole Board must respect the sentencing court's decision by also providing a meaningful determination and review when parole eligibility arises."[143]

D. Courts Must Meaningfully Consider Age and Mitigating Circumstances

The *Miller* Court stated "[a]lthough we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[144] Thus states must provide juveniles with a meaningful sentencing hearing where their age and all other possible mitigating factors are considered by the sentencing judge. The newly amended North Carolina statute provides a great model for states. The statute requires a hearing to occur "as soon as practicable after the guilty verdict is returned"[145] where the defendant and the state have the opportunity to present evidence and where the defendant has the right to the last argument. The statute also provides for a non-exhaustive list of factors deemed to be relevant to sentencing determinations, which are discussed previously in this Note.[146] The newly amended Pennsylvania statute also includes a similar non-exhaustive list of factors that can also be used as a model for states.[147]

The requirement of a meaningful sentencing hearing is not satisfied by

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[141] J.M. Kirby, Graham, Miller*, & The Right to Hope*, 15 CUNY L. REV. 149, 156 (2011).
[142] *Id.*
[143] People v. Carp, No. 307758, 2012 Mich. App. LEXIS 2270, at *88 (Mich. Ct. App. Nov. 15, 2012).
[144] Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).
[145] N.C. GEN. STAT. § 15A-1340.19B (2012).
[146] *Id.*
[147] 18 PA. CONS. STAT. ANN. § 1102.1 (West 2007).

a juvenile transfer hearing. The Court rejected this argument made on behalf of both Arkansas and Alabama.[148] Such a hearing does not satisfy the Eighth Amendment mandate for individualized sentencing for two reasons. First, "the [decision-maker] typically will have only partial information at this early, pretrial stage about either the child or the circumstances of his offense."[149] This is apparent in the *Miller* case as the court acknowledges stating:

> [T]he juvenile court denied Miller's request for his own mental-health expert at the transfer hearing, and the appeals court affirmed on the ground that Miller was not then entitled to the protections and services he would receive at trial. But by then, of course, the expert's testimony could not change the sentence; whatever she said in mitigation, the mandatory life-without-parole prison term would kick in. The key moment for the exercise of discretion is the transfer—and as Miller's case shows, the judge often does not know then what she will learn, about the offender or the offense, over the course of the proceedings.[150] (internal citations omitted)

Second, "the question at transfer hearings may differ dramatically from the issue at a post-trial sentencing."[151] For example, at transfer hearings in some states, the decision might be primarily based on whether a juvenile should receive an extremely light sentence (in states where juveniles must be released from custody by age twenty-one) or a standard sentence as an adult.[152]

Thus, juveniles should be given a post-conviction sentencing hearing where a judge considers all mitigating evidence, in addition to just age, before granting juveniles life without parole. This cannot be said to have been done in Iowa where the governor is continuing to hand down cookie cutter sentences.

V. A CATEGORICAL CHALLENGE AHEAD

The Supreme Court concluded in *Miller* that it was not necessary to address the question of whether the Eighth Amendment requires a

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[148] *Miller*, 132 S. Ct. at 2470 ("And they next assert that the rule is unnecessary because individualized circumstances come into play in deciding whether to try a juvenile offender as an adult. We think the states are wrong …").
[149] *Id.* at 2474.
[150] *Id.*
[151] *Id.*
[152] *Id.*

categorical ban on life without parole for juveniles as it was not necessary to decide the cases before the court.[153] To truly comply with the Supreme Court's decision in *Miller v. Alabama*, however, it would seem that a court could never impose a life without parole sentence on a juvenile. This was *somewhat* suggested by the majority who stated, in dicta, "given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[154] Considering the underlying psychological premise, Justice Kagan's suggestion sounds less like dicta.[155] This approach (a categorical ban on juvenile LWOP) is taken by the American Civil Liberties Union (ACLU)[156] and the approach most likely to be taken by the Supreme Court if this question is ever placed before them in the future.[157]

Interestingly, California is already assisting the move towards a categorical ban. Although the state was not affected by the ruling in *Miller*, because they do not have mandatory LWOP, the Governor decided to listen to the Justices anyway. On September 30, 2012, Governor Brown signed S.B. 9, which went into effect in California on January 1, 2013.[158] This Bill, termed the "Second Chance" law, gives those juveniles who were sentenced to LWOP for crimes committed before the age of eighteen with a chance to be resentenced after serving fifteen years of their sentence.[159] It does, however, limit those juveniles who are eligible.[160] Under the law, juveniles' sentences "could be reduced to a stint of 25 years

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[153] *Id.* at 2469.

[154] Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

[155] *Leading Cases*, *supra* note 139, at 286.

[156] Currently the ACLU is litigating this issue in Michigan where it has filed with their Michigan affiliate and local counsel in the federal district court. The ACLU is also preparing an amicus brief for a separate case before the Michigan Court of Appeals. Lastly, the ACLU is challenging Michigan's juvenile sentencing laws and policies before the Inter-American Commission, charging the United States with violating "universally recognized human rights laws and standards for allowing Michigan to impose life without parole sentences on children." Brandon Buskey, *Gingrich Argues States Should Abandon Life Imprisonment Without Parole for Juveniles,* ACLU (Sept. 26, 2012, 10:26AM), http://perma.cc/0dt4znyGQp3.

[157] Fuller, *supra* note 6, at 395 ("If the Court had engaged in its Eighth Amendment proportionality analysis, it would have relied on the objective indicia of societal consensus and its own independent moral judgment to establish a categorical ban on the imposition of juvenile life without parole sentences.").

[158] *Senate Bill 9 - California Fair Sentencing For Youth*, FAIR SENTENCING FOR YOUTH, http://perma.cc/0c6gWVxXDUS (last visited Nov. 15, 2013).

[159] Clay Duda, *California's 'Second Chance' Bill Offers Hope for LWOP Sentenced Youth,* JUVENILE JUSTICE INFO. EXCH. (July 11, 2011), http://perma.cc/0iozUd5BKmR.

[160] Maggie Lee, *California Governor May Toss Certain Juvenile Life Sentences*, JUVENILE JUSTICE INFO. EXCH. (Aug. 28, 2012), http://perma.cc/0n6C1GaPmkS ("Inmates are not eligible if the crime involved torture or the killing of officials such as law enforcement officers. To get a chance at parole or a reduced sentence, the offender must convince a judge of their remorse and their progress toward rehabilitation.").

to life, a prison term that comes with the possibility of parole."[161] Before a juvenile is resentenced, a judge must hold a hearing during which she considers factors such as (1) the crime; (2) past offenses, past psychological or physical trauma; (3) cognitive limitations due to mental illness or developmental disabilities; (4) rehabilitation efforts; (5) showing of remorse; (6) current family ties; and (6) disciplinary actions while incarcerated.[162]

In regards to the bill, Senator Leland Yee (D-San Francisco), the author of the bill and also a child psychologist, states "SB 9 reflects that science and provides the opportunity for compassion and rehabilitation that we should exercise with minors. SB 9 is not a get-out-of-jail-free card; it is an incredibly modest proposal that respects victims, international law, and the fact that children have a greater capacity for rehabilitation than adults."[163] This statute could serve as a great model for states to begin doing away with juvenile life without parole.

If the LWOP option were eliminated completely, the justice system would have more flexibility in reviewing and determining which inmates deserve release many years after sentencing and which inmates deserve to remain incarcerated. Even without LWOP, a scheme that sentences a juvenile who committed homicide to life-with-parole would still include be a harsh penalty for committing the worst crime as it is likely that many, maybe even a majority, would still serve life imprisonment.[164]

Although, generally the Supreme Court has seemed reluctant to regulate the constitutionality of sentences other than the death penalty,[165] *Graham v. Florida* and *Miller* seem to have opened the door to regulating life without parole as well.[166] Thus a categorical ban on life without parole is possible and states should prepare themselves for such a decision.

VI. CONCLUSION

Although the Supreme Court's decision was, as Craig Lerner suggests,

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[161] Duda, *supra* note 159.

[162] CAL. PENAL CODE § 1170 (West 2010).

[163] Duda, *supra* note 159.

[164] Hoover, *supra* note 49.

[165] Nellis, *supra* note 38, at 455 ("The Supreme Court typically avoids regulating the constitutionality of sentences other than the death penalty.").

[166] *Id.*; Jackson v. Norris, 378 S.W.3d 103, 106 (Ark. 2011) ("The Supreme Court's decision in *Graham* marked the first time the Court elected to extend a categorical ban on a particular type of punishment in a case that did not involve the death penalty."); Sussman, *supra* note 93, at 381 (2012) ("Graham, though, marks the first time that the Court has held a non-death-penalty sentence to be categorically unconstitutional when applied to a specific group. As a result, juvenile justice advocates have hailed Graham as a "landmark," "pivotal," "revolutionary," and "game-changing." case, and its influence continues with the recent expansion of its holding in *Miller*."); Nellis, *supra* note 38, at 457 ("These two recent cases suggest the Court's potential willingness to draw additional categorical distinctions in limiting LWOP sentences.").

"riddled with uncertainties that will spawn more litigation," Elena Kagan's opinion does more to offer states guidance than is apparent.[167] For example, the Supreme Court did not state whether the decision would be applied retroactively. However, it was applied retroactively in both the case of *Miller v. Alabama* and its companion case of *Jackson*; thus answering the question for all state courts. Additionally, although the Supreme Court, in an effort to issue a narrow decision, did not hold that LWOP would always be unconstitutional when applied to a juvenile, they made certain to state that such a sentence should and would be "uncommon" stating:

> But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[168]

Reading between the lines offers great insight into not just what the Supreme Court intended the *Miller* decision to mean, but also what the Supreme Court might say if faced with similar questions in the future, for example whether Governor Branstad's commutations violate the Eight Amendment.

Thus, states should implement the proposed recommendations and move towards a justice system where juveniles are "uncommonly" receiving life without parole, and are only receiving it after being given a fair sentencing hearing where their age is taken into consideration. In her article for the ACLU regarding the Supreme Court's decision in *Miller v. Alabama*, Tanya Greene writes "[l]egally, these boys couldn't vote, they couldn't marry, they couldn't join the military, they couldn't drink, they couldn't drive – but they broke the law and their state threw the book, the shelf, the whole library at them, and then buried them

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[167] Lerner, *supra* note 5, at 27.

[168] The majority stated that their holding (that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders) was "sufficient" and therefore did not address whether a categorical ban on LWOP for juvenile offenders was also required by the Eighth Amendment. Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

under it."[169] By either merely giving juveniles parole after their life expectancy has come and gone or by continuing to sentence juveniles to life without parole despite taking their age into consideration, states are continuing to punish juveniles for crimes they commit before they have had a chance to develop, something that runs contrary to international law and practice.[170] Instead, states should give juveniles a chance to transcend their adolescence before burying them alive.

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[169] Tanya Greene, *ACLU Lens: Supreme Court Rules Against Mandatory Life Without Parole for Children*, ACLU (June, 25, 2012, 1:56 PM), http://perma.cc/0MjGK3JqoqY.

[170] Allison Frankel & Katie Haas, *Seeking a Second Chance: Children Sentenced to Life Without Parole Seek Justice Before International Tribunal*, ACLU (Sept. 7, 2012, 12:47 PM), http://perma.cc/0XQu6LuPahz:

> [U]niversal human rights laws and standards, including the American Declaration, have long proscribed the imposition of life without parole sentences on anyone who commits a crime when they are below eighteen years of age. The U.N. Convention on the Rights of the Child, a treaty ratified by every nation in the world except for the United States, Somalia, and the new nation of South Sudan, explicitly prohibits the practice and also requires that States take measures to ensure that children convicted and sentenced to a term of imprisonment are properly rehabilitated and reintegrated back into society at the end of their sentence.