NOTES

MITIGATING AFTER *MILLER*: LEGISLATIVE CONSIDERATIONS AND REMEDIES FOR THE FUTURE OF JUVENILE SENTENCING

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In the 2012 case, Miller v. Alabama*, the Supreme Court found mandatory juvenile life-without-parole sentences for homicide offenses unconstitutional, continuing its trend of treating juvenile criminal offenders differently than their adult counterparts. The decision sparked a sense of victory for juvenile-justice advocates, but left several important questions unanswered. Many states are now scrambling to rework their sentencing statutes to comply with* Miller*'s unclear commands. This Note proposes using specific language from* Miller *and capital-mitigation strategies as a template for post-*Miller *sentencing statutes, focusing on explicitly outlining the mitigating factors courts should now consider when sentencing juvenile offenders. This solution provides courts with the flexibility necessary to give each juvenile offender an appropriate sentence while also accounting for the variety of unique characteristics that accompany youth. Most importantly, a detailed and individualistic approach to juvenile-sentencing statutes fully embraces the spirit of* Miller*'s ruling – that children are different than adults – while anticipating future potential constitutional challenges.*

INTRODUCTION

The past decade has seen a dramatic shift in the Supreme Court's jurisprudence on juvenile offenders and their sentencing. Since 2005, the Court

has struck down the juvenile death penalty[1] and juvenile life-without-parole sentences for nonhomicide offenses.[2] The shift culminated in the 2012 decision, *Miller v. Alabama*,[3] where the Court found mandatory life-without-parole sentences unconstitutional as applied to homicide offenders younger than eighteen years old at the time of the offense.[4] *Miller* reaffirmed the idea that children are different than adults, and requires that courts now take an offender's age into special consideration before sentencing juvenile offenders who commit homicide to life without parole.[5] Though it is clear that mandatory juvenile life-without-parole sentences are now unconstitutional,[6] the decision offers little guidance on other important issues. What is the appropriate remedy for juvenile offenders currently serving these sentences? How must states revise their sentencing schemes to comply with *Miller*'s commands? What factors must courts consider when sentencing juvenile offenders? This Note seeks to answer these questions and chart the legal landscape in the aftermath of *Miller*.

Part I explains the history and background of the juvenile justice system in the United States, focusing on the harsh retributive policies of the 1990s and the shift thereafter towards more rehabilitative solutions. Part II examines the Supreme Court cases that set the stage for *Miller*, finally analyzing the *Miller* opinion itself. This Part determines what *Miller* actually requires, identifying the characteristics the Court mandates lower courts to take into consideration when sentencing juvenile offenders. Case law and professional guidelines on capital-mitigation strategies inform the discussion identifying the most important of the *Miller* mitigating factors. Part III turns to the question of whether *Miller* should apply retroactively to those currently serving mandatory life-without-parole sentences, commonly called "juvenile lifers."[7] Part IV

[1] Roper v. Simmons, 543 U.S. 551, 568 (2005) ("A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.").

[2] Graham v. Florida, 560 U.S. 48, 82 (2010) ("The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.").

[3] 132 S. Ct. 2455 (2012).

[4] *Id.* at 2464 ("[M]andatory life-without-parole sentences for juveniles violate the Eighth Amendment.").

[5] *Id.* at 2469 (requiring the sentencer to consider "how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison").

[6] Life-without-parole sentences were eradicated for nonhomicide offenses committed by juveniles in *Graham*, 560 U.S. 48; thus, this Note's discussion of any future imposition of life without parole refers only to homicide offenses.

[7] As of 2009, there were 2570 juveniles sentenced to life without parole. HUMAN RIGHTS WATCH, WHEN I DIE . . . THEY'LL SEND ME HOME: YOUTH SENTENCED TO LIFE WITHOUT PAROLE IN CALIFORNIA, AN UPDATE 2 (2012). It is unclear what percentage of those sentences were imposed based on mandatory guidelines, but the majority of life-without-parole sentences are imposed in states in which judges are required to sentence juveniles without considering factors such as age or life circumstances. ASHLEY NELLIS, THE

considers the future of juvenile sentencing for both juvenile lifers and juvenile offenders convicted after *Miller*. It proposes a solution to the *Miller* dilemma, advocating for a scheme that explicitly outlines the mitigating factors courts should consider when sentencing juvenile homicide offenders. In doing so, this Part addresses concerns relating to and benefits drawn from an individualized sentencing approach, and anticipates future challenges to such a sentencing scheme.

I. THE JUVENILE JUSTICE SYSTEM

A. *Historical Roots of the Juvenile Justice System*

The United States based its juvenile justice system heavily on the English common law tradition.[8] In the colonial era, this meant adhering to the doctrine of *parens patriae*, which governed English remedies for juvenile delinquency.[9] The turning point came with the rise of industrialism in the late 1800s and the "child savers" reform movement that came about during that period.[10] The child savers movement focused on the idea that "bad environments produce bad children."[11] Rather than relying on punishment, reformers sought to provide juvenile delinquents with reformation and rehabilitation using specially designed institutions called reformatories.[12] The reformatories created homelike environments designed to address the special needs of juveniles and were meant to capture the fundamental concepts of the movement.[13] The main tenets of the child savers movement were that (1) children should not be treated like adults, (2) each child has unique and individualized needs, and (3) the juvenile justice system should be less onerous than the adult criminal justice system.[14] Many of the youths placed in reformatories served as apprentices or indentured servants as part of their rehabilitation.[15] Despite the rosy view of many reformers, the treatment in

SENTENCING PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 3 (2012).

[8] GUS MARTIN, JUVENILE JUSTICE: PROCESS AND SYSTEMS 36 (2005).

[9] *Id.* (describing how the state punished children, such as jailing juvenile offenders with adult criminals and using the "indentured apprenticeship system for idle and impoverished children").

[10] *Id.* at 39-40.

[11] *Id.* at 41.

[12] *Id.* Child saver reformatories were a vast improvement over their predecessor, refuge houses, which were more prisonlike.

[13] *Id.*

[14] *Id.*

[15] David W. Springer et al., *A Brief Historical Overview of Juvenile Justice and Juvenile Delinquency*, *in* INTRODUCTION AND OVERVIEW OF JUVENILE DELINQUENCY AND JUVENILE JUSTICE 3, 3-4 (2011) (explaining the shift in juvenile punishment from harsher treatments like public whippings to more rehabilitative sentences like forced apprenticeship under the

these facilities had much room for improvement – labor conditions at the factories and farms were harsh and often mirrored adult punishments.[16] Children fifteen years or older were frequently transferred to adult prisons under the belief that by that age, "there was little hope for a child to reform."[17]

The child savers movement eventually merged with other causes of the Progressive Era and advocates of the movement slowly began to implement comprehensive institutional change. Expanding on the philosophy of the child savers, Progressive Era reformers focused more on treatment and rehabilitation with social services.[18] Part of this expansion involved the creation of the first separate court system for juveniles, opened in Cook County, Illinois in 1899.[19] The federal system followed suit in 1906, and most states had juvenile court systems and probation services in place by 1925.[20]

The child saver and Progressive Era movements had dual and somewhat competing purposes. On the one hand, the actions of the elite upper class were motivated by the fear of rampant crime by the extreme poor.[21] Reformatories and juvenile services sought to combat that fear by preventing rebellions.[22] On the other hand, some reformers did have genuine concerns about protecting children and providing them with much needed guidance and services.[23] If the implementation of juvenile courts did anything, it highlighted the lack of social service agencies necessary to meet the "original goals of the juvenile court."[24]

Social services continued to expand after the Great Depression with the proliferation of Roosevelt's New Deal programs.[25] These programs addressed the broad range of proposed solutions for juvenile delinquency, which ranged

"child saving" movement).

[16] *Id.* at 4 (describing the treatment of children in "houses of refuge," such as long days working in factories and handcuffing).

[17] *Id.*

[18] MARTIN, *supra* note 8, at 43.

[19] Springer et al., *supra* note 15, at 3 (discussing the history of juvenile courts and Jane Addams and Julia Lathrop, who were strong advocates for the legislation that led to the first juvenile court). The development of a court system led to the dubbing of this era as the "juvenile court period." MARTIN, *supra* note 8, at 41.

[20] Springer et al., *supra* note 15, at 4-6.

[21] MARTIN, *supra* note 8, at 43 (emphasizing that the movement was "not entirely selfless" and that Progressive Era reformers "understood that failure to alleviate hardship among poor and working classes could lead to social upheaval and outright rebellion").

[22] Springer et al., *supra* note 15, at 5.

[23] *Id.* (explaining the more altruistic goals of juvenile courts "to protect and direct children").

[24] *Id.* This realization spurred the opening of organizations like the Hull-House in Chicago, which helped develop "a range of strategies to address delinquency," the Institute for Juvenile Research, which focused on psycho-social assessments of children, and juvenile probation services which created "intermediary levels of treatment" within the court system. *Id.* at 5-6.

[25] *Id.* at 6-7.

from improving home environments to providing individualized emotional treatment to creating community outreach clinics.[26] Even as other social services declined during the "conservative retrenchment" of the 1970s and 1980s, community-based programs maintained strong support.[27] The courts instituted additional protections as they reviewed conditions in both juvenile and adult prison facilities.[28] The judicial protections were supplemented by federal legislation, most notably the Juvenile Justice and Delinquency Prevention Act of 1974, which created the Office of Juvenile Justice and Delinquency Prevention.[29] The legislation also provided funding for various state juvenile justice programs.[30]

B. *The End of the Twentieth Century and the Current Landscape*

In the late 1980s and early 1990s, the United States saw a rapid increase in violent-crime rates among juveniles.[31] The juvenile-crime increases resulted in tough-on-crime state legislation throughout the country.[32] This legislation was fueled by the fear of the "super-predator,"[33] fear that multiplied in response to

[26] *Id.* Community outreach programs saw especially great development from the 1940s to the 1960s, with model programs increasingly focusing on the challenges faced by youths from families with low socioeconomic status. *Id*. at 7 ("During the 1940s, 50s, and early 60s, great strides were made in developing community-based councils and programs for delinquency prevention. . . . [The work of model programs] was based on the premise that the cause of juvenile delinquency was the lack of available opportunities for youth of lower socio-economic status.").

[27] *Id.* at 8 ("Social welfare programs shrank during the 1970s and 1980s, as the country experienced a conservative retrenchment . . . . However, there continued to be advancements in services and programs for juvenile offenders as well as victims services.").

[28] *Id.* at 8-9 (using *Morales v. Turman*, 383 F. Supp. 53 (1974), as an example of judicial oversight of prison conditions).

[29] Juvenile Justice and Delinquency Prevention Act, 42 U.S.C. §§ 5601-5751 (1976); Springer et al., *supra* note 15, at 9 (outlining congressional action leading up to the Juvenile Justice and Delinquency Prevention Act).

[30] Springer et al., *supra* note 15, at 9 (listing examples of supported state initiatives, such as "deinstitutionaliz[ing] status offenders, remov[ing] juveniles from adult jails and lockups, establish[ing] runaway youth shelters and counseling programs, and improv[ing] delinquency prevention programs").

[31] Barry C. Feld, *Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform*, 79 MINN. L. REV. 965, 976-77 (1995) ("[T]he rates of juvenile violence . . . have surged dramatically since the mid-1980s. . . . [T]he FBI reported a record juvenile violent crime rate in 1990." (citations omitted)).

[32] *See, e.g.*, Julian Borger, *U.S. Throws 'Predator' Kids to the Wolves*, GUARDIAN (Mar. 16, 2000), http://www.theguardian.com/world/2000/mar/17/julianborger (describing the trend toward "harsher treatment for young offenders" through transfer procedures into adult court despite decreases in juvenile crime).

[33] Lori Montgomery defines super-predators as "young people bred for violence through generations of poverty, fatherlessness, drug addiction and neglect." Lori Montgomery,

highly publicized incidents of school violence, such as the Columbine shootings.[34] States overwhelmingly enacted policies that "adultified" juvenile offenders and focused on punitive, rather than rehabilitative, measures.[35] More and more juvenile offenders were incarcerated during this period.[36] In addition to higher numbers of juvenile offenders facing incarceration, sentences increased in severity and life-without-parole sentences proliferated in many states.[37]

Since the 1990s, however, states have begun to relax harsh policies on juvenile crime.[38] Some data from the early twenty-first century has shown fewer incarcerated youths, lower rates of waiver from juvenile to adult court, and fewer juveniles sentenced to life without parole.[39] There have also been

Blame for Juvenile Crime: 'Super-Predators' or Guns?, HOUS. CHRON., June 2, 1996, at A19; *see also* Suzanne Fields, Op-Ed., *The Super-Predator*, WASH. TIMES, Oct. 17, 1996, at A23 ("The super-predator is a boy, a preteen and teen, who murders, rapes, robs, assaults, does and deals in deadly drugs, joins gangs with guns, terrorizes neighborhoods and sees no relationship between right and wrong, reward and punishment. These boys are not so much demoralized as unmoralized, boys who have never been taught the significance of morality or even the pleasure, perverted though it may be, of breaking the rules.").

[34] *See* Peter J. Benekos & Alida V. Merlo, *Juvenile Justice: The Legacy of Punitive Policy*, 6 YOUTH VIOLENCE & JUV. JUST. 28, 28 (2008) ("School shootings like those that were widely publicized in the 1997-1998 academic year continue to garner headlines and to create fear that supports reactive policies.").

[35] Alida V. Merlo & Peter J. Benekos, *Is Punitive Juvenile Justice Policy Declining in the United States? A Critique of Emergent Initiatives*, 10 YOUTH JUST. 3, 4 (2008) (identifying "exaggerated media coverage, demonization of youth, and loss of faith in the juvenile justice system" as reasons for the movement towards removal of juvenile offenders to the adult criminal justice system). The expansion of judicial waivers and transfers to adult court is the main way that legislatures "adultified" the process, including lowering the age of waiver or transfer, broadening the types of crimes eligible for waiver/transfer, expanding the crimes for presumptive and automatic transfers, and shifting discretion from judges to prosecutors. *See* Benekos & Merlo, *supra* note 34, at 31 (providing statistics for the numbers and types of judicial waivers that occurred during the 1990s).

[36] Merlo & Benekos, supra note 35 at 5 ("Over 14,000 youth under age 18 were confined in state and local adult institutions in 1997.").

[37] *See* Benekos & Merlo, *supra* note 34, at 38-40 (referencing data that shows growing numbers of life-without-parole sentences for juveniles).

[38] *Id*. at 42-43 (discussing some states' processes of reassessing and changing juvenile-sentencing policies).

[39] *Id.* (stating that there have been fewer juveniles imprisoned and fewer cases of judicial waiver since the mid 1990s). Some jurisdictions have also shown a relaxation of harsh juvenile crime policies, although these policies remain more punitive than rehabilitative. *Id.* at 43 (listing changes in state laws concerning juvenile sentencing). It is important to note that the Benekos & Merlo article was published prior to *Graham v. Florida*, 560 U.S. 48 (2010), and before the effects of *Roper v. Simmons*, 543 U.S. 551 (2005), had been assessed. The authors suggest that the prohibition on the juvenile death penalty may actually result in a greater number of juvenile offenders being sentenced to life without parole. Benekos &

movements towards implementing systems of restorative justice as an alternative to punitive policies.[40] More recently, surveys have suggested that the public is more open to treating juvenile offenders differently, favoring accountability over punishment and even expressing a willingness to pay for rehabilitative services rather than incarceration.[41] Overall, researchers identify a trend toward softening the strict polices of the late twentieth century.[42] Though tentative and somewhat disputed (at least in terms of degree and longevity),[43] this trend is mirrored in the Supreme Court's most recent jurisprudence involving juvenile offenders.

II. THE SUPREME COURT'S APPROACH TO JUVENILE SENTENCING

A. *Pre*-Miller *Cases*

In the years preceding *Miller v. Alabama*, the Supreme Court shifted from a view that seemed to mirror the tough-on-crime approach taken by the federal government as well as state legislatures.[44] Beginning in 2005 with *Roper v. Simmons*, and continuing in 2010 with *Graham v. Florida*, the Court prohibited certain severe punishments for juvenile offenders because of their age at the time of the crime.[45]

1. *Roper v. Simmons*

In *Roper*, the Court reconsidered the constitutionality of the juvenile death penalty after upholding it for offenders over the age of sixteen in *Stanford v. Kentucky*, this time finding capital punishment for juvenile offenders

Merlo, *supra* note 34, at 42 ("[W]ithout the death penalty, legislatures may be reluctant to remove the life without parole sanction.").

[40] Benekos & Merlo, *supra* note 34, at 41-42 (describing one rehabilitation-focused solution implemented in Pennsylvania, which has more juveniles serving life-without-parole sentences than most states).

[41] Merlo & Benekos, *supra* note 35, at 18 (summarizing findings from a 2007 survey in which eighty percent of respondents were supportive of rehabilitation for juvenile offenders and a separate study where a majority were willing to pay twenty percent more in taxes to provide such services).

[42] *Id.* at 21 ("[S]ome evidence suggests that the juvenile justice system has maintained a measured response and is committed to a more progressive approach toward youth.").

[43] *See id.* (identifying some researchers' concerns that the trend is merely part of the "hardening-softening cycle of juvenile justice").

[44] *See supra* Part I.B (describing the recent history of juvenile justice, including tough-on-crime laws following highly publicized school shootings and an eventual trend towards softening harsh sentencing policies).

[45] Graham v. Florida, 560 U.S. 48, 80 (2010) ("The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide."); Roper v. Simmons, 543 U.S. 551, 572-73 (2005) ("The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.").

unconstitutional.[46] Focusing on how "contemporary standards of decency" had changed since *Stanford*,[47] the decision relied heavily on the prohibition of death sentences for the mentally retarded in *Atkins v. Virginia*.[48] The prohibition was based on three main differences between juveniles and adults.[49] First, brain development and social science data have long confirmed the "comparative immaturity and irresponsibility of juveniles."[50] Second, juveniles have a higher vulnerability to peer pressure, a vulnerability that stems from "less control . . . over their own environment."[51] Finally, juveniles have not had the opportunity to develop strong character in the same way that adults have and thus have personalities that "are more transitory."[52]

Together, these traits reduce the culpability of juveniles, making "the penological justifications for the death penalty" inadequate for that class of offenders.[53] Based on the parallels to the *Atkins* reasoning and the insufficient justifications for applying the death penalty to juvenile offenders, the Court announced a categorical ban on the death penalty for any juvenile offender.[54] *Roper* marked a huge victory for juvenile justice advocates not only because of its ban of the juvenile death penalty, but also because of the abundance of language acknowledging that children must be treated differently from adults. The value of this rhetoric became clear in *Graham* and *Miller*, which cite language from *Roper* extensively.

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[46] *Roper*, 543 U.S. at 568 ("A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.").

[47] *Id*. at 562.

[48] *Id.* at 564 (explaining that "[t]he evidence of national consensus against the death penalty for juveniles is similar, and in some respects parallel, to the evidence" used to overrule the death penalty for the mentally retarded in *Atkins v. Virginia*, 536 U.S. 304 (2002)).

[49] *Id.* at 569 (discussing "[t]hree general differences between juveniles under 18 and adults").

[50] *Id.* (using state policies on the age of consent, the age for voting, and the age to serve on juries as further evidence of juveniles' immaturity).

[51] *Id.*

[52] *Id.* at 570 (stating that minors have not fully completed their development and that their personalities are therefore "less fixed").

[53] *Id.* at 571 (explaining that the justification for the death penalty does not apply to juveniles because they are not as culpable as adults). Justice Kennedy ultimately concludes that the case for the death penalty as a retributive punishment is not strong because of proportionality concerns and that the special characteristics of youth also undermine its deterrent effect. *Id.* ("[T]he absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.").

[54] *Id.* at 572-74 (deciding on a categorical ban after highlighting the "unacceptable likelihood . . . that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course").

2. *Graham v. Florida*

Graham faced the much more difficult obstacle of categorically challenging a term-of-years sentence under the Eighth Amendment's disproportionality test.[55] Highlighting the disparity between legislative sentencing guidelines permitting the imposition of juvenile life without parole for nonhomicide offenses and the actual sentencing practices,[56] the *Graham* majority concluded that life without parole was rare and "a national consensus has developed against it."[57] In striking down nonhomicide life without parole for juvenile offenders, the Court reasserted *Roper*'s acknowledgment that juveniles are less culpable than adults, particularly when they "do not kill, intend to kill, or foresee that life will be taken."[58] The Court also analogized life without parole for juvenile defendants to a death sentence,[59] pointing out that the sentence's severity is magnified for the juvenile offender, who will serve a longer term and for "a greater percentage of his life" than an adult.[60]

In addition to the rarity and severity of the sentence, the Court also found that typical penological justifications did not support imposing juvenile life-without-parole sentences for nonhomicide crimes.[61] Life-without-parole sentences, by their very nature, reject the goal of rehabilitation which is central

[55] Graham v. Florida, 560 U.S. 48, 58-60 (2010).

[56] *Id.* at 62 ("Here, an examination of actual sentencing practices in jurisdictions where the sentence in question is permitted by statute discloses a consensus against its use."). The opinion notes that six states have barred all juvenile life-without-parole sentences, seven only allow such sentences for homicides, and thirty-seven allow life without parole for some nonhomicide juvenile offenses. *Id.* More important are the actual sentencing practices that demonstrate juvenile life-without-parole sentences are most rare for nonhomicide offenders. *Id.* at 62-63 ("[O]nly 109 juvenile offenders [are] serving sentences of life without parole for nonhomicide offenses.").

[57] *Id*. at 67 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

[58] *Id.* at 69 ("[A] juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.").

[59] *Id.* ("[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. . . . [T]he sentence alters the offender's life by a forfeiture that is irrevocable.").

[60] *Id.* at 70 ("A 16—year—old and a 75—year—old each sentenced to life without parole receive the same punishment in name only.").

[61] *Id.* at 71 ("With respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate . . . provides an adequate justification." (citation omitted)). The Court found that retribution does not support life-without-parole sentences for nonhomicide crimes because of the already established lessened culpability of a juvenile, particularly one who has not committed homicide. *Id*. at 71-72. Deterrence also failed to justify such sentences because of a juvenile's inability to consider the possibility of punishment, especially when infrequently meted out. *Id.* at 72. Finally, incapacitation cannot justify life without parole for nonhomicide offenses because of a juvenile's special ability to grow, mature, and rehabilitate. *Id.* at 72-73.

to addressing juvenile crime.[62] Furthermore, anything less than a categorical ban would lead to major complications for sentencing judges and defense counsel. Judges would face enormous difficulty determining which juvenile offenders truly lack psychological maturity and culpability for the crimes they commit.[63] The Court also pointed to the potential for communication problems between juvenile defendants and their defense counsel, exacerbating the difficulty of evaluating culpability.[64]

B. Miller v. Alabama

Miller v. Alabama and its companion case, *Jackson v. Hobbs*, presented the Court with an issue not addressed in *Graham* – whether the Eighth Amendment bars life-without-parole sentences for juvenile homicide offenders.[65] Using *Roper* and *Graham* as the foundation for its decision, the Court held that the *mandatory* imposition of these sentences was unconstitutional under the Eighth Amendment.[66]

1. The Facts

Evan Miller and Kuntrell Jackson were both fourteen years old at the time of their offenses.[67] Miller had a troubled childhood, growing up in a home riddled with abuse, alcoholism, and drug use.[68] He had already attempted suicide four times by the time he committed murder in the course of arson.[69] In Alabama, where Miller was tried, such a charge requires a mandatory minimum sentence of life without parole.[70] When he was found guilty, he was sentenced to die in

[62] *Id.* at 74 ("The penalty forswears altogether the rehabilitative ideal.").

[63] *Id.* at 77 ("[I]t does not follow that courts taking a case-by-case proportionality approach could with sufficient accuracy distinguish the few incorrigible juvenile offenders from the many that have the capacity for change.").

[64] *Id.* at 78 ("[Juveniles] are less likely than adults to work effectively with their lawyers to aid in their defense.").

[65] *See* Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012) ("*Graham*'s flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder . . . .").

[66] *Id.* at 2463-64 ("Here, the confluence of [the *Roper* and *Graham*] lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment.").

[67] *Id.* at 2460.

[68] *Id.* at 2462 ("Miller had . . . been in and out of foster care because his mother suffered from alcoholism and drug addiction and his stepfather abused him.").

[69] *Id.*

[70] *Id.* at 2462-63 ("Alabama law required that Miller initially be charged as a juvenile, but allowed the District Attorney to seek removal of the case to adult court. . . . The D.A. did so . . . [and] charged Miller as an adult with murder in the course of arson. That crime . . . carries a mandatory minimum punishment of life without parole.").

prison.[71] Kuntrell Jackson was charged and found guilty of capital felony murder and aggravated robbery after serving as a lookout in a video store robbery with two other boys.[72] One of the boys brought a sawed-off shotgun to the attempted robbery and shot the video store clerk in the face after she threatened to call the police.[73] Jackson was sentenced under the Arkansas mandatory sentencing statute that, like Alabama's, did not permit the judge to consider any mitigating factors.[74]

2. The Opinion

The *Miller* opinion began with a now familiar mantra – "children are constitutionally different from adults for purposes of sentencing."[75] Like in *Roper* and *Graham*, the Court emphasized children's "lack of maturity," vulnerability to outside influence and pressure, and transient personality traits.[76] The majority also used *Graham*'s analogy between juvenile life-without-parole and death sentences to invoke a second line of precedent – the requirement of individualized sentencing for capital punishment.[77] By preventing any consideration of age, each juvenile offender is treated the same as all other juveniles and adults who commit the same crime.[78] Such treatment is impermissible in the context of imposing "a State's harshest penalties" on juvenile offenders.[79] The Court used the unique circumstances of Miller's and Jackson's crimes to illustrate the problem with mandatory sentencing for juveniles, lamenting the inability of either the trial court judge or the jury to consider relevant characteristics to lighten the sentence.[80]

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[71] *Id.* at 2463.

[72] *Id.* at 2461.

[73] *Id.*

[74] *Id.* ("A defendant convicted of capital murder or treason shall be sentenced to death or life imprisonment without parole." (quoting ARK. CODE ANN. § 5-4-104(b) (1997)).

[75] *Id.* at 2464.

[76] *Id.* (explaining that previous cases relied on three significant gaps between juveniles and adults, including lack of maturity, vulnerability to negative influences, and lack of formation of character to explain why children are constitutionally different than adults).

[77] *Id.* at 2466-67 (remarking that the analogy between juvenile life sentences and the death penalty "makes relevant here a second line of our precedents, demanding individualized sentencing when imposing the death penalty").

[78] *Id.* at 2467-68 (stressing that mandatory juvenile life-without-parole sentences do not allow for the consideration of age during sentencing and, in doing so, require the same sentence for all juveniles and the same as the vast majority of adults).

[79] *Id.* at 2468 ("So *Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult.").

[80] *Id.* at 2468-69 (stating that Jackson's and Miller's cases illustrate the problem with mandatory punishments and the inability of the sentencer to consider relevant mitigating factors). Jackson played only a limited role in the crime and had an inability to calculate the risk and foreseeability of death when he learned his friend was carrying a firearm. Miller

Defending its holding against arguments put forward by Alabama, Arkansas, and the dissenting Justices, the majority emphasized again that sentencing rules applicable to adults are not necessarily constitutionally appropriate for children.[81] The outcomes in *Roper* and *Graham* turned on the need to consider age when dispensing the most serious punishments, not the prevalence of the sentence.[82] The need to consider age in sentencing emphasized by *Graham* and *Roper* led the Court to prohibit mandatory life-without-parole sentences for homicide offenses, requiring consideration of age before sentencing juveniles to the harshest penalty available.[83]

C. *What Does* Miller *Actually Require?*

Miller made clear that mandatory life-without-parole sentences for juvenile homicide offenders are unconstitutional and that age must be considered as a mitigating factor when sentencing juvenile offenders to life without parole. It provides little guidance, however, on exactly how state courts should weigh youth and its attendant characteristics to comply with the court's holding. Some rhetoric from the opinion provides an idea of the type of mitigating factors that should be given weight:

> Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other – the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one.[84]

At a minimum, sentencing judges should thus consider (1) the actual age of the offender, (2) the offender's role in the crime, and (3) the offender's background and upbringing. The first two factors are relatively straightforward, but the third opens the door for a wide variety of considerations, including mental illness and emotional problems, history of child abuse or negligence, and any kind of traumatic experience. In addition to

had a documented history of severe abuse and neglect and was under the influence of both drugs and alcohol at the time he committed the crime.

[81] *Id.* at 2470 ("We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children."). In doing so, the Court distinguished *Miller* from the ruling in *Harmelin v. Michigan*, 501 U.S. 957 (1991), which upheld a mandatory life-without-parole sentence for an adult drug-possession offense.

[82] *Miller*, 132 S. Ct. at 2471 (finding that although twenty-nine jurisdictions mandated life without parole for juveniles who committed homicide offenses, the Court was not precluded from finding mandatory life without parole for juveniles unconstitutional).

[83] *Id.* at 2469 ("[T]he Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. . . . By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment.").

[84] *Id.* at 2467-68.

the vagueness of the third factor, the opinion also leaves room to bring in other characteristics of age that could result in the admission of a wide variety of evidence.[85] The three bases for treating children differently than adults, as described in *Roper* and *Graham*, could enable (and potentially require) consideration of extremely broad categories of traits.[86]

Because the *Miller* opinion gives little guidance, the Court's strand of cases involving death-penalty mitigation factors provide much needed clarification. The capital-mitigation jurisprudence is especially informative because of the rhetoric in *Graham* and *Miller* that analogizes juvenile life without parole to the death penalty.[87] *Graham* justified the comparison because of the finality and lack of hope resulting from the imposition of life without parole on young defendants.[88] *Miller* drew on *Graham* to require a procedural safeguard for juveniles facing life without parole, mandating that sentencing for juvenile homicide offenders should in some way account for the defendant's age and background.[89] By making comparisons between juvenile life without parole and the death penalty, the Court thus leaves room for capital-mitigation strategies to clarify how juvenile homicide offenders should be sentenced after *Miller*.

1. Judicially Required Capital-Mitigation Strategies

The development of capital-mitigation strategies began with the Supreme Court's decision in *Furman v. Georgia*,[90] which struck down Georgia's and Texas's capital sentencing statutes because of the unfettered discretion the statutes gave to judges and juries.[91] In a plurality opinion, the Court required capital sentencing to put in place guidelines to prevent application that disadvantaged unpopular groups, such as African Americans and the poor.[92]

[85] *Id.* at 2468 (explaining that a problem with mandatory sentencing for juveniles is the inability of the sentencer to consider the features that correlate to the defendant's age, including immaturity, impetuosity, and/or failure to appreciate risks and consequences).

[86] Multiple categories of capital-mitigation evidence might be relevant to each of these three categories, discussed previously: (1) lack of maturity, (2) vulnerability to influences and pressure, and (3) ability to reform. *See supra* Part II.A.1.

[87] *See Miller*, 132 S. Ct. at 2466-67; Graham v. Florida, 560 U.S. 48, 69-70 (2010).

[88] *Graham*, 560 U.S. at 69-70 ("[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences." *Id.* at 69).

[89] *Miller*, 132 S. Ct. at 2468 (stressing that when a mandatory life-without-parole sentence is imposed, the sentencer is unable to consider necessary mitigating factors such as the defendant's maturity, capacity to assist at trial, background, and ability for rehabilitation, as well as the surrounding circumstances of the homicide).

[90] 408 U.S. 238 (1972).

[91] *Id*. at 255-57 (finding the statutes unconstitutional because they gave judges and juries broad discretion to administer the death penalty, leading to unequal application based on racial and socioeconomic biases).

[92] *Id.* at 256 ("[T]he 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and

The ruling spurred the drafting of new state legislation that attempted to meet the demands of *Furman*.[93] Over the next thirty years, the Court developed its capital-mitigation jurisprudence to flesh out exactly what kind of guidance capital sentencing statutes must provide. After *Furman*, the Court evaluated a variety of capital sentencing statutes.[94] In the years following *Furman*, it upheld a more carefully drafted capital sentencing statute that required judges or juries to find one of ten aggravating circumstances before recommending a death sentence.[95] Though the statute in question did not outline any particular mitigating circumstances, the Court was satisfied that it gave judges and juries the authority to consider any relevant mitigating factors.[96] Such authority is necessary given the "fundamental respect for humanity underlying the Eighth Amendment."[97]

The Court later evaluated a capital sentencing statute that required the imposition of the death penalty for certain aggravated offenses unless the sentencing judge found one of three mitigating factors present: (1) the victim induced the crime, (2) the defendant committed the crime because of duress, coercion, or strong provocation, or (3) the offense was a product of the defendant's mental deficiency.[98] The statute thus prevented any consideration of other pertinent factors that might weigh in favor of imposing a term-of-years

nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.").

[93] Todd Haugh, *Can the CEO Learn from the Condemned? The Application of Capital Mitigation Strategies to White Collar Cases*, 62 AM. U. L. REV. 10 (2012) (recounting that *Furman* led not only to a halt on all state executions, but also to the rewriting of all state death penalty statutes).

[94] *See infra* notes 95-115 and accompanying text (tracing the Court's treatment of capital punishment).

[95] Gregg v. Georgia, 428 U.S. 153, 196-97, 206-07 (1976) (holding that Georgia's new death penalty statute does not violate the Constitution because it limited the discretion of the jury and required a finding of one enumerated aggravator to impose the death penalty). The statute also provided a bifurcated trial that determined guilt and the appropriate sentence separately and had any death sentences automatically reviewed by the state supreme court for arbitrariness. *Id.* at 198.

[96] *Id.* at 197-98 (remarking that Georgia's death penalty statute requires the jury to consider the circumstances of the crime and the characteristics of the defendant before sentencing).

[97] Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (recognizing that "consideration of the character and record of the individual offender and the circumstances of the particular offense" is "a constitutionally indispensable part of the process of inflicting the penalty of death"); *see also* Roberts v. Louisiana, 428 U.S. 325, 333-34 (1976) ("Even the other more narrowly drawn categories of first-degree murder . . . afford no meaningful opportunity for consideration of mitigating factors presented by the circumstances of the particular crime or by the attributes of the individual offender.").

[98] Lockett v. Ohio, 438 U.S. 586, 593-94 (1980) (finding that if the defendant was guilty of aggravated murder, the Ohio death penalty statute allowed the judge to consider only three specified mitigating factors in order to impose a term-of-years sentence).

sentence instead of the death penalty.[99] Citing the historical acceptance of individualized sentencing and the cases discussed previously,[100] the Court concluded that in capital sentencing, judges and juries must "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[101] Because death sentences lack any way to correct or modify an executed sentence, an individualized decision is necessary to comply with the Constitution.[102] The Court thus significantly broadened its doctrine on capital sentencing by requiring that capital sentencing statutes allow consideration of any relevant mitigating factors.[103]

Although the Court assured defendants facing the death penalty that they could present a wide range of potential mitigating evidence, it did not give any guidelines as to what (if any) boundaries for such evidence existed.[104] Instead, the Court encouraged defense attorneys to try various approaches to mitigation, leading to complex arguments attempting to explain criminal conduct and the Court's subsequent shaping of the outer boundaries of mitigating evidence.[105] Evidence of a troubled upbringing must be weighed in the decision of whether to impose a capital sentence.[106] Such evidence is particularly relevant when the offender committed the crime at a young age.[107] Evidence regarding an already

[99] *Id.* at 597. Specifically, the defendant cited "her character, prior record, age, lack of specific intent to cause death, and her relatively minor part in the crime" as mitigating factors, all precluded from consideration under the statute. *Id.*

[100] *See supra* Part II.A-B.

[101] *Lockett*, 438 U.S. at 604.

[102] *Id.* at 605 (recognizing that the lack of modification mechanisms available in capital cases underscores the need for individualized consideration as a constitutional requirement).

[103] *Id.* ("[A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.").

[104] Haugh, *supra* note 93, at 12-13 (describing the Court's lack of clarity in articulating the boundaries for mitigating evidence and its effect on capital attorneys in determining what evidence to introduce).

[105] *See id.* at 13 (observing how some capital defense attorneys used evidence based on psychology, psychiatry, and physiology to mitigate possible death sentences).

[106] *See* Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982) (rejecting the lower courts' approach that mitigating evidence must "tend to support a legal excuse from criminal liability"). In this case, the sixteen-year-old defendant presented evidence of childhood neglect and physical abuse, as well as evaluations finding he had a personality disorder. *Id.* The lower courts did not consider that evidence in sentencing because it did not factor into the determination of criminal responsibility. *Id.*

[107] *Id.* at 116 ("[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.").

tried defendant's behavior in prison while awaiting sentencing also must be admitted because it bears directly on the threat of danger such a person may pose in the future.[108] The Court's holdings on what mitigating evidence is admissible make it clear that defendants must have an adequate opportunity to present a broad array of evidence that *may* justify a punishment other than the death penalty.

The Court further defined the scope of capital mitigation by solidifying defense counsel's duty to investigate a client's background and present mitigating evidence when found. Defense counsel is ineffective if they do not "conduct a thorough investigation of the defendant's background" in a capital case.[109] The threshold inquiry is whether counsel's investigation was reasonable.[110] Counsel must delve into the defendant's past, particularly where preliminary research signals mental illness, a troubled childhood, substance abuse, and other mitigating circumstances.[111] Investigation is important even when the defendant suggests his or her background would not be helpful in mitigating capital punishment; the search for possible mitigating factors must still be thorough and complete.[112]

Despite the seemingly endless list of potential mitigating factors, capital mitigation is not without limits. Trial courts are allowed to instruct jurors to focus only on the mitigating and aggravating evidence presented rather than mere feelings of sympathy.[113] Moreover, jury instructions can be tailored to specific "special issue" questions as long as jurors have an opportunity to consider all presented mitigating evidence while answering those questions.[114]

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[108] Skipper v. South Carolina, 476 U.S. 1, 5-7 (1986) ("Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing . . . .").

[109] Williams v. Taylor, 529 U.S. 362, 396 (2000) (holding that defense counsel was ineffective because he did not introduce evidence of the defendant's mental illness, lack of education, and good behavior in prison during sentencing).

[110] *See* Wiggins v. Smith, 539 U.S. 510, 523-25 (2003) (finding defense counsel's investigation unreasonable because of counsel's failure to go beyond preliminary background documents that indicated a past of extreme abuse).

[111] *See Williams*, 529 U.S. at 395-96.

[112] *See* Rompilla v. Beard, 545 U.S. 374, 389 (2005) (finding defense counsel ineffective because of counsel's failure to examine the defendant's past convictions, which the prosecution planned to use at sentencing).

[113] *See* California v. Brown, 479 U.S. 538, 543 (1987) ("An instruction prohibiting juries from basing their sentencing decision on factors not presented at the trial, and irrelevant to the issues at the trial, does not violate the United States Constitution."). In *Brown*, the Court upheld challenged jury instructions that told members not to be convinced by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." *Id*. at 539. The Court found that such a prohibiting instruction served to "limit the jury's consideration to matters introduced in evidence before it" and fostered reliability in sentencing. *Id.* at 543.

[114] *See* Franklin v. Lynaugh, 487 U.S. 164, 185 (1988) (O'Connor, J., concurring)

If the mitigating evidence is beyond the scope of the special issues, though, the sentencing statute cannot pass constitutional muster because the jury cannot consider all evidence that helps determine the appropriate punishment.[115]

2. Professionally Developed Guidelines for Capital Mitigation

In the later cases challenging effectiveness of counsel, the Supreme Court relied heavily on the American Bar Association (ABA) Guidelines to evaluate whether defense counsel had met its obligations for investigating mitigating factors in capital cases.[116] Because of this reliance, ABA updated its Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("Guidelines") to specifically identify the components of a defendant's social history that defense counsel must investigate.[117] The Guidelines now provide detailed instructions for how defense counsel should make a case for mitigation. By expanding the defense team to include two attorneys as well as an investigator and a mitigation specialist, counsel can better explore all avenues for possible mitigating circumstances.[118] The Guidelines also demand that mitigation investigations are conducted even with uncooperative clients.[119] Finally, taking a cue from the Supreme Court, the Guidelines outline numerous types of witnesses and evidence that must be investigated to prepare for the penalty part of the trial, including:

(rejecting a constitutional challenge to a statutory scheme that only allowed the jury to answer special issue questions because "the jury was free to give mitigating effect to [evidence of good prison behavior] in answering the special verdict question regarding future dangerousness").

[115] Penry v. Lynaugh, 492 U.S. 302, 322 (1989) (finding that the defendant's mitigating evidence of mental retardation and childhood abuse had relevance beyond the scope of the special issue questions and as a result the jury was not able to "express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment"). *Penry* and *Franklin* evaluated the same Texas capital sentencing statute, which required jurors to impose the death penalty if they answered yes to certain special issue questions, including (1) whether the defendant acted deliberately, (2) whether there is probability that the defendant will be dangerous in the future, and (3) whether the defendant responded unreasonably to provocation. *Id.* at 320.

[116] *See, e.g.*, Wiggins v. Smith, 539 U.S. 510, 522 (2003) (explaining how the Court used ABA's standards to define the "clearly established" duty to investigate for defense counsel in *Williams*).

[117] *See* Haugh, *supra* note 93, at 16-18 (describing the evolution of the ABA Guidelines and outlining the "template for building [a] client's mitigation case").

[118] ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 4.1 (2003) (instructing defense teams to include at least two attorneys, an investigator, a mitigation specialist, and at least one member who is qualified to screen individuals for mental or psychological disorders).

[119] *Id.* at 10.7 ("The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.").

(1) witnesses familiar with the defendant's life and development;
(2) expert and lay witnesses able to give a variety of insights into the defendant's emotional and mental health and development;
(3) witnesses able to testify on alternatives to capital punishment;
(4) witnesses able to identify the adverse impact of a death sentence on the client's loved ones; and
(5) physical evidence that demonstrates the client's positive traits.[120]

III. RESPONDING TO *MILLER*: RETROACTIVITY AND APPROPRIATE REMEDIES

The most pressing debate in the wake of *Miller* is whether it applies retroactively to offenders currently serving mandatory life-without-parole sentences. Judges and scholars have been debating that question since the opinion came out.[121] If state courts decide that *Miller* does apply retroactively, they must also decide the appropriate remedy for juvenile offenders sentenced to mandatory life-without-parole sentences. This Part discusses the arguments for and against retroactivity, as well as possible remedies for currently serving lifers.

A. *Should* Miller *Apply Retroactively?*

A flurry of litigation has followed since *Miller* was decided as offenders currently serving mandatory life-without-parole sentences seek to have those sentences reduced or reevaluated, and the outcomes have not been consistent.[122] *Teague v. Lane* governs whether a new rule announced by the Supreme Court applies retroactively, holding that retroactivity depends on its

[120] *Id.* at 10.11(F).

[121] *See* discussion *infra* Part III.A.

[122] Much of this litigation is discussed *infra* Part III.A.1-2. *See, e.g.*, David Ovalle, *State Courts Struggle with Supreme Court Ruling on Young Killers*, MIAMI HERALD (Nov. 13, 2012), http://www.miamiherald.com/2012/11/12/v-print/3094364/state-courts-struggle-with-supreme.html (reporting that one Florida appeals court neglected to apply *Miller* retroactively, but acknowledging that the decision "is likely bound for higher courts"); *Two Distinct Illinois Appellate Panels Find* Miller *Retroactive on Two Distinct Grounds*, SENTENCING L. & POLICY (Dec. 2, 2012, 10:25 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2012/12/two-distinct-illinois-appellate-panels-find-miller-retroactive-on-two-distinct-grounds.html (summarizing the holdings in *Williams* and *People v. Morfin*, 981 N.E.2d 1010, 1010 (Ill. App. Ct. 2012), both of which found *Miller* retroactive, but were decided on two distinct grounds). Although many lower courts have ruled on the retroactivity question, not all states have a final decision on *Miller*'s retroactive applicability. For example, in a concurring opinion in a post-*Miller* case (where retroactivity was not at issue), a Florida judge sought to certify the issue to the Florida Supreme Court to provide adequate guidance to the lower courts. *See* Partlow v. State, No. 1D10–5896, 2013 WL 45743, at *3-4 (Fla. Dist. Ct. App. Jan. 4, 2013) (Makar, J., concurring) ("The question of what sentencing options are available in Florida post-*Miller* is a purely legal issue that should be passed upon now and certified to the Florida Supreme Court.").

status as procedural or substantive.[123] Procedural rules generally are not retroactive on collateral review.[124] The rationale for not applying procedural rules retroactively is that the costs of retroactivity for the states as well as the high level of intrusiveness normally outweigh the benefits of retroactivity.[125] There are, however, two exceptions: either the new rule places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"[126] or the rule's observance is "implicit in the concept of ordered liberty."[127] The second exception is meant to apply to "watershed rules of criminal procedure" where "the procedure at issue . . . implicate[s] the fundamental fairness of the trial."[128] Subsequent cases have revealed this exception to be extremely narrow.[129] In order for a procedural rule to be retroactive as a "watershed rule," it must (1) "be necessary to prevent an impermissibly large risk of an inaccurate conviction," and (2) "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding."[130]

1. Arguments Against *Miller*'s Retroactivity

Opponents to retroactivity point out that *Miller* did not categorically ban life without parole for juvenile homicide offenders.[131] Instead, the majority emphasized that it "require[d] only that a sentencer follow a certain process" when imposing the penalty.[132] *Miller* thus merely marks a new procedural rule that changes how a court may impose life-without-parole sentences.[133] This

[123] Teague v. Lane, 489 U.S. 288, 310 (1989) ("Unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced.").

[124] *Id.*

[125] *Id.* ("The 'costs imposed . . . by retroactive application of new rules of constitutional law . . . generally far outweigh the benefits of this application.'" (quoting Solem v. Stumes, 465 U.S. 477, 654 (1981))).

[126] In other words, the rule is a substantive one.

[127] *Id*. at 311 (quoting Mackey v. United States, 401 U.S. 667, 692-93 (1971)).

[128] *Id.* at 311-12.

[129] *See* Whorton v. Bockting, 549 U.S. 406, 417-18 (2007) ("[I]n the years since *Teague*, we have rejected every claim that a new rule satisfied the requirements for watershed status.").

[130] *Id.* at 418 (internal quotation marks omitted).

[131] Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) (holding that the Eighth Amendment forbids mandatory life without parole for juveniles, but does not forbid life without parole for juveniles in all cases).

[132] *Id*. at 2459.

[133] Laurie L. Levenson, *Retroactivity of Cases on Criminal Defendants' Rights*, NAT'L L.J., Aug. 13, 2012, at 26 (suggesting that opponents of retroactivity will argue that *Miller* is a procedural rule falling under the general *Teague* rule barring retroactivity).

argument parallels the ruling in *Schriro v. Summerlin*,[134] where the Court found that a rule requiring certain procedural steps prior to sentencing was not retroactive under *Teague*.[135] Florida and Michigan, two of the states with the highest numbers of currently serving juvenile lifers,[136] used this reasoning to refuse to apply *Miller* retroactively.[137]

Many commentators also reference the significant costs of applying *Miller* retroactively to bolster the argument against doing so. Some state court judges have voiced concerns over "open[ing] the floodgates for postconviction motions" if they apply *Miller* retroactively.[138] Resentencing would direct valuable resources towards old cases where relevant evidence may be missing or unavailable. It could also trigger the right to counsel for those offenders challenging their sentences, further increasing the costs of retroactivity.[139] With already strained court systems, opponents to *Miller*'s retroactivity argue that resources would be better directed at reforming juvenile sentencing for convictions occurring after *Miller*.[140] Retroactive application also threatens the

[134] 542 U.S. 348, 354 (2004) (characterizing the requirement of jury trials to decide aggravating factors in capital cases as a new procedural rule and refusing to apply it retroactively where a trial judge found the defendant's aggravating factors).

[135] *See* Levenson, *supra* note 133 (comparing *Miller*'s holding with *Schriro*'s).

[136] As of 2009, Michigan had 346 people serving mandatory juvenile life-without-parole sentences. *How Many People Are Serving in My State?*, THE CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, http://fairsentencingofyouth.org/reports-and-research/how-many-people-are-serving-in-my-state (last visited Oct. 3, 2013). As of 2013, Florida had 195 people serving juvenile life-without-parole sentences. *Id.*

[137] Geter v. State, 115 So. 3d 375, 378 (Fla. Dist. Ct. App. 2012) (rejecting retroactivity because *Miller* is not a "development of fundamental significance" as required under Florida case law); Michigan v. Carp, 828 N.W.2d 685, 710 (Mich. Ct. App. 2012) (finding that *Miller* does not apply retroactively, in part, because of the Supreme Court's specific distinction between a categorical ban and a procedural process).

[138] *See Geter*, 115 So. 3d at 383 ("Applying *Miller* retroactively would undoubtedly open the floodgates for postconviction motions where at the time of conviction and sentencing, the judge did not have an affirmative duty to consider mitigating factors of youth."); *see also Carp*, 828 N.W.2d at 714 (neglecting to apply *Miller* retroactively under state case law because of "a commensurate concern regarding the effect of these potential appeals on our limited judicial resources").

[139] *See A Moral Right to Counsel*, Op-Ed., N.Y. TIMES, July 4, 2012, at A22, (advocating for assistance of public counsel to challenge pre-*Miller* life-without-parole convictions and claiming that states will need to also provide funds for expert testimony at resentencing hearings). *But see* Douglas A. Berman, NY Times *Editorial on* Miller *Puts* Gideon *Cart Before the* Teague *Horse*, SENT'G L. & POL'Y (July 5, 2012, 7:56 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2012/07/ny-times-editorial-on-miller-puts-gideon-cart-before-the-teague-horse.html (criticizing the imposition of an obligation on states to provide currently serving lifers with the right to counsel because of the diversion of state funds from other outlets).

[140] *See, e.g.*, *Carp*, 828 N.W.2d at 715 (declining to apply *Miller* retroactively under state case law because of "a commensurate concern regarding the effect of these potential appeals

finality of convictions, valued by both the state and victims.[141] This type of disruption of finality, opponents to retroactivity argue, is only appropriate when the accuracy of a conviction is questionable given the new rule.[142] In addition to disrupting judicial finality, reopening the sentencing of past juvenile homicide offenders would resurface painful memories for families of the victims.[143]

2. Arguments in Support of *Miller*'s Retroactivity

Proponents of retroactivity argue that the Court's treatment of *Miller*'s companion case, *Jackson v. Hobbs*, implied that the Court meant for its ruling to be retroactive. In acknowledging the importance of deciding retroactivity as "a threshold question," *Teague* held that "once 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."[144] Thus, when the Court reversed and remanded *Jackson v. Hobbs* on collateral review, it implicitly endorsed the retroactivity of its holding.[145] Proponents of *Miller*'s retroactivity also argue that the first *Teague* exception, which allows retroactivity for substantive rules has been expanded, now capturing rules that categorically bar sentences for defendants based on the offense they committed or their status.[146] Illinois courts found in two separate rulings that *Miller* fit into the *Teague* exception as a substantive rule and thus should be applied

on our limited judicial resources" and suggesting instead that the limited resources should be used to aid those defendants currently charged who may be entitled to relief).

[141] *See* Aaron-Andrew P. Bruhl, *When Is Finality . . . Final? Rehearing and Resurrection in the Supreme Court*, 12 J. APP. PRAC. & PROCESS 1, 5-6 (2011) (summarizing the "reluctance to upset final judgments," particularly in civil cases, but also in criminal cases).

[142] *See Geter*, 115 So. 3d at 380 (arguing that retroactively applying procedural rules like those in *Miller* "would thwart the State's interest in the finality of convictions" because procedural fairness does not change the determination of guilt or innocence).

[143] *See* Ethan Bronner, *Juvenile Killers and Life Terms: A Case in Point*, N.Y. TIMES, Oct. 14, 2012, at A1 (acknowledging that while *Miller* gave hope to juvenile offenders serving mandatory life-without-parole sentences, it "threw [victims' surviving family members] into anguished turmoil at the prospect that the killers of their loved ones might walk the streets again").

[144] Teague v. Lane, 489 U.S. 288, 300 (1989).

[145] Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012) (reversing and remanding both cases for further proceedings); Raven, Comment to *Should* Miller v. Alabama *Be Applied Retroactively?*, JUV. JUST. BLOG (Aug. 27, 2012, 4:45 PM), http://juvenilejusticeblog.web.unc.edu/2012/08/15/should-miller-v-alabama-be-applied-retroactively ("Accordingly, Miller should be applied retroactively to all who are similarly situated to Jackson.").

[146] *See In re* Sparks, 657 F.3d 258, 261 (2011) ("[*Teague*] should be understood as extending '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.'" (quoting Penry v. Lynaugh, 492 U.S. 302, 330 (1989))).

retroactively.[147] Furthermore, states can always expand protections beyond the requirements of the Supreme Court.[148] Even if state judges find that *Miller* does not fall under the *Teague* exception, they can choose to apply *Miller* retroactively under state case law and grant relief to currently serving juvenile lifers.[149] Some states, like Louisiana, have simply assumed retroactivity and remanded challenged pre-*Miller* mandatory life-without-parole sentences for resentencing.[150]

B. *Evaluation of* Miller*'s Retroactivity and Appropriate Remedies*

The retroactivity issue is complex and uncertain, with many states still resolving it within their court systems.[151] Though the main argument against *Miller*'s retroactivity is the high costs, the decision itself seems to require that states provide at least some remedy to currently serving juvenile lifers. The Court remanded Jackson's case for further proceedings, implying that its decision applied retroactively.[152] The opinion is also laden with language that emphasizes the importance of considering age in sentencing, particularly when deciding whether an individual has the capacity to reform.[153] Some states will

[147] People v. Williams, 982 N.E.2d 181, 181 (Ill. App. Ct. 2012) (finding *Miller* to be a new criminal procedural rule that has changed the substantive law and thus must apply retroactively); People v. Morfin, 981 N.E.2d 1010, 1010 (Ill. App. Ct. 2012) (relying on *Teague* to apply *Miller* retroactively on collateral review and provide those affected with a new sentencing hearing).

[148] *See, e.g.*, Robert A. Schapiro, *Judicial Federalism and the Challenges of State Constitutional Contestation*, 115 PENN ST. L. REV. 983, 983 (2011) (summarizing the ways states can give their citizens the necessary protections "if the national government does not adequately address a problem").

[149] Douglas A. Berman, *Issue-Spotting the Mess Sure to Follow* Miller*'s Narrow (Procedural?) Ruling*, SENT'G L. & POL'Y (June 25, 2012, 12:34 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2012/06/issue-spotting-the-mess-sure-to-follow-millers-narrow-procedural-ruling-.html ("[S]tates can (and should?) decide not to follow *Teague* . . . .").

[150] State v. Simmons, 99 So. 3d 28, 28 (La. 2012) (per curiam) (remanding for resentencing consistent with *Miller* with "reasons for reconsideration and sentencing on the record"); Douglas A. Berman, *Without Fanfare, Louisiana Supreme Court Gives Retroactive Effect to* Miller *Via Brief Order*, SENT'G L. & POL'Y (Oct. 15, 2012, 6:37 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2012/10/without-fanfare-louisiana-supreme-court-gives-retroactive-effect-to-miller-via-brief-order.html (characterizing *Simmons* as a "big deal" because the per curiam opinion gave *Miller* retroactivity "without pause").

[151] *See supra* Part III.A.1-2 (discussing how several states are treating the retroactivity issue differently).

[152] *See supra* note 144 and accompanying text (stating that if a new rule is announced, the rule should be applied retroactively to all prior "similarly situated" defendants).

[153] *See, e.g.*, Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) (predicting little need for life without parole given children's "heightened capacity for change").

(and should) choose to apply *Miller* retroactively regardless of whether the Supreme Court meant to require such application, if not to extend rights to those currently serving, to avoid a future ruling from the Court requiring it.[154]

States that have decided (and will later decide) to apply *Miller* retroactively must determine the appropriate remedy. Several courts have already reached this phase, although results have been inconsistent. Some are taking an individualized approach to resentencing, remanding cases for new sentencing hearings for defendants challenging pre-*Miller* mandatory convictions.[155] Lower courts have responded to these remands by accordingly lowering sentence lengths based on new mitigating evidence.[156] Other states have chosen a remedy that requires significantly less resources, simply reducing pre-*Miller* mandatory life-without-parole sentences across the board.[157] Iowa Governor Terry Branstad commuted the life-without-parole sentences mandatorily imposed on thirty-eight juvenile offenders to sixty-year sentences instead.[158] Because retroactivity is still being debated in jurisdictions across the

[154] In some cases, judges and victims alike acknowledge the inappropriateness of a life-without-parole sentence and express relief in resentencing offenders after *Miller*. *Man Convicted of Murder as Teen Resentenced*, WALL ST. J. (Apr. 2, 2012, 4:46 PM), http://online.wsj.com/article/AP1c76e27df0354918a56b1e3d5bcebc38.html?KEYWORDS=juvenile+life+without+parole (describing the resentencing hearing of a Delaware man convicted under the felony murder rule as his sentence was reduced to twenty years). Other resentencing decisions do not have such good intentions behind them. For example, the Iowa Governor commuted juvenile life-without-parole sentences to sixty-year sentences not to afford offenders an opportunity to reform, but rather to ensure they would still serve lengthy terms and be kept off the streets. Press Release, Office of the Governor of Iowa, Branstad Moves to Prevent the Release of Dangerous Murderers in Light of Recent U.S. Supreme Court Decision (July 16, 2012), *available at* https://governor.iowa.gov/2012/07/branstad-moves-to-prevent-the-release-of-dangerous-murderers-in-light-of-recent-u-s-supreme-court-decision ("The governor's action today gives the opportunity for parole in compliance with the recent Supreme Court decision; however, the action also protects victims from having to be re-victimized each year by worrying about whether the Parole Board will release the murderer who killed their loved one.").

[155] *See* Daugherty v. State, 96 So. 3d 1076, 1079 (2012) (reversing and remanding for resentencing a life-without-parole conviction that, though not mandatory, was not based on express consideration of the defendant's attributes of youth).

[156] *See* Tonya Alanez, *Judge Reduces Life Sentence to 40 Years in Fatal Beating of Homeless Man*, SUN SENTINEL (Nov. 15, 2012), http://articles.sun-sentinel.com/2012-11-15/news/fl-homeless-beating-resentencing-20121115_1_thomas-daugherty-homeless-man-brian-hooks (discussing a case in which the prisoner's sentence was reduced because of various factors, including the prisoner's remorse and testimony regarding the prisoner's "broken childhood").

[157] *See, e.g.*, Steve Eder, *Iowa Governor Reduces Juvenile Killers' Terms*, WALL ST. J. (July 17, 2012), http://online.wsj.com/article/SB10001424052702303612804577531242880353760.html (stating that Iowa's Governor made changes to the sentences of several juvenile offenders).

[158] *See supra* note 154.

country, the issue of the appropriate remedy will arise only after the issue of retroactivity is decided and until then will likely vary state to state.[159]

The nuances of *Miller*'s retroactivity argument, complex as they are, are beyond the scope of this Note, which is more focused on developing a model sentencing scheme for juvenile offenders convicted after *Miller*. Further, many of the issues surrounding retroactive remedies overlap with those presented by future remedies. Because of this overlap, this Note addresses those issues together in Part IV.

IV. JUVENILE SENTENCING AFTER *MILLER*

In addition to answering the retroactivity and remedy questions, states must also adapt their current sentencing practices to comply with *Miller*. In doing so, the legislature must amend existing laws or create new sentencing statutes that give courts clear guidance on how to sentence juvenile offenders. This Part examines alternatives that have been proposed (and in some cases, enacted) to replace unconstitutional sentencing statutes after *Miller*. It then outlines the solution that best meets the requirements laid out in *Miller*: individualized sentencing hearings modeled off of capital-mitigation hearings. Finally, it addresses the problems surrounding this approach, defending individualized sentencing as the best option, even in the face of criticism.

A. *Potential Solutions*

1. Temporary Judicial-Created Law

Legislative reform takes time, so judges have largely taken the first steps in providing *Miller*'s protections to juvenile offenders. Many states with mandatory life-without-parole sentencing have already issued state court opinions that respond to the now-unconstitutional statutes. Florida and Pennsylvania have both remanded direct appeal cases for resentencing hearings that comply with *Miller*.[160] Some states have even gone beyond the Supreme Court's ruling, expanding protections for juvenile offenders without the input of the legislature.[161] The problem with this type of judicially originated reform

[159] *See* Suevon Lee, *Despite Supreme Court Ruling, Many Minors May Stay in Prison for Life*, PROPUBLICA (Aug. 2, 2012, 8:43 AM), http://www.propublica.org/article/despite-supreme-court-ruling-many-minors-may-stay-in-prison-for-life (finding that *Miller* gives room for states to try different approaches to retroactivity remedies).

[160] Washington v. State, 103 So. 3d 917, 919 (Fla. Dist. Ct. App. 2012) (invalidating a post-*Miller* mandatory life-without-parole sentence and remanding for resentencing that individually considered age as a factor); Commonwealth v. Batts, 66 A.3d 286, 286 (Pa. 2013) (holding a life-without-parole sentence for a fourteen-year-old juvenile to be vacated and reconsidered while looking at mitigating circumstances, particularly age).

[161] For example, the Supreme Judicial Court of Massachusetts upheld the dismissal of a second-degree murder indictment for a juvenile defendant in *Commonwealth v. Walczak*, holding that grand juries must be instructed on the age of the accused as a mitigating

is that it results in ad hoc sentences that breed inconsistency in the justice system.[162] Some states have already encountered this problem as different courts reach different conclusions on *Miller*'s retroactivity, the remedy for retroactivity, and how to sentence juvenile offenders in the absence of a constitutional statute.[163]

2. Replacing Mandatory Life Without Parole with Lesser Sentences

The simplest solution for states whose sentencing statutes were struck down by *Miller* is to replace mandatory life-without-parole sentences with life sentences that allow for the possibility of parole. In some states, this solution has taken the form of converting life-without-parole sentences to life sentences with the possibility of parole after some minimum amount of time has passed.[164] Such an approach does not necessarily foreclose the ability to sentence a juvenile offender to life without parole, but rather essentially establishes a mandatory minimum sentence. For example, the Wyoming legislature has replaced life-without-parole sentences with life sentences that offer parole eligibility after twenty-five years,[165] and states like Massachusetts, Nebraska, and Pennsylvania are reportedly considering similar bills.[166]

circumstance even though the prosecutor in this case had presented evidence sufficient for such an indictment. Commonwealth v. Walczak, 979 N.E.2d 732, 733 (Mass. 2012). *Walczak* did not involve the possibility of a mandatory life-without-parole sentence, but rather a mandatory life sentence with the possibility of parole after fifteen years. *Id*. at 749. Citing *Miller*, the court reasoned that the significant differences in culpability and capacity for change required that the grand jury be able to account for the defendant's age. *Id.* at 737. Doing so would thus allow the grand jury to indict the defendant on a lesser offense (here, voluntary manslaughter) and afford him the opportunity to obtain the protections of the juvenile court system. *Id.* at 766. Otherwise, the defendant would be tried in adult court where age could not be considered as a factor. *Id.*

[162] *See Mass. Must Adjust Sentences for Murders by Juveniles*, Op-Ed., BOS. GLOBE (Nov. 28, 2012), http://www.bostonglobe.com/opinion/editorials/2012/11/28/supreme-court-ruling-should-prompt-state-change-juvenile-sentencing-laws/6S1sy9l7fa7LW26s3z598N/story.html (calling for legislative action after a district judge declined to impose a mandatory life-without-parole sentence and asked that the legislature clarify the situation after *Miller*); Ovalle, *supra* note 122 (quoting the Florida Public Defender's Office, who criticized judicial solutions because "courts don't have the authority to 'enact a new, hybrid statute'").

[163] See supra Part III (discussing state court rulings on retroactivity and appropriate remedies that vary widely from state-to-state and even within states).

[164] North Carolina amended its sentencing statute to impose a life sentence with the possibility of parole after a minimum of twenty-five years, though it reserved the ability to impose a life-without-parole sentence after an individualized hearing so long as the offender's conviction was *not* based solely on the felony murder rule. 2012 N.C. Sess. Laws 148.

[165] 2013 Wyo. Sess. Laws 75 (stating that a minor sentenced to life imprisonment will be eligible for parole after "having served twenty-five years of incarceration"); *Wyoming Abolishes Life Without Parole for Children*, CAMPAIGN FOR FAIR SENTENTING OF YOUTH

Criticism of *Miller*'s holding reveals the problem with this solution: exceptionally long term-of-years sentences bear close similarity to life without parole, particularly for juveniles.[167] The same problem occurred after *Graham* when many courts were left to consider whether the ban on life-without-parole sentences for nonhomicide offenses applied equally to lengthy term-of-years sentences.[168] Similarly, the dissenters in *Miller* predicted that the majority's reasoning would support eliminating mandatory sentencing for juveniles altogether because of their immaturity and potential for change and reform.[169] Replacing life without parole with certain term-of-years sentences ignores the similarities between the two and presents the potential for future challenges. Some commentators have argued that the constitutionality of these types of statutes turns on whether juvenile offenders are given a meaningful opportunity for release.[170]

3. Eliminating Juvenile Life Without Parole Altogether

The most liberal juvenile justice advocates have proposed a different across-the-board legislative solution – abolishing all life-without-parole sentences for juvenile offenders. Because many scholars believe that *Miller* and its progeny can be read to support a complete prohibition of juvenile life-without-parole sentences, they argue that eliminating those sentences through legislative action is "most faithful to the trend in recent Supreme Court decisions . . . ."[171]

(Feb. 15, 2013), http://fairsentencingofyouth.org/2013/02/15/wyoming-abolishes-life-without-parole-for-children (discussing the Wyoming law that abolished life without parole for minors). The Wyoming law mirrors the retroactivity approach of simply commuting all former life-without-parole sentences to term-of-years sentences. *See supra* note 154 and accompanying text.

[166] *Iowa Supreme Court Watch: Juvenile Life Without Parole*, IOWA CRIM. DEF. BLOG (Mar. 18, 2013), http://iowacriminaldefenseblog.com/2013/03/18/iowa-juvenile-life-sentences (discussing these states' efforts to establish meaningful opportunities for parole for juvenile offenders).

[167] Craig S. Lerner, *Sentenced to Confusion:* Miller v. Alabama *and the Coming Wave of Eighth Amendment Cases*, 20 GEO. MASON L. REV. 25, 37 (2012) (criticizing the Court for differentiating life without parole on the basis that it "mandates that the defendant 'die in prison'" because many long sentences provide the same mandate).

[168] *Id.* at 37-38 (documenting the cases post-*Graham* that challenged term-of-years sentences for juveniles ranging from 52 years to 120 years, including a California case that struck down a 110-year sentence for a juvenile offender).

[169] Miller v. Alabama, 132 S. Ct. 2455, 2482 (2012) (Roberts, C.J., dissenting) ("There is no clear reason that principle would not bar all mandatory sentences for juveniles, or any juvenile sentence as harsh as what a similarly situated adult would receive.").

[170] *See, e.g.*, *Iowa Supreme Court Watch: Juvenile Life Without Parole*, *supra* note 166 ("[T]he Iowa Supreme Court must determine whether the Governor's commutation provides prisoners sentenced to life for crimes they committed as juveniles a meaningful opportunity for parole.").

[171] Doriane Lambelet Coleman & James E. Coleman, Jr., *Getting Juvenile Life Without*

Although the *Miller* majority did not go so far as to categorically ban juvenile life without parole, it did so implicitly by choosing to not address that claim.[172] Because the Court in *Miller* did not go so far to explicitly ban all juvenile life-without-parole sentences, states may be unwilling to go this far in their sentencing reforms.

B. *The Best Solution: Individualized Sentencing Hearings for Juvenile Offenders*

New juvenile sentencing schemes should require individualized sentencing hearings for juvenile homicide offenders. Not only is such an approach necessary to comply with *Miller*, but it also sets up a system that will withstand future challenges that scholars predict will follow the decision. State legislators should use the capital-mitigation strategies developed through Supreme Court rulings and the ABA Guidelines to inform the sentencing scheme, providing specific examples of mitigating evidence that judges must consider during the sentencing hearings. Beyond sentencing legislation that requires individual evaluation of each juvenile offender, public defender organizations and the private defense bar can model their approach to representing juvenile offenders after the ABA Guidelines to further provide that population with the full protection of *Miller*.

1. Compliance with *Miller* Requires Individualized Consideration of Age and Its Attendant Circumstances Before Sentencing Juvenile Offenders

Though *Miller* did not give clear and specific guidance to states on how to proceed after banning mandatory life without parole, it did give a clear message: "children are constitutionally different from adults" and that difference must be taken into account when imposing the "harshest penalties."[173] The opinion also emphasizes the problems with mandatory penalties, particularly in the context of juvenile sentencing.[174] Scholars and commentators have further elaborated on those problems, highlighting the possibility of successful future challenges to mandatory sentencing schemes for juvenile offenders.[175] To allow judges and juries to fully account for the

Parole "Right" After Miller v. Alabama, 8 DUKE J. CONST. L. & PUB. POL'Y 61, 69 (2012).

[172] *Miller*, 132 S. Ct. at 2469 ("Because [our] holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger.").

[173] *Id.* at 2464, 2468.

[174] *See supra* Part II.C; *supra* note 84 and accompanying text (explaining that mandatory penalties do not take into account any specific circumstances, including the upbringing of the child).

[175] *See infra* notes 202-06 (discussing the potential of *Miller* to bar punishments for juvenile offenders beyond mandatory life without parole).

differences among juvenile offenders, states must adopt sentencing schemes that allow for the consideration of age and the mitigating circumstances that accompany it.

2. Capital-Mitigation Approaches Are Applicable to Juvenile Sentencing Because of the Parallels Between Juvenile Life Without Parole and Capital Punishment

Graham analogized juvenile life without parole to the death penalty because of the finality and lack of hope resulting from its imposition.[176] *Miller* drew on that analogy to require a procedural safeguard for a juvenile facing life without parole: that sentencing should in some way account for a juvenile defendant's age and background. Further, *Miller*'s rhetoric contains many parallels to capital cases. The Court explicitly says it expects life without parole to be imposed rarely.[177] The majority also refers several times to life without parole as the harshest penalty available for juvenile sentencing.[178] By comparing juvenile life without parole and the death penalty, the Court leaves room for capital-mitigation strategies to clarify how juveniles should be sentenced after *Miller* in cases where life without parole is available. These strategies should thus be incorporated into new, post-*Miller* sentencing statutes.

a. *Broad Consideration of Any and All Mitigating Evidence*

First and foremost, judges must liberally allow defense counsel to present mitigating evidence when sentencing juvenile offenders who face a life-without-parole sentence. *Miller* itself stresses the importance of considering the "mitigating qualities of youth" that affect the culpability (and thus appropriate sentences) for juveniles.[179] The *Miller* court also mentions a wide variety of characteristics that play a role in mitigating an offender's sentence.[180] The broad ways in which a juvenile offender's culpability can be reduced favor the admission of an equally broad range of mitigating evidence. The comparisons between juvenile life without parole and capital punishment provide further support for allowing a broad range of evidence, particularly in light of the liberal admissibility of mitigating evidence allowed in capital sentencing hearings.

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[176] *See* Graham v. Florida, 560 U.S. 48, 77-79 (2010) (observing significant differences between juvenile and adult offenders and arguing that these differences create an unacceptable risk that a juvenile may spend his entire life in prison for a nonhomicide offense or receive the death penalty for any crime is too great).

[177] *Miller*, 132 S. Ct. at 2469 ("[W]e think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.").

[178] *See, e.g.*, *id.* at 2458 (stating that the mandatory life-without-parole schemes at issue are "the law's harshest term of imprisonment" for juveniles).

[179] *Id.* at 2467.

[180] *See supra* Part II.B-C (discussing the language in *Miller* that provides the foundation for the type of factors to consider).

b. *Identification of Specific Sources of Mitigating Evidence*

Though broad admissibility of mitigating evidence is an important part of post-*Miller* sentencing schemes, trial courts and defense counsel must have at least some guidance on specific areas of mitigating evidence. New sentencing schemes should thus draw on the capital-mitigation strategies to outline illustrative, though not exhaustive, lists of sources of mitigating evidence that judges should consider.[181] The capital-mitigation case law establishes the importance of certain social background information, particularly where the offender is youthful.[182] A troubled and abusive upbringing is one area where defense counsel can find evidence that could mitigate the offender's sentence.[183] Evidence of deficient mental and emotional help is also relevant to an offender's ability to reform and to alternative rehabilitation options.[184]

Legislators should also use the ABA Guidelines to create a list of mitigation areas. Modeling juvenile-sentencing statutes on the Guidelines will help defense counsel shape the social history they present for mitigation, including witnesses on the defendant's background and childhood, the defendant's character, and the defendant's mental and emotional health.[185] The Guidelines also suggest presenting evidence on alternatives to the death penalty (in this case, alternatives to life without parole).[186] In the context of juvenile sentencing, this category gives defense counsel an opportunity to use an offender's age and role in the crime as illustrations of capacity for reform. *Miller* explicitly emphasizes the importance of distinguishing between offenders with intent to kill and those without such intent, as well as between younger offenders who are more subject to peer pressure and older offenders who have a better sense of right and wrong.[187]

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[181] *See supra* Part II.C (discussing how new sentencing schemes have been developed both through the Supreme Court decisions and the ABA Guidelines).

[182] *See* Eddings v. Oklahoma, 455 U.S. 104, 116 (1982) ("[I]t is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing.").

[183] *See id.* at 107 (describing the defendant's alcoholic mother and physically abusive father as mitigating factors).

[184] *See id.* (holding that a state psychologist could testify regarding the defendant's personality and emotional tendencies).

[185] *See* ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES, Guideline 10.11(F) (2003) (discussing which witnesses and evidence defense counsel should consider in death penalty cases).

[186] *Id.* (stating that counsel should collect "demonstrative evidence," including any evidence that "humanize[s]" the defendant).

[187] Miller v. Alabama, 132 S. Ct. 2455, 2467-68 (2012) ("Under these [mandatory sentencing] schemes, every juvenile will receive the same sentence as every other—the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one.").

c. *Beyond the Statute: How Defense Counsel Can Use Capital-Mitigation Strategies to Improve Juvenile Representation*

Beyond drawing on the sources of capital mitigation, public defender organizations and private defense bar members could model their approach to representing juveniles in sentencing hearings off of the approach employed by counsel in capital cases. Defense counsel should adhere to a duty to investigate and present mitigating evidence of a juvenile offender's background as part of their role as effective counsel. Furthermore, counsel could employ a team-based approach that would allow more comprehensive research into a juvenile offender's past. Another way to model juvenile mitigation on capital mitigation would involve improving training and giving more guidance to public defenders. Public defender organizations should provide new training on analyzing different sources of a client's social background, such as school and medical records and documents from social workers and foster care organizations. ABA could develop a governing document for those representing juvenile offenders similar to the guidelines for counsel in capital cases.

Finally, like the development of capital-mitigation strategies, defense counsel's creativity and persistence could shape the future of juvenile sentencing jurisprudence. Attorneys representing juvenile offenders should think outside of the box when it comes to presenting mitigating evidence. They can also use mitigation in cases with other mandatory or harsh juvenile sentences (but not necessarily life without parole) to test the outer boundaries of mitigation. This type of innovation could provide more guidance to trial courts, legislatures, and attorneys by developing case law defining the parameters of mitigation in juvenile sentencing.

3. Public Policy Supports an Individualized Approach

In addition to arguments based on *Miller*'s language and its parallels to capital punishment for juveniles, public policy also supports individualized sentencing for juvenile offenders. Juvenile justice advocates do not ask that youthful offenders are not held accountable for their actions, only that they are held accountable in developmentally appropriate ways.[188] Though the public has a legitimate interest in punishing those who commit crimes, punishment must be based both on principles of proportionality and culpability, which change depending on the individual offender.[189] This is especially true for juvenile offenders, where the risk of miscalculating which youths are

[188] Robert G. Schwartz, *Age-Appropriate Charging and Sentencing*, 27 CRIM. JUST. 49, 49 (2012) (summarizing over a decade's worth of research that has led to a view culminating in the idea that "social, behavioral, and neuroscience require that juveniles be treated by the law differently than adults").

[189] Coleman & Coleman, Jr., *supra* note 171, at 68 ("[S]erious attention must be paid both to the crime and to the individual criminal.").

"irretrievably depraved" is high.[190] A more individualized approach to juvenile sentencing is championed outside the United States, where life without parole is rarely, if ever, imposed on juvenile offenders.[191]

4. A Model Start: North Carolina's Post-*Miller* Sentencing Law

North Carolina's newly enacted sentencing statute provides one example of this Note's proposed solution, and is a model starting point for states that must amend or create sentencing schemes after *Miller*.[192] First, North Carolina's statute anticipates a future challenge to juvenile sentencing by prohibiting the imposition of life without parole for convictions based solely on the felony murder rule.[193] Second, it gives convicted juvenile offenders an opportunity for release after twenty-five years, as opposed to requiring a longer term that is effectively equivalent (or close to equivalent) to life in prison.[194] Third, the statute provides the following list of factors that defense counsel can present and judges may consider during sentencing:

> (1) [A]ge at the time of the offense[,] (2) immaturity[,] (3) ability to appreciate the risks and consequences of conduct[,] (4) intellectual

[190] *Id.* (arguing that eliminating life without parole altogether still prevents "psychopaths" from being released through the actual parole process).

[191] *See* Lisa Mosley, *Judge Slams Mandatory Sentencing Laws as "Unjust*,*"* ABC NEWS (July 5, 2012, 8:25 AM), http://www.abc.net.au/news/2012-07-04/nt-judge-attacks-mandatory-sentencing-laws/4109212?section=nt (discussing how an Australian judge deemed mandatory sentences to be "in principle, obnoxious"); *see also* Douglas A. Berman, *Judge Down Under Laments Mandatory 20 Years (with Parole) for Brutal Contract Killer*, SENT'G L. & POL'Y (July 4, 2012, 7:13 AM), http://sentencing.typepad.com/sentencing_law_and_policy/2012/07/judge-down-under-laments-mandatory-20-years-with-parole-for-brutal-contract-killer.html (citing Mosley, *supra*) (comparing the view of mandatory sentencing in the United States, particularly the harsh perspective of the *Miller* dissents, with that in Australia).

[192] This Section focuses on the foundation that such a statute provides for creating a sentencing scheme that complies with *Miller*. It is not, however, without its flaws. For one, the statute faces some potential for a future challenge in that it provides a mandatory minimum sentence of life *with* parole for homicide offenses, allowing parole eligibility after serving twenty-five years. This Note has already discussed the issues with mandatory sentencing after *Miller*, especially where the mandatory sentence is life with parole. Such sentences could be found unconstitutional depending on whether offenders get a fair and meaningful opportunity for release. Furthermore, an ideal statute would go into more detail regarding potential *sources* of the mitigating evidence (including witnesses, school, or health records) to give even more guidance to trial courts and defense counsel.

[193] 2012 N.C. Sess. Laws 148 (automatically granting parole for those convicted of felony murder after twenty-five years of incarceration); *see also* Emily C. Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of* Roper*,* Graham*, and* J.D.B., 11 CONN. PUB. INT. L.J. 297, 298 (2012) (arguing that juvenile life without parole is unconstitutional for any juvenile convicted of a felony murder offense).

[194] *See, e.g.*, *supra* note 154 (discussing Iowa's commutation to sixty-year sentences).

> capacity[,] (5) prior record[,] (6) mental health[,] (7) familial or peer pressure exerted upon the defendant[,] [and] (8) likelihood that the defendant would benefit from rehabilitation in confinement.[195]

Finally, and most importantly, the statute leaves open the opportunity to present "any other mitigating factor or circumstance" and makes clear that its list of mitigating factors is merely illustrative.[196]

C. *Addressing the Problems with an Individualized Sentencing Approach*

The most notable problem with an individualized approach to sentencing is the substantial resources it would require and the strain it would place on an already overworked court system.[197] The cost of implementing any new rule, however, will be high. An individualized sentencing scheme will require a heavy initial investment of time and resources, but will address the constitutional problem immediately and prevent costs from later challenges down the road. The dissenting opinions in *Miller* lamented the possibility of many future challenges under the majority's reasoning.[198] Much of the scholarship post-*Miller* has also focused on the potential challenges in the wake of the decision. Indeed, the future landscape of Eighth Amendment jurisprudence is far from certain.[199] Commentators have claimed that *Miller* can be read to bar a wide variety of punishments, ranging from the prohibition of all juvenile life-without-parole sentences[200] to the ban of life without parole for offenders convicted under the felony murder rule.[201]

While the opinion itself does not go as far as some suggest, it certainly leaves room for that interpretation, especially in future challenges.[202] Critics of

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[195] 2012 N.C. Sess. Laws 148.

[196] *Id.*

[197] *See supra* notes 138-40 and accompanying text (discussing how this criticism is also found in the case law and scholarship on retroactivity).

[198] Miller v. Alabama, 132 S. Ct. 2455, 2481 (2012) (Roberts, C.J., dissenting) (arguing that the majority's language invites another categorical challenge to juvenile life without parole with "no discernible end point" for challenges to other mandatory or harsh juvenile sentences).

[199] Douglas A. Berman, Graham *and* Miller *and the Eighth Amendment's Uncertain Future*, 27 CRIM. JUST. 19, 19-20 (2013) (pointing out the "fundamental doctrinal line-drawing problem" inherent in Eighth Amendment cases and concluding that the future of its jurisprudence is "certainly uncertain").

[200] *See* Robert Johnson, Ph.D. & Chris Miller, *An Eighth Amendment Analysis of Juvenile Life Without Parole: Extending* Graham *to All Juvenile Offenders*, 12 U. MD. L.J. RACE RELIGION GENDER & CLASS 101, 101 (2012) (arguing that *Graham* alone is sufficient to justify a ban of all juvenile life-without-parole sentences).

[201] Keller, *supra* note 193, at 298 ("[T]his article argues that any mandatory sentence for a juvenile convicted of felony murder is inconsistent with precedent.").

[202] *See Miller*, 132 S. Ct. at 2469 (emphasizing that "we do not foreclose a sentencer's ability to make that judgment in homicide cases" while also pointing out that "appropriate

the opinion have even suggested that Justice Kagan's reasoning, based in part on "common sense" and "brain science,"[203] could rationalize expanding *Miller*'s prohibition on mandatory life-without-parole sentences to the "impaired brains of octogenarians."[204] The possibility of an expansion of *Miller* seems especially likely after the Supreme Court ordered California's Second District Court of Appeals to reconsider the discretionary imposition of consecutive terms of life without parole on a homicide offender who was seventeen at the time of he murdered three people.[205] The order suggests that presumptive life without parole is an impermissible punishment for juvenile offenders, even with room to consider age before imposition.[206]

Though it is unclear just how successful any one of these future challenges will be, the potential for expansion in any direction supports developing sentencing schemes now that would survive scrutiny in the face of future challenges. Lower mandatory sentences or one-size-fits-all opportunities for parole could present the same constitutional problem in a few short years if the Supreme Court continues to expand protection for juvenile defendants. Investing in developing individualized sentencing schemes now would prevent the possibility of starting from scratch if *Miller* is expanded.

CONCLUSION

Miller continued a trend of increasingly treating young offenders as constitutionally different from adult offenders. The decision marked yet another step towards a more rehabilitative justice system for juveniles. The opinion, however, gives little guidance about how to proceed. State courts and legislatures must change their practices to accommodate for age when

occasions for sentencing juveniles to this harshest possible penalty will be uncommon").

[203] *Id.* at 2464 ("Our decisions rested not only on common sense – on what 'any parent knows' – but on science and social science as well.").

[204] Lerner, *supra* note 167, at 37 (claiming that *Miller* does not have a principled distinction that contains the holding to apply only to mandatory juvenile life without parole).

[205] Mauricio v. California, 133 S. Ct. 524, 524 (2012) (holding that the lower California court must reevaluate the life-without-parole sentence of a juvenile).

[206] *See* Douglas A. Berman, *Does* Miller *Also Render* Presumptive *Juve LWOP Sentencing Unconstitutional?*, SENT'G L. & POL'Y (Nov. 18, 2012, 11:28 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2012/11/does-miller-also-render-presumptive-juve-lwop-sentencing-unconstitutional.html ("[T]he remand certainly does hint that *Miller* is not the end of the SCOTUS development of Eighth Amendment limits on severe sentencing systems for juveniles."); Lyle Denniston, *A Puzzle on Juvenile Sentencing*, SCOTUSBLOG (Nov. 16, 2012, 5:20 PM), http://www.scotusblog.com/2012/11/a-puzzle-on-juvenile-sentencing (arguing that the *Mauricio* ruling could lead to expanded protection for juveniles convicted of murder, but there are also other outcomes as well, not all of which would result in an expansion of *Miller*).

sentencing juvenile offenders. In doing so, they must anticipate future challenges and consider those challenges as they reform their statutes. Attorneys must determine how to use *Miller*'s holding to benefit their young clients. The best way to begin that process is to model sentencing statutes after the specific categories of mitigation developed in death penalty cases. This model will give defense counsel a solid starting point, enabling them to adequately represent their clients after *Miller*. As a result, the justice system will become better equipped to serve the youthful offenders who would, before *Miller*, have been sentenced to die in prison.