Victims of Youth: Equitable Sentencing Reform for Juvenile Offenders in the Wake of *Miller v. Alabama* and *Jackson v. Hobbs*

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Introduction

In the companion cases of *Miller v. Alabama* and *Jackson v. Hobbs*, the United States Supreme Court found mandatory life-without-parole sentences for juvenile offenders unconstitutional.[1] The Court's decision followed a decade of sentencing reform for juveniles; in 2005, *Roper v. Simmons* ended the execution of juvenile offenders, and in 2010, *Graham v. Florida* barred states from sentencing juveniles to life without parole for non-homicide crimes.[2] In *Miller*, the Court extended the rationale set forth in *Roper* and *Graham*, that juveniles are "constitutionally different" from adults due to their lack of maturity, vulnerability to negative influences, and capacity for change.[3] Consequently, the Court held, before "imposing the harshest possible penalty for juveniles" convicted of homicide, courts must consider mitigating circumstances specific to the juvenile and the offense.[4]

When the Court issued the *Miller* opinion in 2012, twenty-eight states retained statutes imposing *mandatory* life-without-

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1. Miller v. Alabama, 132 S. Ct. 2455, 2457–58 (2012).

2. Roper v. Simmons, 543 U.S. 551, 575 (2005); Graham v. Florida, 560 U.S. 48, 82 (2010).

3. *Miller*, 132 S. Ct. at 2458, 2475 (citing *Graham*, 560 U.S. at 67–70) ("*Graham* recognized that lack of intent normally diminishes the 'moral culpability' that attaches to the crime in question, making those that do not intend to kill 'categorically less deserving of the most serious forms of punishment than are murderers.'").

4. *Id.* at 2475.

parole sentences for juveniles convicted of homicide offenses.[5] To reform now unconstitutional statutes, these states must develop new sentencing schemes that will not only bar mandatory life sentences, but also allow juveniles "some meaningful opportunity" for release.[6] Moreover, while the Court's decision demands prompt statutory reform that will govern *future* juvenile offenders, it does not address the fate of juveniles sentenced prior to *Miller*.[7] In effect, state legislatures and courts are left to decide the fate of future offenders *and* determine if *Miller* will be applied retroactively to allow sentencing relief for pre-*Miller* offenders.[8]

The primary goal of this Comment is to evaluate legislation enacted in the wake of *Miller* and ultimately prescribe a statutory sentencing scheme that encompasses the foundational principles set forth in *Roper*, *Graham* and *Miller*. While the Court did not explicitly abolish life-without-parole sentences, this Comment argues that a sentencing scheme entirely eliminating life sentences for juveniles adheres most closely with the Court's rationale. Section I presents *Miller*'s mandate and contextualizes earlier cases leading up to *Miller*. Section II examines how states have interpreted and applied the Court's holding in *Miller*, illustrating the varied approaches taken to transform juvenile sentencing statutes. Section III prescribes a sentencing scheme that adheres to the holding in *Miller*—one that examines youthful offenders individually through consideration of mitigating factors. This Comment concludes by contending that a progressive scheme that eliminates life-without-parole sentences for juvenile offenders, and instead offers a meaningful opportunity for release,

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5. Joshua Rovner, *Slow to Act: State Responses to 2012 Supreme Court Mandate on Life Without Parole*, THE SENTENCING PROJECT (June 2014), *available at* http://sentencingproject.org/doc/publications/jj_State_Responses_to_Miller.pdf. Prior to the Court's decision in *Miller*, seven states—Alaska, Colorado, Kansas, Kentucky, Montana, New Mexico, and Oregon, as well as the District of Columbia—banned life without the possibility of parole for juvenile offenders. *Id.*

6. *Miller*, 132 S. Ct. at 2469 (quoting *Graham*, 560 U.S. at 74).

7. Elizabeth S. Scott, Miller v. Alabama *and the (Past and) Future of Juvenile Crime Regulation*, 31 LAW & INEQ. 535, 548 (2013) ("Although the Court's views surely influence other lawmakers, the Supreme Court does not dictate most juvenile crime regulations. But changing attitudes toward young offenders have affected policymakers at all levels of government; across the country, there has been a rethinking of harsh incarceration-based policies and a readiness to try different approaches.").

8. Marsha L. Levick & Robert G. Schwartz, *Practical Implications of* Miller v. Jackson [sic]*: Obtaining Relief in Court and Before the Parole Board*, 31 LAW & INEQ. 369, 369 (2013) ("However, *Miller* did not provide nuanced answers to *how* [developmental and neurological differences] matter. The issues that *Miller* did not reach have left an assortment of practical problems to be resolved by legislatures, courts, practitioners, and correctional administrators.").

most accurately reflects the Court's reasoning in *Miller* and the reduced culpability of youth.

I. Juvenile Culpability and Punishment Reform in the United States

Over the past decade, the United States Supreme Court has addressed the status of juvenile offenders and the role punishment played in youth sentencing in three cases: *Roper v. Simmons*,[9] *Graham v. Florida*,[10] and *Miller v. Alabama/Jackson v. Hobbs*.[11] These cases reinforce the foundational principle that "children are constitutionally different from adults" and that courts must consider mitigating factors specific to an offender's youth when sentencing juveniles.[12] These rulings guide lower courts to consider the diminished cognitive capacity of youthful offenders in sentencing and direct state legislatures to abolish existing juvenile sentencing schemes that do not comply with the Court's mandate.[13] The following sections will examine *Roper*, *Graham*, and *Miller,* and discuss their impact on juvenile criminal justice reform.

A. Roper v. Simmons

At the age of seventeen, Christopher Simmons was charged and indicted on charges of first-degree murder, burglary, kidnapping, and stealing in the death of Shirley Cook.[14] A jury found Simmons guilty of first-degree murder and recommended the death sentence.[15] Simmons subsequently appealed his conviction, sentence, and denial of post-conviction relief.[16]

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9. Roper v. Simmons, 543 U.S. 551, 551 (2005) (finding the execution of juvenile offenders unconstitutional).

10. *Graham*, 560 U.S. at 48 (finding life sentences for juvenile offenders convicted of non-homicide crimes unconstitutional).

11. *Miller*, 132 S. Ct. at 2455 (finding mandatory life sentences without the possibility of parole unconstitutional for juvenile offenders).

12. *Id.* at 2458 (citing *Roper*, 543 U.S. at 551 and *Graham*, 560 U.S. at 48).

13. *See* ARK. CODE ANN. § 5-10-101 (c)(1)(B) (2013); CAL. PENAL CODE § 1170 (d)(2)(A)(i) (West 2013); DEL. CODE ANN. tit. 11, § 4209A (West 2013); H.R. 2116, 27th Leg. Reg. Sess. (Haw. 2014); H.R. 152, Reg. Sess. (La. 2013); S.B. 319, 97th Leg. Reg. Sess. (Mich. 2014); NEB. REV. STAT. § 28-105.02 (2013); N.C. GEN. STAT. ANN. § 15A-1340.19A (West 2013); 18 PA. CONS. STAT. ANN. § 1102.1 (West 2012); TEX. PENAL CODE ANN. § 12.31 (West 2013); UTAH CODE ANN. § 76-5-202 (3)(e) (West 2013); S.B. 5064, 63d Leg. Reg. Sess. (Wash. 2014); WYO. STAT. ANN. § 6-2-101 (b) (2013).

14. *Roper*, 543 U.S. at 556.

15. *Id.*

16. *Id.* at 551.

Simmons' appeal and succeeding petitions for state and federal relief were denied.[17]

More than five years later, the Court held in *Atkins v. Virginia*[18] that the execution of "mentally retarded" offenders was cruel and unusual under the Eighth Amendment.[19] Following this decision, Simmons filed a new post-conviction petition contending that the holding in *Atkins* prohibited the execution of juvenile offenders;[20] Simmons argued that a national consensus had emerged opposing the execution of juveniles and that this consensus emphasized the unconstitutionality of capital punishment for youthful offenders.[21]

On March 1, 2005, the United States Supreme Court found imposition of the death penalty on juvenile offenders unconstitutional under the Eighth Amendment.[22] The Court first determined that juveniles lack maturity and a sense of responsibility, making them "more reckless than adults."[23] Second, the impressionable nature of juveniles makes them "more vulnerable to outside influences because they have less control over their surroundings."[24] Finally, the character of a juvenile is transitory and distinguishable from adults.[25] Thus, the "susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.'"[26] Based on this reasoning, largely reliant on medical findings regarding adolescent cognitive development, the

17. *Id.*

18. Atkins v. Virginia, 536 U.S. 304 (2002).

19. U.S. CONST. amend. VIII. In *Atkins*, Petitioner Atkins appealed a capital murder conviction and death sentence contending that the execution of mentally retarded persons is in direct violation of the Eighth Amendment. 536 U.S. at 304.

20. State *ex rel.* Simmons v. Roper, 112 S.W.3d 397, 399 (Mo. 2003), *aff'd sub nom. Roper*, 543 U.S. at 551 ("[T]he Supreme Court held that a national consensus had emerged against the execution of mentally retarded offenders . . . Simmons now asks [the Missouri Supreme Court] to hold that a similar consensus against the execution of juveniles has developed . . . that the rationale for the Supreme Court's determination that the execution of juveniles was not cruel and unusual punishment has disappeared, and that the Eighth Amendment bars his execution.").

21. *Id.* at 399–400; *Atkins*, 536 U.S. at 304–05.

22. *Roper*, 543 U.S. at 553.

23. *Id.* at 598 (O'Connor, J., dissenting).

24. *Id. See also* Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1011–14 (2003) (asserting that juveniles should not be held to the same standards of criminal responsibility as adults because of adolescent diminished capacity).

25. *Roper*, 543 U.S. at 558.

26. *Id.* at 570 (citing Thompson v. Oklahoma, 487 U.S. 815, 835 (1988)).

Court found the death penalty to be a cruel and unusual form of punishment for youthful offenders.[27]

B. Graham v. Florida

Terrance Jamar Graham was sixteen years old when he was indicted on charges of armed burglary with battery and attempted armed robbery.[28] After Graham pled guilty to both offenses, the court withheld adjudication and placed him on probation.[29] Six months after his release, Graham violated his probation when he participated in a home invasion robbery.[30] The court subsequently sentenced him to life imprisonment without the possibility of parole.[31]

Graham petitioned the District Court of Appeal of Florida, challenging the statute that provided authority for his sentence of life imprisonment;[32] Graham argued that life sentences without parole for juveniles should be considered *per se* unlawful and banned pursuant to the Eighth Amendment's ban on cruel and unusual punishment.[33] In examining the severe and serious nature of the offenses, the court found Graham to be "incapable of rehabilitation" and found that he had effectively forfeited his "second chance" by repeating his past crimes.[34] The District Court of Appeal denied Graham's petition and "decline[d] to implement a *per se* ban on the sentencing of juveniles to life imprisonment."[35]

On review, the United States Supreme Court examined the constitutionality of life-without-parole sentences for juveniles convicted of non-homicide offenses.[36] Largely reliant on findings in

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27. *Id.* at 571 ("Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."). *See also* Steinberg & Scott, *supra* note 24, at 1011–14 (arguing that immaturity and adolescent cognitive ability mitigate punishment and render youth offenders ineligible for capital punishment).

28. Graham v. State, 982 So. 2d 43, 45 (Fla. Dist. Ct. App. 2008), *rev'd*, 130 S. Ct. 2011 (2010).

29. *Id.* at 45.

30. *Id.* at 45–46.

31. *Graham*, 130 S. Ct. at 2020 (2010) (citing FLA. STAT. § 921.002 (1)(e) (2003)).

32. *Id.* at 2020–21; FLA. STAT. § 921.002 (1)(e) (2003).

33. U.S. CONST. amend. VIII; *Graham*, 982 So. 2d at 46.

34. *Graham*, 130 S. Ct. at 2020.

35. *Graham*, 982 So. 2d at 54 (emphasis added) ("Accordingly, appellant [Graham] cannot assert that established precedent supports a conclusion that the use of the sentence has become so unique as to be unusual as defined by the Eighth Amendment."). *Id.* at 49.

36. *Graham*, 130 S. Ct. at 2017–18.

Roper, the Court highlighted the "limited culpability" of juveniles and the disparate nature of life sentences on those who have a diminished moral responsibility.[37] The Court further stated the "inadequacy of penological theory to justify life without parole sentences for juvenile nonhomicide offenders, the limited culpability of such offenders, and the severity of these sentences" support the conclusion that juveniles are less deserving of such punishments.[38] Finally, as a less culpable category of offenders, courts "*must* impose a sentence that provides some meaningful opportunity for release based on demonstrated maturity and rehabilitation."[39]

Graham was significant most notably because it demonstrated a "shift in the Court's proportionality jurisprudence . . . for more Eighth Amendment challenges in noncapital cases";[40] *Graham* applied a "categorical challenge to a term-of-years sentence" by prohibiting a certain type of punishment—life without parole—for an entire class of defendants—juvenile non-homicide offenders.[41]

C. Miller v. Alabama *and* Jackson v. Hobbs

On June 25, 2012, the United States Supreme Court found mandatory life imprisonment for juvenile offenders unconstitutional in *Miller v. Alabama*[42] and its companion case, *Jackson v. Hobbs*.[43] In 2006, Evan Miller was indicted as a juvenile for capital murder, and was subsequently removed to adult court where he was charged with murder in the course of arson.[44] A jury found Miller guilty, and the trial court subsequently imposed a mandatory punishment of life without the possibility of parole.[45] The Alabama Court of Criminal Appeals

37. *Id.* at 2029–30 ("Even if the punishment has some connection to a valid penological goal, it must be shown that the punishment is not grossly disproportionate in light of the justification offered. Here, in light of juvenile nonhomicide offenders' diminished moral responsibility, any limited deterrent effect provided by life without parole is not enough to justify the sentence.").

38. *Id.* at 2016.

39. *Id.* (emphasis added).

40. Rachel E. Barkow, *Categorizing* Graham, 23 FED. SENT. REP. 49, 50 (2010).

41. *Graham*, 130 S. Ct. at 2022. *See also* Barry C. Feld, *The Youth Discount: Old Enough to Do the Crime, Too Young to Do the Time*, 11 OHIO ST. J. CRIM. L. 107, 124 (2013).

42. Miller v. Alabama, 132 S. Ct. 2455 (2012).

43. Jackson v. Hobbs, 132 S. Ct. 548 (2011).

44. *Miller*, 132 S. Ct. at 2457; *see also* Judgment and Sentencing Order, State v. Miller, No. CC 2006-68, 1 (Ala. Cir. Ct. 2006).

45. *Miller*, 132 S. Ct. at 2458.

affirmed Miller's sentence, holding that it was not overly harsh when compared to his crime, and that its mandatory nature was permissible under the Eighth Amendment.[46] Miller subsequently appealed the Alabama Court of Criminal Appeals' decision seeking review by the United States Supreme Court.[47]

In *Miller*'s companion case, *Jackson v. Hobbs*, Kuntrell Jackson was convicted of murder and sentenced mandatorily to a term of life without parole.[48] Jackson was similarly charged as an adult at the age of fourteen under counts of capitol felony murder and aggravated robbery.[49] After the appeals court confirmed his conviction and sentence on habeas review, Jackson appealed to the Arkansas Supreme Court, which affirmed his conviction.[50] Upon review by the United States Supreme Court, Miller and Jackson's cases were combined and decided jointly.[51]

In its analysis, the Court relied on precedent established in *Roper* and *Graham*;[52] as a consequence of their vulnerability to negative influences, underdeveloped sense of responsibility, and capacity for change, juveniles are "constitutionally different" from adults and "less deserving of the most severe punishments."[53] The degree of imprisonment assigned to juveniles, according to the Court, must be in proportion to their reduced level of culpability.[54] More specifically, because children lack maturity in ways that lead to impulsive behavior, they "lack the ability to extricate themselves from horrific, crime-producing settings[,]" making them less culpable than adult offenders.[55]

In *Graham*, the Court held that age matters in deciding whether a lifetime sentence is appropriate.[56] However, the

46. *See* Miller v. State, 63 So. 3d 676, 696 (Ala. Crim. App. 2010), *rev'd and remanded*, 132 S. Ct. 2455 (2012).

47. *Miller*, 132 S. Ct. at 2457.

48. *Id.*

49. *Id.*

50. *Id.*; Jackson v. State, 359 Ark. 87, 94, 194 S.W.3d 757, 762 (2004).

51. *Miller*, 132 S. Ct. at 2457; Jackson v. Hobbs, 132 S. Ct. 548, 548 (2011).

52. *Miller*, 132 S. Ct. at 2458; Roper v. Simmons, 543 U.S. 551, 551 (2005); Graham v. State, 130 S. Ct. 2011, 2011 (2010).

53. *Miller*, 132 S. Ct. at 2464–65 ("[A juvenile's] 'lack of maturity' and . . . 'underdeveloped sense of responsibility'" lead to "recklessness, impulsivity, and heedless risk-taking . . . *Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes."). *See also Roper*, 543 U.S. at 569.

54. *Miller*, 132 S. Ct. at 2458.

55. *Id.* at 2464.

56. *Id.* at 2465–66 (citing *Graham*, 130 S. Ct. at 2027) ("Most fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime

mandatory penalty schemes used to sentence Miller and Jackson were in direct conflict with the Court's holding in *Graham*; compulsory sentences of life without the possibility of parole inherently prevent sentencing authorities from assessing the actions of each juvenile individually:

> [M]andatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham*'s (and also *Roper*'s) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.[57]

By adhering to a structure that compulsively sentences juveniles without weighing their age, background, and nature of the crime, states intrinsically place children in the same class as adult offenders.[58] Further, mandatory sentencing schemes often impose identical, if not harsher, sentences on juveniles and adults convicted of the same crime.[59]

In evaluating culpability, the Court pointed specifically to Miller and Jackson's background to further emphasize the need to examine all circumstances surrounding the commission of the crime *and* the background of the juvenile.[60] Miller's stepfather was physically abusive, his mother was chemically dependent and abandoned her son, forcing him to live in foster care. Additionally,

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of incarceration without the possibility of parole. In the circumstances there, juvenile status precluded a life-without-parole sentence, even though an adult could receive it for a similar crime. And in other contexts as well, the characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate.").

57. *Id.* at 2466.

58. *Id.* at 2467–68 ("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.").

59. *Id.* at 2468 ("[E]ach juvenile . . . will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as *Graham* noted, a *greater* sentence than those adults will serve.").

60. *Id.* at 2468–69 ("Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth . . . .").

Miller attempted suicide on more than one occasion.[61] Comparably, Jackson's conviction relied on his participation in the commission of a robbery, as he did not actually discharge the gun that led to the victim's death.[62] In addressing the importance of these contextual factors, the Court determined that the familial background of juvenile offenders and the level of involvement in the crime should be examined and utilized to designate a just sentence.[63]

Miller also requires that sentencers review the offender's age and educational background, as these may be indicative of the juvenile's cognitive maturity, or lack thereof.[64] Moreover, the Court held that juveniles must be given "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[65] Finally, "given all that [the Court has] said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, [the Court held] appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[66] In adherence with this requirement, the Court reversed the judgments of both the Alabama Court of Criminal Appeals and the Arkansas Supreme Court, and remanded both cases for resentencing.[67]

II. Legislative Impact of *Miller v. Alabama*

After the Court's decision in *Miller*, sentencing statutes for juvenile offenders in twenty-eight states were effectively

61. *Id.* at 2469.

62. *Id.* at 2468.

63. *Id.* at 2469.

64. *Id.* at 2469 ("Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.").

65. *Id.* at 2469 (citing Graham v. State, 130 S. Ct. 2011, 2030 (2010).

66. *Id.*

67. *Id.* at 2475. *See also* Miller v. State, CR-06-0741 (Ala. Crim. App. Nov. 8, 2013) ("Thus, in accordance with the decision of the Supreme Court of the United States in *Miller*, Miller's sentence is reversed, and this cause [sic] is remanded with instructions for the circuit court to conduct a new sentencing hearing . . . ."); Jackson v. Norris, 2013 Ark. 175, *9, 426 S.W.3d 906, 911 (Ark. 2013) (remanding to the Mississippi County Circuit Court with instructions to resentence Kuntrell Jackson) ("We thus instruct the Mississippi County Circuit Court to hold a sentencing hearing where Jackson may present *Miller* evidence for consideration. We further instruct that Jackson's sentence must fall within the statutory discretionary sentencing range for a Class Y felony. For a Class Y felony, the sentence is not a mandatory sentence of life imprisonment without parole, but instead a discretionary sentencing range of not less than ten years and not more than forty years, or life.").

unconstitutional.[68] To date, fifteen states—Arkansas, California, Delaware, Florida, Hawaii, Louisiana, Michigan, Nebraska, North Carolina, Pennsylvania, South Dakota, Texas, Utah, Washington and Wyoming—have passed legislation to reconstruct sentencing schemes in adherence with *Miller*.[69] Of these states, four have abolished life-without-parole sentences for juvenile offenders entirely.[70]

The variation among states is immense and fails to provide a uniform application of the Court's rationale in *Miller*. This section will classify state legislation passed in the wake of *Miller* into one of two categories: *more* progressive and *less* progressive legislation. Some states adopted legislation adhering to the foundational principles set forth in *Miller*—children are constitutionally different from adults, and mitigating factors of youth must be considered in sentencing.[71] Conversely, other states have reconstructed sentencing statutes to allow for punishments that operate as de facto life sentences by requiring a minimum number of years in prison, often without consideration of mitigating circumstances specific to the offender's youth.[72]

While *Miller* did not explicitly provide state legislatures with an alternative to life-without-parole sentences, the Court did

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68. Kent Faulk, *Report: States Slow to Reform Sentencing Laws for Juveniles After 2012 Supreme Court Ruling in Alabama Capital Murder Case*, AL.COM (June 25, 2014, 5:17 PM), http://www.al.com/news/birmingham/index.ssf/2014/06/report_states_slow_to_reform_s.html. *See also* Rovner, *supra* note 5 ("*Miller* struck down laws in [twenty-eight] states . . . ."); Ryan Schill, *California Guarantees Chance at Parole for Juveniles Facing Life Sentences*, JUV. JUST INFO. EXCHANGE (Oct. 2, 2012), www.jjie.org/california-guarantees-chance-at-parole-for-juveniles-facing-life-sentences/ ("At least seven [sic] states already prohibit juvenile life without parole . . . . They are Alaska, Colorado, Kansas, Kentucky, New Mexico and Oregon.").

69. *See* ARK. CODE ANN. § 5-10-101 (c)(1)(B) (2013); CAL. PENAL CODE § 1170 (d)(2)(A)(i) (West 2013); DEL. CODE ANN. tit. 11, § 4209A (2013); H.R. 2116, 27th Leg. Reg. Sess. (Haw. 2014); H.R. 7035, Reg. Sess. (Fla. 2014); H.R. 152, Reg. Sess. (La. 2013); S.B. 319, 97th Leg. Reg. Sess. (Mich. 2014); NEB. REV. STAT. § 28-105.02 (2013); N.C. GEN. STAT. ANN. § 15A-1340.19A (West 2013); 18 PA. CONS. STAT. ANN. § 1102.1 (West 2012); S.B. 39, Reg. Sess. (S.D. 2013); TEX. PENAL CODE ANN. § 12.31 (West 2013); UTAH CODE ANN. § 76-5-202 (3)(e) (West 2013); H.R. 1338, 63d Leg. Reg. Sess. (Wash. 2013); WYO. STAT. ANN. § 6-2-101 (b) (2013). Conversely, fifteen states—Alabama, Arizona, Connecticut, Idaho, Illinois, Iowa, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, Ohio, Vermont, and Virginia—have not passed legislation to replace currently unconstitutional sentencing statutes. *See* Rovner, *supra* note 5.

70. *See* CAL. PENAL CODE § 1170 (d)(2)(A)(i) (West 2013); H.R. 2116, 27th Leg. Reg. Sess. (Haw. 2014); TEX. PENAL CODE ANN. § 12.31 (West 2013); WYO. STAT. ANN. § 6-2-101 (b) (2013).

71. Rovner, *supra* note 5.

72. *Id.*

instruct states to consider the reduced culpability of children when imposing sentences on juvenile offenders. By considering the impact of this mandate on sentencing reform post-*Miller*, this section supports a recommendation for a sentencing scheme that adheres to the purpose and spirit of *Miller*.

A. More Progressive Legislation

Although *Miller*'s mandate did not require states to eliminate juvenile life sentences altogether, the Court did state that use of the life sentences should be "uncommon" and only employed after a sentencer takes into "account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[73] At the time of *Miller*, seven states had abolished juvenile life-without-parole sentences, and five more followed after the ruling.[74] The decision to eliminate life sentences for youthful offenders, even by characteristically conservative states, reflects the elevation of restorative justice.[75] Reformed sentencing guidelines reflect a national trend towards "treating juvenile offenders differently, favoring accountability over punishment and even expressing a willingness to pay for rehabilitative services rather than incarceration."[76]

In the wake of *Roper* and *Graham*, California introduced a bill allowing juveniles convicted of homicide and currently serving life-without-parole sentences the opportunity to petition for resentencing.[77] Upon review, courts may reduce a life sentence to twenty-five years if the petitioner exhibits progress toward rehabilitation and remorse.[78] By offering an opportunity for judicial review, juvenile offenders *already* serving life sentences are able to submit retroactive resentencing petitions that demonstrate mitigating factors surrounding the circumstances of the offense alongside their efforts toward rehabilitation.[79] Under

73. Miller v. State, 132 S. Ct. 2455, 2469 (2012).

74. Rovner, *supra* note 5.

75. Sara E. Fiorillo, *Mitigating After* Miller*: Legislative Considerations and Remedies for the Future of Juvenile Sentencing*, 93 B.U. L. REV. 2095, 2102 (2013).

76. *Id.*

77. S.B. 9, 2011–2012 Leg. (Cal. 2012). After serving fifteen years in prison, selected juvenile offenders may seek judicial review and petition the court to reduce their sentence. *Id.*

78. *Id. See also* Don Thompson, *SB 9, California Juvenile Second Chance Bill, Signed by Governor Brown*, HUFFINGTON POST (Sept. 30, 2012, 11:13 PM), http://www.huffingtonpost.com/2012/09/30/sb-9-california_n_1927840.html.

79. S.B. 9, 2011–2012 Leg. (Cal. 2012); S.B. 260, 2013–2014 Leg. Reg. Sess. (Cal. 2013).

preceding California law, youthful offenders had no system of review and were essentially sentenced to die in prison for crimes committed as juveniles.[80]

Following the outcome in *Miller*, California again passed legislation amending the state's penal code to completely eliminate life-without-parole sentences for juveniles. The bill's addition to the previous 2012 legislation, which allows for retroactive resentencing petitions,[81] institutes a parole process for juveniles: offenders are eligible for release during the fifteenth year of incarceration, during the twentieth year of incarceration if the original sentence was less than twenty-five years to life, and during the twenty-fifth year of incarceration if the person received a sentence that was twenty-five years to life.[82] At each opportunity

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80. Jennifer Turner, *California Gives Hope to Child Offenders Sentenced to Die in Prison*, ACLU (Oct. 1, 2012), https://www.aclu.org/blog/criminal-law-reform-human-rights/california-gives-hope-child-offenders-sentenced-die-prison ("There are 309 child offenders serving life-without-parole sentences in California for murders committed when they were younger than [eighteen].").

81. Discussing the change, the California Senate said that:

> [e]xisting law provides that the Secretary of the Department of Corrections and Rehabilitation or the Board of Parole Hearings, or both, may, for specified reasons, recommend to the court that a prisoner's sentence be recalled, and that a court may recall a prisoner's sentence. When a defendant who was under [eighteen] years of age at the time of the commission of a crime has served at least [fifteen] years of his or her sentence, existing law allows the defendant to submit a petition for recall and resentencing, and authorizes the court, in its discretion, to recall the sentence and to resentence the defendant, provided that the new sentence is not greater than the initial sentence.

S.B. 260, 2013–2014 Leg. Reg. Sess. (Cal. 2013). *See also Gov. Brown Signs Bill Giving Juveniles Second Chance*, USA TODAY (Sept. 30, 2012, 9:04 PM), http://www.usatoday.com/story/news/nation/2012/09/30/gov-brown-signs-bill-juveniles/1604907/ ("[Legislation enacted in 2012 allows] the inmates [to] ask judges to reconsider their sentences after they serve at least [fifteen] years in prison. Judges could then reduce the no-parole sentence to [twenty-five] years-to-life if the inmate shows remorse and is taking steps toward rehabilitation.").

82. The legislation explains that:

> [e]xisting law requires the board to meet with each inmate sentenced pursuant to certain provisions of law during his or her [third] year of incarceration for the purpose of reviewing his or her file, making recommendations, and documenting activities and conduct pertinent to granting or withholding postconviction credit. This bill would instead require the board to meet with those inmates, including those who are eligible to be considered for parole pursuant to a youth offender parole hearing, during the [sixth] year prior to the inmate's minimum eligible parole release date. The bill would also require the board to provide an inmate additional, specified information during this consultation, including individualized recommendations regarding the inmate's work assignments, rehabilitative programs, and institutional behavior, and to provide those findings and recommendations, in writing, to the inmate within [thirty] days following the consultation.

S.B. 260, 2013–2014 Leg. Reg. Sess. (Cal. 2013).

for review, the Board of Parole relies on *Miller* by "giv[ing] great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner . . . ."[83] The Board also accepts testimony from family, friends and community members relating to the offender's life prior to the crime, and his or her individual development since commission of the crime.[84] Pursuant to the new law, a sentence of life without the possibility of parole is barred entirely for youth offenders.[85]

As determined by *Miller*, mandatory sentencing schemes are faulty in their failure to assign significance to the *individual* and instead provide an overarching punishment that fails to take into account the character of the offender and the circumstances of the offense.[86] In contrast with increasingly punitive statutes in other states, the California movement to reform punishment for youthful offenders displays a progressive shift consistent with the Court's reasoning in *Miller*.[87] Similarly, the Hawaii Fair Sentencing of Youth Act eliminates life-without-parole and, together with current state law that orders continuous opportunities for parole, requires sentencing review for juvenile offenders every twelve months once they become eligible for parole.[88] Juvenile offenders may file a motion requesting sentence

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83. The legislature specifically noted that:

> [i]n the wake of the US and the California Supreme Courts' decisions and consistent with neuroscientific research, SB 260 establishes a comprehensive judicial review process to evaluate cases involving extreme sentences for juveniles. SB 260 holds young people responsible for the crimes they committed and creates a system in which they must demonstrate remorse and rehabilitation to merit any possible sentence reduction as determined by the court.

Id. *See also Senate Committee on Public Safety: Hearing on S.B. 9*, 2011–2012 Session (2011).

84. S.B. 260, 2013–2014 Leg. Reg. Sess. (Cal. 2013).

85. *Id.*

86. Miller v. State, 132 S. Ct. 2455, 2467 (2012) ("[W]e insisted in these rulings that a sentencer have the ability to consider the 'mitigating qualities of youth.'").

87. S.B. 9, 2011–2012 Leg. (Cal. 2012); S.B. 260, 2013–2014 Leg. Reg. Sess. (Cal. 2013); *Miller*, 132 S. Ct. at 2465–77.

88. The Act states that:

> [t]he minimum term of imprisonment before a prisoner who was less than eighteen years of age at the time of the offense becomes eligible for parole shall be no longer than twenty years, or such shorter period as may be applicable. The authority shall ensure that the hearing to consider parole upon expiration of the minimum term . . . shall provide a meaningful opportunity to obtain release . . . .

H.R. 2116, 27th Leg. Reg. Sess. (Haw. 2014). *See also Hawaii Legislature Abolishes JLWOP*, THE CAMPAIGN FOR FAIR SENTENCING OF YOUTH (May 6, 2014, 11:16 AM), http://fairsentencingofyouth.org/2014/05/06/hawaii-legislature-abolishes-jlwop/.

modification, whereby courts consider mitigating circumstances specific to the offender and the offense.[89] Factors expressly prescribed by the Act call for courts to examine the offender's emotional and intellectual capacity at the time of the offense, presence of external influences, and evidence of rehabilitation and expressed remorse.[90] Consistent with *Miller*'s holding, the Act addresses the lessened moral culpability of juveniles and their potential to become contributing members of society.[91]

A number of revised statutes elected to retain juvenile life sentences as an option for courts. In several states that have retained life-without-parole sentences, the sentence can only be used after courts have considered the mitigating factors outlined in *Miller*.[92] Delaware's new statutory scheme grants courts the ability to sentence juvenile homicide offenders a minimum sentence of twenty-five years to a maximum sentence of life in prison, only after utilizing "individualized criteria suggested by the Supreme Court."[93] While the statute fails to provide explicit factors to be considered by sentencers, Delaware's new sentencing provision is most progressive in its retroactive application; youthful offenders sentenced pre-*Miller* to more than twenty years in prison are now entitled to a review hearing that will determine a sentence ranging from twenty-five years to life imprisonment.[94]

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89. H.R. 2116, 27th Leg. Reg. Sess. (Haw. 2014).

90. *Id.* (stating "[T]he court shall consider the following additional factors: (a) Age of the defendant at the time of the offense; (b) Impetuosity of the defendant at the time of the offense; (c) Family and community environment of the defendant; (d) Ability of the defendant to appreciate the risks and consequences of the conduct; (e) Intellectual capacity of the defendant; (f) The outcome of any comprehensive mental health evaluation conducted by an adolescent mental health professional licensed in the State of Hawaii; (g) Family or peer pressure on the defendant; (h) Level of the defendant's participation in the offense; (i) Ability of the defendant to participate meaningfully in the defendant's defense; (j) Capacity for rehabilitation; (k) School records and any special education evaluations of the defendant; (l) Trauma history of the defendant; (m) Community involvement of the defendant; (n) Involvement in the child welfare system; and (o) Any other mitigating factor or circumstance the court deems relevant to its decision.").

91. *Id.*

92. Samuel Brinton & Bryan Poellot, *Juvenile Justice in the Commonwealth: Analyzing Judicial Reform in the Aftermath of* Miller v. Alabama, HARV. IOP (May 2014), http://www.iop.harvard.edu/sites/default/files_new/research-policy-papers/JuvenileJusticeSpring2014.pdf.

93. DEL. CODE ANN. tit. 11, § 4209A (2013); S.B. 9, 147th Gen. Assemb. (Del. 2013) ("This Act will bring Delaware into compliance with the Miller [sic] holding by removing juvenile offenders from the mandatory sentencing scheme for first degree murder to one which gives judges a range of options up to life imprisonment."); *Delaware Eliminates Death in Prison Sentences for Children*, EQUAL JUST. INITIATIVE (June 13, 2013), http://www.eji.org/node/779.

94. *Delaware Eliminates Death in Prison Sentences for Children*, *supra* note 93.

In application, Delaware's new statutory scheme is employed retroactively to all juvenile offenders serving life-without-parole sentences.[95] Since *Miller*, this level of retroactive application has been applied by four states—Delaware, North Carolina, Washington and Wyoming—through statutory reform.[96]

In addition to retroactivity, the language of the new Delaware law allows for sentencing review for all juveniles sentenced to more than twenty years in prison: "[r]eviews will occur after [thirty] years for first degree murder convictions and after [twenty] years for all other cases and are intended to determine whether an individual has been rehabilitated and should be eligible for release."[97] Similar to California and Hawaii, Delaware's recent legislation aligns with the Court's rationale in *Miller* by not only removing mandatory life sentences for juvenile offenders, but also by providing meaningful opportunity for review and release.[98]

B. Less Progressive Legislation

Prior to *Miller*, Texas utilized a mandatory sentencing structure for juvenile offenders convicted of capital murder.[99] However, within a year of *Miller*, Texas passed legislation introducing new guidelines for juveniles convicted of murder.[100] Pursuant to the amended statute, offenders under the age of eighteen found guilty of capital murder shall be sentenced to life imprisonment with parole eligibility after serving forty years in prison.[101]

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95. *Delaware Enacts Sentence Review Process for Youth*, THE CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH (June 10, 2013), http://fairsentencingofyouth.org/2013/06/10/delaware-entacts-sentence-review-process-for-youth/.

96. DEL. CODE ANN. tit. 11, § 4209A (2013); N.C. GEN. STAT. ANN. § 15A-1340.19A (West 2013); H.R. 1338, 63d Leg. Reg. Sess. (Wash. 2013); WYO. STAT. ANN. § 6-2-101 (2013).

97. DEL. CODE ANN. tit. 11, § 4209A (2013).

98. *Id.*; CAL. PENAL CODE § 1170 (d)(2)(A)(i) (West 2013); H.R. 2116, 27th Leg. Reg. Sess. (Haw. 2014).

99. TEX. PENAL CODE ANN. § 12.31 (West 2013); Michelle Mondo, *House Committee Again Passes Juvenile Sentence Bill*, MY SA: TEX. POLITICS (July 9, 2013), http://blog.mysanantonio.com/texas-politics/2013/07/house-committee-again-passes-juvenile-sentence-bill/.

100. *Senate Bill 2 History*, TEX. LEGIS. ONLINE, http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=832&Bill=SB2.

101. TEX. PENAL CODE ANN. § 12.31 (West 2013); *Texas Changes Sentencing for Juveniles Convicted of Homicide*, CHILDREN AT RISK (July 17, 2013), http://www.childrenatrisk.org/2013/07/17/texas-changes-sentencing-for-juveniles-convicted-of-homicide/ ("However, Senate Bill 2 basically exchanges one mandatory sentence for another. We've exchanged life without parole for life with the possibility of parole.

While Texas takes a progressive step in sentencing reform by eliminating life-without-parole sentences, the new alternative also regresses by issuing a *mandatory* sentence of life imprisonment without possibility of parole *until* forty years into the sentence for *all* juveniles convicted of capital murder.[102] The courts have no opportunity to examine individualized factors to determine a juvenile's sentence; all juvenile homicide offenders, regardless of age, background, or cognitive capacity, must serve forty years in prison.[103] If a seventeen-year-old offender is convicted of capital murder in Texas, he or she does not see an opportunity for parole until he or she is fifty-seven years old.[104] With an average life expectancy of juveniles serving life sentences of approximately fifty years old, this amended provision arguably operates as a de facto life sentence, allowing juveniles minimal hope for relief or motivation to seek rehabilitative support.[105]

Similarly, Arkansas introduced and passed legislation prescribing two alternatives to *mandatory* life sentences: *permissive* life imprisonment without the possibility of parole, or life imprisonment with the possibility of parole after serving a minimum of twenty-eight years in prison.[106] The legislature explicitly designated the purpose of the new statute to apply to punishments for *future* offenders under the age of eighteen, excluding juveniles sentenced prior to the effective date of the new statute.[107]

While the Arkansas legislature prescribed a facially progressive sentencing scheme by providing a potential twenty-

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In Texas, that opportunity for parole doesn't even come up until the prisoner has served [forty] years, and good behavior is not a consideration.").

102. *Texas Changes Sentencing for Juveniles Convicted of Homicide*, *supra* note 101.

103. *Id.*

104. *Id.*

105. *See Michigan Life Expectancy Data for Youth Serving Natural Life Sentences*, THE CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, http://www.fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf (stating "[t]he life expectancy averages drop even lower for those who began their natural life sentences as children, therefore, serving longer years in prison then [sic] adults with the same sentence. Looking at Michigan youth who were punished with a natural life sentence, the average life expectancy is 50.6 years. The number of the cohort is too small to establish an average based on race, although 72% of youth serving natural life sentences in Michigan, [sic] are children of color.").

106. ARK. CODE ANN. § 5-10-101 (c)(1)(B) (2013); H.R. 1993, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

107. H.R. 1993, 89th Gen. Assemb., Reg. Sess. (Ark. 2013). Offenders under the age of eighteen convicted and sentenced prior to statute revisions are not granted retroactive relief or sentencing review in Arkansas. *Id.*

eight year sentence for convicted juveniles,[108] the amended statute remains fundamentally stringent: Arkansas retained life-without-parole sentences for juveniles, failed to prescribe qualifying circumstances to direct the court in sentencing juveniles, and left offenders convicted under the previous unconstitutional scheme without the opportunity for resentencing relief.[109] Further, the legislature has not provided explicit guidelines to sentencing courts or parole councils in evaluating post-*Miller* juveniles convicted of capital murder.[110] In turn, juveniles may be sentenced under varied, inconsistent standards because courts are not guided to consider factors specific to the offender's youth.

III. Proposed Statutory Reform

The Court's decisions in *Roper*, *Graham*, and *Miller* were monumental in several respects, most notably because they restored "principles of rehabilitationism to a system that, over the last [twenty] years, has come almost entirely unmoored from its ideological foundations."[111] First, in *Roper* and *Graham*, the Court relied on developmental research to conclude "policymakers may be heading in the wrong direction with juvenile court policy" by failing to account for attributes specific to youth.[112] The Court recognized the impact of an individual's cognitive capacity—specifically the impact of "logical reasoning and the ability to identify and weigh competing alternatives"—and degree of psychological development—on an individual's "social, emotional, and temporal perceptions and judgments."[113] In identifying the cognitive and psychological attributes that motivate and guide adolescents, as compared to their adult counterparts, the Court determined juveniles lack a level of maturity and comprehension that allow them to weigh the consequences of their actions fully.[114] Reaffirmed in *Miller*, the Court's rationale "treats youth as a mitigating factor and supports a rehabilitative response to

108. ARK. CODE ANN. § 5-10-101 (c)(1)(B) (2013).

109. *Id.*

110. *Id.*

111. Perry Moriearty, *Restoring Rehabilitation to the American Juvenile Justice System*, JURIST (Sept. 24, 2012, 4:30 PM), http://jurist.org/forum/2012/09/perry-moriearty-juvenile-justice.php.

112. Kristin Henning, *Juvenile Justice After* Graham v. Florida*: Keeping Due Process, Autonomy, and Paternalism in Balance*, 38 WASH. U. J.L. & POL'Y 17, 23 (2012).

113. *Id.* at 23.

114. *Id.*

juvenile crime."[115] Consequently, the Court instructed state legislatures and courts to adhere to "[t]heories of diminished culpability and rehabilitative potential" when developing and enforcing sentencing statutes for juveniles.[116]

While the Court left states to determine how *Miller* should be applied to statutory sentencing reform, it did demand nationwide uniformity by barring mandatory penalties which, "by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it."[117] To properly apply this standard, state legislatures should (1) abolish life-without-parole sentences for juvenile offenders entirely; (2) require courts to examine a comprehensive list of mitigating factors specific to each offender; (3) provide offenders a meaningful opportunity for release through continued review by parole entities; and (4) retroactively apply *Miller* to juvenile offenders convicted prior to the Court's holding.

A. Eliminate Life-Without-Parole Sentences for Juvenile Offenders

Abolishing life-without-parole sentences would adhere with the spirit of *Miller* and empirical research connecting reduced culpability to the age of the offender.[118] The Court stated it is inherently difficult to distinguish between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[119] To avoid release of offenders who are incapable of reform or remorse, it is reasonable for states to retain a sentence that allows for courts to assess the character and development of the offender over time.

Roper, *Graham*, and *Miller* "emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes."[120] By leaving discretionary life-

115. *Id.* at 25.

116. *Id.* at 28.

117. Miller v. Alabama, 132 S. Ct. 2455, 2467 (2012).

118. *See* Doriane Lambelet Coleman & James E. Coleman, Jr., *Getting Juvenile Life Without Parole "Right" After* Miller v. Alabama, 8 DUKE J. CONST. L. & PUB. POL'Y 61, 69 (2012); *Adolescence, Brain Development and Legal Culpability,* ABA ONLINE (2004), http://www.abanet.org/crimjust/juvjus/Adolescence.pdf.

119. Lauren Kinell, *Answering the Unanswered Questions: How States Can Comport with* Miller v. Alabama, 13 CONN. PUB. INT. L. J. 143, 164 (2013) (quoting *Miller*, 132 S. Ct. at 2469).

120. *Miller*, 132 S. Ct. at 2465.

without-parole sentences *on the table*, legislatures retain sentences that fail to account for transitory characteristics of youth. Advocates for life-without-parole sentences may contend that life sentences combat the risk of releasing an "irretrievably depraved" offender.[121] However, the parole process inherently combats this argument, as courts can evaluate the development, or lack thereof, of an offender and determine if they should remain incarcerated.[122] Moreover, imposing a life-without-parole sentence on a juvenile who is capable of rehabilitation is the *exact* type of sentencing flaw the Court attempts to remedy in *Miller*.[123]

B. Include Examination of Mitigating Circumstances and Meaningful Opportunity for Rehabilitation and Release

When stipulating mitigating circumstances that may be presented and considered in sentencing, legislatures should develop a broad and expansive *list* of factors that envelope the cognitive capacity of the offender alongside a depiction of the offender's formative years.[124] As articulated by the Court in *Graham* and *Miller*,[125] factors that should be considered include, but are not limited to:

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121. Coleman & Coleman, *supra* note 118, at 68 (citing Roper v. Simmons, 543 U.S. 551, 598–603 (2005) (O'Connor, J., dissenting)).

122. *Id.*

123. *Miller*, 132 S. Ct. at 2468 ("[T]his mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.").

124. Sonia Mardarewich, *Certainty in a World of Uncertainty: Proposing Statutory Guidance in Sentencing Juveniles to Life Without Parole*, 16 SCHOLAR 123, 143 (2013) (stating "[t]he first and most important component of any model sentencing statute is the adoption of mitigating factors for courts to consider when sentencing juveniles convicted of homicidal offenses. When considering mitigating factors that should be included in proposed guidelines, two main factors that must be considered are: (1) the juvenile's background and (2) the juvenile's mental and emotional development . . . .").

125. *Miller*, 132 S. Ct. at 2468 (stating "[m]andatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors . . . or his incapacity to assist his own attorneys . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it."). *See also* Graham v. State, 130 S. Ct. 2011, 2028–29 (2010).

- The juvenile's age and its features, including immaturity, impetuosity and failure to appreciate risks and consequences, at the time of the offense;[126]
- The juvenile's intellectual capacity and development, including educational history;[127]
- The juvenile's family and home environment;[128]
- The circumstances of the offense, including the extent of the juvenile's level of participation and the impact of familial and peer pressures in the commission of the crime;[129]
- The juvenile's inability to function in the criminal justice system that is designed for adult offenders;[130] and
- The possibility of rehabilitation.[131]

Furthermore, states should grant juvenile offenders a meaningful opportunity for review and potential release after serving a specified number of years. Review opportunities should evaluate the juvenile's participation in rehabilitative and educational programs while incarcerated, as well as their present threat to the community. Finally, any juvenile offender denied release should be granted continued review every five years.

Individualized sentencing does not restrict courts from incarcerating juvenile offenders who fail to exhibit a substantial level of rehabilitation and remorse. When a juvenile offender is initially sentenced, or eligible for parole or sentence modification, courts should have the capacity to examine the cognitive development of the offender and efforts towards rehabilitation. As juvenile offenders age, courts can more effectively examine their characteristics and "evidence of irretrievable depravity" that may be indicative of an offender who should remain incarcerated.[132] For example, California's sentencing scheme requires courts to hold a hearing to determine whether the offender has displayed

126. *Id.*

127. *See* Eddings v. Oklahoma, 455 U.S. 104, 116 (1982) ("It 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.").

128. *Miller*, 132 S. Ct. at 2468.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Miller*, 132 S. Ct. at 2458 (citing Roper v. Simmons, 543 U.S. 551, 553 (2005)) ("The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."). *See also* Coleman & Coleman, *supra* note 118; *Adolescence, Brain Development and Legal Culpability, supra* note 118.

efforts towards rehabilitation and remorse, eliminated ties with individuals involved in crime, and remained in exemplary disciplinary standing.[133] California also calls for recurring opportunities for parole during the fifteenth, twentieth, and twenty-fifth year of incarceration if the offender received a sentence that is twenty-five years to life.[134] Sentencing schemes that do not account for mental and emotional development fail to follow *Miller*'s mandate—that courts must account for mitigating circumstances attributed to youth *and* grant juvenile offenders a meaningful opportunity for release. This means allowing for continued evaluation of juvenile offenders through individualized sentences that can be re-examined over time.

C. *Apply* Miller *Retroactively*

Following the Court's holding in *Miller,* both Evan Miller and Kuntrell Jackson's sentences were invalidated and remanded to state court for resentencing.[135] When *Miller* was decided, Evan Miller's case was on direct review and Kuntrell Jackson's case was on collateral review.[136] In the past, the Court has held that when it applies a new rule of constitutional law to the defendant in the case announcing the new rule, "even-handed justice" requires that the rule apply retroactively to all similar cases.[137] While the application and limits of retroactivity is beyond the scope of this Comment, it is important to note that the Court's holding distinctly reversed the decisions of both the Alabama and Arkansas Supreme Courts and ordered that both Evan Miller and Kuntrell Jackson be granted relief through resentencing.[138] Moreover, the Court effectively made the ban on mandatory life without parole for juvenile offenders applicable to all similarly-

133. CAL. PENAL CODE § 3050 (b)(1–3) (West 2014); S.B. 260, 2013–2014 Leg., Reg. Sess. (Cal. 2013). *See also* Ryann Blackshere, *California Passes New Parole Law for Young Offenders*, THE CHRONICLE OF SOCIAL CHANGE (Sept. 17, 2013), https://chronicleofsocialchange.org/news/california-passes-new-parole-law-for-young-offenders/3978.

134. CAL. PENAL CODE § 3050 (b)(1–3) (West 2014).

135. *Miller*, 132 S.Ct. at 2475 (stating "[b]y requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment. We accordingly reverse the judgments of the Arkansas Supreme Court and Alabama Court of Criminal Appeals and remand the cases for further proceedings not inconsistent with this opinion.").

136. *Id.* at 2461–62.

137. Teague v. Lane, 489 U.S. 288, 316 (1989).

138. *Miller*, 132 S. Ct. at 2475.

situated defendants.[139] Based on this line of precedent, state legislatures and courts should similarly allow pre-*Miller* offenders to seek resentencing.

IV. Conclusion

Following the Court's holding in *Miller*, we have seen a nationwide trend toward more lenient sentencing schemes for youthful offenders. However, while some state legislatures have adopted new sentencing statutes that closely adhere to the Court's reasoning in *Miller*, other states have retained harsh sentencing for juveniles without creating significant opportunities for review or release. To avoid despotic sentencing schemes, states should follow the recent shift in juvenile justice reform by creating sentencing procedures that require individualized assessment based on a list of comprehensive, mitigating factors.[140] By creating an exhaustive sentencing process that looks at the characteristics of the defendant, alongside other extenuating elements, courts can more effectively determine the proper sentence duration for juvenile offenders.

While arguably progressive in its application, adoption of a sentencing scheme that (1) abolishes life-without-parole sentences for juvenile offenders entirely, (2) requires that courts examine a comprehensive list of mitigating factors specific to each offender, (3) provides offenders a meaningful opportunity through continued review by parole entities, *and* (4) retroactively applies *Miller* to juvenile offenders convicted prior to the Court's holding, will allow for the most equitable sentencing for youthful offenders. This level of sentencing review grants defendants the ability to demonstrate their individual level of culpability and capacity for change. In effect, juvenile offenders will be permitted a fair opportunity to be sentenced to serve a period of time equal to their own guilt.

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139. *Teague*, 489 U.S. at 316 ("We . . . refuse to announce a new rule in a given case unless the rule would be applied retroactively to the defendant in the case and to all other similarly situated.").

140. These mitigating factors may include those cited by Justice Kagan in the opinion: "immaturity, impetuosity, and failure to appreciate risks and consequences . . . the family and home environment . . . circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him." *Miller*, 132 S. Ct. at 2468. Other mitigating factors that may be considered include, but are not limited to: the age of the offender at commission of the crime; the past criminal history of the offender; the educational background of the offender; the offender's family history; the results of an educational and mental health evaluation. *Id.*