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Practical Implications of *Miller v. Jackson*: Obtaining Relief in Court and Before the Parole Board†

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The United States Supreme Court's decision in *Miller v. Alabama*,[1] ending mandatory life sentences for juveniles, established that developmental and neurological differences matter when meting out long sentences to juveniles. However, *Miller* did not provide nuanced answers to *how* they 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.

Some of these issues are being addressed as we write. It is doubtful, however, that today's reactions will be the last word. Various judicial and legislative responses to *Miller* will likely find their way to higher courts. They will be measured by a jurisprudence that began with the United States Supreme Court's abolition of the juvenile death penalty in *Roper v. Simmons*.[2] *Roper* was reinforced by *Graham v. Florida*,[3] which eliminated life without parole sentences for juveniles in non-homicide cases, and was most recently expanded by *Miller*.

This Article will examine some of the practical challenges that have emerged since *Miller* was decided. Twenty-nine jurisdictions have mandatory life sentences that have been vacated by *Miller*.[4] These jurisdictions must address the sentences

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1. 132. S. Ct. 2455 (2012).

2. 543 U.S. 551 (2005).

3. 130 S. Ct. 2011 (2010).

4. *See Miller*, 132 S. Ct. at 2471 ("By our count, 29 jurisdictions (28 States and the Federal Government) make a life-without-parole term mandatory for some juveniles convicted of murder in adult court.").

of current and future lifers by answering the following:

1. Is *Miller* retroactive?

2. What principles should guide courts in re-sentencing juveniles after their mandatory life sentences are vacated?

3. What is *Miller*'s impact on state parole schemes?

4. How do juveniles demonstrate rehabilitation to re-sentencing courts or parole boards when they have been denied access to prison programs?

In this Article, we answer these questions by looking at precedent and a Supreme Court jurisprudence that has, in the case of juveniles, been increasingly informed by the characteristics of the offender, rather than the nature of the offense.

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

Evan Miller and Kuntrell Jackson were both convicted of murder for crimes they committed when they were fourteen years old.[5] Miller was convicted of murder in the course of arson; Jackson was convicted of felony murder.[6] Under prevailing Alabama and Arkansas law, both Miller and Jackson were sentenced to mandatory life imprisonment without parole.[7] Both sentences were affirmed on appeal and, in the case of Jackson, affirmed as well in post-conviction proceedings.[8] The Supreme Court issued its opinion on June 25, 2012.[9]

Justice Elena Kagan wrote the majority opinion; she was joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor.[10] Justice Breyer wrote a concurring opinion, in which Justice Sotomayor joined.[11] Chief Justice Roberts, as well as Justices Thomas and Alito, filed dissenting opinions that Justice Scalia

5. *Id.* at 2460.

6. *Id.* at 2461–63.

7. *See id.* (citing ARK. CODE ANN. § 5-4-104(b) (West 1997); ALA. CODE §§ 13A-5-40(9), 13A-6-2(c) (1982)).

8. *See* Miller v. State, 63 So. 3d 676 (Ala. Crim. App. 2010); Jackson v. State, 194 S.W.3d 757 (Ark. 2004).

9. *Miller*, 132 S. Ct. at 2455.

10. *Id.* at 2460.

11. *Id.*

joined.[12]

Justice Kagan wasted no time in setting forth the rationale for striking mandatory life without parole sentences for all juveniles, observing in the opening paragraph of her opinion that "[s]uch a scheme prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties."[13]

Significantly, the language quoted above links the Court's death penalty jurisprudence with its cases reviewing juvenile sentences under the Eighth Amendment. Justice Kagan specifically noted that *Miller* implicates "[t]wo strands of precedent reflecting the concern with proportionate punishment."[14] In the first "strand," the Court adopted categorical bans on sentences reflecting a mismatch between the culpability of the offender and the severity of the punishment.[15] This proportionality analysis drove the Court to strike the death penalty for non-homicide crimes in *Kennedy v. Louisiana*,[16] and to similarly prohibit its imposition on mentally retarded defendants in *Atkins v. Virginia*.[17] Of course, this express concern with proportionality also led to the Court's holdings in *Roper* and *Graham*.[18]

The second "strand" of the Court's precedent involves cases prohibiting the mandatory imposition of the death penalty, requiring instead individualized sentencing hearings in which the sentencer considers the offender's individual characteristics as well as the specific circumstances of the offense before sentencing the individual to death.[19] Here, Justice Kagan specifically acknowledged the Court's recent analogy of juvenile life without parole to the death penalty itself in *Graham*,[20] providing the

12. *Id.*

13. *Id.* (citation omitted) (quoting Graham v. Florida, 130 S. Ct. 2011, 2026–27, 2029–30 (2010)).

14. *Id.* at 2458.

15. *Id.*

16. 554 U.S. 407 (2008), *modified, reh'g denied*, 129 S. Ct. 1 (2008).

17. 536 U.S. 304 (2003).

18. *See Miller*, 132 S. Ct. at 2463–67.

19. *See id.* at 2463–64 (citing Woodson v. North Carolina, 428 U.S. 289 (1976) (plurality opinion); Lockett v. Ohio, 438 U.S. 586 (1976)).

20. In *Graham*, Justice Kennedy wrote that "life without parole sentences share some characteristics with death sentences that are shared by no other sentences." Graham v. Florida, 130 S. Ct. 2011, 2027 (2010). Justice Kennedy further observed that sentencing a juvenile to die in prison alters the remainder of his life "by a forfeiture of his life that is irrevocable." *Id.*

foundation for the Court's requirement of individualized, *non-mandatory* sentencing hearings in the juvenile life without parole cases as well.

Looking to the first strand—proportionality of the challenged punishment to the blameworthiness of the offender—Justice Kagan set forth a principle that has implications for juvenile offenders beyond the specific facts of *Miller* itself: "*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform . . . 'they are less deserving of the most severe punishments.'"[21] The Court reiterated once again its core findings about adolescents: they are less mature and more prone to reckless, impulsive, and heedless risk-taking; they are particularly vulnerable to negative peer pressure; and, as adolescence is inherently a period of transition, they are less likely to be found "irretrievably depraved."[22] The Court acknowledged the uncontroverted body of research and social science confirming these findings, and noted that the evidence of these unique attributes of youth had become even stronger since *Roper* and *Graham* were decided.[23]

Importantly, in extending the rationale of *Graham* from non-homicide cases to the homicide cases before it in *Miller*, the Court held that "none of what is said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific."[24] In other words, the unique characteristics of youth are present and relevant whether the youth commits a robbery or a murder. Those characteristics matter in determining the constitutionality of a lifetime of incarceration, which will end only with the death of the juvenile in prison. Moreover, Justice Kagan repeated a key corollary to the Court's holding in *Graham*: "An offender's age . . . is relevant to the Eighth Amendment, and so criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."[25]

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21. *Miller*, 132 S. Ct. at 2464 (quoting *Graham*, 130 S. Ct. at 2026).

22. *Id.* at 2475 (quoting *Graham*, 130 S. Ct. at 2026).

23. *Id.* at 2464 n.5.

24. *Id.* at 2465.

25. *Id.* at 2466 (quoting *Graham*, 130 S. Ct. at 2031) (internal quotation marks omitted). While Chief Justice Roberts appears to have disavowed this core aspect of the *Graham* holding in his dissent in *Miller*, he specifically concurred with it in *Graham* itself, acknowledging that an "offender's juvenile status can play a central role" in considering the proportionality of a particular sentence. *Graham*, 130 S. Ct. at 2039 (Roberts, C.J., concurring).

The Court invoked the second strand of its Eighth Amendment jurisprudence—the requirement of individualized sentencing in capital cases—because of *Graham*'s likening of life without parole to the death penalty.[26] The Court specifically relied upon its reasoning in cases striking mandatory death penalty statutes to undergird its holding in *Miller*.[27] As the Court held in *Woodson v. North Carolina*,[28] mandatory death sentences violate the Eighth Amendment because they allow for no consideration of "the character and record of the individual offender or the circumstances of the particular offense excludes from consideration . . . the possibility of compassionate or mitigating factors."[29]

Miller also highlights the Court's insistence in capital cases that the "mitigating qualities of youth" must be considered before a sentence of death may be imposed.[30] Reviewing the prior holdings of *Johnson v. Texas*[31] and *Eddings v. Oklahoma*,[32] Justice Kagan stressed the striking similarity between the Court's observations in those cases—e.g., "youth is more than a chronological fact"[33]—and the question posed by the imposition of mandatory life without parole sentences on juvenile homicide offenders.[34] Justice Kagan wrote:

> 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. And still worse, each 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. In meting out the death penalty, the elision of all these differences would be strictly forbidden. And once again, *Graham* indicates that a similar rule should apply when a juvenile confronts a sentence of life (and death) in

26. *Miller*, 132 S. Ct. at 2459 (citing *Graham*, 130 S. Ct. at 2027).

27. *Id.*

28. 428 U.S. 280 (1976).

29. *Id.* at 304. *See also* Sumner v. Shuman, 483 U.S. 66, 74–76 (1987); Eddings v. Oklahoma, 455 U.S. 104, 110–12 (1982).

30. *See Miller*, 132 S. Ct. at 2458–69.

31. 509 U.S. 350 (1993).

32. 455 U.S. 104 (1982).

33. *Miller*, 132 S. Ct. at 2467 (quoting *Eddings*, 455 U.S. at 115).

34. *Id.* at 2467–68.

prison.[35]

In bringing the two strands of the Court's Eighth Amendment jurisprudence together, Justice Kagan concluded: "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*."[36] The Court spelled out what it meant by treating children like *children*:

> 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. . . . [T]his mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.[37]

Finally, Justice Kagan addressed the Court's decision to forego a categorical ban on life without parole sentences for juveniles convicted of homicide. While the Court viewed its requirement for individualized sentencing determinations that would take account of "youth (and all that accompanies it)" sufficient to address the challenges by Miller and Jackson, the Court was also clear that *Miller* must be read in the context of *Roper* and *Graham*.[38] Thus, though "'[a] State is not required to guarantee eventual freedom,' it 'must provide 'some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.'"[39] Justice Kagan further observed that, "given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[40]

II. Retroactivity of *Miller*

The *Miller* Court identified twenty-nine jurisdictions in which juveniles have been subject to mandatory life without parole

35. *Id.*
36. *Id.* at 2468 (emphasis added).
37. *Id.*
38. *Id.* at 2469.
39. *Id.* (quoting *Graham*, 130 S. Ct. at 2030).
40. *Id.*

sentences.[41] As of January 2008, it was estimated that 2,570 individuals nationwide were serving life without parole sentences for crimes they committed as juveniles.[42] Given the substantial number of individuals potentially affected by the *Miller* holding, lawyers began speculating as to its retroactivity even before the "ink was dry" on the decision.

A. Decisions to Date

The record to date is mixed, offering no clear blueprint for resolution of the retroactivity question. No state supreme court has yet decided retroactivity, although the issue is currently pending before the Pennsylvania Supreme Court,[43] and the Minnesota Supreme Court,[44] and will likely be considered by the Missouri Supreme Court in the spring/summer of 2013.[45] Roughly a handful of intermediate appellate courts issued decisions on retroactivity since *Miller*; these decisions must still be tested by higher courts. This Article will now discuss a brief, chronological summary of court decisions on retroactivity jurisdictional category.

In one of the earliest cases to address *Miller*'s potential retroactivity (albeit indirectly), an appellate court in Iowa remanded the case of a defendant serving life without parole for a crime she committed at seventeen.[46] The defendant challenged her sentence as violative of the Eighth Amendment, and the court vacated it "[u]nder the principles articulated in *Miller*."[47] Although the court did not discuss retroactivity, by implication *Miller* operated retroactively.

Florida, too, addressed whether *Miller* is retroactive. In *Geter v. Florida*,[48] the intermediate appellate court held that *Miller* cannot be applied retroactively to Florida post-conviction proceedings.[49] Characterizing *Miller*'s ruling as being more about

41. *Id.* at 2471.

42. *See* ELIZABETH CALVIN, HUM. RTS. WATCH, WHEN I DIE . . . THEY'LL SEND ME HOME (2012), *available at* http://www.hrw.org/node/105473/section/2.

43. *See* Commonwealth v. Cunningham, 51 A.3d 178 (Pa. 2012). *Cunningham* was argued before the Pennsylvania Supreme Court in September 2012.

44. Timothy Patrick Chambers v. State of Minnesota, Case #A11-1954. *Chambers* was argued before the Minnesota Supreme Court in March 2013.

45. *See* State v. Nathan, Nos. ED 96851, ED 96832, 2012 WL 5860933 (Mo. Ct. App. Nov. 20, 2012) (transferring the defendant's appeal to the Missouri Supreme Court).

46. Iowa v. Lockheart, 820 N.W.2d 769 (Iowa Ct. App. 2012) (unpublished table decision).

47. *Id.* at *3.

48. No. 3D12–1736, 2012 WL 4448860 (Fla. Dist. Ct. App. Sept. 27, 2012).

49. *Id.*

process than substance, and applying Florida precedent, the court concluded that *Miller* was not "a development of fundamental significance."[50] The court compared *Miller* and the United States Supreme Court case of *Apprendi v. New Jersey*,[51] which the Florida Supreme Court had previously found not to be retroactive.[52] Both *Apprendi* and *Miller*, according to *Geter*, "implicat[e] procedural changes with unique and narrow applications," constitute "new procedural rules in criminal law that do not affect the finality of the criminal conviction," and "do not preclude the sentencer from imposing the statutory maximum, but rather require the sentencer to follow certain procedures before doing so."[53]

Taking a different approach, the Louisiana Supreme Court remanded a juvenile lifer's case "for reconsideration after conducting a sentencing hearing in accord with the principles enunciated in *Miller* and stating the reasons for reconsideration and sentencing on the record."[54]

In Michigan, an appellate court held that *Miller* is not retroactive, focusing on the fact that it did not perceive the ban on juvenile life without parole (JLWOP) to be categorical, nor the rule announced to be "watershed."[55] After reviewing previous Eighth Amendment case law, the court analyzed *Miller* as well as cases governing retroactivity, and ultimately deemed *Miller* to be "procedural in nature."[56] Focusing on the fact that *Miller* did not categorically ban life without parole for juveniles, the court deemed *Miller* distinguishable from *Graham*.[57] It also determined that *Miller* was not a watershed rule because it "focused solely on accuracy in sentencing and does not address or impinge on the accuracy of a juvenile defendant's conviction for a homicide offense."[58] Despite this ruling, however, many lower courts in Michigan have subsequently granted petitions for resentencing, either by distinguishing or by simply stating that the decision was

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50. *Id.* at *3–8.

51. 530 U.S. 466 (2000). *Apprendi v. New Jersey* invalidated a state hate crime sentence enhancement statute as violative of due process. *Id.* at 491–97.

52. *See* Hughes v. State, 901 So. 2d 837, 839–43 (Fla. 2005).

53. *Geter*, 2012 WL 4448860, at *6.

54. State v. Simmons, 99 So. 3d 28 (La. 2012) (per curiam) (stating that *Miller* "required that a sentencing court consider an offender's youth and attendant characteristics as mitigating circumstances before deciding whether to impose the harshest possible penalty for juveniles who have committed a homicide offense").

55. People v. Carp, No. 307758, 2012 WL 5846553, at *15–*17 (Mich. Ct. App. Nov. 15, 2012).

56. *Id.* at *14.

57. *Id.* at *20.

58. *Id.* at *16.

wrong and that it would be an injustice to follow the appellate court. Additionally, the Michigan Supreme Court has been denying motions for resentencing "without prejudice to any relief that the defendant may seek under *Miller v. Alabama*."[59]

More recently, appellate courts in Illinois have held that *Miller* is retroactive. In *People v. Morfin*,[60] the First Appellate District of Illinois found that "*Miller* constitutes a new substantive rule" and thus, "pursuant to *Teague*, [it] is applicable retroactively on collateral review."[61] The court explained that "*Miller* creates a new rule of law that was not required by either the precedents on what penalties a minor constitutionally cannot receive (*Roper* and *Graham*) or by the cases cited in *Miller* requiring sentencing discretion for the death penalty."[62] Specifically, the court observed that while *Miller*

> [D]oes not forbid a sentence of life imprisonment without parole for a minor, it does require Illinois courts to hold a sentencing hearing for every minor convicted of first-degree murder at which a sentence other than natural life imprisonment must be available for consideration. *Miller* mandates a sentencing range broader than that provided by statute for minors convicted of first-degree murder who could otherwise receive only natural life imprisonment.[63]

In reaching this determination, the court specifically noted its disagreement "with the Florida courts in *Geter* and *Gonzalez* and the Michigan court in *Carp*."[64]

In *People v. Williams*,[65] another Illinois appellate court held that *Miller* is fully retroactive, remanding for an evidentiary hearing on an unrelated innocence claim and, in the alternative, for a resentencing hearing in accordance with *Miller*.[66] The petitioner had submitted three prior post-conviction petitions and the court engaged in a full *Teague* analysis. In its reasoning, the court stated that *Miller* announced a new "watershed rule[ ] of criminal procedure."[67] The court found that "*Miller* not only changed procedures, but also made a substantial change in the law in holding under the Eighth Amendment that the government

59. *See, e.g.*, People v. Reed, 821 N.W.2d 886 (Mich. 2012); People v. Burns-Perry, 823 N.W.2d 601 (Mich. 2012).

60. 367 Ill. Dec. 282 (Ill. App. Ct. 2012).

61. *Id.* at 294.

62. *Id.*

63. *Id.*.

64. *Id.*

65. 367 Ill. Dec. 503 (Ill. App. Ct. 2012).

66. *Id.* at 520.

67. *Id.* (quoting Teague v. Lane, 489 U.S. 288, 311 (1989)).

cannot constitutionally apply a mandatory sentence of life without parole for homicides committed by juveniles."[68] The court also gave weight to the fact that the Supreme Court vacated Kuntrell Jackson's sentence and remanded for resentencing, and cautioned that, like imposing life without parole on a child, it would similarly "be cruel and unusual to apply [*Miller*'s holding] only to new cases."[69] The Supreme Court of Illinois recently agreed to address the issue of retroactivity in *People v. Davis*.[70]

In federal district court, the retroactivity argument has found more success. In the Eastern District of Pennsylvania, a judge granted a prisoner's third amended petition for a writ of habeas corpus, "to the extent that it challenges the petitioner's mandatory sentence of life without parole in light of *Miller v. Alabama*" and vacated the petitioner's sentence with an order that he "may be resentenced within 120 days."[71] In the context of a challenge to the constitutionality of Michigan's parole statute under Section 1983 because it denied parole eligibility to juveniles serving mandatory life without parole sentences, the Eastern District of Michigan observed that "if ever there was a legal rule that should—as a matter of law and morality—be given retroactive effect, it is the rule announced in *Miller*. To hold otherwise would allow the state to impose *unconstitutional* punishment on some persons but not others, an intolerable miscarriage of justice."[72] The court in *Hill* further described that it

> [W]ould find Miller retroactive on collateral review, because it is a new substantive rule, which "generally apply retroactively." "A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes." "Such rules apply retroactively because they 'necessarily carry a significant risk that a defendant . . . faces punishment that the law cannot impose upon him.'" Miller alters the class of persons (juveniles) who can receive a category of punishment (mandatory life without parole). Further, the Supreme Court applied Miller to the companion case before it–on collateral review–and vacated the sentence of Kuntrell Jackson. "[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are

68. *Id.* at 519.

69. *Id.*

70. No. 1-11-2577, 2012 WL 6863262 (Ill. App. Ct. Dec. 28, 2012).

71. Order of Judge Timothy J. Savage, Songster v. Beard, No. 04-5916 (Sept. 6, 2012).

72. Hill v. Snyder, No. 10-14568, 2013 WL 364198, at *2 (E.D. Mich. Jan. 30, 2013).

similarly situated."[73]

The federal appeals courts are more split on the issue of *Miller*'s retroactivity: the Fifth Circuit concluded that the case did not merit retroactive application, while the Fourth Circuit, in a case in a different procedural posture, granted a petitioner's right to file a successive habeas petition.[74] In an extremely short decision in *Craig v. Cain*, the Fifth Circuit held that *Miller* is not retroactive as it fails to satisfy either exception under *Teague*.[75] Specifically, the court found that it fails the first *Teague* test in that it "does not categorically bar all sentences of life imprisonment for juveniles" and instead "bars only those sentences made mandatory by a sentencing scheme."[76] In finding that *Miller* did not meet the second *Teague* exception either, the court highlighted the fact that only *Gideon v. Wainwright*[77] has been characterized as a "watershed rule."[78] Importantly, however, the Fifth Circuit's January 4, 2013 order in *Craig* recently has been challenged on the grounds that the court examined the retroactivity of *Miller* without either party having raised the issue, and without it being germane to the resolution of the habeas claims before it, which did not seek sentencing relief.[79] In fact, not only did the petitioner not present any claim or argument that raises or even implicates the retroactivity of *Miller*, but the petitioner also had not exhausted those claims in the state courts and thus they were not properly before the Fifth Circuit for review.[80] The Eleventh Circuit agreed that *Miller* was not retroactive in *In re Morgan*,[81] finding the rule procedural rather than substantive. However, the *Morgan* court failed to even consider or discuss Jackson, who himself received relief despite the post-conviction posture of his appeal. Taking a different approach from *Craig* and *Morgan*, in an unpublished per curium opinion, the Fourth Circuit granted a prisoner's motion for "authorization

73. *Id.* at 2 n.2.

74. *See* Craig v. Cain, No. 12-30035, at *1–2, 2013 WL 69128 (5th Cir. 2013); *In re* Evans, 449 F. App'x 284 (4th Cir. 2011).

75. *Craig*, 2013 WL 69128, at *1–2.

76. *Id.* at *2.

77. 372 U.S. 335 (1963).

78. *Craig*, 2013 WL 69128, at *2 (quoting Beard v. Banks, 542 U.S. 406, 413 (2004)).

79. *See* Appellant's Opposition to the State's Motion to Publish and Motion to Withdraw January 4, 2013 Order at *1, Craig v. Cain, No. 12-30035, 2013 WL 69128 (5th Cir. Jan. 14, 2013) (describing that the petitioner raised only claims regarding the guilt phase of his trial).

80. *See id.* at *1–2.

81. No. 13-11175-D, 2013 WL 1499498 (11th Cir. Apr. 12, 2013).

to file a successive habeas application" because he had "made a 'prima facie showing' that his 'claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.'"[82]

B. Retroactivity Analysis

Generally, many scholars and practitioners believe that the starting place for any discussion of retroactivity is the United States Supreme Court's decision in *Teague v. Lane*.[83] There, the Court laid out the framework for determining whether a rule announced in one of its opinions should be applied retroactively to judgments in criminal cases that are already final on direct review.

Even before addressing the question of retroactivity under *Teague*, however, it is not unreasonable to argue—like some of the cases referenced above—that the Supreme Court has already answered the question by applying *Miller* to cases on collateral review. As noted above in *Miller*, the Court vacated the sentences of both Miller and Jackson.[84] While *Miller* was before the Supreme Court on direct review, Jackson's conviction became final long before the Court announced its new rule in *Miller*.[85] The Court's application of its holding in *Miller* to Jackson's case necessarily dictates retroactivity of the new rule.[86] There is no other logical interpretation of the Court's decision except that it applied the same reasoning and holding to Jackson's case, which was before the Court on collateral review.

Had *Miller* not applied retroactively to cases on collateral review, Jackson would have been precluded from the relief he was

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82. *In re* Evans, 449 F. App'x 284 (4th Cir. 2011).

83. 489 U.S. 288 (1989) (plurality).

84. Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012) (announcing that the Court "accordingly reverse[d] the judgments of the Arkansas Supreme Court and Alabama Court of Criminal Appeals and remand[ed Jackson's case] for further proceedings not inconsistent with this opinion").

85. *Id.* at 2461.

86. *See* Tyler v. Cain, 533 U.S. 656, 666 (2001). Justice Thomas explains that under § 2244(b), "[m]ultiple cases can render a new rule retroactive only if the holdings in those cases necessarily dictate retroactivity of the new rule." *Id.* Justice O'Connor's concurrence in *Tyler* is likewise instructive. O'Connor explained that the Court "may 'ma[k]e' a new rule retroactive through multiple holdings that logically dictate the retroactivity of the new rule." *Id.* at 668. She clarified that "the holdings must *dictate* the conclusion and not merely provide principles from which one *may* conclude that the rule applies retroactively" and that the Court "can be said to have 'made' a rule retroactive within the meaning of § 2244(b)(2)(A) only where the Court's holdings logically permit no other conclusion than that the rule is retroactive." *Id.* at 669. *Miller* represents such a clear dictation.

granted.[87] Indeed, Justice O'Connor noted this precise point in *Teague*: "[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated."[88] Justice O'Connor explained further:

> Were we to recognize the new rule urged by petitioner in this [collateral review] case, we would have to give petitioner the benefit of that new rule even though it would not be applied retroactively to others similarly situated. . . . [T]he harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated: such inequitable treatment "hardly comports with the ideal of 'administration of justice with an even hand.'" (if a rule is applied to the defendant in the case announcing the rule, it should be applied to all others similarly situated). Our refusal to allow such disparate treatment in the direct review context led us to adopt the first part of Justice Harlan's retroactivity approach in *Griffith*. "The fact that the new rule may constitute a clear break with the past has no bearing on the 'actual inequity that results' when only one of many similarly situated defendants receives the benefit of the new rule."
>
> If there were no other way to avoid rendering advisory opinions, we might well agree that the inequitable treatment described above is "an insignificant cost for adherence to sound principles of decision-making." But there is a more principled way of dealing with the problem. *We can simply 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 others similarly situated.* . . . We think this approach is a sound one. Not only does it eliminate any problems of rendering advisory opinions, it also avoids the inequity resulting from the uneven application of new rules to similarly situated defendants. *We therefore hold that, implicit in the retroactivity approach we adopt today, is the principle that habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to* all *defendants on collateral review through one of the two exceptions we have articulated.*[89]

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87. Notably, *Jackson* and *Miller* were joined—the Court did not simply apply *Miller* to *Jackson*, or remand *Jackson* for reconsideration in light of *Miller*. Instead, the two received the same relief, in the same manner. This is clear from the Court's language, which announced that both cases were remanded "for further proceedings not inconsistent with" its opinion. *Miller*, 132 S. Ct. 2455, at 2475. Moreover, on remand, the state of Arkansas has not contested that Jackson is entitled to a resentencing. *See* Brief of Appellee on Remand from the United States Supreme Court at 10, Jackson v. Hobbs, No. 09-145 (Ark. Jan. 7, 2013) (citing Yates v. Aiken, 484 U.S. 211, 218 (1988)).

88. *Teague*, 489 U.S. at 300.

89. *Id.* at 315–16 (emphasis added) (citations omitted). *See also* Griffith v. Kentucky, 479 U.S. 314, 323 (1987) ("[S]elective application of new rules violates

As acknowledged in *Teague*, unless the Court's granting of relief to Jackson extends to both him and other similarly situated defendants, the Court is doing nothing more than rendering an advisory opinion—something the Court may not do.[90] Therefore, if a new rule is announced and applied to a defendant on collateral review, as in *Miller*, that rule is necessarily retroactive.[91] Significantly, the retroactive effect of *Miller* was apparent even to the dissenting Justices in the case. Chief Justice Roberts, joined by Justices Scalia, Thomas, and Alito, lamented that the decision would likely invalidate more than 2,000 sentences.[92]

Additionally, the fact that *Miller* struck the mandatory sentence of life without parole as violative of the Eighth Amendment's ban on cruel and unusual punishment further strengthens the argument that *Miller* must be applied retroactively. First, the Court relied upon two strands of precedent regarding proportionate punishment that have themselves been applied retroactively.[93] As discussed above, the first strand includes cases adopting "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty."[94] These cases include the Court's decisions banning the execution of mentally retarded individuals in *Atkins v. Virginia*,[95] banning the death penalty for juvenile offenders in *Roper v. Simmons*,[96] and banning life imprisonment without the possibility of parole for juvenile non-homicide offenders in *Graham v. Florida*.[97] *Roper* was retroactive when it was announced, as it was decided on collateral review.[98] Although *Atkins* was decided on direct appeal, because of the categorical nature of the rule

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the principle of treating similarly situated defendants the same.").

90. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 205 (1962). *See also* U.S. CONST. art. III, § 2.

91. *See also Tyler*, 533 U.S. at 663 ("The new rule becomes retroactive, not by the decisions of the lower court or by the combined action of the Supreme Court and the lower courts, but simply by the actions of the Supreme Court.").

92. *Miller*, 132 S. Ct., at 2481 ("[I]ndeed, the Court's gratuitous prediction [that life without parole sentences will be 'uncommon'] appears to be nothing other than an invitation to *overturn* life without parole sentences imposed by juries and trial judges.") (emphasis added).

93. *Id.* at 2463.

94. *Id.*

95. 536 U.S. 304 (2002).

96. 543 U.S. 551 (2005).

97. 130 S. Ct. 2011 (2010). *See also* Coker v. Georgia, 433 U.S. 584, 584 (1982) (finding the death penalty grossly disproportionate and excessive for a crime of rape of an adult woman); Kennedy v. Louisiana, 128 S. Ct. 2641, 2649 (2008) (finding the death penalty unconstitutional for child rapists).

98. *Roper*, 543 U.S. at 559.

announced, and the Supreme Court's prior jurisprudence regarding such categorical rules,[99] courts have uniformly applied *Atkins* retroactively to cases on collateral review.[100] Likewise, courts generally have applied *Graham*'s categorical bar against life imprisonment without the possibility of parole for juvenile non-homicide offenders retroactively;[101] cases declining to apply *Graham* retroactively involved petitioners outside the scope of *Graham*'s holding.[102]

The second line of cases includes those "requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death."[103] This line of cases includes *Woodson v. North Carolina*,[104] *Lockett v. Ohio*,[105] *Sumner v. Shuman*,[106] and *Eddings v. Oklahoma*.[107] These cases have likewise received retroactive application. *Sumner* struck down a statute mandating the death penalty for an inmate

99. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 330 (1989).

100. *See In re* Ochoa v. Simmons, 485 F.3d 538, 540 (10th Cir. 2007); *In re* Holladay, 331 F.3d 1169, 1172–73 (11th Cir. 2003); *In re* Morris, 328 F.3d 739, 740 (5th Cir. 2003).

101. *See, e.g.*, *In re* Moss, 703 F.3d 1301 (11th Cir. 2013) (allowing petitioner to file a second or successive habeas motion pursuant to *Graham*); *In re* Evans, 449 F. App'x 284 (4th Cir. 2011); *In re* Sparks, 657 F.3d 258, 262 (5th Cir. 2011) ("By the combined effect of the holding of *Graham* itself and the first *Teague* exception, *Graham* was therefore made retroactive on collateral review by the Supreme Court as a matter of logical necessity under *Tyler*."); Loggins v. Thomas, 654 F.3d 1204, 1221 (11th Cir. 2011) (finding *Graham* applies retroactively because it fit under the *Teague* exception for "new rules 'prohibiting a certain category of punishment for a class of defendants because of their status or offense'") (quoting *Penry*, 492 U.S. at 330).

102. *See, e.g.*, Craig v. Cain, No. 12-30035, 2013 WL 69128 (5th Cir. 2013), People v. Carp, No. 307758, 2012 WL 5846553 (Mich. App. Nov. 15, 2012); Geter v. State, No. 3D121736, 2012 WL 4448860 (Fla. Dist. Ct. App. Sept. 27, 2012); Silas v. Pennsylvania, No. 08-0659, 2011 WL 4359973, at *2 (E.D. Pa. Sept. 19, 2011) ("First, there is no indication that *Graham* was 'made retroactively applicable to cases on collateral review.' Second, the rule in *Graham* does not apply to Petitioner.") (internal citations omitted); Lawson v. Pennsylvania, No. Civ. A. 09-2120, 2010 WL 5300531, at *3 n.8. (E.D. Pa. Dec. 21, 2010) ("[T]here is no indication that the Supreme Court has held *Graham* retroactively applicable on collateral review; furthermore, *Graham* does not extend relief to someone convicted of a homicide offense."). It should be noted that the Court's language in *Lawson* and *Silas* was dicta, and *Graham* applied to neither petitioner. Moreover, Petitioner in *Silas* had not raised or briefed the Court regarding the retroactivity of *Graham*; the Court raised the issue *sua sponte*. In Michigan, a number of lower courts have granted petitions for resentencings despite the *Carp* ruling, either by distinguishing or by simply stating that the decision was wrong and that it would be an injustice to follow the appellate court.

103. Miller v. Alabama, 132 S. Ct. 2455, 2463–64 (2012).

104. 428 U.S. 280 (1976).

105. 438 U.S. 586 (1978).

106. 483 U.S. 66 (1987).

107. 455 U.S. 104 (1982).

convicted of murder while serving a life sentence without the possibility of parole; it was retroactive to cases on collateral review because it was decided on collateral review.[108]

Although *Lockett* and *Eddings* were decided on direct appeal, both cases have been applied retroactively to other inmates long after their cases became final.[109] "[T]he confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment."[110] *Miller* articulates a new rule typical of the two lines of precedent it relies on and should receive the same retroactive application.

Second, it can be argued that *any* Supreme Court ruling striking a sentence as cruel and unusual punishment should be deemed retroactive on that basis alone. The Court repeatedly has recognized that the Eighth Amendment's ban on cruel and unusual punishment "flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense.'"[111] In determining what constitutes a cruel and unusual punishment, the Court has considered the proportionality of the sentence imposed to the harm committed.[112] The Court has emphasized the need for objective factors to determine the gravity of the offenses in comparison to the criminal sentences,[113] in order to assess the constitutionality of those sentences based on "the evolving standards of decency that mark the progress of a maturing society."[114] In *Miller*, the Court observed that:

[B]y requiring that all children convicted of homicide receive

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108. *Sumner*, 483 U.S. at 68. *See also* Thigpen v. Thigpen, 541 So.2d 465, 466 (Ala. 1989) (applying *Sumner* retroactively to case on collateral review).

109. *See, e.g.*, Dutton v. Brown, 812 F.2d 593, 599 n.7 (10th Cir. 1987) (noting that "retroactive application" of *Lockett* is "required"); Harvard v. State, 486 So. 2d 537, 539 (Fla. 1986) (applying *Lockett* retroactively); Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir. 1985) (applying *Lockett* retroactively); Shuman v. Wolff, 571 F. Supp. 213, 216 (D. Nev. 1983) (applying rule from *Eddings* retroactively).

110. Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012).

111. Kennedy v. Louisiana, 554 U.S. 407, 419 (2008) (quoting Weems v. United States, 217 U.S. 349, 367 (1910) (finding the death penalty unconstitutional for child rapists)).

112. *See, e.g.*, Solem v. Helm, 463 U.S. 277, 277 (1983) (holding life without parole "significantly disproportionate" punishment for falsifying a check when the defendant had only relatively minor prior offenses); Coker v. Georgia, 433 U.S. 584, 592 (1982) (finding the death penalty "grossly disproportionate and excessive for a crime of rape" of an adult woman); Enmund v. Florida, 458 U.S. 782, 798 (1982) (holding the death penalty disproportionate to the crime of felony murder, when the defendant "did not kill or intend to kill").

113. *See Coker*, 433 U.S. at 592 ("Eighth Amendment judgments . . . should be informed by objective factors to the maximum possible extent.").

114. Trop v. Dulles, 356 U.S. 86, 101 (1958).

> lifetime incarceration without the 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.[115]

Unless *Miller* is applied retroactively, children who committed their crimes and exhausted their appeals before *Miller* was decided will be deemed more blameworthy than children convicted of homicide during or after the pendency of *Miller*, and will remain condemned to "die in prison."[116] Such a conclusion defies reason and contravenes Eighth Amendment jurisprudence.[117] As the Illinois Appellate Court recently concluded in finding *Miller* retroactive to cases on collateral review, if mandatory life without parole sentences are now cruel and unusual, "[i]t would also be cruel and unusual to apply that principle only to new cases."[118] In *Hill v. Snyder*, the recent successful challenge to the constitutionality of Michigan's parole statute under Section 1983, the court echoed this observation.[119] In finding *Miller* retroactive, the court declared that "[t]o hold otherwise would allow the state to impose *unconstitutional* punishment on some persons but not others, an intolerable miscarriage of justice."[120] The challenge came in the form of a motion for summary judgment, and the court deemed *Miller* a

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

116. *See id.* at 2460 (invalidating the mandatory imposition of sentences of life without parole because it does not allow those deciding the punishment to factor in the reduced blameworthiness and greater likelihood for rehabilitation of juveniles).

117. *See, e.g.*, *In re* Brown, 457 F.3d 392, 396 (5th Cir. 2006) (noting that in order to "file a successive petition based on the new constitutional rule announced in *Atkins*," a petitioner must show that his petition is supported by a new, retroactive constitutional rule that was not available to him earlier); Atkins v. Virginia, 536 U.S. 304, 316 (2002) (banning the death penalty for "mentally retarded offenders" whom the Court acknowledged were viewed by society as "categorically less culpable than the average criminal"). Given the Court's language about culpability in *Atkins*, it would have been inconceivable for the Court to have sanctioned the further execution of mentally retarded individuals simply because they had exhausted their direct appeal rights. The same holds true for the pronouncements made in *Miller*. Imagine, for example, that the Supreme Court were to find that it is cruel and unusual to torture someone today: how could it possibly then sanction torture tomorrow for those who happened to have received the sentence and exhausted their direct appeal rights before the decision was handed down?

118. People v. Williams, No. 1-11-1145, slip op. at 28 (Ill. App. Ct. Dec. 12, 2012), *available at* http://www.state.il.us/court/Opinions/AppellateCourt/2012/1stDistrict/1111145.pdf.

119. Hill v. Snyder, No. 10-14568, slip op. at *4 (E.D. Mich. Jan. 30, 2013), *available at* http://www.freep.com/assets/freep/pdf/C4200020130.PDF.

120. Hill v. Snyder, No. 10-14568, 2013 WL 364198, at *2 (E.D. Mich. Jan. 30, 2013) (emphasis in original).

substantive rule because it "alters the class of persons (juveniles) who can receive a category of punishment (mandatory life without parole)."[121]

Finally, *Miller* meets the Court's retroactivity test under *Teague*. The *Teague* Court held that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced,"[122] except in two instances. First, a new constitutional rule is retroactive if it "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,'"[123] or addresses a "substantive categorical guarantee[ ] accorded by the Constitution," such as a rule "prohibiting a certain category of punishment for a class of defendants because of their status or offense."[124] Second, *Teague* held that "a new rule should be applied retroactively if it requires the observance of 'those procedures that . . . are implicit in the concept of ordered liberty.'"[125]

The decisions in *Atkins v. Virginia*, which barred the execution of mentally retarded individuals, and *Roper v. Simmons*, which prohibited the death penalty for juveniles, have been applied retroactively because they "prohibit[ ] a certain category of punishment for a class of defendants because of their status or offense."[126] Similarly, *Graham v. Florida* "bar[red] the imposition of a sentence of life imprisonment without parole on a juvenile offender"—i.e., barred a category of punishment for a class of defendants.[127] Like the rules announced in *Atkins*, *Roper*, and *Graham*, *Miller* "prohibit[s] a certain category of punishment," mandatory life imprisonment without the possibility of parole, "for a class of defendants,"—juvenile homicide offenders—[128] satisfying the first prong of *Teague*.

Miller also meets the second *Teague* exception. The second exception applies to "watershed rules of criminal procedure" and to "those new procedures without which the likelihood of an accurate conviction is seriously diminished."[129] This occurs when the rule

121. *Id.* at *2 (citing *Teague v. Lane*, 489 U.S. 288, 300 (1989)).

122. Teague v. Lane, 489 U.S. 288, 310 (1989).

123. *Id.* at 311 (quoting Mackey v. United States, 401 U.S. 677, 692 (1971)).

124. Penry v. Lynaugh, 492 U.S. 302, 329–30 (1989).

125. *Teague*, 489 U.S. at 307 (alteration in original) (quoting *Mackey*, 401 U.S. at 692).

126. Horn v. Banks, 536 U.S. 266, 272 (2001).

127. *In re Sparks*, 657 F.3d at 262.

128. *Horn*, 536 U.S. at 272.

129. *Teague*, 489 U.S. at 311.

"requires the observance of 'those procedures that . . . are 'implicit in the concept of ordered liberty.'"[130] To be "watershed" a rule must first "be necessary to prevent an impermissibly large risk" of inaccuracy in a criminal proceeding, and second, "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding."[131] The Supreme Court has recognized that sentencing is a critical component of the trial process, and thus directly affects the accuracy of criminal trials.[132]

Miller satisfies both of these requirements. First, the mandatory life without parole sentences cause an "impermissibly large risk" that the harshest sentence available for juveniles will be inaccurately imposed.[133] Such a mandatory sentence fails to consider the unique characteristics of youths, which make them "constitutionally different" from adults. By requiring that specific factors be considered before a court can impose a life without parole sentence on a juvenile, *Miller* also alters our understanding of what bedrock procedural elements are necessary to the fairness of such a proceeding.[134] Indeed, state appellate courts have adopted this analysis. In *People v. Williams*[135] for example, the Illinois appellate court granted the petitioner the right to file a second or successive habeas petition because *Miller* is a "watershed rule," and because, at his pre-*Miller* trial, petitioner had been "denied a basic 'precept of justice' by not receiving any consideration of his age from the circuit court in sentencing."[136] The court found that "*Miller* not only changed procedures, but also made a substantial change in the law."[137]

More recently, the Supreme Court has focused on whether a new rule is "substantive" or "procedural" to determine its

130. *Id.* at 307 (internal citations omitted).

131. Whorton v. Bockting, 549 U.S. 406, 418 (2007) (internal citations omitted); Figuereo-Sanchez v. United States, 678 F.3d 1203, 1208 (11th Cir. 2012).

132. *See, e.g.*, Witherspoon v. Illinois, 391 U.S. 510, 523 n.22 (1968) (applying retroactively a decision on a jury selection process that related to sentencing because it "necessarily undermined 'the very integrity of the . . . process' that decided the [defendant's] fate" (internal citation omitted)).

133. *Miller*, 132 S. Ct. at 2464, 2469 (explaining that imposing mandatory life without parole sentences "poses too great a risk of disproportionate punishment"); *Whorton*, 549 U.S. at 418.

134. *Miller*, 132 S. Ct. at 2469 (requiring sentencing judges "to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison").

135. People v. Williams, No. 1-11-1145, slip op. (Ill. App. Ct. Dec. 12, 2012), *available at* http://www.state.il.us/court/Opinions/AppellateCourt/2012/1stDistrict/1111145.pdf.

136. *Id.* at 16.

137. *Id.* at 15.

retroactivity under *Teague*.[138] A new rule is "substantive" if it "alters the range of conduct or the class of persons that the law punishes."[139] Generally, new substantive "rules apply retroactively because they 'necessarily carry a significant risk that a defendant stands convicted of an act the law does not make criminal' or faces a punishment that the law cannot impose upon him."[140]

Using the Court's updated terminology likewise favors retroactivity. While scholars, lawyers, and judges may debate whether a ban on mandatory sentences of juvenile life without parole constitutes a substantive or procedural rule, it can reasonably be argued that *Miller* established a substantive rule because it banned a "category of punishment" (mandatory sentencing) for a "class of defendants" (juveniles). The new rule "alters . . . the class of persons that the law punishes."[141] In *Miller*, the Court modified the class of persons eligible for mandatory life without parole sentences by excluding juvenile offenders from the statutes' reach.[142] Moreover, characterizing the *Miller* rule as substantive is consistent with the retroactive application of *Sumner v. Shuman,* where the Supreme Court struck a mandatory death penalty scheme.[143] Like *Miller*, the *Sumner* Court barred only the *mandatory* imposition of the death sentence and permitted the discretionary imposition of the sentence after consideration of mitigating factors. *Sumner* has been applied retroactively to cases on collateral review.[144] If *Sumner* is retroactive, *Miller* must be as well.

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138. *See* Schriro v. Summerlin, 542 U.S. 348, 353 (2004).

139. *Id.*

140. *Id.* at 352 (quoting Bousley v. United States, 523 U.S. 614, 620 (1998)).

141. *Schriro*, 542 U.S. at 353.

142. Opponents of retroactivity may argue that the new rule in *Miller* is procedural, since *Miller* bars only the imposition of mandatory life without parole, and still theoretically allows for the discretionary imposition of such a sentence. Indeed, *Miller* recognized, as previously held by *Harmelin v. Michigan*, 501 U.S. 957 (1991), that in the adult context, there is no substantive right against mandatory sentencing. "A sentence which is not otherwise cruel and unusual" does not "becom[e] so simply because it is mandatory." Miller v. Alabama, 132 S. Ct. 2455, 2470 (2012). However, the Court rejected *Harmelin* in the juvenile context, writing that "*Harmelin* had nothing to do with children and did not purport to apply its holding to the sentence of juvenile offenders." *Id.* Instead, the Court likened its holding to *Roper* and *Graham*, decisions holding that "a sentencing rule permissible for adults may not be so for children." *Id.* By rejecting *Harmelin,* the Court implicitly held that mandatory life without parole is *categorically* cruel and unusual for juveniles—and thus "prohibit[ed] a certain category of punishment for a class of defendants because of their status or offense." Penry v. Lynaugh, 492 U.S. 302, 330 (1989).

143. 483 U.S. 66, 68 (1987).

144. *Id.* at 68. *See also* Thigpen v. Thigpen, 541 So. 2d 465, 466 (Ala. 1989).

III. Now that Miller Has Been Decided, What Can Sentencing Courts Do?

Courts must now grapple with applying *Miller* to individuals seeking resentencing—either on direct appeal, in the absence of new applicable legislation, or through collateral challenges—assuming the decision is deemed retroactive.

The immediate question in all affected jurisdictions is what sentence may be imposed on juveniles convicted of first- or second-degree murder in place of mandatory life without parole. If state law already provides for an alternative term of years or life sentence with the possibility of parole, the sentencer can likely impose one of those options (as well as consider a non-mandatory life without parole sentence if such a discretionary sentence is already statutorily available).[145] However, in the absence of new or currently available alternative sentencing schemes, jurisdictions that only have the sentencing option of mandatory life without parole, or jurisdictions with no parole mechanism in place, will lack an applicable, constitutional sentencing scheme for juveniles convicted of first- or second-degree murder.[146] Under these circumstances, there is ample precedent from many state courts supporting the imposition of the next most severe statutory sentence available for that offense, or the next most severe sentence for any lesser-included offense if no other statutory sentence is available for the initial offense.

In Pennsylvania, for example, in *Commonwealth v. Story*,[147] the Pennsylvania Supreme Court ruled that once the death penalty scheme had been declared unconstitutional, the only sentence that could be imposed was the next most severe sentence statutorily available, life imprisonment.[148] The Court held that because the "death penalty has been unconstitutionally entered, the sentence of death must be vacated and a sentence of life imprisonment imposed."[149] In *Commonwealth v. Bradley*,[150] the

145. *See, e.g.*, WIS. STAT. §973.014 (2013) (establishing life without parole as a discretionary penalty).

146. Courts are not required to wait for the legislature to act to implement the discretionary procedures required by *Miller/Jackson*. In an attempt to comply with *Atkins v. Virginia*, the Supreme Court of Louisiana set forth guidelines for how to construct an evidentiary hearing to determine if an inmate was in fact mentally retarded (and thus eligible for resentencing). State v. Williams, 831 So. 2d 835, 858–60 (La. 2002). The court remanded to the trial court to conduct the hearing based on the guidelines it set forth. *Id.* at 858.

147. 440 A.2d 488 (Pa. 1981).

148. *Id.*

149. *Id.* at 492.

150. 295 A.2d 842 (Pa. 1972).

Pennsylvania Supreme Court was presented with a similar sentencing challenge after the state death penalty statute was declared unconstitutional pursuant to *Furman v. Georgia*,[151] which invalidated statutes that had "no standards [to] govern the selection of the penalty [of death or imprisonment]" and left the decision "to the uncontrolled discretion of judges or juries."[152] In *Bradley* as well, the court imposed the next most severe sentence available: life imprisonment.[153] In *State v. Davis*,[154] the North Carolina Supreme Court found that "common sense and rudimentary justice demand[ed] that the maximum permissible sentence of life imprisonment . . . be imposed upon person[s] convicted of first-degree murder or rape committed between" the case in which the Court first applied *Furman* and the date of the enactment of a new statute which rewrote the death sentencing provisions.[155]

Additionally, resentencing based on the lesser-included offense is in line with the Supreme Court decisions in *Roper*, *Graham*, and now *Miller* that juveniles are categorically less culpable than adults who commit similar offenses. In other words, juveniles who commit murder are categorically less culpable than adults who commit murder. Therefore, it is logical to look to sentences for lesser-included offenses since the legislature has consciously adopted sentences other than life without parole for those *adult* murderers whom they consider less culpable. This approach also resolves the Supreme Court's concern in *Graham* and *Miller* that juveniles sentenced to life, because of their young age, serve longer sentences than adult murderers who receive the

151. 408 U.S. 238 (1972).

152. *Id.* at 253 (Douglas, J., concurring).

153. *Bradley*, 295 A.2d at 845. *See also* Commonwealth v. Edwards, 411 A.2d 493, 494 (Pa. 1979) (vacating the death sentence and imposing life imprisonment because "the statute authorizing the death sentence was declared unconstitutional by this Court in *Commonwealth v. Moody*").

154. 227 S.E.2d 97 (N.C. 1976).

155. *Id.* at 199. *See also* Calloway v. Blackburn, 612 F.2d 201 (5th Cir. 1980) (finding no violation of separation of powers doctrine for Louisiana Supreme Court to sentence defendant for lesser included offense after death penalty found unconstitutional); Carey v. Garrison, 452 F. Supp. 485, 488 (W.D.N.C. 1978) (describing how an unconstitutional sentence was commuted down to the next harshest constitutional sentence made available by statute); State v. Lindquist, 589 P.2d 101, 106 (Idaho 1979) (directing to resentence for lesser included offense of second degree murder after death sentence ruled unconstitutional); State v. Craig, 340 So. 2d 191, 194 (La. 1976) (ordering defendant to be sentenced to most serious penalty for next lesser included offense because mandatory death penalty struck for aggravated rape); People v. Webb, 542 P.2d 77, 79 (Colo. 1975) (en banc) (resentencing defendant to lesser-included offense of criminal negligence after manslaughter statute was struck down).

same sentence.[156]

One other point should be noted in considering what alternative sentences may be imposed on juvenile offenders. The imposition of any higher sentence other than that available at the time the underlying felony or homicide was committed may well violate due process, *ex post facto*, and equal protection rights. In many jurisdictions within the purview of *Miller*, only one possible sentence for first- or second-degree murder—life imprisonment without the possibility of parole—may have been statutorily available. Under *Miller*, this mandatory sentence has now been struck down. These state codes therefore lack a constitutional sentence for first- or second-degree murder committed by a juvenile. It is well established that a juvenile's *ex post facto* rights would be violated, however, if the state were to "inflict punishments, where the party was not, by law, liable to any punishment" or to inflict "greater punishment, than the law annexed to the offence."[157] Thus, any sentence imposed that is greater than a statutorily established, constitutional sentence would amount to a judicially created, retroactive punishment that was not "annexed to the offence" at the time the crimes occurred. This further supports the argument that juveniles must be sentenced in accordance with the lesser-included sentence available.

For similar reasons, imposing a judicially created sentence—in the absence of an available, constitutional statutory alternative—that is greater than any statutorily established constitutional sentence would also violate juveniles' due process rights.[158] Likewise, a judicially created sentence, such as a sentence of life with the possibility of parole, would violate equal protection by treating the *Miller* class of juveniles differently than those who are sentenced according to constitutionally sound statutes.[159] For example, in *Story*, the Pennsylvania Supreme Court refused to permit the defendant to be subjected to another

156. *See, e.g.*, Graham v. Florida, 130 S. Ct. 2011, 2028 (2010) ("Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender.").

157. Stogner v. California, 539 U.S. 607, 612 (2003) (quoting Calder v. Bull, 3 U.S. 386, 389 (1798)).

158. *Cf.* Commonwealth v. Story, 440 A.2d 488, 492 (Pa. 1981) (vacating a death sentence for a defendant who had been retried after a new death penalty statute was enacted).

159. *Id.* ("Because appellant was tried, convicted, and sentenced to death under an unconstitutional statute, he must be treated the same as all those persons whose death penalties have been set aside.").

capital sentencing proceeding under the newly enacted sentencing statute. The Court explained that such an approach would "violate equal protection and due process."[160]

Of course, the devil is in the details. The next most severe sentence available, which may require looking to the statutory sentence for lesser-included offenses, will vary from state to state. Again, in Pennsylvania, the next most severe sentence for first-degree murder is a maximum sentence of forty years for the lesser-included offense of third-degree homicide.[161] For second-degree felony murder, the lesser-included offense would be the underlying felony, i.e., robbery or another first-degree felony, which would carry a maximum sentence of twenty years in Pennsylvania.[162]

Lastly, *Miller* is quite prescriptive about what these sentencing hearings should look like. The fundamental premise behind the Court's rejection of mandatory life without parole sentences for juveniles was its insistence that the factor of youth be taken into account before the imposition of a state's harshest penalties, and that each juvenile receive an individualized sentence based upon the particular youth's age and the "wealth of characteristics and circumstances attendant to it."[163] Justice Kagan identified particular characteristics or attributes that sentencers must consider. These include, at a minimum, age and developmental attributes, some of which are immaturity, impetuosity, failure to appreciate risks and consequences, the juvenile's family and home environment, circumstances of

160. *Id.* *See also* Commonwealth v. Bradley, 295 A.2d 842, 845 (Pa. 1972) (vacating defendant's death sentence in light of *Furman v. Georgia*, 408 U.S. 238 (1972)), and imposing the next most severe statutorily authorized sentence of life imprisonment).

161. *See* 18 PA. CONS. STAT. § 1102 (2012).

162. *See, e.g.*, 18 PA. CONS. STAT. §§ 106(b), 2502(b) (2012). The Pennsylvania Supreme Court heard argument on September 12, 2012, in two cases, *Commonwealth v. Batts*, No. 79 MAP 2009, 2013 WL 1200252 (Pa. Mar. 26, 2013), and *Commonwealth v. Cunningham*, see Juv. Law Ctr., *Commonwealth of Pennsylvania v. Ian Cunningham*, JLC, http://www.jlc.org/legal-docket/commonwealth-pennsylvania-v-ian-cunningham (last visited Apr. 1, 2013). The court considered the adoption of the lesser included offense sentencing scheme for both first and second degree murder, in the absence of an alternative, constitutional sentencing option. *Batts* at *7. Ultimately, the court in *Batts* held that the appropriate remedy for the constitutional violation in that case (Batts was a fourteen-year-old who was given a mandatory life without parole sentence) was a new sentencing hearing where the trial court could consider the factors detailed in *Miller*, and impose a life sentence with eligibility for parole to be set by the trial judge. *Batts* at *12. While Pennsylvania has approximately 500 juvenile lifers, the Batts decision—limited to cases on direct appeal—will likely apply to less than twenty juvenile lifers.

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

the offense, the extent of his participation, the way familial and peer pressures may have affected his or her behavior, a lack of sophistication in dealing with a criminal justice system that is designed for adults, and potential for rehabilitation.[164]

Notably, Justice Kagan did not frame these considerations as either specifically mitigators or aggravators; this suggests that these sentencing hearings may more closely resemble juvenile transfer hearings[165] than the penalty phase in death penalty cases. Since the question post-*Miller* is not life in prison or death, but the opportunity for eventual release from prison, an exact parallel to capital cases is not apt. Presumably, the criteria identified by Justice Kagan will be viewed positively or negatively on a case-by-case, individualized basis.

IV. If Juveniles Will Now Be Eligible For Parole, We Must Make Prison Programming Available and Meaningful To Juvenile Offenders

For juvenile offenders, rehabilitation is often viewed as a central goal of incarceration because of adolescents' malleability. However, as we discuss below, rehabilitation is often undermined by state laws and regulations that deny juvenile lifers access to prison programs such as Alcoholics Anonymous, Narcotics Anonymous, vocational training, and courses to achieve a GED or college degree.[166]

In addition to being denied access to useful programming, many juvenile lifers entered prison at a tumultuous developmental time in their lives. They were ill-equipped for life in prison, where they had to adjust to a primitive, Darwinian battle to survive.[167]

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164. *Id.* at 2468.

165. A juvenile transfer hearing occurs when a prosecutor has petitioned or motioned for a juvenile criminal defendant to be transferred from the juvenile court to the criminal court at the discretion of a judge. Richard E. Redding, *Juveniles Transferred to Criminal Court*, 1997 UTAH L. REV 709, 717 (1997). The criteria for granting such a transfer are defined by statute and vary by state. *Id.* at 718. Much like the factors enumerated by Justice Kagan, the factors taken into consideration in many state statutes do not require the judge to make a particular finding, and how to weigh a factor, or whether a certain factor is positive or not, is left entirely to the judge's discretion. *Id.*

166. Gerard Glynn & Ilona Vila, *What States Should Do to Provide a Meaningful Opportunity for Review and Release: Recognize Human Worth and Potential*, 24 ST. THOMAS L. REV. 310, 340 (2012) (explaining that due to limited funding, many prisons deny inmates with longer sentences access to rehabilitative programs).

167. *Id.* at 337.

When juveniles start their sentences poorly—for any number of reasons, including their efforts to "act tough" to get by—their misbehavior can be used against them decades later.[168]

This is one of many paradoxes of treating juvenile lifers as though they are adults. There are others. As Ed Mulvey and Carol Schubert have observed, "developing . . . adolescents will flourish most productively when the demands of the environment present challenges and supports for mastery of the skills needed to move on to the next developmental phase."[169] Youth in prison are not only victimized at high rates,[170] but there is a disruption of normative life experiences.

There is little support for "positive identity formation," but there is extensive peer support for additional criminality. There are lost opportunities for learning.[171] In addition:

> Removal from the community during adolescence in and of itself has a profound effect on both present and future human and social capital. . . . From the perspective of the adolescent, removal from the community means loss of access to positive social relationships in the context of school settings or supportive work environments in the community and an erosion of previously established positive relationships from restricted contact (in person and by phone) with individuals on the "outside."[172]

These factors place juvenile lifers far behind the starting line for a race that measures their performance every day that they are in prison. This is the most practical, and trenchant, of problems.

Consider Pennsylvania, which accounts for almost twenty percent of the nation's juvenile lifer population.[173] *Miller* gives Pennsylvania's juvenile lifers a new opportunity to challenge their

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168. *Id.* at 334–35 ("The Nevada Administrative Regulations provide a detailed list of aggravating and mitigating factors for a parole board to consider [including] . . . (i) whether the prisoner has engaged in disruptive behavior while incarcerated.").

169. Edward P. Mulvey & Carol A. Schubert, *Youth in Prison and Beyond*, *in* THE OXFORD HANDBOOK OF JUVENILE CRIME AND JUVENILE JUSTICE 843, 845 (Barry C. Feld & Donna M. Bishop eds., 2011).

170. JUV. LAW CTR., PROTECTING YOUTH IN THE PREA NATIONAL STANDARDS: PUBLIC COMMENTS FROM YOUTH ADVOCATES ON PROPOSED STANDARDS FOR THE IMPLEMENTATION OF NATIONAL PRISON RAPE ELIMINATION ACT 17 (2011), *available at* http://www.jlc.org/sites/default/files/publication_pdfs/PREA_Youth_Comments_0.pdf ("Twelve percent of adjudicated youth in juvenile facilities reported experiencing sexual abuse in 2008 and 2009.").

171. Mulvey & Schubert, *supra* note 169, at 845–50.

172. *Id.* at 852.

173. Matt Stroud & Liliana Segura, *The Uncertain Fate of Pennsylvania's Juvenile Lifers*, NATION (Aug 7, 2012), http://www.thenation.com/article/169268/uncertain-fate-pennsylvanias-juvenile-lifers.

mandatory life without parole sentences. However, after decades behind bars with no hope of release, it is not surprising that many juvenile lifers in Pennsylvania have amassed lengthy prison disciplinary records that will be difficult to explain to parole boards.

One Pennsylvania juvenile lifer, Shariff I., wrote from "the hole" about his struggle to overcome the hopelessness of his life without parole sentence for more than fourteen years in prison before the Supreme Court decided *Miller*. His words are haunting:

> Because I had given up hope a long time ago[,] I was prepared to die behind these walls. I gave up all hope of ever having an opportunity to ever see life outside of these walls. You all have slowly help[ed] to restore that hope. However during these years of hopelessness, I've dug myself in a hole. I have stabbed people, caught additional time in prison for assault on guards. So I now have a minimum of 11 years to serve aside from my life sentence [a]nd I wonder if any of these doors that are opening [after *Miller*] will benefit me in any way. Is it too late to turn things around or do I have a real shot. This is my question to you[ ] [b]ecause there are those in here with me, that giv[en] the opportunity would do what[ ]ever is required to get out of here and stay out. We have bad prison records, but are not bad people. We just got caught up in this jail house maddness [sic] and had a rougher time than some others. Some people have always held onto hope[;] others such as myself felt it was easier to do my time by letting go of any false hope, [a]nd because of that lack of hope our minds began to deteriorate, and with no rehabilitation taking place for us . . . our stress, anger, confusion, and frustration would lash out. Along with losing all hope, we lost all patience. [W]e also had to adapt to a violent environment at a young age, and were forced to become a product [sic] of that environment in some way. Either you are the wolf or the sheep in here. And I learned this early on and felt if I have to spend the [r]est of my life here I refuse to be the sheep. Now I look back and question my decisions over the past 14 ½ years. And I feel like all I had to do is be patient, and not give up hope so fast, or so early. I allowed my environment to get the best of me, and it may have cost me my only shot left in getting out of here. But I just wanted to . . . ask, please don't forget about those like myself, that we can't change our past mistakes in here, and hope to still have a chance to benefit from [the *Miller* decision and] any leg[i]slation that is passed in regards to juvenile lifers.[174]

Shariff's story is shared by many juvenile lifers throughout the country who were locked up decades ago and told they would "die behind these walls." Juvenile lifers interviewed in July 2006

174. Letter from Shariff I. to the Juv. Law Ctr. (July 17, 2012) (on file with the authors).

and 2007 by the Illinois Coalition for the Fair Sentencing of Children (Illinois Coalition) said that "[c]oping with th[eir] sentence was especially difficult in the first few years."[175] Many juveniles sentenced to life without the possibility of parole contemplate suicide during the first years behind bars, and almost all of them "struggle every day to find some purpose in their lives."[176] Other juvenile lifers share Shariff's feelings of frustration and anger. Jaime J., one of Illinois's hundred-plus juvenile lifers, told the Illinois Coalition that his life without parole sentence for a crime he committed when he was fifteen years old made him feel "written off and 'helpless.'"[177] Prison policies reinforce juvenile lifers' sense of being "written off" by excluding them from educational, vocational, and rehabilitative prison programming. Such prison policies feed the "lack of hope" described in Shariff's letter and ensure that "no rehabilitation take[es] place for us [juvenile lifers]."[178]

The Supreme Court observed in *Graham* that "[f]or juvenile offenders, who are most in need of and receptive to rehabilitation, the absence of rehabilitative opportunities or treatment makes the disproportionality of the [life without parole] sentence all the more evident."[179] The Court used the denial of rehabilitative services as a justification for striking down mandatory life without parole sentences for juveniles. Its analysis in *Graham* and *Miller* suggests that policymakers must change the plethora of laws, regulations, and policies that bar juvenile offenders from rehabilitative services, including educational and vocational training.[180]

Building upon *Roper* and *Graham*, the *Miller* Court spoke repeatedly of youths' capacity for change in rejecting mandatory life sentences.[181] After *Miller*, states must make sure that their approach to prison programming, and its impact on parole hearings, recognizes youths' capacities for rehabilitation and leaves open the possibility of their release. Juveniles sentenced as

175. ILL. COAL. FOR THE FAIR SENTENCING OF CHILDREN, CATEGORICALLY LESS CULPABLE: CHILDREN SENTENCED TO LIFE WITHOUT POSSIBILITY OF PAROLE IN ILLINOIS 20 (2008) [hereinafter CATEGORICALLY LESS CULPABLE].

176. *Id.*

177. *Id.*

178. Letter from Shariff I. to the Juv. Law Ctr., *supra* note 174.

179. Graham v. Florida, 130 S. Ct. 2011, 2030 (2010) (citations omitted).

180. *Id. See also* Brief for The Sentencing Project as Amici Curiae Supporting Petitioners at 11, Graham v. Florida, 130 S. Ct. 2011 (2010) (No. 08-7412 & 08-7621) (encouraging an analysis that would require legal changes to expand opportunities for juvenile lifers).

181. Miller v. Alabama, 132 S. Ct. 2455, 2465, 2468–69, 2478, 2490 (2012).

adults must have the opportunity to reform and make their case for reentering society.[182]

A. *State Correctional Programs*

Although the *Miller* Court's analysis of juvenile culpability "rest[s] not only on common sense—on what 'any parent knows'—[but] on science and social science as well,"[183] states too often fail to require parole boards to consider a juvenile offender's age and subsequent maturation in making parole decisions.

Consider Louisiana: after *Miller*, there were over 330 juveniles serving life without the possibility of parole, making it the state with the third largest juvenile lifer population in the country.[184] Louisiana's prison regulations make it extremely difficult, if not impossible, for the state's juvenile lifers to participate in many programs run by the Department of Public Safety and Corrections (Louisiana Corrections Department).

Under Louisiana law, juvenile offenders "convicted of forcible rape, aggravated arson, armed robbery, attempted murder, attempted armed robbery," and juveniles "sentenced as habitual offenders" are ineligible for work release. The exceptions to this rule include: offenders who have been imprisoned for less than fifteen years during the last six months of their terms, as well as offenders who have been imprisoned less than fifteen years and during the last twelve months of their term[s].[185] Even if a juvenile lifer was not sentenced to one of the offenses enumerated above, Louisiana Corrections Department regulations preclude any inmate from participation in work release until the prisoner "is within two years of discharge."[186] Louisiana's work release guidelines ensure that juvenile lifers will not be able to participate because of their indefinite life sentences. Until juvenile lifers are resentenced to a term of years with a definite release date, they will be excluded from work release programs in Louisiana.

Florida, which has over 260 juvenile lifers,[187] is similar to Louisiana in its restrictions. While Florida's Youthful Offenders Program provides many inmates with "a programmatically

182. *Id.* at 2469.

183. *Id.* at 2464.

184. HUM. RTS. WATCH, STATE DISTRIBUTION OF ESTIMATED 2,589 JUVENILE OFFENDERS SERVING JUVENILE LIFE WITHOUT PAROLE (2012), *available at* http://www.hrw.org/sites/default/files/related_material/updatedJLWOP10.09.pdf [hereinafter STATE DISTRIBUTION OF JLWOP INMATES].

185. LA. REV. STAT. ANN. §15:1111 (2012).

186. LA. ADMIN. CODE tit. 22, § 311 (2012).

187. STATE DISTRIBUTION OF JLWOP INMATES, *supra* note184.

diversified extended day of 16 hours . . . six days a week" consisting of academic and vocational training, substance abuse programs, and counseling, juvenile lifers are systematically excluded from participation in these programs.[188] Under Florida Department of Corrections regulations, juvenile offenders are ineligible for the Youthful Offenders Program if they are serving time for "murder, attempted murder, or an offense resulting in a death," "sexual battery," "kidnapping," "carjacking," or "home invasion robbery."[189]

California, which has the nation's fifth largest juvenile lifer population,[190] also has laws and regulations governing prison administration that exclude juvenile lifers from participating in rehabilitative activities.[191] California's prison regulations often exclude inmates who have committed violent crimes from prison programs. For instance, female inmates may not participate in the Family Foundations program, a twelve-month substance abuse program for expectant mothers, if they are sentenced for violent crimes, including murder, voluntary manslaughter, kidnapping, or "[a]ny felony punishable by death or imprisonment in the state prison for life."[192]

In addition, California,[193] Ohio,[194] and many other states[195] prohibit juvenile lifers from earning "good time credits"[196] toward release in any prison programs, including vocational programs, educational programs, treatment programs for drug and alcohol

188. FLA. ADMIN. CODE ANN. r.33-601.226(1)–(3) (2012).

189. FLA. ADMIN. CODE ANN. r.33-601.226(3)(h) (2012).

190. HUM. RTS. WATCH & AMNESTY INT'L, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 35 (2005), *available at* http://hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf.

191. STATE DISTRIBUTION OF JLWOP INMATES, *supra* note 184

192. *See* CAL. PENAL CODE § 1174.4(a)(2)(A)–(I) (West 2012); CAL. CODE REGS. tit. 15, § 3074.3 (2012).

193. CAL. PENAL CODE § 2933.05 (West 2009).

194. OHIO ADMIN. CODE 5120-2-06(V)(1) (2012) ("[T]he following prison terms . . . shall not be reduced by any days of earned credit: (1) A prison term for which an indefinite term of imprisonment is imposed.").

195. *See, e.g.*, KAN. ADMIN. REGS. § 44-6-114c (2012).

196. *See* 18 U.S.C.A. § 3624(b)(1) (West 2008) (stating that only prisoners not serving life sentences are eligible for "credit toward service of sentence for satisfactory behavior" (what is frequently referred to in this article as "good time credit")); James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217, 221 (1982) (explaining "[t]here are at least three types of good time. The first type rewards prisoners who conform with prison rules and regulations . . . [t]he second type rewards participation in prison programs and industries . . . [and] [t]he third type is used to reward prisoners who give blood, serve as experimental medical subjects, or perform such outstanding services as saving the life of a staff member or fellow prisoner").

addiction, and sex offender rehabilitation.[197] Juvenile lifers' inability to obtain "good time credit" may disadvantage them in two ways. First, restrictions on eligibility for good time credit in Ohio, Kansas, and other states prohibit individuals serving life *with or without* the possibility of parole from earning earlier release dates through good behavior.[198] Thus, even in states where juvenile lifers have their life without parole sentences commuted to life with parole sentences following *Miller*, they will still be unable to prove their rehabilitation through participation in educational, vocational, and rehabilitation programs. Second, states' definitions of "good time credit" associate these credits with good behavior.[199] As noted earlier, juveniles entering prison often struggle to maintain good behavior.[200] Given this, parole boards can easily misinterpret a former juvenile lifer's lack of "good time credit" as a reflection of the inmate's bad character, rather than of his or her inability to participate in prison programs because of regulatory restrictions.

Illinois may not have statutory or regulatory restrictions on juvenile lifers' participation in prison programs, but interviews with Illinois's juvenile lifers illustrate the practical barriers they face.[201] Between 2006 and 2007, the Illinois Coalition for the Fair Sentencing of Children interviewed 83 of the 103 juvenile offenders in Illinois serving life without the possibility of parole.[202] Many of Illinois's juvenile lifers described their struggle to gain access to educational and vocational prison programs.[203] In Illinois, juvenile lifers go to the back of the line of inmates enrolling in prison programs because "prison policy gives enrollment preferences to those with less time to serve."[204]

Juvenile lifers who were able to participate in educational and vocational trainings found their experiences enriching, but many who could not enroll described their lives as extraordinarily boring and monotonous, "not living, just existing."[205] One Illinois lifer, Darnell F., "described waiting for chow as his full-time job."[206]

197. *See, e.g.*, OHIO ADMIN. CODE 5120-2-06(A) (2012).

198. *Id. See also* KAN. ADMIN. REGS. 44-6-114c (2012).

199. *See, e.g.*, OR. ADMIN. R. 169.110 (2011) (establishing that Oregon juvenile courts will grant good time credit for good behavior).

200. Glynn & Vila, *supra* note 166, at 337–39.

201. CATEGORICALLY LESS CULPABLE, *supra* note 175.

202. *Id.* at 20 n.35.

203. *Id.* at 21–23.

204. *Id.* at 21.

205. *Id.* at 22.

206. *Id.*

Since Illinois law does not explicitly exclude juvenile lifers from participation in rehabilitative programs, these interviews show that regulations and statutes tell only a partial story about the exclusion of juvenile lifers from prison programming. Prison administrators in many others jurisdictions may likewise exercise their substantial discretion to exclude juvenile lifers from participation in educational and vocational training, substance abuse rehabilitation, and sex offender treatment.

B. Federal Programs

Reflecting pre-*Miller* biases, juvenile lifers, including those sentenced to life *with* the possibility of parole, are often excluded from participation in prison programs for educational and vocational training funded by federal grants.[207] Though incarcerated juvenile offenders need educational proficiency and job skills in order to obtain gainful employment upon their release from prison, they often cannot access federal student aid distributed by the U.S. Department of Education. The Federal Pell Grant Program, administered by the U.S. Department of Education, provides financial assistance of up to $5,550 per year to 5.4 million low-income students enrolled full-time or part-time in American colleges, universities, and vocational schools.[208] But, in 1994, Congress amended the Federal Pell Grant Program, as part of the Violent Crime Control and Law Enforcement Act, to prohibit the use of Pell Grants to fund the education of "any individual who is incarcerated in any Federal or State penal institution."[209] Thus, juvenile offenders incarcerated in state or federal prisons cannot receive assistance for post-secondary education under the Federal Pell Grant Program even if they would otherwise qualify for federal student aid.[210]

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207. *See, e.g.*, Violent Crime Control and Law Enforcement Act of 1994, 20 U.S.C. § 1070(a)(b)(6) (2012) (establishing that "no Federal Pell Grant shall be awarded under this subpart to any individual who is incarcerated in any Federal or State penal institution or who is subject to an involuntary civil commitment upon completion of a period of incarceration for a forcible or non-forcible sexual offense").

208. *See, e.g.*, Minn. Office of Higher Educ., GET READY FOR COLLEGE: FEDERAL PELL GRANT (2012), http://www.getreadyforcollege.org/gPg.cfm?pageID=139&1534-D83A_1933715A=f07538b484e4efd0ba6d933da0d63412d7e48b3c (last visited Apr. 10, 2013).

209. 20 U.S.C. § 1070 (a)(b)(6) (2012).

210. *See* FED. STUDENT AID, INCARCERATED INDIVIDUALS AND ELIGIBILITY FOR FEDERAL STUDENT AID 1 (2012), *available at* https://studentaid.ed.gov/sites/default/files/aid-info-for-incarcerated-individuals.pdf ("An individual incarcerated in a federal or state institution is ineligible to receive a Federal Pell Grant or federal student loans.").

Even when the federal government funds educational proficiency programs in prisons to promote "acquir[ing] educational and job skills," these programs have eligibility requirements that often exclude juvenile lifers.[211] To qualify for federally funded prison programs that educate state prisoners or teach them job skills, juveniles incarcerated in U.S. penal institutions must satisfy maximum age and offense restrictions, which juvenile lifers will often be unable to meet.[212] In an effort to channel federal education funds to youthful offenders, Congress initially set an age limit of twenty-five—later raised to thirty-five—years of age for each participant in prison education programs funded by the federal government. That is, inmates older than thirty-five are ineligible.[213]

Ironically, these age restrictions prevent educational and vocational training for juvenile offenders who have been incarcerated for decades in the jurisdictions that had mandatory life without parole sentences for juveniles.[214] Many juvenile lifers today—finding themselves with apparent post-*Miller* opportunities for parole—will discover that they are too old for these federal programs. Juvenile offenders convicted of murder, or certain crimes against children, are also categorically excluded from participating in prisoner education programs funded by federal grants.[215] Federal law thus raises barriers to rehabilitation of juvenile offenders whom the Supreme Court has deemed capable of rehabilitation. Combined with state barriers to prison programming, these policies make it harder for juvenile lifers to demonstrate to parole boards that they are ready for release. State parole policies add even more burdens.

V. State Corrections and Parole

Miller requires states to rethink parole opportunities for juveniles who are convicted as adults for capital crimes. Parole offers prisoners the opportunity to earn early release from prison based on factors that typically include good behavior and participation in rehabilitative programs.[216] Parole systems

211. 20 U.S.C. § 1151 (2012).

212. *Id.*

213. *Id.* at (a)(1).

214. The forty-six jurisdictions which had mandatory life without parole sentences for juveniles prior to *Miller* include forty-four states, the District of Columbia, and the federal government. *See* Graham v. Florida, 130 S. Ct. 2011, 2035 (2010).

215. 20 U.S.C. § 1151 (e)(3).

216. For a selection of statutes authorizing "good time credit" for successful

advance society's goals for criminal punishment. These include retribution, rehabilitation, incapacitation, and deterrence.[217]

In most jurisdictions, prisoners can increase their chances for parole or earn time off their sentence by participating in educational, vocational, and rehabilitative programs.[218] This credit for good behavior, or "good time," improves safety inside prisons.[219] It is also justified on rehabilitative grounds since prisoners' participation in educational and substance-abuse programs decreases their likelihood of recidivism, and increases the chance that inmates will be able to function when they are paroled.[220] The need for incapacitation thus diminishes because inmates over time pose less of a post-release risk to public safety.[221]

Unfortunately, as discussed above, juveniles sentenced as adults are often denied meaningful opportunities to participate in rehabilitative programming. They are thus, ironically, less likely to become eligible for parole. Consequently, current practices in many jurisdictions undermine *Miller*'s premises. *Miller*, like *Roper* and *Graham*, recognized "the great difficulty . . . of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'"[222] Rehabilitative programming and meaningful opportunities for parole are the vehicles by which society can distinguish the former from the latter.

In response to *Miller* legislatures and courts must conceptualize anew the purposes of punishment for juveniles. Legislatures, courts, and corrections agencies must also reconceptualize correctional programming (rehabilitation) and parole (incapacitation) for juveniles.[223] Denial of, or reduction in,

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completion of educational, vocational, and rehabilitative programs, see Michael M. O'Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 AM. CRIM. L. REV. 1247, app. (2011) (compiling recent changes in "earned-time" parole credit throughout the United States).

217. *See* HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 35–61(1968).

218. *See* O'Hear, *supra* note 216.

219. Nora V. Demleitner, *Good Conduct Time: How Much and for Whom? The Unprincipled Approach of the Model Penal Code: Sentencing*, 61 FLA. L. REV. 777, 782 (2009).

220. Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1, 22 (2011).

221. Graham v. Florida, 130 S. Ct. 2011, 2029 (2010).

222. Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

223. The final purposes of punishment—specific and general deterrence—are not relevant to this discussion. As the Court observed in *Roper v. Simmons*, "the same characteristics that render juveniles less culpable than adults suggest as well that

correctional programming, and the consequent denial of parole because of the absence of programming, defies *Miller*'s implied requirement that states allow convicted murderers to show, over time, why they should be released. States must eliminate this "catch-22": denying juveniles correctional programming increases the chances that they will misbehave while in prison, prevents them from building evidence of rehabilitation, increases the chances that they will be a risk if released, and almost certainly reduces any chance they will have for parole.

A. Correctional Programming and Its Relationship to Parole

Many state codes explicitly require parole boards to use rehabilitation as the central benchmark for parole decisions. Missouri, for example, describes the goals of its substance abuse rehabilitation programs for persons convicted of a drug offense as four-fold: "(A) To promote a drug- and crime-free lifestyle; (B) To provide education and/or treatment on the multi-faceted consequences of substance use; (C) To explore intervention and treatment options; and (D) To contribute to public health and safety in Missouri."[224] Missouri's stated goal "[t]o contribute to public health and safety" demonstrates that rehabilitation can reduce the need for incapacitation.[225]

In Missouri, the purpose of parole hearings is to "[d]iscuss progress made, or expected to be made, toward rehabilitation

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juveniles will be less susceptible to deterrence." Roper v. Simmons, 543 U.S. 551, 571 (2005). It is clear that teens in general will not adjust their behavior by anticipating whether they will be rehabilitated or paroled many decades in the future. It is also clear that, for purposes of specific deterrence, an inmate serving a sentence will be more likely to behave if there is a possibility of release tied to good behavior. We thus deem deterrence related to inmate behavior subsumed by our discussion of rehabilitation and incapacitation.

224. MO. CODE REGS. ANN. tit. 9, § 30-3.230 (2012).

225. An obvious example is the need for drug and alcohol programming. Many states correctly view drug and alcohol addiction as a major cause of violent crime. *See* Nat'l Council on Alcoholism & Drug Dependence, *Alcohol, Drugs and Crime*, NCADD.ORG, http://www.ncadd.org/index.php/for-youth/drugs-and-crime/230-alcohol-drugs-and-crime (last visited Apr. 10, 2013). According to a survey of American prisoners, fifty-four percent of prisoners incarcerated for violent crimes in the U.S. report drug or alcohol use at the time of their offense, and sixty to eighty percent of incarcerated drug abusers will reoffend upon release. ANN H. CROWE & RHONDA REEVES, TREATMENT FOR ALCOHOL AND OTHER DRUG ABUSE: OPPORTUNITIES FOR COORDINATION ch. 14 (1994); Nat'l Ass'n of Drug Court Prof'ls, *The Facts on Drugs and Crime in America*, NADCP.ORG (2008), *available at* http://www.nadcp.org/sites/default/files/nadcp/Facts%20on%20Drug%20Courts%20.pdf. Hence, parole programs designed to encourage participation in substance abuse programs can be justified on grounds of rehabilitation and incapacitation.

while confined."[226] Other states, like Massachusetts, make a more explicit connection between rehabilitation and incapacitation. They emphasize the parole board's duty both to incapacitate dangerous criminals *and* to release prisoners whose continued incapacitation is no longer necessary to protect the public.[227] The dual goals of rehabilitation and incapacitation are served by programs that use "good time credit" to encourage prisoners to participate in drug and alcohol treatment programs. Prisoners who receive substance abuse treatment in prison are more likely to find gainful employment upon release and less likely to recidivate.[228] These results serve the goal of using parole to encourage long-term rehabilitation of offenders.

In addition, parole guidelines that authorize the release of offenders undergoing substance abuse treatment, while discouraging the release of untreated addicts and alcoholics, help ensure the continued incapacitation of those most dangerous to society. Offenders who continue to use drugs and alcohol are far more likely to commit violent crimes than offenders who are not addicted to drugs or alcohol, or are recovering from addiction.[229] Parole guidelines designed to encourage drug and alcohol treatment, and prevent the release of active addicts or alcoholics, link the need for incapacitation to post-release risks to public safety. Prisoners may be more likely to participate in treatment programs—and eschew use of drugs that violate prison rules—if they know that a clean disciplinary record will be a sign of rehabilitation.[230]

On the surface, it is encouraging that some states link the need for incapacitation to rehabilitation. In practice, however, this link is often illusory. Several states expressly prohibit parole boards from making decisions for release based solely on rationales of rewarding good behavior. Thus, Massachusetts law, despite its encouraging guidance to parole boards, also provides:

> No prisoner shall be granted a parole permit merely as a reward for good conduct but only if the parole board is of the opinion that there is a reasonable probability that, if such prisoner is released, he will live and remain at liberty without

226. MO. CODE REGS. ANN. tit. 14, § 80-2.010 (West 2012).

227. MASS. GEN. LAWS ch. 127, § 130 (2012).

228. *See* NAT'L INST. ON DRUG ABUSE, PRINCIPLES OF DRUG ABUSE TREATMENT FOR CRIMINAL JUSTICE POPULATIONS: A RESEARCH-BASED GUIDE 15–23 (2012), *available at* http://www.drugabuse.gov/sites/default/files/podat_cj_2012.pdf.

229. *Id.*

230. *See, e.g.*, LA. ADMIN. CODE tit. 22, pt. XI, § 301 (2012) ("No inmate may be paroled while there is pending against him any indictment or bill of information for any crimes suspected of having been committed by him while a prisoner.").

> violating the law, and that his release is not incompatible with the welfare of society.[231]

The latter requirement gives parole boards enormous discretion to advance the kind of retributive policy upon which *Miller* frowns. It is an open invitation to ignore how an offender's life unfolds, while giving undue weight to the nature of the crime.

B. Differentiating Juvenile from Adult Offenders

The American Bar Association (ABA) adopted a policy in 2008 that built upon *Roper* and anticipated *Miller* by calling for different sentencing and parole policies for offenders who were under eighteen at the time of their crimes. With respect to parole, the ABA declared that:

> Youthful offenders should generally be eligible for parole or other early release consideration at a reasonable point during their sentence; and, if denied, should be reconsidered for parole or early release periodically thereafter.[232]

Most state parole guidelines, however, do not differentiate between juvenile and adult offenders.[233] A prisoner's eligibility for parole is determined on the basis of many factors, but the most important factors for parole eligibility are typically: (1) the offense committed, and (2) the offender's post-conviction conduct in prison.[234] While these considerations should be a basis for parole decisions, state laws and regulations should also explicitly direct parole boards to consider the offender's youth at the time of any offense(s) or rules violation(s) and subsequent evidence of maturation. In other words, parole boards should be required to replace the offense-centered and largely discretionary evaluation of juvenile offenders' parole eligibility with the offender-centered approach established in *Roper*, *Graham*, and *Miller*. In the post-*Miller* world, parole guidelines must be revised to reflect the particular circumstances of juvenile offenders.

Louisiana's parole guidelines are typical of the current approach that treats all offenders similarly, regardless of their age

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231. MASS. GEN. LAWS ch. 127, § 130 (2012).

232. AM. BAR ASSOC. CRIM. JUST. SECTION, THE STATE OF CRIMINAL JUSTICE 2007–2008, at 317 (Victor Streib ed., 2008).

233. For example, Massachusetts also has a single-track set of parole guidelines. 120 MASS. CODE REGS. 300.05(1) (2012). The parole board is directed to consider available information such as "the inmate's prior criminal record" and "official reports of the nature and circumstances of the offense." *Id.* at (b), (e). However, nothing in the parole guidelines suggests that the parole board should consider juvenile and adult offenders separately.

234. *See* Norval Morris, *The Contemporary Prison*, *in* THE OXFORD HISTORY OF THE PRISON 227, 242 (Morris & Rothman eds., 1995).

at the time of the crime. All persons convicted of "a crime of violence committed on or after January 1, 1997" are ineligible for parole until they have served eighty-five percent of their time.[235] This requirement applies to all parole-eligible offenders, including juvenile offenders, and appears to conflict with the Supreme Court's admonition that juveniles—including those who commit violent crimes—must be treated differently than adult offenders.

Making youth an explicit factor in parole guidelines, like those found in Louisiana, is all the more important because these guidelines include "prison records" as a central factor in making parole decisions.[236] If parole boards simply consider a juvenile offender's overall prison record without considering whether the juvenile's record has improved over time, with fewer violations as the inmate ages, they fail to adequately appreciate the developmental factors that make juvenile offenders less dangerous over time.[237] Parole guidelines should reflect *Miller*'s recognition that adolescence is a temporary state where "personality traits . . . are more transitory, less fixed" than characteristics of adult inmates.[238]

Other states give the illusion of taking age into account when inmates are considered for parole. For example, in Missouri—with its apparently promising principles described above—juvenile lifers are "eligible for parole after a minimum of fifteen (15) years has [sic] been served, except where statute would require more time to be served."[239] After this minimum period of time, the parole board may place an offender "on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen."[240] This law gives Missouri the appearance of having a parole system tied to rehabilitation (which in turn affects the need for incapacitation)—Missouri law seems to permit the release of prisoners when they have demonstrated sufficient rehabilitation that they are no longer a threat to the community.

Missouri's Parole Board Guidelines reinforce this appearance: the board "[e]valuate[s] the offender individually in regard to suitability for community reentry," which could include an evaluation of the individual's maturation from a juvenile

235. LA. ADMIN. CODE tit. 22, pt. XI, § 303 (2012).

236. *Id.*

237. *See, e.g.*, Graham v. Florida, 130 S. Ct. 2011, 2029 (2010) (describing most crimes committed by juveniles as the result of "transient immaturity" which would disappear as they aged, thus demonstrating improvement over time).

238. Roper v. Simmons, 543 U.S. 551, 570 (2005).

239. MO. CODE REGS. ANN. tit. 14, § 80-2.010 (2012).

240. MO. REV. STAT. § 217.690 (2012).

criminal to a law-abiding adult.[241] The parole board should also consider "the offender's institutional adjustment and civility including participation in work, school and treatment programs, restorative justice activities, other cognitive restructuring programs and conduct violation history."[242] Thus, offenders who are participating in, and earning good time credit for, prison programming should be eligible for parole sooner than other offenders. However, many juvenile lifers are prohibited from earning good time credit pursuant to Section 558.041 of the Missouri code.

Under Missouri law, juveniles sentenced to life imprisonment for murder, attempted murder, forcible rape, or statutory rape in the first-degree are prohibited from receiving credit toward early release for educational, vocational, and rehabilitative programming.[243] Because of this, juvenile lifers in Missouri often face yet another "catch-22", whereby they must demonstrate their rehabilitation to parole boards by earning "good time" in prison programs from which they are categorically excluded.[244]

In Georgia, juveniles serving terms of life imprisonment are quite unlikely to be granted parole expeditiously. The Georgia Board of Pardons and Paroles is only required to review parole decisions every eight years for juveniles and adults sentenced to life imprisonment with the possibility of parole.[245] Moreover, Georgia's Parole Decision Guidelines (Parole Guidelines) systematically disadvantage youthful offenders who have committed serious crimes, but are no longer a threat to society.[246] The Parole Guidelines provide objective criteria for evaluating parole candidates. Georgia's Parole Guidelines are based on a numerical point system—much like points on driver's licenses in many states—called "a Risk to Re-Offend Score," where inmates with fewer points have the opportunity for earlier parole.[247] Because of the severity of most juvenile lifers' crimes (typically,

241. STATE OF MO. DEP'T OF CORRS. BD. OF PROB. & PAROLE, PROCEDURES GOVERNING THE GRANTING OF PAROLES AND CONDITIONAL RELEASES 4 (2009) [hereinafter PROCEDURES GOVERNING PAROLE].

242. *Id.*

243. MO. REV. STAT. § 558.041(1) (2012) ("Any offender committed to the department of corrections, except those persons committed pursuant to subsection 6 of section 558.016 [including murder and attempted murder], or subsection 3 of section 558.018 [including forcible rape and statutory rape in the first degree], may receive additional credit in terms of days spent in confinement.").

244. *See id.*

245. GA. COMP. R. & REGS. 475-3-.05 (2012).

246. *Id.*

247. *Id.*

murder, attempted murder, voluntary manslaughter, or rape), they are invariably lumped into "Crime Severity Level VIII," which is the highest category of crimes in the Parole Guidelines.[248] Juvenile lifers in Crime Severity Level VIII must serve a minimum of sixty-five percent of their time, and the Parole Guidelines ensure that the vast majority of juvenile lifers will serve between seventy-five percent and ninety percent of their sentence.[249]

In addition, Georgia's point-based parole guidelines give preference to criminals who enter prison at an older age.[250] Thus, juvenile offenders receive no point reduction whereas parole candidates between the ages of twenty and forty at the time of their imprisonment receive a one-point deduction from their total Risk to Re-Offend Score and are more likely to receive parole; candidates who were older than forty at the time of their incarceration receive a two-point deduction.[251]

Finally, Georgia's Parole Guidelines disadvantage juvenile lifers because they provide no objective means of calculating sixty-five percent, seventy-five percent, or ninety percent of an indeterminate life sentence. The Parole Guidelines focus almost exclusively on juvenile lifers' past behavior rather than their rehabilitation and improvement over time.[252]

Conclusion

Unless and until *Miller* is clearly held to be retroactive, full implementation of the decision will roll out slowly and inconsistently across jurisdictions. But the questions and challenges *Miller* presents require our attention now. Approximately 2,100 juveniles have been sentenced to mandatory life without parole sentences in this country. Some of them will be re-sentenced pursuant to new legislation passed in response to *Miller*, but some percentage of them will likely fall in a sentencing void, with no available constitutional sentence to guide re-sentencing courts. At the opposite end of the spectrum, juvenile

248. *Id.* at 475-3-.05(9)(a)–(d). *See also* R.I. CODE R. § 49, 1 (LexisNexis 2012) (Rhode Island applies age as a factor in its point system for its parole board guidelines.); 37 TEX. ADMIN. CODE § 145.2 (2012) (Texas applies age as a factor in point system in parole board guidelines.).

249. Because they start their sentences at a younger age, juvenile lifers will thus have a *longer* time to wait for parole opportunities than adults convicted of the same offenses.

250. *See* GA. COMP. R. & REGS. 475-3-.05(8)(e) (2012).

251. *Id.*

252. *Id.* at 475-3-.05(5), (8).

lifers will also start facing parole boards, but they will confront a parole system hostile to their release because of built-in obstacles they cannot control. In both cases, these challenges also present opportunities to imagine a better way to sentence and ultimately release many juveniles convicted in the criminal justice system.