The Supreme Court's Emerging Jurisprudence on the Punishment of Juveniles:

Legal and Policy Implications

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In the 1980s and 1990s, nearly every state enacted legislative changes that eased the process of treating juveniles as adults. Scholars seeking to understand the consequences of these changes have found evidence of an increase in the number of juveniles transferred to criminal court and sentenced as adults. As part of this increase, the number of juveniles receiving sentences of life without the opportunity for parole (LWOP) rose substantially. In fact, a large majority of the approximately 2,600 individuals serving LWOP sentences for crimes committed as juveniles (under age 18) were sentenced over the last several decades. LWOP sentences for juveniles, which preclude the possibility of release at any point except through clemency or a pardon, have drawn a considerable amount of criticism and have been the focus of a great deal of litigation and policy-reform efforts. Responding to this criticism, the United States Supreme Court issued two decisions over the last few years limiting the extent to which juveniles can receive LWOP sentences, *Graham v. Florida*[1] and *Miller v. Alabama*.[2] Despite these decisions, numerous questions remain regarding the appropriate and allowable levels of punishment for young offenders that courts and legislatures will continue to grapple with for the foreseeable future.

This article explores these questions through an examination of the legal and legislative landscape of LWOP sentences for juveniles in light of these decisions. Part I begins with a discussion of the broader context of legislative changes that eased the process of treating juveniles as adults and the consequences of the changes. Part II shifts to a discussion of Supreme Court decisions on the death penalty for juveniles that provide the foundation for the *Graham* and *Miller* decisions, with a specific focus on the Court's decision in *Roper v. Simmons*.[3] Part III discusses the *Graham* decision and the significance of the Court's decision to extend its analysis in *Roper* outside of the death-penalty context. Part IV then turns to the *Miller* decision, providing an analysis of the decision and a discussion of several issues that courts and legislatures are grappling with following *Graham* and *Miller*. In particular, we will discuss how courts have treated the question of virtual LWOP, term-of-year sentences that are the functional equivalent of life without parole for juveniles. In addition, in Part V, we will focus on the response of courts and legislatures specifically to *Miller* in light of its ban on mandatory LWOP sentences. This part will focus on Pennsylvania, the state with the most individuals serving LWOP sentences for crimes committed as juveniles. In the immediate aftermath of *Miller*, the Pennsylvania Supreme Court heard two cases regarding the implementation of *Miller*, and the Pennsylvania General Assembly has passed legislation to bring the state in line with *Miller*. The article will conclude by highlighting key issues that need to be addressed by courts and legislatures going forward.

I. THE SHIFTING BOUNDARY BETWEEN JUVENILE AND CRIMINAL COURTS

Although transfer provisions vary considerably across states, during the 1980s and 1990s, every state changed their transfer laws to facilitate the process of treating juveniles as adults.[4] These changes have generally served to lower or eliminate the minimum age of eligibility to be treated as an adult, to expand the offenses eligible for adult treatment, to move waiver criteria toward offense-based characteristics, to shift discretion from judges to prosecutors, and to create additional avenues to handle juvenile offenders in the justice systems.[5] The result of these changes has been a transformation of the boundary between juvenile and criminal courts, and, as a result, an increase in the number of juveniles being treated as adults.[6]

Given these developments, researchers have sought to iden-

Footnotes

1. 130 S. Ct. 2011 (2010).
2. 132 S. Ct. 2455 (2012).
3. 543 U.S. 551 (2005).
4. *See* PATRICK GRIFFIN, PATRICIA TORBET, & LINDA SZYMANSKI, TRYING JUVENILES AS ADULTS IN CRIMINAL COURT: AN ANALYSIS OF STATE TRANSFER PROVISIONS. U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (1998); PATRICIA TORBET, RICHARD GABLE, HUNTER HURST IV, IMOGENE MONTGOMERY, LINDA SZYMANSKI, & DOUGLAS THOMAS, STATE RESPONSE TO SERIOUS AND VIOLENT JUVENILE CRIME: RESEARCH REPORT, U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (1996); PATRICIA TORBET & LINDA SZYMANSKI, STATE LEGISLATIVE RESPONSES TO VIOLENT JUVENILE CRIME: 1996-97 UPDATE. U.S. DEPARTMENT OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION (1998). See also Jeffrey J. Shook, *Contesting Childhood in the U.S. Justice System: The Transfer of Juveniles to the Adult Criminal Court*, 12 CHILDHOOD: GLOBAL J. CHILD RES. 461 (2005).
5. *Id.*
6. Assessing the overall effect of the legislative changes is difficult given data limitations and decreases in juvenile crime. See JEFFREY FAGAN & FRANKLIN E. ZIMRING, THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO CRIMINAL COURT (2000); and

tify the effects of these changes on both youth and society. Despite the rhetoric of the legislative changes of the 1980s and 1990s, it is clear from the evidence that the vast majority of young people sentenced in criminal court do not receive sentences that extend far into their adulthood.[7] In fact, there is significant evidence that large percentages of young people convicted in the criminal court are placed on probation, sentenced to a term of months in local jails, or receive prison sentences that are not much longer than the punishments available in the juvenile justice system.[8] This is problematic because youth in the criminal justice system are less likely to receive programs and services, are subject to higher rates of victimization, and experience worse mental-health outcomes.[9] Thus, it is clear that, when treated as adults, many juveniles are essentially receiving the same sentence that they could otherwise receive in the juvenile system without sufficient programs and services. In addition, being convicted in an adult criminal court means that a youth is likely to have a felony record, a result that has a detrimental effect on his or her life opportunities; other studies have found that incarceration during adolescence and early adulthood has negative consequences for the transition to adulthood.[10] For example, numerous studies have also found that transferred juveniles are more likely to recidivate than youth retained in the juvenile justice system, calling into question the public-safety consequences of sentencing juveniles as adults.[11]

LIFE WITHOUT THE OPPORTUNITY FOR PAROLE FOR JUVENILES

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In light of the findings discussed above, some states are reconsidering their transfer policies, and a number have enacted new policies regarding the transfer of young people to, and the treatment of young people in, the criminal justice system.[12] One area that has received a great deal of attention is the issue of LWOP sentences for juveniles. As discussed previously, the vast majority of young people convicted in criminal court do not receive long sentences.[13] This is, in large part, a reflection of the reality that transfer to criminal court is not limited to juveniles who commit the most violent and serious offenses, and that the legislative changes of the 1980s and 1990s broadened the population of youth subject to transfer to criminal court.[14] At the same time, a common thread of these legislative changes was a trend to remove discretion from judges for deciding whether youth charged with specific offenses, often violent crimes, should be transferred to criminal court.[15] The impetus behind these changes was, in most respects, the desire to increase the number of these youth who were transferred to

Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 Crime & Just.: Rev. Res. 81 (Michael Tonry ed., 2000), for a discussion of the effects of the legislative changes on the number of juveniles treated as adults. See also Jeffrey J. Shook & Rosemary C. Sarri, *Trends in the Commitment of Juveniles to Adult Prisons: Toward an Increased Willingness to Treat Juveniles as Adults?*, 54 Wayne L. Rev. 1725 (2008), for an analysis of 20 years of the commitment of juveniles to adult prisons in Michigan.

7. These changes were driven, in large part, by a changing image of juvenile offenders that featured young people as "superpredators" and dangerous thugs. The idea was that these young people were the "worst of the worst" and needed to receive adult (*i.e.*, severe) sentences to protect society. Shook, supra note 4. See Richard Redding, *The Effects of Adjudicating and Sentencing Juveniles as Adults: Research and Policy Implications*, 1 Youth Violence & Juv. Just. 128 (2003), for a discussion of differences in sentencing between juvenile and criminal courts. See also Eric J. Fritsch, Tony J. Caeti, & Craig Hemmens, *Spare the Needle but Not the Punishment: The Incarceration of Waived Youth in Adult Prisons*, 42 Crime & Delinq. 593 (1996), for a discussion of the time served by juveniles in adult prisons; Shook & Sarri, supra note 6.
8. *Id*. *See also* Pennsylvania Commission on Sentencing, Sentencing in Pennsylvania: Annual Report 2011, *available at* http://pcs.la.psu.edu/publications-and-research/annual-reports.
9. Bishop, *supra* note 6. *See also* Irene Y.H. Ng, Rosemary C. Sarri, Jeffrey J. Shook, & Elizabeth Stoffregen, *Comparison of Correctional Services to Youths Incarcerated in Juvenile and Adult Facilities in Michigan*, Prison J. (forthcoming); Irene Y.H. Ng, Xiaoyi Shen, Rosemary C. Sarri, Elizabeth Stoffregen, & Jeffrey J. Shook, *Adult Incarceration of Juveniles as a Factor of Depression*, 21 Crim. Behav. & Mental Health 21 (2011); Jennifer L. Woolard, Candice Odgers, Lonn Lanza-Kaduce, & Hayley Daglis, *Juveniles Within Adult Correctional Settings: Legal Pathways and Developmental Considerations*, 4 Int'l J. Forensic Mental Health 1 (2005).
10. *See* Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937 (2003); Stephen Raphael, *Early Incarceration Spells and the Transition to Adulthood*, *in* The Prize of Independence: The Economics of Early Adulthood (Sheldon Danziger & Cecilia Rouse eds., 2007); Christopher Uggen & Sara Wakefield, *Young Adults Reentering the Community from the Criminal Justice System: The Challenge of Becoming an Adult*, *in* On Your Own without a Net: The Transition to Adulthood for Vulnerable Populations (D. Wayne Osgood, E. Michael Foster, Constance Flanagan, & Gretchen R. Ruth eds., 2005).
11. See Robert Hahn, Angela McGowan, Akiva Lieberman, Alex Crosby, Mindy Fullilove, Robert Johnson, Eve Moscicki, LeShawndra Price, Susan Snyder, Farris Tuma, Jessica Lowy, Peter Briss, Stella Cory, & Glenda Stone, Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services (2007), Centers for Disease Control and Prevention; and Richard E. Redding, Juvenile Transfer Laws: An Effective Deterrent to Delinquency? U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention (2008) for reviews of the general and specific deterrent effects of these legislative changes.
12. Campaign for Youth Justice, State Trends: Legislative Victories from 2005 to 2010 Removing Youth from the Adult Criminal Justice System, *available at* http://www.campaignforyouthjustice.org/documents/CFYJ_State_Trends_Report.pdf.
13. *See supra* notes 7-8.
14. *See id.*; *see also* Shook, *supra* note 4.
15. *Id.*

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and sentenced in criminal court.[16]

A review of the evidence on transfer and sentencing reveals that this intent was realized.[17] With regard to LWOP, the number of juveniles receiving these sentences began to rise in the mid-1980s and rose substantially until peaking and beginning to decline in the late 1990s and into the 2000s.[18] One reason for this increase was the nature of criminal-court sentencing policy. Because most state sentencing provisions do not distinguish between juveniles and adults in criminal court, juveniles are subject to the same sentences as adults.[19] In the majority of states that allow juveniles to receive life without the opportunity for parole sentences, LWOP is mandatory upon conviction of specific offenses.[20] While LWOP sentences for juveniles increased both in states with discretionary and with mandatory sentencing provisions, the rate of LWOP sentences differed substantially, as states with mandatory sentencing provisions sentenced juveniles to LWOP at significantly higher rates than states with discretionary sentencing provisions.[21] Thus, it is apparent that the combination of changing laws and mandatory transfer and sentencing structures account for a large proportion of juveniles sentenced to LWOP.

II. THE ROAD TO MILLER: THE DEATH PENALTY

Based on the evidence, there is strong support for the conclusion that the legislative changes of the 1980s and 1990s have had a range of negative and harmful consequences for both young people and society. Despite this conclusion and the reality that those legislative changes reflected a fairly dramatic departure in juvenile justice policy and practice, courts generally did not strike down provisions allowing juveniles to be punished similarly to adults.[22] The limited legal intervention, in large part, is rooted in a state's general authority to establish and regulate its juvenile justice system, especially with regard to determining who is within the jurisdiction of the juvenile justice system.[23]

In the late 1980s, however, the United States Supreme Court did decide two cases pertaining to the punishment of juvenile offenders. These cases considered the question of whether it was a violation of the Eighth Amendment's prohibition on cruel and unusual punishment to execute individuals convicted of crimes that occurred before their 18th birthday. In the first case, *Thompson v. Oklahoma*, the Court held that it was unconstitutional to execute someone who was less than 16 years old at the time of his or her offense.[24] The case involved a 15-year-old named William Thompson who was convicted of murder in Oklahoma.

In reaching its decision, the majority applied the "evolving-standards-of-decency test" and determined that there was a national consensus against executing individuals under the age of 16 at the time of their offense.[25] In particular, the Court found that 18 states that allowed the death penalty, in addition to the 14 states that did not, prohibited it for individuals under the age of 16 to support the "conclusion that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense."[26] The Court also determined that the rarity in which the penalty was applied to individuals under 16 evidenced that this penalty was "abhorrent to conscience of the community."[27] In addition, the Court asserted that because of a juvenile's "lesser culpability, as well as the teenager's capacity for growth and society's fiduciary obligations to its children, the retributive purpose underlying the death penalty is simply inapplicable to the execution of a 15-year-old offender."[28] Similarly, the Court reasoned that a youth's status reduced the deterrent justification for the death penalty.[29]

A year later, the Supreme Court decided a second case regarding the execution of juveniles involving a 16-year-old

16. *Id.*
17. *Id.*
18. See SECOND CHANCES 4 YOUTH, BASIC DECENCY: PROTECTING THE HUMAN RIGHTS OF CHILDREN (2012), for a discussion of trends in the sentencing of juveniles to LWOP. See ASHLEY NELLIS & RYAN S. KING, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA, THE SENTENCING PROJECT (2009), for a discussion of the increasing use of LWOP sentences in the United States; see also EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL PUNISHMENT: SENTENCING 13- AND 14-YEAR OLD CHILDREN TO DIE IN PRISON (2007); HUMAN RIGHTS WATCH & AMNESTY INTERNATIONAL, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES (2005); and MICHIGAN ACLU, SECOND CHANCES: JUVENILES SERVING LIFE WITHOUT PAROLE IN MICHIGAN PRISONS (2004), for more context on LWOP sentences for juveniles.
19. *See* Jeffrey J. Shook, *Sentencing Juveniles to Life Without the Opportunity for Parole*, *in* HANDBOOK OF JUVENILE FORENSIC PSYCHIATRY AND PSYCHOLOGY (Elena L. Grigorenko ed., 2012).
20. *Id.* This means that juveniles in these states were sentenced to LWOP without consideration of factors such as developmental status, family circumstances, and a variety of other factors that could mitigate against LWOP. In many states, the combination of mandatory transfer and mandatory sentencing provisions removed judicial discretion entirely from the decision-making process.
21. *Id.* See also petitioner's brief in *Miller v. Alabama* and *Jackson v. Hobbes* for a discussion of differences between mandatory and discretionary states.
22. *See* Linda E. Frost Clausel & Richard J. Bonnie, *Juvenile Justice on Appeal*, *in* THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO CRIMINAL COURT (Jeffrey Fagan & Franklin E. Zimring eds., 2000).
23. *Id.*
24. 487 U.S. 815 (1988).
25. *Id.* The decision was 5-3, and the majority opinion was written by Justice Stevens and joined by Justices Brennan, Marshall, and Blackmun. Justice O'Connor concurred in the judgment.
26. *Id.* at 830.
27. *Id.* at 832.
28. *Id.* at 836-837.
29. *Id.*

convicted of murder. In the decision, *Stanford v. Kentucky*, the majority opinion held that it was permissible under the Eighth Amendment to execute an individual who was 16 or 17 years old at the time of his or her offense.[30] Unlike in *Thompson*, the majority found that there was not a national consensus against executing 16- and 17-year-olds.[31] Further, the majority rejected the argument relied upon in *Thompson* that the reluctance of juries to impose the death penalty on 16- and 17-year-olds was evidence of a consensus against the punishment.[32] The majority opinion also rejected arguments regarding the reduced culpability for young people as a basis for finding the death penalty for 16- and 17-year-olds unconstitutional.[33] Thus, although the Court was willing to prohibit the death penalty for those under the age of 16, it was not willing to draw a line prohibiting the death penalty for all juveniles.

ROPER V. SIMMONS

The Supreme Court revisited this issue less than two decades later when it decided the case of *Roper v. Simmons*.[34] The decision to hear *Roper* came soon after the Court decided another case regarding the death penalty. This case, *Atkins v. Virginia*, addressed whether it was a violation of the Eighth Amendment to execute someone who was mentally retarded.[35] Similar to the juvenile death penalty, the Supreme Court had found that it was constitutional to do so in a case decided in 1989.[36] In *Atkins*, however, a majority of the Court found that there was evidence of a societal consensus against executing the mentally retarded and raised the potential of another challenge to the juvenile death penalty.[37]

Roper, decided just three years after *Atkins*, involved 17-year-old Christopher Simmons who was convicted of first-degree murder and sentenced to death in Missouri. Simmons appealed his sentence, and the Missouri Supreme Court ruled that it constituted cruel and unusual punishment.[38] The Supreme Court granted certiorari and decided the case in March 2005. The majority decision relied on the fact that since *Stanford*, 5 states had abolished the death penalty for juveniles—joining the 30 states that did not allow for the execution of juveniles—in finding that there was a societal consensus against executing juveniles.[39] In addition to this analysis, the majority opinion assessed other evidence to support its decision, extending its reasoning in *Thompson* regarding the reduced culpability of juveniles and their capacity to change.[40] Specifically, the majority used this evidence to draw three conclusions regarding differences between juveniles and adults: (1) juveniles possessed "'[a] lack of maturity and an underdeveloped sense of responsibility'" that often leads to "'impetuous and ill-considered actions and decisions'"; (2) "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and (3) "the character of a juvenile is not as well formed as an adult."[41]

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These conclusions led the Court to reason that juveniles were not as culpable or blameworthy as adults, and it therefore determined that they could not reliably be classified among the worst offenders and that executing juveniles was not supported by penological interests.[42] Thus, the majority enacted a categorical rule prohibiting the execution of someone for a crime he or she committed under the age of 18. Although the dissents argued that the individualized approach used by courts in death-penalty decisions was adequate to account for differences between juveniles and adults, the majority rejected this approach.[43] The majority also noted the contradictions that exist in denying juveniles the rights of citizenship (*e.g.*, right to vote, sit on juries, etc.) but subjecting them to the most severe penalties administered by the state.[44] Finally, it used international law to justify its decision by noting the "stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty" and

30. 492 U.S. 361 (1989).
31. *Id.* The majority decision was written by Justice Scalia and joined by Chief Justice Renhquist and Justices White and Kennedy. Justice O'Connor concurred that there was not a national consensus against executing 16- and 17-year-olds.
32. *Id.*
33. *Id.*
34. 543 U.S. 551 (2005).
35. 536 U.S. 304 (2002).
36. Penry v. Lynaugh, 492 U.S. 302 (1989).
37. 536 U.S. 304 (2002).
38. *See* State ex. rel. Simmons v. Roper, 112 S.W.3d 397 (Mo. 2003).
39. *Id.*
40. *Id.* In particular, the majority decision cited an article by Elizabeth Scott and Laurence Steinberg examining whether evidence from research on adolescent development mitigated against the death penalty for juveniles. The majority also relied on amicus briefs submitted by the American Psychological Association, the American Medical Association, and other organizations to draw its conclusions regarding differences between juveniles and adults.
41. *Id.* at 569-570.
42. *Id.* The Court considered whether the execution of minors was supported by four penological interests: deterrence, retribution, incapacitation, and rehabilitation. Based on its conclusions regarding differences between juveniles and adults, the majority determined that penological interests underlying the use of the death penalty did not support the execution of juveniles.
43. *Id.* at 573. In rejecting this approach, the majority argued that "differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." The majority expressed concern that "an unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death." It also questioned the ability of psychologists to "differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."
44. *Id.* at 575.

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the fact that the juvenile death penalty is prohibited in international treaties and conventions.[45]

In declaring that juveniles are "categorically less culpable than adults," the *Roper* decision presented a strong rationale for treating juveniles differently and, at least symbolically, called into question sentencing schemes that treated juveniles similarly to adults. Yet Supreme Court jurisprudence has traditionally treated the death penalty differently, meaning that death-penalty decisions generally did not apply outside of that context. Thus, questions remained regarding whether and how *Roper* would be applied to other sentences for young people.

III. NEXT STEP ON THE ROAD: BANNING LWOP FOR NONHOMICIDE OFFENSES

Following *Roper*, many individuals serving LWOP or other long sentences for crimes committed as juveniles challenged their convictions. Most of these challenges, however, were denied because courts determined that *Roper* did not apply outside of the death-penalty context. The Supreme Court, however, granted certiorari in two cases in 2009: *Graham v. Florida*[46] and *Sullivan v. Florida*. The issue considered by the Court in *Graham* and *Sullivan* was whether, pursuant to an Eighth Amendment analysis, it was cruel and unusual punishment to sentence a juvenile convicted of a nonhomicide offense to LWOP.[47] Building upon its analysis in *Roper*, the majority decision enacted a categorical rule prohibiting LWOP sentences for juveniles convicted of nonhomicide offenses based on its determination that such a sentence constituted cruel and unusual punishment.[48] In reaching this decision, the majority used the evolving-standards-of-decency analysis[49] and concluded that there was a societal consensus against the punishment because despite the fact that LWOP sentences were available in 37 states (plus the District of Columbia and federal government), only 11 states had sentenced a juvenile to LWOP for a nonhomicide offense and only 123 juveniles had ever been sentenced to LWOP for nonhomicide offenses.[50]

Similar to *Roper*, the *Graham* decision was based on a review of existing research regarding adolescent development. Based on its review of the research, the majority asserted:

> No recent data provide reason to reconsider the Court's observations in *Roper* about the nature of juveniles. As petitioner's amici point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.[51]

Based on the reduced culpability of juveniles and a long recognition that those "who do not kill, intend to kill, or foresee that life will be taken are less deserving of the most serious forms of punishment than are murderers," the majority reasoned that, "[i]t follows that, when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."[52]

Given the severity of the sentence—life in prison without the possibility of release—the Court considered whether it met penological goals and concluded that because juveniles are less culpable than adults and have more potential for change, sentencing juveniles to LWOP for nonhomicide offenses could not be justified through these goals.[53] Interestingly, Chief Justice Roberts concurred in the decision in *Graham*. In a separate opinion, he argued that while he did not agree with the categorical rule advanced by the majority, he did believe that the LWOP sentence was not proportional in the case of Terrance Graham.[54] He proposed a case-by-case "narrow proportionality" analysis, accounting for an "offender's juvenile status," to determine whether the punishment is proportional to the crime. In reaching this conclusion, Chief Justice Roberts asserted, "*Roper*'s conclusion that juveniles are typically less culpable than adults has pertinence beyond capital cases, and rightly informs the case-specific inquiry I believe to be appropriate here."[55] As noted, the majority rejected this approach and adopted a categorical rule in large part because of the difficulty in making this determination while an individual was still a juvenile.[56]

45. *Id.*
46. Graham v. Florida, 130 S. Ct. 2011 (2010). *Sullivan v. Florida* was a companion case that was not decided because of procedural issues and because Joe Sullivan was subject to relief under *Graham*.
47. *Id.*
48. *Id.*
49. *See Roper*, 543 U.S. at 560-61.
50. *Graham*, 130 S. Ct. at 2024.
51. *Id.* at 2026.
52. *Id.* at 2027.
53. *Id.* at 2030 (". . . penological theory is not adequate to justify life without parole for juvenile nonhomicide offenders"). The majority also used international law as part of its analysis and concluded that the U.S. was the only country to sentence juveniles to LWOP. It did so based on the rationale that it "has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world's nations that a particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it." *Id.*
54. *See id.* at 2036 ("I agree with the Court that Terrance Graham's sentence of life without parole violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' Unlike the majority, however, I see no need to invent a new constitutional rule of dubious provenance in reaching that conclusion. Instead, my analysis is based on an application of this Court's precedents, in particular (1) our cases requiring 'narrow proportionality' review of noncapital sentences and (2) our conclusion in *Roper v. Simmons* [citation omitted] that juvenile offenders are generally less culpable than adults who commit the same crimes.").
55. *Id.*
56. *Id.*

Like *Roper*, *Graham* was a momentous decision. Not only did it confirm and extend the findings from *Roper* regarding differences between juveniles and adults, it also extended this rationale to create a categorical rule banning a punishment outside of the death-penalty context. The question, then, was how *Graham* would be implemented and whether it would be extended to other categories of cases or punishments.

IV. WHERE WE ARE TODAY: MILLER V. ALABAMA AND JACKSON V. HOBBS

On June 25, 2012, the Court announced its decision in *Miller v. Alabama* and its companion case, *Jackson v. Hobbs*, thereby fundamentally altering the landscape of juvenile sentencing law in the United States. Finding that "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children,"[57] the Court built on its Eighth Amendment juvenile sentencing jurisprudence in *Thompson*, *Roper*, and *Graham* by finding mandatory LWOP sentences unconstitutional for youth under the age of 18. The following section provides a brief analysis of the *Miller* decision and, using Pennsylvania as a case study, discusses how one state has sought to bring itself into compliance with *Miller*.

THE CASES

Evan Miller and Kuntrell Jackson, both 14 years old when they were convicted of murder, suffered traumatic life experiences before they were sentenced to mandatory terms of life in prison without the possibility of parole. In Miller's case, he was charged and convicted of first-degree murder and arson. In Jackson's case, he was charged and convicted of felony murder for his role as a lookout and non-triggerman in an armed robbery gone awry.

KUNTRELL JACKSON

Kuntrell Jackson was raised in an abusive and impoverished Arkansas household with significant exposure to gun violence. "Kuntrell's mother was sent to prison for shooting and injuring a neighbor when Kuntrell was about six years old. When Kuntrell was about thirteen years old, his older brother [] was also imprisoned for shooting someone. Not long after this, [Kuntrell's abusive father figure] left the family; two of Kuntrell's teenage sisters became pregnant; and several other relatives were incarcerated."[58] In 1999, Jackson and two other boys decided to rob a video store. Upon learning that one of the other boys was carrying a sawed-off shotgun, Jackson decided to stay outside when the other boys entered the store. There was a struggle with the storekeeper, Jackson entered the store, and when the storekeeper threatened to call the police, one of the other boys shot and killed her. The three boys fled empty-handed.[59]

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The prosecutor in Jackson's case exercised his authority to charge Jackson as an adult,[60] and Jackson was charged with capital felony murder and aggravated robbery. The trial court denied his motion to transfer the case to juvenile court, and an appellate court affirmed.[61] A jury then convicted Jackson of both crimes, and the judge sentenced Jackson to LWOP, the only statutorily available sentence.[62] Jackson did not challenge the sentence on appeal, and the Arkansas Supreme Court affirmed the convictions. Two years later, Jackson filed a state petition for habeas corpus, challenging his sentence under *Roper v. Simmons* and then under *Graham v. Florida*. The Arkansas Supreme Court affirmed the circuit court's dismissal of Jackson's petition, finding that "*Roper* and *Graham* were 'narrowly tailored' to their contexts: 'death-penalty cases involving a juvenile and life-imprisonment-without-parole cases for nonhomicide offenses involving a juvenile.'"[63]

EVAN MILLER

Evan Miller grew up "in and out of foster care because his mother suffered from alcoholism and drug addiction and his stepfather abused him. Miller, too, regularly used drugs and alcohol; and he had attempted suicide four times, the first when he was six years old."[64] In Miller's case, the crime occurred one evening, after the victim, Cole Cannon, came to Miller's home to make a drug deal with Miller's mother. Miller and a friend followed Cannon back to his trailer and spent the rest of the night smoking marijuana and playing drinking games. When Cannon passed out, Miller and his friend took money from his wallet. When Miller tried to put the wallet back into Cannon's pocket, Cannon awoke, and a fight ensued, during which Miller struck Cannon repeatedly with a baseball bat. In an attempt to cover up their crime, the two boys set fire to Cannon's trailer, and Cannon eventually died from his injuries and from smoke inhalation.[65] As the Court

57. Miller v. Alabama, 132 S. Ct. 2455, 2466 (2012).
58. Jackson's Petition for Writ of Certiorari, 2011 WL 5322575, at 4-5, *Miller*, 132 S. Ct. 2455 (No. 10–9647) (internal citations omitted).
59. *Miller*, 132 S. Ct. at 2461.
60. Justice Kagan notes, "Arkansas law gives prosecutors discretion to charge 14-year-olds as adults when they are alleged to have committed certain serious offenses." *Id.* (citing ARK. CODE ANN. § 9-27-318(c)(2) (1998)).
61. *Id.* (citing Jackson v. State, No. 02-535, 2003 WL 193413 at 1 (Ark. App., 2003); ARK. CODE ANN. §§ 9-27-318(d), (e)).
62. *See* ARK. CODE ANN. § 5-4-104(b) (1997) ("A defendant convicted of capital murder or treason shall be sentenced to death or life imprisonment without parole."). Because Jackson was ineligible for the death penalty under *Thompson*, 485 U.S. 815, the only available sentencing option was life imprisonment without parole.
63. *Miller*, 132 S. Ct. at 2461 (citing Jackson v. Norris, 2011 Ark. 49, ____S.W. 3____, at 5 (2012)).
64. *Id.* at 2462 (citing E.J.M. v. State, 928 So. 2d 1077, 1081 (Ala. Crim. App. 2004) (Cobb, J., concurring in result)); App. in No. 10-9646, pp. 26-28).
65. *Id.*

The Court focuses on the fundamental developmental differences between youth and adults . . . .

noted in the *Miller* decision,

> Alabama law required that Miller initially be charged as a juvenile, but allowed the District Attorney to seek removal of the case to adult court. [ ] The D.A. did so, and the juvenile court agreed to transfer after a hearing. . . . The State accordingly charged Miller as an adult with murder in the course of arson. That crime (like capital murder in Arkansas) carries a mandatory minimum punishment of life without parole. [Citations omitted.] Relying in significant part on testimony from [Miller's friend], who had pleaded to a lesser offense, a jury found Miller guilty. . . . The Alabama Court of Criminal Appeals affirmed . . . [and the] Alabama Supreme Court denied review.[66]

The Supreme Court granted certiorari in both cases—*Miller* on direct appeal and *Jackson* on collateral review.

THE DECISION

The Supreme Court, in a 5-4 decision authored by Justice Elena Kagan, declared Miller and Jackson's mandatory LWOP sentences unconstitutional.[67] Justice Kagan's analysis in the *Miller* decision is rooted in the Court's Eighth Amendment jurisprudence and rests on the convergence of "two strands of precedent reflecting [the Court's] concern with proportionate punishment."[68] The first line relates to "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty."[69] The second line stems from cases prohibiting the mandatory imposition of capital punishment, "requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death."[70]

The Court focuses on the fundamental developmental differences between youth and adults to establish the disproportionality of mandatory LWOP sentences for juveniles and the corresponding need for individualized sentencing of youth convicted of murder. In setting forth the key aspect of the opinion, Kagan builds on the premise established by the *Roper* and *Graham* decisions—that, based on continuously evolving science and social-science research, "children are constitutionally different than adults for purposes of sentencing."[71]

As in *Roper* and *Graham*, the *Miller* decision underscores the lack of any penological justification for "imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes."[72] To reach this conclusion, the Court reviewed its previous analyses of retribution, deterrence, and incapacitation in the juvenile-sentencing context and found that none of the traditional penological rationales support the existence of mandatory LWOP sentences for juveniles.[73]

The Court further relied on its line of reasoning in *Graham* by likening LWOP sentences for juveniles to the death penalty itself.[74] Looking to *Woodson v. North Carolina*[75] and its progeny, which call for individualized sentencing and the ability to consider mitigating factors in capital cases,[76] the *Miller* Court argues that the same rationale should be extended to juveniles facing the state's harshest available penalty. In extending *Woodson*'s rationale to the juvenile-sentencing context, *Miller* mandates sentencing processes tailored to account for the distinct attributes of youth:

> In light of *Graham*'s reasoning, these [death-penalty] decisions too show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. 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. . . . 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.[77]

Accordingly, to comply with *Miller*, states must implement processes and procedures reflective of the substantive change to sentencing law. By extending traditional death-penalty sentenc-

66. *Id.* at 2462-63.
67. Justice Kagan was joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor. Justice Breyer wrote a concurring opinion focused on the felony-murder rule, in which Justice Sotomayor joined. Chief Justice Roberts, as well as Justices Thomas and Alito, filed dissenting opinions in which Justice Scalia joined.
68. *Id.* at 2463.
69. *Id. See, e.g.*, *Roper*, 543 U.S. 551; *Graham*, 130 S. Ct. 2011; Kennedy v. Louisiana, 554 U.S. 407 (2008) (finding imposition of death penalty for nonhomicide offenses unconstitutional); *Atkins*, 536 U.S. 304 (finding Eighth Amendment violation in the imposition of death penalty on mentally retarded defendants).
70. *Id.* at 2464 (citing Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio, 438 U.S. 586 (1978)).
71. *Id. See also id.* at 2465, n. 5 ("The evidence presented to us in these cases indicates that the science and social science supporting *Roper*'s and *Graham*'s conclusions have become even stronger.").
72. *Id.* at 2465.
73. *See, e.g., id.* at 2464-65 (Noting the unique juvenile capacity for rehabilitation: "[Scientific] findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's 'moral culpability' and enhanced the prospect that as the years go by and neurological development occurs, his '"deficiencies will be reformed."'" (quoting Graham, 130 S. Ct. at 2027).
74. *Id.* at 2466.
75. 428 U.S. 280 (1976) (invalidating a mandatory death sentence for first-degree murder on Eighth Amendment grounds).
76. *Miller*, 132 S. Ct. at 2467 (citing Sumner v. Shuman, 483 U.S. 66, 74-76 (1987); Eddings v. Oklahoma, 455 U.S. 104, 110-112 (1982); *Lockett*, 438 U.S. at 597-609).
77. *Id.* at 2467-68.

ing procedures to the juvenile-sentencing context, the *Miller* decision creates a requirement of individualized sentencing hearings and review of mitigating circumstances whenever juveniles charged as adults are facing LWOP sentences.[78] To aid the lower courts' review of such mitigating factors, as applied to juveniles, the Court outlined the factors a sentencer must consider, including: (1) the youth's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences"; (2) the youth's "family and home environment that surrounds him"; (3) "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;" (4) "the incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys;" and (5) "the possibility of rehabilitation."[79]

Despite its sometimes-sweeping language, *Miller* leaves us with a relatively constricted holding: "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."[80] Yet the narrow holding results in broad implications for juvenile sentencing going forward, as Marsha Levick notes in the *Criminal Law Reporter*:

> A close reading of Kagan's opinion suggests that the whole may be greater than the sum of its parts. From the outset of her opinion, Kagan made clear that the social science and other scientific research that had informed the court's decisions in *Roper*, *Graham*, and *J.D.B.* dictated a similar outcome in *Miller*. Consequently, while affording narrow specific relief, *Miller* still provides a broad framework for rethinking our treatment of juvenile offenders.[81]

Further, as Professor Erwin Chemerinsky writes, *Miller* stands apart from its juvenile sentencing counterparts in terms of its future implications:

> At first glance, the decision seems to follow from other recent Supreme Court decisions that have limited the punishments imposed on juvenile offenders. But in a key respect this case is different: previous cases prohibited the imposition of certain punishments under any circumstances, whereas *Miller* holds only that there cannot be a mandatory sentence. This distinction is going to matter enormously and raise important issues that are sure to be litigated.[82]

Despite its sometimes-sweeping language, *Miller* leaves us with a relatively constricted holding . . . .

V. POST-MILLER IMPLEMENATION: NEXT STEPS ON THE ROAD?

As is evident, the Supreme Court has been unequivocal in its conclusions that young people are different than adults and should be subject to different punishments. This conclusion is especially important in light of the trend over the last few decades to punish them similarly to adults. Numerous questions remain, however, regarding how courts and legislatures will implement both the letter and spirit of these decisions. While an exhaustive examination of these issues is beyond the scope of this article, below we discuss several specific issues that courts and legislatures are grappling with in response to these decisions—"virtual LWOP" and decisions regarding the sentencing options available for courts in light of *Miller*.[83]

"VIRTUAL LWOP"

In addition to those serving LWOP for crimes committed as juveniles, many individuals are serving long sentences for nonhomicide crimes committed as juveniles and challenges have been brought to some of these sentences in both state and federal courts under *Graham*. In *People v. Caballero*, the California Supreme Court considered the question of whether a "110-year-to-life sentence [for attempted murder] contravenes *Graham*'s mandate against cruel and unusual punishment under the Eighth Amendment."[84] In concluding that it did, the California Supreme Court drew from *Graham*'s assertion that the Eighth Amendment requires a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[85]

The *Caballero* court rejected the state's contention that

78. *See also* Erwin Chemerinsky, *Chemerinsky: Juvenile Life-Without-Parole Case Means Courts Must Look at Mandatory Sentences*, A.B.A. J., Aug 8, 2012, *available at* http://www.abajournal.com/news/article/chemerinsky_juvenile_life-without-parole_case_means_courts_must_look_at_sen/ (noting that the inability to mandatorily impose life without parole sentences on juveniles "will necessitate a penalty phase after conviction to make [the sentencing] decision. After the Supreme Court held that there cannot be a mandatory death sentence in homicide cases, the practice of the penalty phase developed for a determination of whether capital punishment is warranted based on the facts in each case. The same type of penalty phase will be required when life without parole is sought for a homicide crime committed by a juvenile").
79. *Miller*, 132 S. Ct. at 2468.
80. *Id.* at 2469.
81. Marsha Levick, *From a Trilogy to a Quadrilogy:* Miller v. Alabama *Makes It Four in a Row For U.S. Supreme Court Cases That Support Differential Treatment of Youth*, 91 Crim. L. Rep. 748 (2012).
82. Chemerinsky, *supra* note 78.
83. Another question involves the current status of cases where juveniles were sentenced to LWOP for nonhomicide offenses. Because *Graham* found the sentences of juveniles serving LWOP for nonhomicide offenses unconstitutional, those individuals needed to be resentenced. Most courts determined that *Graham* did apply retroactively to juveniles already serving LWOP for nonhomicide offenses. While individuals were sentenced to LWOP for nonhomicide offenses in 12 states, the vast majority were serving their sentences in Florida and Louisiana. Drawing conclusions about the outcomes of resentencing hearings is difficult because there is no comprehensive analysis of the outcomes available and many cases have still not been resentenced.
84. People v. Caballero, 55 Cal. 4th 262 (Cal. 2012).
85. *Id.* at 273 (citing *Graham*, 130 S. Ct. at 2030).

Similar challenges to virtual or de facto LWOP sentences have cropped up across the country, with . . . varying outcomes.

"*Graham*'s ban on life without parole sentences does not apply to juvenile offenders who commit attempted murder, with its requisite intent to kill," as well as the state's view "that a cumulative sentence for distinct crimes does not present a cognizable Eighth Amendment claim . . . ."[86] The Court relied on the clarification of the *Graham* decision provided by the United States Supreme Court in *Miller* to hold that "*Graham*'s 'flat ban' on life without parole sentences applies to all nonhomicide cases involving juvenile offenders, including [a] term-of-years sentence that amounts to the functional equivalent of a life without parole sentence . . . ."[87]

Unlike *Graham*, the *Caballero* decision does not categorically prohibit the possibility of incarcerating juveniles for the rest of their lives. Instead, drawing from the language of *Graham* and *Miller*, the decision recognizes that "the state may not deprive [juveniles] at sentencing of a meaningful opportunity to demonstrate their rehabilitation and fitness to reenter society in the future."[88] With regard to procedure, the California Court declined to implement specific sentencing guidelines for those wishing to challenge their LWOP or de facto life sentences going forward.[89] Rather, the court ordered that juvenile lifers "may file petitions for a writ of habeas corpus in the trial court in order to allow the court to weigh the mitigating evidence in determining the extent of incarceration required before parole hearings."[90] It will then be up to the parole board to determine if and when the juvenile will be released from prison.

Similar challenges to virtual or de facto LWOP sentences have cropped up across the country, with different procedural postures and with varying outcomes. In *Bunch v. Smith*, the Sixth Circuit Court of Appeals considered a case involving a 16-year-old who was convicted of robbing, kidnapping, and raping a young woman and was sentenced to consecutive, fixed terms totaling 89 years' imprisonment.[91]

Operating under a very different standard of review from its state-court counterparts, the *Bunch* court's analysis was guided by the Antiterrorism and Effective Death Penalty Act of 1996, which permits federal courts to grant relief on a habeas petition only where the state court has ruled in a way that is either contrary to, or an unreasonable application of, clearly established federal law.[92] Here, the *Bunch* court held that the Ohio Supreme Court was not unreasonable in finding *Graham* to be inapplicable on the facts. Specifically, the *Bunch* court held that *Graham* "does not clearly establish that consecutive, fixed-term sentences for juveniles who have committed multiple nonhomicide offenses are unconstitutional when they amount to the practical equivalent of life without parole."[93] The court employed a narrow reading of the *Graham* decision, arguing that although "Bunch's 89-year aggregate sentence may end up being the functional equivalent of life without parole,"[94] *Graham* is inapplicable because "[the *Graham*] Court did not . . . consider the constitutionality of such sentences, let alone clearly establish that they can violate the Eighth Amendment's prohibition on cruel and unusual punishments."[95] Notably, the *Bunch* court concluded its opinion by noting that this is not an established area of law:[96]

> [C]ourts across the country are split over whether *Graham* bars a court from sentencing a juvenile nonhomicide offender to consecutive, fixed terms resulting in an aggregate sentence that exceeds the defendant's life expectancy. Some courts have held that such a sentence is a de facto life without parole sentence and therefore violates the spirit, if not the letter, of *Graham*.[97] Other courts, however, have rejected the de facto life sentence argument, holding that *Graham* only applies to juvenile nonhomicide offenders expressly sentenced to 'life with-

86. *Id*. The Court also rejected the argument that "each of defendant's sentences was permissible individually because each included the possibility of parole within his lifetime." The Court disagreed with the state's reading of *Lockyer v. Andrade* "that a juvenile offender may receive consecutive mandatory terms exceeding his or her life expectancy without implicating the prohibition against cruel and unusual punishment," finding instead that "the high court noted that it has never provided specific guidance 'in determining whether a particular sentence for a term of years can violate the Eighth Amendment,' observing that it had 'not established a clear or consistent path for courts to follow.'" *Id.* at n. 3 (citing Lockyer v. Andrade, 538 U.S. 63, 72 (2003)).
87. *Id.* at 273 (citing *Miller*, 132 S. Ct. at 2465, 2469).
88. *Id*.
89. *See id.* ("Because every case will be different, we will not provide trial courts with a precise time frame for setting these future parole hearings in a nonhomicide case. However, the sentence must not violate the defendant's Eighth Amendment rights and must provide him or her a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' under *Graham*'s mandate.").
90. *Id.*
91. 685 F.3d 546 (6th Cir. 2012), *petition for cert. filed* (U.S. Nov. 5, 2012) (No. 12-558).
92. *See* 28 U.S.C. § 2254(d)(1) (2006) ("(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court.").
93. *Id.* at 547.
94. *Id.* at 551.
95. *Id.* at 552.
96. It is worth noting that *Caballero*, 55 Cal. 4th 262, was decided after *Bunch*, providing further support for the proposition that *Graham* is applicable to virtual juvenile LWOP sentences.
97. Citing, *e.g.*, People v. J.I.A., 196 Cal. App. 4th 393, 127 Cal. Rptr. 3d 141, 149 (Cal. Ct. App. 2011); People v. Nuñez, 195 Cal. App. 4th 414, 125 Cal. Rptr. 3d 616, 624 (Cal. Ct. App. 2011).

out parole.'[98] This split demonstrates that *Bunch*'s expansive reading of *Graham* is not clearly established.[99]

In light of the split regarding *Graham*'s applicability to de facto LWOP sentences, the United States Supreme Court's treatment of similar cases on petitions for certiorari may provide insight on the proper reading of *Graham*. Consider the recent case from Wyoming of Wyatt Bear Cloud, a 16-year-old convicted of second-degree murder and sentenced to life in prison *with* the possibility of parole. In challenging his case on both *Graham* and *Miller* grounds, Bear Cloud argued that "although [he] wasn't sentenced to serve life without parole . . . that was the practical effect of his sentence because his only chance for release was commutation by a state governor."[100] The Wyoming Supreme Court found that "Bear Cloud is afforded the possibility of parole. Rehabilitation and even release are still possible. Accordingly, his sentence does not constitute cruel or unusual punishment in contravention of Wyoming's constitution."[101] But the United States Supreme Court vacated the judgment and remanded the case for further consideration in light of *Miller*.[102]

Caballero provides a strong example of state courts embracing and reaffirming both the letter and spirit of the *Graham* decision by acknowledging the unique attributes of youth and the necessary consideration of these attributes when it comes to sentencing children as adults. Unlike *Caballero*, cases like *Bunch* provide only a narrow reading of the precedent and refuse to fully adopt *Graham*'s mandate that children "are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults."[103] Although not yet concluded, the current posture of *Bear Cloud* gives some indication that merely providing a choice between "life with" or "life without" parole for juvenile nonhomicide offenders fails to comply with the directives of both the *Graham* and *Miller* decisions.

MILLER IMPLEMENTATION IN PENNSYLVANIA: RESPONSES BY THE COURTS AND LEGISLATURE

Caballero provides a strong example of state courts embracing and reaffirming both the letter and spirit of the *Graham* decision . . . .

At the time *Miller* was decided, 26 states had sentencing provisions mandating juvenile LWOP sentences for certain categories of offenses, and making such sentences applicable to 14 year-olds.[104] Of those 26 states, Pennsylvania has the highest number of people serving the sentence, with nearly 500 men and women who were incarcerated throughout the state as children. Prior to *Miller*, Pennsylvania held the distinction of mandating life imprisonment sentences for all first- and second-degree murder convictions,[105] regardless of the age of the defendant.[106] Finally, Pennsylvania is unique in that it has an extraordinarily short time frame—60 days—for filing a petition for post-conviction relief based on a new rule of constitutional law.[107] This means that Pennsylvania courts are among the first in the country to consider *Miller* implementation. For all of these reasons, Pennsylvania serves as a battleground for determining how state-based implementation of the *Miller* decision will look. Using Pennsylvania as a case study in this context will help to forecast the challenges other states may face in implementing *Miller*, as well as the avenues they may wish to avoid or pursue.

After *Miller* was decided, the Pennsylvania Supreme Court has heard arguments in two juvenile LWOP cases. At the time of this writing, the cases remain undecided. In the first case, *Commonwealth v. Batts*,[108] the Court (on direct appeal) is tasked with deciding the appropriate sentence for a 16-year-old convicted of first-degree murder, in light of the *Miller* decision and the mandatory nature of the state's sentencing scheme. In *Commonwealth v. Cunningham*,[109] a second-degree murder case

98. See, *e.g.*, Henry v. State, 82 So.3d 1084, 1089 (Fla. Ct. App. 2012); State v. Kasic, 228 Ariz. 228, 265 P.3d 410, 415 (Ariz. Ct. App. 2011).
99. *Bunch*, 685 F.3d at 552.
100. Associated Press, "US Supreme Court Sets Aside Wyoming Teen's Sentence," Oct. 26, 2012, *available at* http://billingsgazette.com/news/state-and-regional/wyoming/us-supreme-court-sets-aside-wyoming-teen-s-sentence/article_127c206e-d7c9-5d67-8280-17ec288174a0.html#ixzz2AkYpdo00.
101. Bear Cloud v. State, 2012 WY 16, P84 (Wyo. 2012).
102. *See* Bear Cloud v. Wyoming, 184 L. Ed. 2d 5 (U.S. 2012) ("On petition for writ of certiorari to the Supreme Court of Wyoming. Motion of petitioner for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Judgment vacated, and case remanded to the Supreme Court of Wyoming for further consideration in light of *Miller v. Alabama*, 567 U.S. ___, [132 S. Ct. 2455, 183 L. Ed. 2d 407] (2012)").
103. *Graha*m, 130 S. Ct. at 2032 (citing *Roper v. Simmon*s, 543 U.S. 551, 570 (2005)).
104. *See Miller*, 132 S. Ct. at 2471, n. 9 ("26 States and the Federal Government make life without parole the mandatory (or mandatory minimum) punishment for some form of murder, and would apply the relevant provision to 14-year-olds (with many applying it to even younger defendants). In addition, life without parole is mandatory for older juveniles in Louisiana (age 15 and up) and Texas (age 17). *See* LA. CHILD. CODE ANN., Arts. 857(A), (B) (West Supp. 2012); LA. REV. STAT. ANN. §§ 14:30(C), 14:30.1(B) (West Supp. 2012); TEX. FAMILY CODE ANN. §§ 51.02(2)(A), 54.02(a)(2)(A) (West Supp. 2011); TEX. PENAL CODE ANN. § 12.31(a) (West 2011). In many of these jurisdictions, life without parole is the mandatory punishment only for aggravated forms of murder.").
105. *See* 18 Pa. Cons. Stat. Ann. § 1102(b) (mandating life sentence for second-degree conviction); 61 Pa.Cons.Stat. Ann. §6137 (removing parole eligibility from murder statute).
106. *See* 42 Pa. Cons. Stat. Ann. § 6302 (omitting the "crime of murder" from the definition of delinquent acts that are handled in juvenile court).
107. *See* 42 Pa. Cons. Stat. Ann. § 9545(b)(2).
108. Docket No. 79 MAP 2009.
109. Docket No. 38 EAP 2012.

After *Miller* was decided, the Pennsylvania Supreme Court has heard arguments in two juvenile LWOP cases.

on collateral review, the Court must squarely confront the issue of retroactivity, determining whether *Miller*'s mandate applies to all of the men and women in the state who were sentenced as juveniles and are currently serving life sentences without the possibility of parole.

COMMONWEALTH V. BATTS

Qu'eed Batts was convicted of first-degree murder, attempted murder, and aggravated assault for his role in a gang-related shooting of two individuals in Easton, Pennsylvania. Batts's appeal was argued before the Supreme Court of Pennsylvania in the winter of 2010 and then held in abeyance pending the United States Supreme Court's grant of certiorari in the *Miller* and *Jackson* cases. Once *Miller* was decided in the summer of 2012, the Pennsylvania Supreme Court ordered supplemental briefing on the decision's potential impact on the pending case.[110] Both sides agreed that because the *Miller* decision invalidated Pennsylvania's statutory sentencing scheme (mandating LWOP for any juvenile convicted of first- or second-degree murder), Batts was entitled to a resentencing hearing. Therefore, the question at issue is what the new constitutional sentence should be.

Batts argued that the Court must look to existing statutes to determine what constitutional sentence may be imposed on juveniles convicted of homicide.[111] Batts further argued that with *Miller*'s invalidation of the existing sentencing scheme, the only constitutionally available sentence in Pennsylvania is the sentence for the lesser-included offense of third-degree murder, carrying a maximum term of 40 years.[112] Accordingly, in the absence of alternate legislation to be applied retroactively, Batts seeks to be resentenced pursuant to the Commonwealth's third-degree murder statute.[113]

The Commonwealth of Pennsylvania argued that the only relief afforded to Batts by the *Miller* decision is a resentencing hearing, at which he can still be sentenced to life in prison without parole.[114] Specifically, the Commonwealth argued that "[t]he trial court has discretion as to whether to impose a sentence to life in prison without parole, or a sentence of life in prison with the possibility of parole."[115] Underlying the Commonwealth's argument is the notion that juveniles do not deserve special treatment; rather, murder should be treated "as a special category of violence that cannot be categorically excused or mitigated by youthful impetuosity."[116]

COMMONWEALTH V. CUNNINGHAM

Ian Cunningham was convicted of second-degree murder for the role he played in an armed-robbery-turned-murder. Once convicted, Cunningham sought collateral relief on the basis of the changes in law as announced in *Roper*. The Pennsylvania Superior Court denied relief, holding that *Roper* had no bearing on life sentences.[117] Soon after the Superior Court denied relief, Cunningham filed a petition for allowance of appeal in the Pennsylvania Supreme Court. The Court reserved the petition pending the disposition of *Batts*. As in *Batts*, following the United States Supreme Court's announcement of its decision in *Miller*, the Pennsylvania court issued a limited allowance of appeal to address the extent to which *Miller* applies on collateral review. The court heard oral argument on this issue in September 2012.

Cunningham puts forward a number of arguments in support of his petition for relief. First, Cunningham challenges the applicability of a felony-murder charge to a juvenile offender. Relying on research regarding adolescent brain development, Cunningham argues that it is not possible to infer intent for felony-murder purposes when dealing with a teenage defendant. Second, Cunningham argues that prisoners convicted of first- or second-degree murder before the *Miller/Jackson* decisions are eligible for relief even after they have exhausted their direct-appeal rights, relying in large part on the fact that the *Miller* decision was held to apply to Jackson on collateral review. Cunningham goes on to argue that if *Miller/Jackson* relief is applied retroactively, courts at resentencing must look to the statutes in existence at the time of the offense to determine what constitutional sentence may be imposed. In

110. Specifically, the Pennsylvania high court ordered briefing on the following questions: "(1) What is, as a general matter, the appropriate remedy on direct appeal in Pennsylvania for a defendant who was sentenced to a mandatory term of life imprisonment without the possibility of parole for a murder committed when the defendant was under the age of eighteen?; (2) To what relief, if any, is appellant entitled from the mandatory term of life imprisonment without parole for the murder he committed when he was fourteen years old?" Docket No. 79 MAP 2009.
111. *See* Supplemental Brief of Appellant at 7-8, *Batts*, Docket No. 79 MAP 2009.
112. *See id.* at 8 ("juvenile offenders convicted of first degree murder should be resentenced in accordance with the sentencing scheme for the lesser-included offense of third degree murder, which carries a maximum term of 40 years.") (citing 18 PA. CONS. STAT. ANN. § 1102). *See also* Rutledge v. United States, 517 U.S. 292, 305-307 (1996) (finding that where a greater offense must be reversed, courts may enter judgment on the lesser included offense); Commonwealth v. Story, 497 Pa. 273, 275 (1981) (imposing life imprisonment, the next most severe punishment under Pennsylvania law, upon invalidation of mandatory death-penalty statute as unconstitutional); Commonwealth v. Bradley, 449 Pa. 19, 23-24 (1972) (vacating death sentence and imposing life imprisonment as next most severe constitutionally available sentence); Commonwealth v. Edwards, 488 Pa. 139, 141 (1979) (same).
113. *See* Supplemental Brief of Appellant, *supra* note 109, at 12.
114. *See* Supplemental Brief of Appellee at 7, *Batts*, Docket No. 79 MAP 2009 ("A sentence of life in prison without parole simply requires a discretionary decision based on individualized consideration.").
115. *Id.* at 8.
116. *Id.* at 10 (citing Commonwealth v. Williams, 522 A.2d 1058, 1063 (Pa. 1987)).
117. *See* Supplemental Response Brief of District Attorney at 4, *Cunningham*, Docket No. 38 EAP 2012.

Pennsylvania, courts at resentencing should only consider lesser-included offenses, which, in the case of felony murder, includes only the underlying felonies.

The Commonwealth argues that *Miller* states a new rule and is therefore "not a basis for relief on collateral review."[118] The Commonwealth further argues that *Miller* does not meet the exceptions required by the Supreme Court's decision in *Teague v. Lane*,[119] to be given retroactive application. Specifically, the rule announced by *Miller* does not meet the exception of being either a "substantive" rule or "watershed rule" of criminal procedure,[120] but, according to the Commonwealth, only "impos[es] a process, [and] is restricted to the manner in which the penalty is determined and has no bearing on the accuracy of the conviction."[121] The Commonwealth rejects Cunningham's argument that *Miller* applies retroactively on collateral review merely because the decision was held to apply to Jackson.[122] Finally, the Commonwealth rebuffs Cunningham's argument that juvenile defendants convicted of second-degree murder should be resentenced pursuant to the sentences available for the underlying felonies. Instead, the Commonwealth argues, "On remand in such a case a sentencing court would have the power to allow or not allow parole, and to define a minimum term that would initiate parole eligibility."[123]

BATTS AND *CUNNINGHAM*: FUTURE IMPLICATIONS

The opposing arguments presented by the petitioners and Commonwealth in *Batts* and *Cunningham* largely portray the range of outcomes available to state courts as they work to implement *Miller*'s mandate. Speculation as to the relative merits of the arguments presented in the two cases serves a limited purpose. Instead, by combining the arguments presented by *Batts* and *Cunningham* with additional analysis on the issue of retroactivity and the role of sentencing legislation, the foundation is laid for a comprehensive understanding of the myriad issues to consider in developing a thoughtful post-*Miller* analysis.

THE QUESTION OF RETROACTIVITY

There is currently no definitive authority that specifically addresses whether or not *Miller* applies retroactively to cases on collateral review. In Pennsylvania, *Cunningham* will likely serve this purpose. The competing sides of the argument are well summarized by Professor Chemerinsky:

> There is a strong argument that *Miller* should apply retroactively: It says that it is beyond the authority of the criminal law to impose a mandatory sentence of life without parole. It also would be terribly unfair to have individuals imprisoned for life without any chance of parole based on the accident of the timing of the trial. On the other hand, if *Miller* is seen as just requiring a new procedure—a penalty phase before a sentence of life without parole is imposed for a crime committed by a juvenile—then it is unlikely to be applied retroactively. Procedural changes rarely apply retroactively.[124]

There is currently no definitive authority that specifically addresses whether or not *Miller* applies retroactively to cases on collateral review.

However, he concludes, "the *Miller* court did more than change procedures; it held that the government cannot constitutionally impose a punishment. As a substantive change in the law which puts matters outside the scope of the government's power, the holding should apply retroactively."[125] Chemerinsky's apt conclusion has considerable support.[126] The new rule announced by the *Miller* decision was held to apply to both Evan Miller on direct appeal and Kuntrell Jackson on collateral review. Presumably, if *Miller* did not apply retroactively to cases on collateral review, Jackson would have been barred from the relief he was granted.

118. *See* Brief of Appellee at 2, *Cunningham*, Docket No. 38 EAP 2012.
119. 489 U.S. 288.
120. *See id.* at 12-13 (citing *Teague*, 489 U.S. 288) ("[U]nder the first *Teague* exception, new rules do not apply on collateral review unless they are 'substantive'" and the second *Teague* exception only applies to "'watershed rules' of criminal procedure 'implicating the fundamental fairness and accuracy of the criminal proceeding.'").
121. *Id.* at 14.
122. *See id.* at 5 ("That one of the appellants in *Miller*, Jackson, was on collateral review is additionally irrelevant because *Miller* did not apply its new rule to Jackson (or even to Miller), but only remanded for further proceedings—in which the state could raise a valid *Teague* objection.").
123. *Id.*
124. *See* Chemerinsky, *supra* note 78 ("In fact, the Supreme Court held that *Ring* [*v. Arizona*] did not apply retroactively. In 2004's *Schriro v. Summerlin*, the court concluded that *Ring* was a procedural change and not a 'watershed' rule of criminal procedure that warranted retroactive application"). For cases finding that *Miller* does not apply retroactively on collateral review, *see Craig v. Cain*, 2013 WL 69128, at *2, 2013 U.S. App. Lexis 431, at *4-*5 (5th Cir. Jan. 4, 2013) (unpublished opinion) ("*Miller* does not satisfy the test for retroactivity because it does not categorically bar all sentences of life imprisonment for juveniles; *Miller* bars only those sentences made mandatory by a sentencing scheme."); *People v. Carp*, ___ N.W.2d ___, 2012 WL 5846553, 2012 Mich. App. Lexis 2270 (Mich. Ct. App. Nov. 15, 2012) ("*Miller* does not comprise a substantive new rule and, therefore, is not subject to retroactive application for cases on collateral review . . . ."); *Geter v. State*, ___ So.3d ___, 2012 WL 4448860, 2012 Fla. App. Lexis 16051 (Fla. Dist. Ct. App. 2012).
125. Chemerinsky, *supra* note 78.
126. *See, e.g.*, People v. Williams, 2012 Ill. App. (1st) 111145, 2012 WL 6206407, 2012 Ill. App. Lexis 1002 (Ill. App. Ct. 2012) ("The *Miller* case held under the Eighth Amendment that it is cruel and unusual punishment to impose a mandatory life sentence without parole to a special class—juveniles. It woiuld also be cruel and unusual to apply that principle only to new cases. We therefore hold that the Court's holding in *Miller* should be

Because cases under both lines of precedent have been applied retroactively . . . , it follows that *Miller* should receive the same retroactive application.

Under the Court's prior ruling in *Tyler v. Cain*,[127] and because the *Miller* Court reversed Jackson's sentence, a strong argument can be made that the ban on mandatory LWOP is retroactive. Specifically, in *Miller*, the majority relies on two lines of precedent that have largely been held to apply retroactively themselves.[128] As discussed above in the explication of the *Miller* decision, the first line of cases relied on by the Court adopted categorical bans on sentencing schemes where the severity of the punishment far outweighed the blameworthiness of a class of offenders.[129] The second line of cases consists of those requiring individualized sentencing hearings with consideration of mitigating factors before a sentence of death may be imposed.[130] Because cases under both lines of precedent have been applied retroactively on collateral and direct review, it follows that *Miller* should receive the same retroactive application. Finally, the *Miller* dissent specifically bemoans the majority's invalidation of over 2,000 cases.[131] The dissent would not have raised such a concern if the Court's new ruling did not apply retroactively.

LEGISLATIVE FIXES—THE PENNSYLVANIA STORY

In the wake of the *Miller* decision, state courts were left with little guidance on implementation. In states like Pennsylvania, the decision invalidated an entire statutory sentencing provision, leaving no sentence on the books for youth under 18 convicted of first- or second-degree murder. Pennsylvania is primed to serve as a case study not only in the litigation context, as described above, but also in terms of its legislative reaction to *Miller*.

Responding to uncertainty among the lower courts, the Pennsylvania legislature acted hastily. The chair of the senate judiciary committee convened a hearing approximately three weeks after the *Miller* decision was issued.[132] The legislature then convened a truncated three-week-long session in September 2012, during which a number of legislative amendments were introduced. One of these amendments, to Senate Bill 850, sought to overhaul the first- and second-degree murder sentencing schemes for juveniles, in direct response to *Miller.* The amended bill provides for the following revised sentencing scheme:

> For first degree murder, either: life without the opportunity for parole; or 35 years to life for individuals who were 15 to 17 years old at the time of the offense or 25 years to life for those who were 14 or younger at the time of the offense. For second degree murder: 30 years to life for youth who were 15 to 17 years old at the time of the offense and 20 years to life for youth who were 14 or under at the time of the offense. Parole hearings are only guaranteed to occur every five years following completion of the minimum term of years.[133]

retroactively applied."); People v. Morfin, 2012 Ill. App. (1st) 103568, 2012 WL 6028634, 2012 Ill. App. Lexis 977 (Ill. App. Ct. 2012) ("*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."); State v. Simmons, 99 So.3d 28 (La. 2012) (finding *Miller* to apply retroactively to a case where crime was committed in 1995); *see also* People v. Hoffman, 2012 WL 3066392, 2012 Cal. App. Unpub. Lexis 5574 (Cal. Ct. App. July 30, 2012) (unpublished opinion); Iowa v. Lockheart, 2012 WL 2814378 (Iowa Ct. App. 2012) (unpublished opinion) (remainding for resentencing in accord with *Miller* without employing the *Teague* analysis). Support for *Miller*'s retroactivity also exists in light of the retroactive application of *Graham*, which has been treated differently in state courts across the country. The U.S. Supreme Court has not spoken on the matter. For cases finding *Graham* to apply retroactively, see, *e.g.*, Louisiana v. Skipper, 2011 WL 2448013 (La. App.); Bonilla v. State, 791 N.W. 2d. 697 (Iowa 2010). For the opposing viewpoint, see, *e.g.*, Selectman v. Zavaras, 2011 WL 1597678 (D. Colo. 2011); Trimble v. Triani, 2011 WL 3426207 (D. Colo. 2011). At the time of this writing, only one federal circuit court had addressed the issue. *See* In re Sparks, 657 F.3d 258 (5th Cir. 2011) (finding *Graham* to apply retroactively).

127. 533 U.S. 656, 663 (2001) ("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"). *See also Teague*, 489 U.S. at 300 ("[O]nce a new rule is applied to a defendant in the case announcing the new rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated.").
128. *See* note 126, *supra* (considering the retroactive application of the *Graham* decision). In *In re Sparks*, the Fifth Circuit Court of Appeals found, "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.*" *Sparks*, 657 F.3d at 260 (citing *Tyler*, 533 U.S. 656, n. 31).
129. *See* Atkins v. Virginia, 536 U.S. 304 (2002) (prohibiting the execution of mentally retarded offenders); *Roper*, 543 U.S. 551 (outlawing the death penalty for juvenile offenders); Graham v. Florida, 130 S. Ct. 2011 (2010) (banning LWOP sentences for juveniles convicted of nonhomicide offenses).
130. *See*, *e.g.*, Woodson v. North Carolina, 428 U.S. 280 (1976); Lockett v. Ohio, 483 U.S. 586 (1978); Eddings v. Oklahoma, 436 U.S. 921 (1978), and Sumner v. Shuman, 483 U.S. 66 (1987).
131. *See Miller*, 132 S. Ct. at 2480 (Roberts, C.J., dissenting).
132. The hearing, convened by Senator Stewart Greenleaf on July 12, 2012, allowed for testimony from stakeholders on all sides of the issue. *See* Matt Stroud and Liliana Segura, *The Uncertain Fate of Pennsylvania's Juvenile Lifers*, The Nation, Aug. 7, 2012, http://www.thenation.com/article/169268/uncertain-fate-pennsylvanias-juvenile-lifers# ("The hearing featured testimony from twenty-six people—none of them prisoners—who advocate for organizations, litigate juvenile cases or are otherwise involved in the juvenile lifer debate").
133. *See* Pennsylvania General Assembly, "Bill Information, Regular Session 2011-2012, Senate Bill 850," *available at* http://www.legis.state.pa.us/cfdocs/billinfo/BillInfo.cfm?syear=2011&sind=0&body=S&type=B&bn=850.

The amendments garnered support among prosecutors and victims' advocates.[134] While child advocates and families and supporters of juvenile lifers applauded the removal of LWOP as a sentencing option for those convicted of second-degree murder, they strongly criticized the legislature for failing to take a measured and thoughtful approach to one of the most substantive changes to this area of the sentencing statute in nearly a century. Opponents disagreed with leaving LWOP on the table for first-degree murder and argued the mandatory minimums were at odds with the directives of *Miller*, which calls for an individualized approach to juvenile sentencing, taking into account the transitory nature of youth.[135] With little time for opponents to mount an organized campaign against the proposed legislation, the Bill passed on concurrence by a vote of 37 to 12. Notably, the vote was not split across party or geographic lines. Representatives on both sides of the aisle voiced discontent with the way the legislation was pushed through the process.[136] The Bill was signed into law by Governor Corbett on October 25, 2012.[137]

The interplay between the legislature's actions and the pending Pennsylvania Supreme Court decisions in *Batts* and *Cunningham* is complex on a number of levels. First, the legislature failed to address the issue of *Miller*'s retroactivity and what is to become of the nearly 500 men and women who are currently serving illegal sentences, leaving the issue for the state's highest court to address in *Cunningham*. Second, the legislature can enact future laws to circumvent the high court's pending rulings in *Batts* and *Cunningham*. Third, advocates may mount constitutional challenges to the form and substance of the current legislation, thereby sending the issues back to the Pennsylvania Supreme Court for consideration.

OTHER APPROACHES—NORTH CAROLINA, CALIFORNIA, AND IOWA

To date, only a handful of other states have taken on the task of amending their laws in accordance with *Miller*. In North Carolina, outgoing Governor Bev Perdue signed into law an amendment to the state sentencing laws on first-degree murder to comply with *Miller*.[138] Under the new law, "life with parole" means that defendants will be eligible for parole at 25 years imprisonment and that parole will be a term of 5 years.[139] Further, juveniles convicted under the felony-murder doctrine are afforded a life-with-parole sentence. The law also outlines the hearing procedure to determine whether the juvenile's sentence should be life with or without parole, and specifies the mitigating factors to be considered by the court at such a hearing.[140]

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California's approach reflects a progressive view on juvenile sentencing. Following a legislative campaign that was put into place well before the *Miller* decision was announced, the governor recently signed into law SB9,[141] which grants juvenile offenders sentenced to life in prison without parole that have served at least 15 years the chance to petition for a new sentence. The courts would then have the ability to lower their sentence to 25 years to life if the juvenile offenders demonstrate remorse and work toward rehabilitation.[142]

Iowa, on the other hand, provides an example of a conservative non-participatory approach. Instead of allowing the legislative process to take its course, the governor of Iowa used his executive privilege to commute life sentences for 38 prisoners sentenced to juvenile LWOP to mandatory 60-year sentences, acquiring a good deal of national attention and derision as a result. While the Iowa Code seems to give the governor this power without limitation, an open question will be

134. *See, e.g.*, Pennsylvania District Attorneys Association, *Press Release: District Attorneys Praise PA Legislature for End of Session Criminal Justice Focus*, 19 Oct. 2012, *available at* http://www.pdaa.org/index.php?option=com_content&view=article&id=154:district-attorneys-praise-pa-legislature-for-end-of-session-criminal-justice-focus&catid=48:press-pdaa&Itemid=64 ("The Pennsylvania District Attorneys Association (PDAA) praised the Pennsylvania State Senate and House of Representatives for using their final session days to focus on criminal justice and public safety matters . . . . The new laws provide appropriate sentences for juveniles convicted of murder. . . .").
135. *See, e.g.*, Antonio Ginatta, *US/Pennsylvania: Don't Codify Excessive Sentences for Children Letter to Pennsylvania Governor Tom Corbett*, HUMAN RIGHTS WATCH, Oct. 19, 2012, http://www.hrw.org/news/2012/10/19/uspennsylvania-dont-codify-excessive-sentences-children ("There is no doubt that thoughtful, informed sentencing reform is needed in Pennsylvania. Senate Bill 850 is neither thoughtful nor sufficiently informed.").
136. *See* Pennsylvania General Assembly, *Floor Roll Call, Bill Information, Regular Session 2011-2012*, *Senate Bill 850*, *available at* http://www.legis.state.pa.us/cfdocs/billinfo/bill_votes.cfm?syear=2011&sind=0&body=S&type=B&bn=850.
137. *See* ASSOCIATED PRESS, *Corbett Signs Juvenile Murder Sentence Legislation*, Oct. 26, 2012, *available at* http://www.philly.com/philly/news/pennsylvania/175897601.html.
138. *See* Senate Bill 635/S.L. 2012-148, "Minors/Sentencing for First Degree Murder."
139. *See* Juvenile Justice Blog, *States Respond to Supreme Court JLWOP Decision*, July 19, 2012, http://juvenilejusticeblog.web.unc.edu/2012/07/17/states-respond-to-supreme-court-jlwop-decision/.
140. The mitigating factors to be considered by the sentencing court include: age at the time of the offense, immaturity, ability to appreciate the risks and consequences of the conduct, intellectual capacity, prior record, mental health, familial or peer pressure exerted upon the defendant, and likelihood that the defendant would benefit from rehabilitation in confinement. *See* note 138, *supra*.
141. CA Senate Bill 9, *available at* http://legiscan.com/gaits/text/665299.
142. *See*, *e.g.*, Patrick McGreevy, *Jerry Brown OKs Appeal for Minors Sentenced to Life Without Parole*, LA TIMES, Sept. 30, 2012, http://latimesblogs.latimes.com/california-politics/2012/09/gov-jerry-brown-approves-appeal-for-minors-sentenced-to-life-without-parole.html.

whether 60-year sentences are functionally "life" sentences, given that these prisoners were at least 13 or 14 at the time of the offense.[143]

CONCLUSION

Over the last decade, the Supreme Court has laid out a clear rationale for punishing juveniles differently than adults and has used this framework, in large part, to ban specific punishments for young people. These decisions are not only supported by prior precedent and common-sense judgment, but also by substantial research from the social and medical sciences as well as the overwhelming consensus of the world community. Courts and legislatures will continue to grapple with these decisions as they seek to directly implement the *Graham* and *Miller* holdings and consider how these decisions might apply to other sentences for juveniles.

Discussions regarding the appropriate implementation of these decisions will dominate the dialogue on juvenile justice for years to come. In these discussions, it is essential that advocates and lawmakers be loyal to the true letter and spirit of the *Miller* decision. State actors must develop and implement comprehensive reforms to their statutory sentencing schemes, rather than surface solutions merely removing the word "mandatory" from otherwise harsh options not in line with *Miller*'s directive. Enacting sentencing schemes that require sentences of 60, or even 35 years before a young person is eligible for parole are examples of the type of reaction that might technically comply with the letter but not the spirit of the *Graham* and *Miller* decisions.

Comprehensive reform must also focus not merely on juveniles serving long sentences. As discussed previously, the vast majority of young people in the criminal justice system do not receive long sentences, and the evidence indicates that the policies that have facilitated the increased transfer of young people have failed. This means that legislatures and courts must revisit the purpose of transferring juveniles to the criminal court and determine whether mechanisms that do so are actually distinguishing between those who should be transferred and those who should not. Consideration of this question must move beyond charged rhetoric concerning the dangerousness of young people and focus on the framework laid out by the Court in *Roper*, *Graham*, and *Miller*. Doing so will not only benefit young people, but will also serve public safety and ensure that we are utilizing financial and other resources appropriately.

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143. Doug Berman, Iowa *Gov Uses Clemency Power to Devise (Astute? Sinister?) Response to Miller for Juvenile LWOPers*, SENTENCING LAW AND POLICY BLOG, July 16, 2012, http://sentencing.typepad.com/sentencing_law_and_policy/2012/07/iowa-gov-uses-clemency-power-to-devise-astute-sinister-response-to-miller-for-juve-lwopers.html.