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An Evolving Society: The Juvenile’s Constitutional Right Against a Mandatory Sentence of Life (and Death) in Prison

*Robert Visca**

INTRODUCTION

On June 25, 2012, the United States Supreme Court (“Court”) decided *Miller v. Alabama*,¹ holding that it is unconstitutional to sentence juvenile homicide offenders to mandatory life-without-the-possibility-of-parole.² With a clear holding in place, the only debatable aspect of *Miller* is the underlying spirit and intent of this decision. The majority’s discussion and reasoning appears to support a broad interpretation of the holding. This piece analyzes how courts and state actors are or should be applying *Miller* under this broad interpretation.

The American juvenile justice system was founded on a principle that should still hold true today: juvenile offenders can be rehabilitated.³ This belief is based on society’s recognition that juveniles are developmentally unique from adults.⁴ Behavioral and neuroscientific research on adolescent development indicates that juveniles lack crucial reasoning and risk-assessment cognitive capabilities.⁵ In making decisions, juveniles “lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”⁶

Furthermore, juveniles do not assess risk in the same way that adults do, because juveniles erroneously focus only on short-term consequences and fail to accurately consider the long-term consequences of their actions.⁷ Other important differences include the fact that “adolescents are more

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¹ 132 S. Ct. 2455 (2012).

² *Id.* at 2475.

³ Danielle R. Oddo, *Removing Confidentiality Protections and the “Get Tough” Rhetoric: What Has Gone Wrong With the Juvenile Justice System?*, 18 B.C. THIRD WORLD L.J. 105, 105 (1998).

⁴ *Id.* at 106.

⁵ Emily C. Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of Roper, Graham & J.D.B.*, 11 CONN. PUB. INT. L.J. 297, 312-13 (2012).

⁶ *Id.* at 312 (citation omitted).

⁷ *Id.* at 313.

susceptible to peer pressure than are adults,”⁸ and the personality traits of a juvenile are more likely to change as the juvenile continues to develop and mature.⁹

In the past, these apparent differences made juveniles less accountable in the eyes of the public, and illegitimate behavior at this early age was generally viewed as the result of correctable developmental deficiencies.¹⁰ Thus, in rehabilitating juveniles, the criminal justice system preferred a clinical, rather than punitive, approach.¹¹ The two general rationales for this approach were that “children are amenable and responsive to treatment, and this treatment was necessary to make up for the care which they were denied for most of their young lives.”¹² Furthermore, allowing for “wide judicial discretion” was key for successful rehabilitation because individualized attention would provide juveniles the best opportunity to receive appropriately tailored treatment.¹³

There may be no better evidence of how society views the mental capabilities of juvenile offenders than by the way various laws typically provide exceptions or different standards and treatment for individuals under the age of eighteen. No individual under this age has full autonomy, as several laws create restrictions on the juvenile’s ability to make certain decisions.¹⁴

Juveniles do not have the “authority to vote, serve on a jury, create a binding legal contract, purchase and possess a firearm, serve in the military, [] gamble,” or consume alcohol.¹⁵ Moreover, there are several activities that a juvenile cannot engage in without parental consent in most states, “including getting an abortion, getting married, purchasing pornography, getting a tattoo, or getting a body piercing.”¹⁶

However, society’s confidence that a rehabilitation system would be most effective in handling juveniles began to waver over time.¹⁷ “[A]s juvenile crime rates [increased], and the stories of juveniles committing serious and violent crimes . . . received widespread and sensationalized coverage, the public . . . increasingly perceived that the nation [was] under

⁸ *Id.* at 314.

⁹ *Id.* at 314-15.

¹⁰ Oddo, *supra* note 3, at 106-07.

¹¹ *Id.* at 107.

¹² *Id.*

¹³ Catherine J. Ross, *Disposition in a Discretionary Regime: Punishment and Rehabilitation in the Juvenile Justice System*, 36 B.C. L. REV. 1037, 1038-39 (1995).

¹⁴ Andrea Wood, *Cruel and Unusual Punishment: Confining Juveniles with Adults After Graham and Miller*, 61 EMORY L.J. 1445, 1462-63 (2012).

¹⁵ *Id.* at 1463.

¹⁶ *Id.*

¹⁷ Oddo, *supra* note 3, at 105-06.

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siege.”¹⁸

In the 1990s, this growing public fear led to state legislatures reworking their transfer procedures to allow for juveniles to be tried as adults for their crimes.¹⁹ “Between 1990 and 1999, the number of juveniles held in adult jails increased by more than 300%, while the overall adult jail inmate population only increased by 48%.”²⁰ Naturally, juveniles would begin receiving longer and harsher sentences, such as life-without-the-possibility-of-parole, which “places emphasis on retribution rather than rehabilitation.”²¹

By 2012, over 2,500 individuals had been incarcerated to life-without-the-possibility-of-parole for crimes they had committed as juveniles.²² While this type of harsh sentence may be appropriate for certain crimes committed by both adults and juveniles, the psychological and developmental differences between these groups require that special care be taken before imposing it on juveniles.

The Court has recognized the need to treat juveniles differently and has been curbing the excessive sentencing practices towards juveniles on a case-by-case basis for decades. *Miller* is the Court’s most recent decision attempting to protect juveniles from unconstitutionally disproportionate punishments under the Eighth Amendment²³ by eliminating mandatory life-without-the-possibility-of-parole sentences for juvenile homicide offenders.²⁴

However, as affected cases (old and new) reach local dockets, and as states across the country attempt to move forward under *Miller*, a survey of the revamped juvenile-sentencing landscape reveals a troubling trend: the Court’s apparent intent in *Miller* to guarantee individualized sentencing for juvenile homicide offenders²⁵ is being side-stepped.

Part I of this note explores the Court’s pre-*Miller* Eighth Amendment cases that specifically deal with the constitutionality of sentencing practices.

¹⁸ *Id.* at 105.

¹⁹ Wood, *supra* note 14, at 1458-59.

²⁰ Howard N. Snyder & Melissa Sickmund, *Juvenile Offenders and Victims: 2006 National Report*, U.S. DEP’T OF JUSTICE 236 (2006), <http://www.ojjdp.gov/ojstatbb/nr2006/downloads/NR2006.pdf>.

²¹ *See* Oddo, *supra* note 3, at 113.

²² *Against All Odds: Prison Conditions for Youth Offenders Serving Life without Parole Sentences in the United States*, HUMAN RIGHTS WATCH 8 (Jan. 2012), http://www.hrw.org/sites/default/files/reports/us0112ForUpload_1.pdf.

²³ The Eighth Amendment to the United States Constitution states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

²⁴ *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012).

²⁵ *See id.*

Part II examines the Court's decision in *Miller*, looking at the rationale and argument for and against life-without-the-possibility-of-parole sentences for juveniles. Part III identifies how courts across the nation have properly been interpreting and applying *Miller* to juvenile cases. Part IV analyzes the ways that state entities and courts can and have side-stepped the spirit of *Miller* and argues that courts should abide by the intent of *Miller* by providing every juvenile homicide offender with a meaningful hearing for courts to consider all mitigating factors before imposing a sentence of life-without-the-possibility-of-parole.

I. CASE PRECEDENT PRECEDING *MILLER*

Over the past century, the Court has decided several cases that have shaped how courts impose sentences under the Eighth Amendment. The Court has gained momentum in its sentencing jurisprudence over the past few decades, culminating in the *Miller* decision. While any decision from the Court may be met with criticism or disagreement from one group or another, reviewing case precedent is an important tool when trying to understand how a present-day decision is reached. A review of the cases preceding *Miller* clearly establishes the reasoning and trends that foreshadowed *Miller*.

A. Principle of Proportionality

There are countless cases that address Eighth Amendment issues, but *Weems v. U.S.*²⁶ is arguably the first link in the long chain of cases leading up to *Miller*. The Court in *Weems* was faced with the issue of whether a sentence of hard labor for falsifying government documents, which was imposed by a court in the Philippine Islands, constituted cruel and unusual punishment.²⁷

In overturning the sentence, the Court discussed the fact that there is no clear definition of cruel and unusual punishment and implied that the punishment should fit the crime.²⁸ The Court referenced the view that "it is a precept of justice that punishment for crime should be graduated and proportioned to [the] offense."²⁹ This principle would form part of the foundation for the Court's current view on determining the constitutionality of sentencing.

²⁶ 217 U.S. 349 (1910).

²⁷ *Id.* at 357-58.

²⁸ *Id.* at 368-70.

²⁹ *Id.* at 367.

B. Evolving Standards of Decency & Objective Indicia

In *Trop v. Dulles*,³⁰ the controversial punishment was the stripping of a military deserter's citizenship,³¹ and the Court reiterated *Weems* by pointing out the ambiguity of the Eighth Amendment language.³² The Court determined that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."³³ The evolving decency standard would become a central question in future Eighth Amendment cases.³⁴

In *Gregg v. Georgia*,³⁵ the Court clarified how the "contemporary values concerning the infliction of a challenged sanction" should be assessed.³⁶ The Court must "look to objective indicia that reflect the public attitude toward a given sanction."³⁷ The Court further stated that, while important, public perceptions are not necessarily conclusive.³⁸

The Court elaborated on this objective indicia analysis in *Coker v. Georgia*.³⁹ In *Coker*, the Court stated that Eighth Amendment determinations should not be "merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent."⁴⁰ This point was later reiterated in *Rummel v. Estelle*.⁴¹ An example of an objective indicium utilized by the Court is a state's actual sentencing practices in applying a law.⁴²

C. Mitigating Circumstances & Youth

Another important development in this Eighth Amendment jurisprudence is the need for courts to consider all of an offender's mitigating circumstances before imposing the harshest penalties possible. Initially, the Court suggested in *Furman v. Georgia*⁴³ that leaving the

³⁰ 356 U.S. 86 (1958).

³¹ *Id.* at 88.

³² *Id.* at 99-100.

³³ *Id.* at 101.

³⁴ This standard has been reiterated in most Eighth Amendment cases following *Trop*. See *Estelle v. Gamble*, 429 U.S. 97, 102 (1976); *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); *Hudson v. McMillian*, 503 U.S. 1, 8 (1992); *Roper v. Simmons*, 543 U.S. 551, 561 (2005); *Graham v. Florida*, 560 U.S. 48, 58 (2010); *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012).

³⁵ 428 U.S. 153 (1976).

³⁶ *Id.* at 173.

³⁷ *Id.* at 153.

³⁸ *Id.*

³⁹ 433 U.S. 584 (1977).

⁴⁰ *Id.* at 592.

⁴¹ 445 U.S. 263, 275 (1980).

⁴² *Atkins v. Virginia*, 536 U.S. 304, 316 (2002).

⁴³ 408 U.S. 238 (1972).

imposition of a death penalty sentence up to the discretion of the judges was dangerous and should be prohibited.⁴⁴ But the Court clarified this decision with its rulings in several similar cases that followed.

In *Roberts v. Louisiana*,⁴⁵ *Woodson v. North Carolina*,⁴⁶ and *Sumner v. Schuman*,⁴⁷ the Court held that it is unconstitutional to impose mandatory death penalties on offenders.⁴⁸ The Court specifically stated in *Woodson* that it is important to “allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death.”⁴⁹ Thus, following these decisions, a death penalty sentence is constitutional under the Eighth Amendment if the judge is permitted to first consider mitigating factors.⁵⁰

One broad mitigating factor that would become crucial in *Miller* is the offender’s youth.⁵¹ The importance of this factor has rapidly grown over the past few decades. In *Eddings v. Oklahoma*,⁵² the Court recognized that youth is a “time and condition of life when a person may be most susceptible to influence and to psychological damage.”⁵³ Furthermore, the Court discussed how minors are typically less mature and responsible than adults,⁵⁴ and stated that a minor’s age, background, and mental and emotional development must be considered in imposing a death sentence.⁵⁵

The Court added to this reasoning in *Tison v. Arizona*⁵⁶ by tying the penological justification for retribution to the imposition of death on youth offenders.⁵⁷ The Court stated that the “heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.”⁵⁸ In other words, the sentence must be proportional to the offender’s culpability, which is measured against the offender’s maturity level, emotional development, and background.⁵⁹

⁴⁴ See generally *id.*

⁴⁵ 428 U.S. 325 (1976).

⁴⁶ 428 U.S. 280 (1976).

⁴⁷ 483 U.S. 66 (1987).

⁴⁸ See *Roberts*, 428 U.S. at 336; *Woodson*, 428 U.S. at 305; *Sumner*, 483 U.S. at 85.

⁴⁹ *Woodson*, 428 U.S. at 303.

⁵⁰ The Court later reaffirmed its position from *Woodson* in *Lockett v. Ohio*, 438 U.S. 586, 602-08 (1978).

⁵¹ *Miller v. Alabama*, 132 S. Ct. 2455, 2458-59 (2012).

⁵² 455 U.S. 104 (1982).

⁵³ *Id.* at 115.

⁵⁴ The Court recently reaffirmed this distinction in *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2404 (2011), where it stated that “children cannot be viewed as miniature adults.”

⁵⁵ *Eddings*, 455 U.S. at 116.

⁵⁶ 481 U.S. 137 (1987).

⁵⁷ *Id.* at 149.

⁵⁸ *Id.*

⁵⁹ See generally *id.* at 137.

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Later in *Johnson v. Texas*,⁶⁰ the Court succinctly summed up its reasoning for the importance of considering an offender's youth before imposing a death sentence.⁶¹ The Court stated that the "relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside."⁶²

D. Categorical Bans on Sentencing Practices

By the early 1980s, the Court had firmly established its reliance on the principles of proportional punishment, the objective determination of society's standard of decency, and the consideration of mitigating factors, especially youth. Moving forward, the Court would rely on these principles and rationales to begin implementing categorical bans on the imposition of the death penalty for particular groups.

For example, in *Enmund v. Florida*,⁶³ the Court held that the "imposition of the death penalty on one . . . who aids and abets a felon in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place" is unconstitutional under the Eighth Amendment.⁶⁴ In *Atkins v. Virginia*,⁶⁵ the Court prohibited the imposition of the death penalty on mentally handicapped criminals.⁶⁶ And in *Kennedy v. Louisiana*,⁶⁷ the Court found that rape offenders could not be sentenced to death where the victim died after the incident, if "the crime did not result, and was not intended to result, in the death of the victim."⁶⁸

These decisions are important because they constructed the framework for courts to follow in analyzing the constitutionality of a sentence. However, the two most groundbreaking decisions for juvenile sentencing under the Eighth Amendment, which the Court most heavily relied on in *Miller*, are *Roper v. Simmons*⁶⁹ and *Graham v. Florida*.⁷⁰

Both decisions created categorical bans on sentencing practices

⁶⁰ 509 U.S. 350 (1993).

⁶¹ *Id.* at 368.

⁶² *Id.*

⁶³ 458 U.S. 782 (1982).

⁶⁴ *Id.* at 797.

⁶⁵ 536 U.S. 304 (2002).

⁶⁶ *Id.* at 321.

⁶⁷ *Kennedy v. Louisiana*, 554 U.S. 407 (2008), *opinion modified on denial of reh'g*, 554 U.S. 945 (2008).

⁶⁸ *Id.* at 413.

⁶⁹ 543 U.S. 551 (2005).

⁷⁰ 560 U.S. 48 (2010).

directly pertaining to juveniles.⁷¹ While the ban in *Roper* prohibited the imposition of the death penalty on offenders who were minors when they committed their capital offenses,⁷² the ban in *Graham* reached new territory, as it prohibited a court from imposing a life-without-the-possibility-of-parole sentence on a juvenile for a non-homicide offense.⁷³

In *Roper*, the offender committed first-degree murder when he was seventeen-years-old and was later convicted and sentenced to death.⁷⁴ The Court synthesized the abundance of case law that has been described above into a two-part analysis: 1) “a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures;” and 2) a determination “in the exercise of [the Court’s] own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.”⁷⁵

For the first factor, the Court determined that a majority of states had already enacted laws prohibiting the death penalty for juveniles, and in the states lacking this prohibition, actual sentences of death for juveniles was exceedingly rare.⁷⁶ Thus, “the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice,” showed that there was no national consensus in favor of this punishment for juveniles.⁷⁷

As to the second factor, the Court stated that capital punishment should be reserved for the worst offenders and described three differences that set juveniles apart from this status of offender:⁷⁸ 1) juveniles are less mature and responsible; 2) “juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure;” and 3) juveniles have personality traits that are “less fixed.”⁷⁹ These differences can result in the lessened or diminished culpability of a juvenile.⁸⁰

Furthermore, the Court reasoned that the juvenile’s diminished culpability makes a retributive punishment excessive, and there is no evidence that the death penalty served as an effective deterrent.⁸¹ While the Court acknowledged that there is always the rare possibility that a

⁷¹ See *Roper*, 543 U.S. at 578; *Graham*, 560 U.S. at 82.

⁷² *Roper*, 543 U.S. at 578.

⁷³ *Graham*, 560 U.S. at 82.

⁷⁴ *Roper*, 543 U.S. at 556-58.

⁷⁵ *Id.* at 564.

⁷⁶ *Id.*

⁷⁷ *Id.* at 567.

⁷⁸ *Id.* at 569.

⁷⁹ *Id.* at 569-70.

⁸⁰ *Id.* at 571.

⁸¹ *Id.* at 571-72.

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competent, mature, and depraved juvenile, who committed a despicable crime, is deserving of the death penalty, it would be too difficult for courts to make accurate determinations, and too dangerous to risk them being wrong.⁸²

In *Graham*, the juvenile was sentenced to life-without-the-possibility-of-parole⁸³ for non-homicide offenses.⁸⁴ Again, the Court used the same two-part analysis described earlier.⁸⁵ The Court looked at actual sentencing practices across the States, and concluded that the imposition of life-without-the-possibility-of-parole sentences on juveniles was rare.⁸⁶

Furthermore, the fact that some states have dual-statute systems, where the juvenile is eligible for transfer to adult court under one statute, and then sentenced according to the sentencing guidelines for adults found in another statute, does not sufficiently indicate that a state legislature intended for juveniles to receive such a harsh penalty.⁸⁷

The Court in *Graham* then reaffirmed the *Roper* rationale, describing how the differences between juveniles and adults create lessened culpability for juveniles.⁸⁸ Furthermore, the Court likened life-without-the-possibility-of-parole for juveniles to a death sentence by highlighting the shared characteristics of the two.⁸⁹ The Court stated that both create a “forfeiture that is irrevocable,” and both “deprive[] the convict of the most basic liberties without giving hope of restoration.”⁹⁰

The Court also considered the penological justifications, or lack thereof, for retribution, deterrence, incapacitation, and rehabilitation as they pertain to this harsh penalty for juveniles.⁹¹ The Court stated that a “sentence lacking any legitimate penological justification is by its nature disproportionate to the offense,”⁹² and concluded that none of these punishment goals justify life-without-the-possibility-of-parole sentences for juveniles who commit non-homicidal crimes.⁹³

The Court found that a juvenile's lessened culpability makes

⁸² *Id.* at 573.

⁸³ The juvenile was sentenced to life in prison, but because Florida had previously abolished its parole system, the juvenile had no possibility to be released, other than by executive clemency.

⁸⁴ *Graham v. Florida*, 560 U.S. 48, 56-57 (2010).

⁸⁵ *Id.* at 61-73.

⁸⁶ *Id.* at 62-67.

⁸⁷ *Id.* at 66-67.

⁸⁸ *Id.* at 67-70.

⁸⁹ *Id.*

⁹⁰ *Id.* at 69-70.

⁹¹ *Id.* at 71.

⁹² *Id.*

⁹³ *Id.*

retribution and deterrence ineffective here.⁹⁴ Retribution is directly tied to the criminal's culpability, and deterrence requires criminals to consider the consequences of their crimes prior to committing them, which juveniles are not likely to do anyway.⁹⁵

Incapacitation would be ineffective due to the extreme difficulty courts would face in trying to predict a juvenile's future threat to society, as he matures and reaches adulthood.⁹⁶

As for the goal of rehabilitation, a life-without-the-possibility-of-parole sentence completely precludes its purpose for obvious reasons.⁹⁷ While the Court made it clear that a state did not have to guarantee a juvenile's release at some point, states are required to provide "all juvenile nonhomicide offenders a chance to demonstrate maturity and reform."⁹⁸

II. EXAMINING *MILLER*

With the precedent of *Roper* and *Graham* in place, which heavily relied on the youth argument,⁹⁹ the Court was ready to extend these arguments to another previously untouched area of sentencing for juveniles, mandatory life-without-the-possibility-of-parole for homicide offenders. While the type of sentence being addressed is different, the Court's simple, but important, theme remains the same: "that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."¹⁰⁰

In *Miller*, the Court decided two companion cases, both of which dealt with juveniles who were convicted of murder and sentenced to mandatory life-without-the-possibility-of-parole.¹⁰¹ The key fact in both cases was that neither court was permitted to use discretion in deciding the proper sentences.¹⁰²

A. Facts of the Two Cases

One of the cases involved petitioner, Kuntrell Jackson ("Jackson"), a

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 72.

⁹⁷ *Id.* at 73-75.

⁹⁸ *Id.* at 79.

⁹⁹ As discussed earlier, the Court has repeatedly argued that minors may have lessened culpability due to their maturity level, mental and emotional development, and transitory characteristics, which also negate the penological justifications for the sentences. *See Graham*, 560 U.S. at 70-74.

¹⁰⁰ *Miller v. Alabama*, 132 S. Ct. 2455, 2466 (2012).

¹⁰¹ *Id.* at 2460.

¹⁰² *Id.*

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fourteen-year-old who robbed a store with two other juveniles.¹⁰³ While Jackson waited outside, the other two juveniles entered the store to commence the robbery.¹⁰⁴ Shortly after Jackson entered the store, one of the other juveniles shot and killed the store clerk.¹⁰⁵ Arkansas law allowed the prosecutor to use discretion in determining whether to charge Jackson as an adult for this serious crime.¹⁰⁶

The prosecutor charged Jackson as an adult with capitol felony murder and aggravated robbery, and the trial court refused to transfer the case to juvenile court after considering the facts, a psychological examination, and Jackson's arrest history.¹⁰⁷ Pursuant to Arkansas law,¹⁰⁸ the only permissible sentence for these crimes was life-without-the-possibility-of-parole.¹⁰⁹ Jackson later filed a state petition for habeas corpus, but the circuit court dismissed it, and the Arkansas Supreme Court affirmed the dismissal.¹¹⁰

Petitioner Evan Miller ("Miller") was also fourteen years old when he committed his crime.¹¹¹ Miller attempted to steal money from the unconscious victim while drinking and doing drugs at the victim's trailer.¹¹² However, the victim awoke during this act, and grabbed Miller's throat.¹¹³ After Miller's friend hit the victim with a baseball bat, allowing Miller to go free, Miller repeatedly hit the victim with the bat.¹¹⁴

Miller and his friend then lit the trailer on fire, killing the victim.¹¹⁵ Alabama law¹¹⁶ also allowed the prosecutor to transfer the case to adult court.¹¹⁷ Miller was subsequently convicted of murder in the course of arson,¹¹⁸ which carried a minimum punishment of mandatory life-without-the-possibility-of-parole.¹¹⁹ The Alabama Court of Criminal Appeals affirmed, and the Alabama Supreme Court denied review.¹²⁰

¹⁰³ *Id.* at 2461.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See ARK. CODE ANN. § 5-4-104(b) (West 1997).

¹⁰⁹ *Miller*, 132 S. Ct. at 2461.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 2462.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See ALA. CODE § 12-15-34 (1977).

¹¹⁷ *Miller*, 132 S. Ct. at 2462.

¹¹⁸ *Id.* at 2463.

¹¹⁹ See ALA. CODE §§ 13-A-5-40(9), 13A-6-2(c) (1982).

¹²⁰ *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012).

The United States Supreme Court then granted certiorari in both cases and held that sentencing juvenile homicide offenders to mandatory life-without-the-possibility-of-parole is unconstitutional under the Eighth Amendment.¹²¹

B. Court's Reasoning

The Court first pointed out that the purpose of the Eighth Amendment is to ensure that proportionate sentencing practices are used.¹²² Moreover, the Court considered the “evolving standards of decency” in society when determining what marks a proportionate sentence.¹²³ The two lines of precedent addressing proportionate sentencing are those: 1) creating categorical bans on sentences “based on mismatches between the culpability of a class of offenders and the severity of the penalty;” and 2) requiring individualized sentencing schemes for the death penalty.¹²⁴

The Court noted that many of the cases creating categorical bans, such as *Roper*¹²⁵ and *Graham*,¹²⁶ were aimed at juveniles because of their lessened culpability.¹²⁷ These cases established that “children are constitutionally different from adults for purposes of sentencing.”¹²⁸ The Court justified this gap between adults and juveniles¹²⁹ by citing the three differences between the two groups mentioned in *Roper*.¹³⁰ Furthermore, the Court cited the reasoning set out in *Graham*¹³¹ for why the “distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders.”¹³²

Moreover, the Court pointed out that the discussion in *Graham* about the mental and environmental characteristics affecting juveniles is not crime specific, and thus, applies to any life-without-the-possibility-of-parole sentence imposed on a juvenile.¹³³ Mandatory sentencing practices prevent a sentencing court from considering a juvenile's youth and attendant circumstances.¹³⁴ Without this consideration, a court would be unable to

¹²¹ *Id.* at 2475.

¹²² *Id.* at 2463.

¹²³ *Id.*

¹²⁴ *Id.* at 2463-67.

¹²⁵ *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

¹²⁶ *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010).

¹²⁷ *Miller*, 132 S. Ct. at 2463.

¹²⁸ *Id.* at 2464.

¹²⁹ *Id.*

¹³⁰ *Roper*, 543 U.S. at 569-70.

¹³¹ *Graham*, 560 U.S. at 70-74.

¹³² *Miller*, 132 S. Ct. at 2465.

¹³³ *Id.*

¹³⁴ *Id.* at 2466.

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ensure that a juvenile received a punishment that is proportional to the offense.¹³⁵

The Court then reiterated its view on the similarities between a death sentence and a life-without-the-possibility-of-parole sentence for juveniles.¹³⁶ These similarities make it that much more crucial¹³⁷ that a court is able to consider any and all mitigating factors when imposing such a harsh sentence on a juvenile.¹³⁸ Prior to applying its rationale to the facts, the Court nicely summed up its position:

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 And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.¹³⁹

Jackson neither killed, nor intended to kill, the victim on the night of the robbery.¹⁴⁰ He was sentenced to life-without-the-possibility-of-parole for merely aiding and abetting.¹⁴¹ His age, ability to assess the risk of his actions, and family background go to the culpability analysis.¹⁴² For example, Jackson's mother and grandmother had shot individuals in the past.¹⁴³

As for Miller, not only was he on drugs and inebriated at the time of his crime, he also had a disturbing “pathological background.”¹⁴⁴ He was physically abused by his stepfather, neglected by his alcoholic and drug-addicted mother, in and out of foster care, and suicidal.¹⁴⁵ Thus, the Court stated that although these circumstances certainly do not excuse Miller's

¹³⁵ *Id.*

¹³⁶ *Id.* at 2466-67.

¹³⁷ The Court discussed the dangers of mandatory sentencing, such as sentencing fourteen and seventeen-year-olds alike, as well as the shooter and the accomplice. *Id.* at 2467-68.

¹³⁸ *Miller*, 132 S. Ct. at 2467.

¹³⁹ *Id.* at 2468.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 2468.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 2469.

¹⁴⁵ *Id.*

behavior in any way, they are relevant to consider before imposing a sentence of life-without-the-possibility-of-parole.¹⁴⁶

C. Opposing Arguments

The Court addressed and rejected the respondents' two opposing arguments that: 1) the holding here conflicts with Eighth Amendment precedent; and 2) "individualized circumstances [already] come into play in deciding whether to try a juvenile offender as an adult."¹⁴⁷

First, the respondents contended that the Court's previous case, *Harmelin v. Michigan*,¹⁴⁸ precluded the holding here because the Court there upheld a mandatory life-without-the-possibility-of-parole sentence for a drug charge, "reasoning that a sentence which is not otherwise cruel and unusual does not becom[e] so simply because it is mandatory."¹⁴⁹ Moreover, the Court in *Harmelin* "refused to extend [the individualized sentencing for death penalty cases] command to noncapital cases 'because of the qualitative difference between death and all other penalties.'"¹⁵⁰

In dismissing this argument, the Court in *Miller* explained that *Harmelin* was not intended to apply to sentencing for juveniles.¹⁵¹ The Court reasoned that sentencing rules frequently differ for adults and juveniles, and that these sentencing exceptions are by no means an "oddity in the law."¹⁵² The Court aptly remarked that "if [] 'death is different,' children are different [too]."¹⁵³ Thus, the Court found that *Miller* does not conflict with *Harmelin*.¹⁵⁴

Second, the respondents contended that "because many States impose mandatory life-without- parole sentences on juveniles,¹⁵⁵ [the Court cannot] hold the practice unconstitutional."¹⁵⁶ The Court responded that the supposed evidence of national consensus actually does not distinguish this situation from other cases where the Court found that a sentencing practice

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 2470.

¹⁴⁸ 501 U.S. 957 (1991).

¹⁴⁹ *Miller v. Alabama*, 132 S. Ct. 2455, 2470 (2012) (quoting *Harmelin*) (internal citations omitted).

¹⁵⁰ *Id.* (quoting *Harmelin*).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* (quoting *Harmelin*).

¹⁵⁴ *Id.* at 2470.

¹⁵⁵ *Id.* at 2471 (respondents pointed to statistics indicating that twenty-nine jurisdictions impose a mandatory life- without-the-possibility-of-parole sentence for some juveniles convicted of murder in adult court).

¹⁵⁶ *Id.* at 2470.

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violated the Eighth Amendment.¹⁵⁷

Furthermore, of the twenty-nine jurisdictions imposing a mandatory life-without-the-possibility-of-parole sentence for juveniles convicted of murder, “more than half” do so through the combination of two independent statutes.¹⁵⁸ “One allowed the transfer of certain juvenile offenders to adult court, while another . . . set out the penalties for any . . . individuals tried there.”¹⁵⁹ The Court was not convinced that States actually intended for these two statutes to work in this way.¹⁶⁰

The Court also dismissed the notion that the ability of courts in some jurisdictions to use discretion in transferring juveniles to adult court makes the Court’s holding here unnecessary.¹⁶¹ First, the Court reasoned that the “decisionmaker typically will have only partial information . . . this early . . . about either the child or the circumstances of his offense.”¹⁶² And second, a sentencing judge in adult court has more sentencing options available to him than does the decisionmaker at a transfer hearing.¹⁶³

For example, in adult court, the sentencing body can impose a “lifetime prison term *with* the possibility of parole or a lengthy term of years.”¹⁶⁴ Thus, the Court concluded that a judge’s discretion at the transfer stage does not substitute for the discretion utilized during post-trial sentencing in adult court.¹⁶⁵

Based on these arguments and policy considerations, the Court held that sentencing juvenile homicide offenders to mandatory life-without-the-possibility-of-parole is unconstitutional under the Eighth Amendment.¹⁶⁶ With the *Miller* decision in place, the burden now shifts to the lower courts across the nation to appropriately apply this holding to incarcerated juveniles who have been improperly sentenced, as well as to future cases.

In his dissent,¹⁶⁷ Justice Thomas addressed how he thinks this decision will ultimately affect the lower courts.¹⁶⁸ He argued that the Court’s stating that discretionary life-without-the-possibility-of-parole sentences would be

¹⁵⁷ *Id.* at 2471.

¹⁵⁸ *Id.* at 2472-73.

¹⁵⁹ *Id.* at 2472.

¹⁶⁰ *Id.* at 2472-73. While this argument is not highly persuasive, the national consensus consideration was not a significant factor utilized by the Court in reaching its decision.

¹⁶¹ *Id.* at 2474.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 2474-75.

¹⁶⁵ *Id.* at 2475.

¹⁶⁶ *Id.*

¹⁶⁷ The author will not discuss here a concurring opinion and two additional dissenting opinions from *Miller*.

¹⁶⁸ *Miller*, 132 S. Ct. at 2482.

“uncommon . . . may well cause trial judges to shy away from imposing life without parole sentences and embolden appellate judges to set them aside when they are imposed.”¹⁶⁹ This statement by the Court, Justice Thomas believes, is the Court’s attempt to “shape the societal consensus of tomorrow.”¹⁷⁰ However, based on the trends arising so far, it appears that some courts and state entities are doing their best to avoid *Miller’s* intent.¹⁷¹

III. WAYS IN WHICH COURTS ARE ABIDING BY *MILLER*

An evaluation of the various ways in which courts have responded in the wake of *Miller* shows that many courts are doing exactly what they should be doing: following the Court’s intent in *Miller* that juvenile homicide offenders receive individualized sentencing.¹⁷² Certain positive trends have emerged in the actions taken thus far by courts.¹⁷³ These actions can only be judged by their compliance, or lack thereof, with the Court’s mandate as set forth in *Miller* last summer. The following sections identify the proper course of actions that have been taken in the wake of *Miller*.

A. Remanding Mandatory Life-Without-The-Possibility-Of-Parole Cases for Resentencing Hearings

The clearest form of compliance with *Miller* comes in the form of appellate courts that remanded cases in which mandatory life-without-the-possibility-of-parole sentences were imposed on defendants who were juveniles at the time they committed homicide offenses. The Court in *Miller* concluded its extensive opinion with a straightforward holding:

By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment’s ban on cruel and unusual punishment.¹⁷⁴

Many courts across the country have construed these words to mean exactly what they say. From appellate courts in Texas, to Florida, to Pennsylvania, and California, decisions for remand and resentencing are pouring in, as courts far and wide do their part to ensure that juveniles affected by the

¹⁶⁹ *Id.* at 2486.

¹⁷⁰ *Id.*

¹⁷¹ *See infra* Part IV.

¹⁷² *Miller*, 132 S. Ct. at 2475.

¹⁷³ *See infra* Part III.

¹⁷⁴ *Miller*, 132 S. Ct. at 2475.

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Miller holding receive their now constitutionally-protected right to individualized sentencing.¹⁷⁵

Even in a Florida appellate case where the conviction and sentence were reversed for other reasons, the appellate court still took the time to mention the holding in *Miller* and warned that the “trial court should be mindful of *Miller*.”¹⁷⁶

B. *U.S. v. Maldonado*: Considering Mitigating Factors from *Miller*¹⁷⁷

During Sentencing Stage of Initial Trial

While nearly all of the cases to address *Miller* so far are from the appellate level, *U.S. v. Maldonado*¹⁷⁸ is a post-*Miller* trial court level case that involved the conviction of a juvenile for homicide offenses and the imposition of a life sentence.¹⁷⁹ In its opinion, the *Maldonado* court took the factors set forth in *Miller* into consideration prior to making a ruling.¹⁸⁰

The court in *Maldonado* weighed the defendant’s age, level of remorse, prior criminal history, “capacity or will to rehabilitate himself,” a psychological evaluation, and “all of the ‘hallmark features’ associated with a person of that young age,” against the nature and gravity of the crimes he was convicted of.¹⁸¹ Based on its analysis, the court in *Maldonado* still found a life sentence to be appropriate under the circumstances,¹⁸² which is fully in line with the Court’s intent in *Miller*.¹⁸³

C. Properly Handling a Statutory Presumption of Life-Without-the-Possibility-of-Parole in California

The appellate cases arising in California under *Miller* appear to be focused on California Penal Code Section 190.5(b),¹⁸⁴ which, although not

¹⁷⁵ See *People v. Silva*, No. B225127, 2012 WL 6721537 (Cal. Ct. App. Dec. 28, 2012); *People v. Moffett*, 148 Cal. Rptr. 3d 1465 (Cal. Ct. App. 2013); *People v. Banks*, No. 08CA105, 2012 WL 4459101 (Colo. App. Sept. 27, 2012); *Rocker v. State*, No. 2D10-5060, 2012 WL 5499975 (Fla. Dist. Ct. App. Nov. 14, 2012) (opinion withdrawn); *Washington v. State*, 103 So. 3d 917 (Fla. Dist. Ct. App. 2012); *State v. Simmons*, 99 So. 3d 28 (La. 2012); *State v. Graham*, 99 So. 3d 28 (La. 2012); *State v. Brooks*, No. 47,394-KA, 2012 WL 6163089, (La. Ct. App. Dec. 12, 2012); *Commonwealth v. Knox*, 50 A.3d 732 (Pa. Super. Ct. 2012); *Commonwealth v. Lofton*, 57 A.3d 1270 (Pa. Super. Ct. 2012); *Wilson v. State*, No. 14-09-01040, 2012 WL 6484718 (Tex. App. Dec. 13, 2012); *Henry v. State*, No. 05-11-00676 CR, 2012 WL 3631251 (Tex. App. Aug. 24, 2012).

¹⁷⁶ *Miller v. State*, 127 So. 3d 580, 587 (Fla. Dist. Ct. App. 2012).

¹⁷⁷ *Miller*, 132 S. Ct. at 2468.

¹⁷⁸ *U.S. v. Maldonado*, No. 09 Cr. 339-02, 2012 WL 5878673 (S.D.N.Y. Jan. 21, 2013).

¹⁷⁹ *Id.* at *1.

¹⁸⁰ *Id.* at *9-10.

¹⁸¹ *Id.*

¹⁸² *Id.* at *10 (quoting *Miller*).

¹⁸³ *Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012).

¹⁸⁴ CAL. PENAL CODE § 190.5(b) (1990).

mandatory, seemingly creates a presumption in favor of life-without-the-possibility-of-parole sentences for juveniles who commit a particular murder crime.¹⁸⁵ Section 190.5(b) states that “[t]he penalty for a defendant found guilty of murder . . . who was . . . under the age of 18 years at the time of the commission of the crime, shall be confinement in the state prison for life without the possibility of parole or, at the discretion of the court, 25 years to life.”¹⁸⁶

In three California appellate cases¹⁸⁷ arising under *Miller*, which all deal with this Section, the courts were able to resist the temptation to take the easy way out by simply proclaiming that the sentencing scheme is discretionary, and thus, not falling under *Miller*. The courts understood that Section 190.5(b) created the potential for a trial court to fail to provide a juvenile with individualized sentencing by merely imposing the proscribed life-without-the-possibility-of-parole sentence.¹⁸⁸

In each case, the court assessed whether the trial court actually considered all potentially mitigating factors before imposing life sentences.¹⁸⁹ Ultimately, all three sentences were approved because the sentencing courts took the mitigating factor of youth into consideration prior to imposing a sentence.¹⁹⁰

D. Remanding Discretionary Punishment Case For Resentencing Due to Failure to Consider Mitigating Factors

Another example of how courts are abiding by the spirit of *Miller* is *Daugherty v. State*,¹⁹¹ where the seventeen-year-old defendant was sentenced to life-without-the-possibility-of-parole for committing a second-degree murder, as well as two counts of attempted second-degree murder, under a discretionary sentencing scheme in Florida.¹⁹² Again, the court could have justified affirming the sentence by pointing to the fact that this sentence was not mandatory, and thus not encompassed by *Miller*. However, the court in *Daugherty* chose to abide by the spirit of *Miller* and

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ See *People v. Abella*, No. Co66010, 2013 WL 28896 (Cal. Ct. App. Jan. 3, 2013); *People v. Gutierrez*, 147 Cal. Rptr. 3d 249 (Ct. App. 2012); *Lewis v. Miller*, No. 2:11-cv- 0423 LKK EFB P, 2012 WL 4469236 (E.D. Cal. Sept. 27, 2012).

¹⁸⁸ See *Abella*, 2013 WL 28896, at *7-8; *Gutierrez*, 147 Cal. Rptr. 3d at 260-61; *Lewis*, 2012 WL 4469236, at *22.

¹⁸⁹ See *Abella*, 2013 WL 28896, at *7; *Gutierrez*, 147 Cal. Rptr. 3d at 61; *Lewis*, 2012 WL 4469236, at *22.

¹⁹⁰ See *Abella*, 2013 WL 28896, at *8; *Gutierrez*, 147 Cal. Rptr. 3d at 61; *Lewis*, 2012 WL 4469236, at *22.

¹⁹¹ *Daugherty v. State*, 96 So. 2d 1076 (Fla. Dist. Ct. App. 2012).

¹⁹² *Id.* at 1077.

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evaluated whether the trial court properly considered all mitigating factors before imposing this sentence.¹⁹³

The court in *Daugherty* stated that, although this is a discretionary sentence, *Miller* requires that “judges must take an individualized approach to sentencing juveniles in homicide cases and consider factors which predict whether a juvenile is amenable to reform or beyond salvation.”¹⁹⁴ Moreover, the court here recognized that the Court in *Miller* “stressed the sentencing judge’s responsibility” to consider the defendant’s youth and how it makes him different, culpability-wise, from an adult.¹⁹⁵

After evaluating the trial court’s analysis prior to sentencing, the court in *Daugherty* concluded that while the trial court considered the defendant’s remorse for committing the crimes, as well as his “upbringing,” the trial court failed to “expressly consider” whether any mitigating factors related to youth are present and would “diminish” the justifications for the life-without-the-possibility-of-parole sentence.¹⁹⁶ The court remanded the case for additional sentencing proceedings and made it clear that a life-without-the-possibility-of-parole sentence may still be imposed, so long as a thorough evaluation of the defendant’s circumstances justified it.¹⁹⁷

E. Striking Down Term-of-Years Sentences that “Amounts to the Functional Equivalent of a Life Without Parole Sentence”¹⁹⁸

In *Miller*, the Court stated that “we require . . . [a sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”¹⁹⁹ While a sentencing scheme that imposes a mandatory life-without-the-possibility-of-parole sentence is the most obvious form of life imprisonment, a term-of-years sentence ranging from 70 years, to 80 years, and even over 100 years in prison, creates these same issues. This is especially true when no parole date is provided, or when the parole date will not come until the inmate is at least well into his nineties.

While not a homicide case, *People v. Caballero*²⁰⁰ has rightly set the tone for how lengthy term-of-years sentences for juvenile homicide offenders should be treated under *Miller*. In *Caballero*, the defendant, who was sixteen years old at the time of his crimes, was convicted of three

¹⁹³ *Id.* at 1079.

¹⁹⁴ *Id.*

¹⁹⁵ *See id.*

¹⁹⁶ *Id.* at 1080.

¹⁹⁷ *Id.*

¹⁹⁸ *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012).

¹⁹⁹ *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

²⁰⁰ 282 P.3d 291 (Cal. 2012).

counts of attempted murder and sentenced to consecutive sentences totaling 110 years to life.²⁰¹ While the analysis at the appellate level focused mostly on *Graham*, the court in *Caballero* did incorporate *Miller* into its discussion.²⁰²

The court in *Caballero* noted that the defendant would not become parole eligible for over 100 years and stated that this sentence “amounts to the functional equivalent of a life without parole sentence.”²⁰³ Pursuant to the holding in *Graham*, the court here concluded that this sentence violated the Eighth Amendment because the “parole eligibility date . . . falls outside the juvenile offender’s natural life expectancy,” and the defendant would have “no opportunity to ‘demonstrate growth and maturity’ to try to secure his release.”²⁰⁴

Utilizing *Caballero*, the courts in two other California appellate cases that did involve juvenile homicide offenders who received lengthy term-of-years sentences reasoned and concluded that both sentences violated *Miller*.²⁰⁵

In *People v. Argeta*, the fifteen-year-old defendant was convicted of murder and attempted murder and received an aggregate sentence of 100 years in prison.²⁰⁶ Moreover, the defendant would not become eligible for parole for at least seventy-five years, which, as the court here stated, “likely requires that he be in prison for the rest of his life.”²⁰⁷ Relying on *Miller* and *Caballero*, the court in *Argeta* remanded the case for resentencing, citing *Caballero*’s reasoning that this type of sentence was the “functional equivalent of a life sentence without possibility of parole.”²⁰⁸

In *People v. Thomas*, which involved another fifteen-year-old defendant, the trial court imposed an aggregate prison sentence of 196 years to life for a multitude of convictions, including first-degree murder.²⁰⁹ The court in *Thomas* quoted the trial judge’s statement during sentencing which, not surprisingly, seemingly involved an attempt to side-step the Court’s intent in *Miller*.²¹⁰ The trial judge stated the following during sentencing: “I choose consecutive. And *it’s not going to be an LWOP* [(i.e., a term of life without the possibility of parole)] *because I’m prohibited to do that because*

²⁰¹ *Id.* at 293.

²⁰² *Id.* at 293-95.

²⁰³ *Id.* at 295.

²⁰⁴ *Id.* (citation omitted).

²⁰⁵ See *People v. Argeta*, 210 Cal. App. 4th 1478, 1482 (2012); *People v. Thomas*, 211 Cal. App. 4th 987, 1016 (2012).

²⁰⁶ *Argeta*, 210 Cal. App. 4th at 1482.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Thomas*, 211 Cal. App. 4th at 1014-15.

²¹⁰ See *id.* at 1015.

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of his age.”²¹¹ He then went on to say that “there’s no bright light at the end of the table for . . . [the defendant] . . . on this. [S]o I intend to [run] consecutive everything I can.”²¹²

The court in *Thomas* then stated that the trial judge was incorrect in believing that a 196 year sentence was not equivalent to a sentence of life-without-the-possibility-of-parole.²¹³ Once again, the court in *Thomas* relied on *Caballero*’s rationale, along with *Miller*, and remanded the case for resentencing.²¹⁴

Whether the trial judge’s attempt to side-step *Miller*’s ban on mandatory life-without-the-possibility-of-parole sentences for juvenile homicide offenders was intentional, or just simply a misunderstanding, it shows how easily sentencing courts can manipulate the system with term-of-years sentences. It will be up to appellate courts to continue to catch and correct these “mistakes” in the future.

IV. WAYS THAT MILLER CAN BE SIDE-STEPPED

While many courts are following the spirit of *Miller* to the fullest extent, others, including entire states, appear to be evading the true purpose of this landmark decision in an effort to maintain the status quo. Whatever the reason for their actions, whether it be political, ideological, social, etc., it is important to recognize the mistakes early on because the constitutional rights of thousands of individuals may be detrimentally impacted.

A. States Commuting Mandatory Life-Without-the-Possibility-of-Parole Sentences to Lesser Sentences for Juvenile Homicide Offenders

Maybe the most alarming and dangerous way that *Miller* can be side-stepped, due to how easy, public, and political it appears, is state entities, specifically governors and attorneys general, commuting juvenile homicide offenders’ mandatory life-without-the-possibility-of-parole sentences to lesser sentences that still lack the element of individualization. Although the United States is still in the early stages of sentencing jurisprudence following *Miller*, two states are already making a big splash nationally with their envisioned solutions in the wake of the Court’s decision.²¹⁵

²¹¹ *Id.* (internal citations omitted).

²¹² *Id.*

²¹³ *Id.* at 1016.

²¹⁴ *Id.*

²¹⁵ See James Q. Lynch et. al, *Branstad Commutes Life Sentences for 38 Iowa Juvenile Murderers*, THE GAZETTE (July 16, 2012), <http://thegazette.com/2012/07/16/branstad-commutes-life-sentences-for-38-iowa-juvenile-murderers>; Todd Cooper, *Pardons Board Can't Speed Action on Juveniles' Life Terms*, KEARNEY HUB (Dec. 14, 2012), http://www.kearneyhub.com/news/state/pardons-board-can-t-speed-action-on-juveniles-life-terms/article_7b04feec-45f2-11e2-96c8-001a4bcf887a.html.

1. Iowa

In Iowa, Governor Terry Branstad did not waste any time this past summer in stirring up a controversy over his solution following *Miller* to commute the crimes for the thirty-eight juvenile homicide offenders in Iowa, who all received mandatory life-without-the-possibility-of-parole sentences upon being convicted.²¹⁶ Governor Branstad “ordered each of the offenders to instead serve a mandatory 60 years before being considered for parole.”²¹⁷ The Iowa governor explained his actions in a newspaper interview on July 16, 2012.²¹⁸

According to the governor, he made this decision after he “carefully reviewed” the Court’s ruling in *Miller* and “consulted with the Iowa Attorney General’s Office, victims’ families and county prosecutors.”²¹⁹ Governor Branstad further stated that he disagreed with the Court’s decision in *Miller*, calling the decision “cruel and unusual punishment” for putting victims and their families through “agony.”²²⁰ Moreover, the Governor elaborated on his concern for the emotional toll on the victims and their families in a separate news conference shortly after he made this controversial decision to commute the sentences.²²¹

In that press conference, Governor Branstad stated that it was important to remember the victims and not force them to “relive the pain of the tragedies.”²²² Expressing his reasoning for his decision, he stated that the decision was made “to protect these victims, their loved ones’ memories, and to protect the safety of all Iowans.”²²³ The Iowa Attorney General supported the Governor, stating that, “[Iowa] needs to do all it can *within the confines of the U.S. Supreme Court decision* to help protect public safety.”²²⁴

However, whether commuting these juveniles’ life-sentences to a 60 year sentence follows the spirit of *Miller* is doubtful. The Court in *Miller* explicitly stated in its holding that “our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalties for juveniles,” i.e. life in prison.²²⁵ Imposing a blanket, universal sentence

²¹⁶ Lynch, *supra* note 215.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* (emphasis added).

²²⁵ *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012).

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to all of these inmates defies any reasonable notion of what “individualized” means.

Moreover, while a 60 year sentence is not technically a mandatory life-without-the-possibility-of-parole sentence, it may become the “functional equivalent” of one, as stated in *Caballero*, depending on the circumstances.²²⁶ If some of these juveniles were eighteen years old or older at the time of their convictions, they would still essentially be facing a lifetime in prison before ever becoming eligible for release. Thus, without any of them receiving the individualized sentencing intended by the Court in *Miller*, their constitutional rights are still being violated.

2. Nebraska

The Nebraska Board of Pardons (“Board”) has also expressed its desire to commute the sentences of their juvenile homicide offenders who received mandatory life-without-the-possibility-of-parole.²²⁷ The Board consists of Nebraska Governor Dave Heineman, Attorney General Jon Bruning, and Secretary of State John Gale.²²⁸ Unlike in Iowa, the Nebraska Supreme Court delayed the plan after challenges were made from local defense attorneys.²²⁹ The Board’s plan to commute the sentences of twenty-four Nebraska prisoners affected by *Miller* to sentences of 50, 70, 90, or even up to 100 years in prison arose in November, 2012.²³⁰ Furthermore, the Board’s plan was based on similar rationale expressed by the Iowa Governor.²³¹ The Attorney General’s spokeswoman stated that the Nebraska Supreme Court’s ruling to halt the Board’s plan was “contrary to Attorney General Bruning’s goal of protecting the public from violent criminals.”²³²

As discussed earlier, automatically applying these sentences across the board fails to allow for each of the twenty-four prisoners to receive individualized sentencing hearings.²³³ Commuting sentences does not allow for a sentencer to consider the “mitigating qualities of youth” that the Court in *Miller* found essential to consider prior to imposing what amounts to life sentences for juveniles.²³⁴ Make no mistake, any sentence approaching 100 years, regardless of how young the defendant is, will ensure that the

²²⁶ *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012).

²²⁷ *Cooper*, *supra* note 215.

²²⁸ *Id.*

²²⁹ *See id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *See supra* Part IV.A.1.

²³⁴ *See Miller v. Alabama*, 132 S. Ct. 2455, 2467 (2012) (internal citations omitted).

convicted exhale their final breaths in a prison cell.

B. Imposing Sentences at Trial that are the Functional Equivalent of Life in Prison Without Considering Mitigating Factors

As discussed earlier, imposing a lengthy term-of-years sentence can be the functional equivalent of life-without-the-possibility-of-parole because juveniles will spend the great majority of their lifetimes in a prison cell. While some courts, such as the one in *Caballero*, are effectively dealing with these types of sentences in light of the Court's ruling in *Miller*, there is always the strong possibility that courts may justify this sentence as not falling within the purview of *Miller*.

After all, the Court in *Miller* did state that, instead of sentencing a juvenile to mandatory life-without-the-possibility-of-parole, one alternative is "a lengthy term of years" sentence.²³⁵ However, the Court also emphasized that less-harsh, alternative sentences could be imposed through the use of "discretionary sentencing."²³⁶ Discretionary sentencing, according to the Court, means "a judge or jury must have the opportunity to consider mitigating circumstances."²³⁷

Furthermore, the Court in *Miller* reiterated what it stated in *Graham* about the similarities between life-without-the-possibility-of-parole sentences and the death penalty when it comes to juveniles.²³⁸ Referring to juveniles, the Court stated that "[i]mprisoning an offender until he dies alters the remainder of his life 'by a forfeiture that is irrevocable,'" and this is "especially harsh" because a juvenile "will almost inevitably serve 'more years in prison and a greater percentage of his life in prison than an adult offender.'"²³⁹ And just as the court in *Caballero* reasoned, a lengthy terms-of-years sentence may prohibit a juvenile from seeking release until after his "natural life expectancy" has passed, and thus, is the "functional equivalent of life without parole."²⁴⁰

Thus, a court simply imposing a lengthy term-of-years sentence on a juvenile for a homicide conviction without conducting individualized sentencing, which would see the juvenile locked up for a majority of his or her entire life, arguably contradicts the Court's intent in *Miller*.

One case that may act as a precursor for these kinds of sentences, as well as a guide post for courts who disagree with *Miller's* intent, is *Bunch v.*

²³⁵ See *id.* at 2474-75.

²³⁶ *Id.* at 2474.

²³⁷ *Id.* at 2475.

²³⁸ See *id.* at 2466.

²³⁹ See *id.* (citation omitted).

²⁴⁰ See *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012).

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Smith,²⁴¹ a Sixth Circuit case. In *Bunch*, a sixteen-year-old was convicted of multiple non-homicide offenses.²⁴² The state trial court sentenced the juvenile to consecutive, fixed terms, totaling 89 years in prison.²⁴³ The trial court imposed the maximum term of imprisonment for several of the counts, while never appearing to consider any mitigating factors.²⁴⁴

The juvenile argued that his sentence was the “functional equivalent of life without parole” and “tantamount to a life sentence” under *Graham*.²⁴⁵ However the court in *Bunch* denied his appeal and distinguished his case from the type covered by *Graham*.²⁴⁶ The court stated that the main difference between the instant case and *Graham* is that the defendant in *Graham* was sentenced to life in prison while the juvenile here received consecutive, fixed term sentences.²⁴⁷

Moreover, the court in *Bunch* reasoned that *Graham* did not “address” juvenile offenders who receive lengthy sentences.²⁴⁸ The court even acknowledged that the 89-year sentence “may end up being the functional equivalent of life without parole,” but because the juvenile did not receive a life sentence as in *Graham*, he is not entitled to an opportunity for meaningful release.²⁴⁹

Courts in the future may apply this same reasoning when it comes to juveniles raising appeals under *Miller* for 70, 80, or 90-year sentences. Courts may reason that *Miller* only covers *mandatory* life-without-the-possibility-of-parole sentences, and thus there is no constitutional barrier to prevent a court from imposing an 80-year sentence on a seventeen-year-old. While this interpretation may comply with *Miller* on its face, locking a juvenile up for the remainder of his life, without providing for the opportunity to consider mitigating factors, appears to be what the Court in *Miller* sought to avoid.

In *Bunch*, there was no question as to how the trial judge intended to sentence the juvenile offender, stating to the juvenile during sentencing that, “I just have to make sure that you don’t get out of the penitentiary. I’ve got to do everything I can to keep you there.”²⁵⁰ When judges believe that a juvenile defendant deserves to be in prison forever, some may turn to

²⁴¹ 685 F.3d 546 (6th Cir. 2012).

²⁴² *Id.* at 547.

²⁴³ *Id.*

²⁴⁴ *Id.* at 548.

²⁴⁵ *Id.* at 547.

²⁴⁶ *Id.* at 550-51.

²⁴⁷ *Id.* at 551.

²⁴⁸ *Id.*

²⁴⁹ *See id.*

²⁵⁰ *Id.* at 548 (internal citations omitted).

questionable methods such as these to ensure that a convicted juvenile cannot, and will not, cause any more harm to society.²⁵¹ But the Court's intent in *Miller* was to prevent a juvenile from receiving "a sentence of life (and death) in prison" prior to first receiving an individualized sentencing hearing.²⁵²

C. Hiding Behind Discretionary Sentencing Schemes Without Actually Considering Mitigating Factors

Another route that courts may take that is similar in theory to imposing lengthy term-of-years sentences is refusing to remand cases for resentencing based on the fact that the imposed sentence was technically discretionary, and thus, does not fall within the scope of the Court's decision in *Miller* of banning mandatory life-without-the-possibility-of-parole sentences. Similar to a term-of-years sentence, a judge can choose to impose a life-without-the-possibility-of-parole sentence instead of being mandated to do so by the language of a state's criminal code.

This type of situation is obviously facially different from the defendants' situations in *Miller*, who were both convicted in states with mandatory life-without-the-possibility-of-parole statutes.²⁵³ And courts could simply use similar logic that the court in *Bunch* employed and justify their appeal denials by stating that the holding in *Miller* is limited to only mandatory life-without-the-possibility-of-parole sentences.²⁵⁴

An example of a court utilizing this type of justification in denying a juvenile's appeal for resentencing under *Miller* is *State v. James*.²⁵⁵ In *James*, the seventeen-year-old defendant was convicted of several homicide and non-homicide counts and sentenced to an aggregate prison term of 315 years in prison, with a requirement that nearly 268 of those years be served prior to becoming eligible for parole.²⁵⁶ The trial court imposed several consecutive and concurrent punishments subject to the No Early Release Act,²⁵⁷ without appearing to hold a hearing to consider any potential mitigating factors.²⁵⁸

The juvenile then appealed his sentence under *Miller*, arguing that

²⁵¹ While *Bunch* provides an overt example of how a court can make an erroneous ruling under *Miller*, it shows how easily the spirit of *Miller* can be sidestepped.

²⁵² *Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012).

²⁵³ *Id.* at 2461-63.

²⁵⁴ See *Bunch v. Smith*, 685 F.3d 546, 553 (6th Cir. 2012).

²⁵⁵ *State v. James*, No. 02-08-2875, 2012 WL 3870349 (N.J. Super. Court. App. Div. Sept. 7, 2012).

²⁵⁶ *Id.* at *1.

²⁵⁷ *Id.*

²⁵⁸ See *id.*

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“though not mandatory, [his sentence] equates to a life sentence without parole, and therefore, runs afoul of *Miller*.”²⁵⁹ The state appellate court in *James* went on to deny this appeal by providing a very brief and undetailed explanation for its decision.²⁶⁰ The court pointed out that the defendants in *Miller* can be distinguished from the defendant here because those defendants were punished under mandatory sentencing schemes, absent any ability for a trial judge to use discretion.²⁶¹

Furthermore, the court here mentioned that the Court’s decision in *Miller* was based on two strands of precedent: 1) categorical bans on disproportionate punishments, and; 2) prohibiting the mandatory imposition of capital punishments.²⁶² The court in *James* reasoned that the fact that the trial judge here had the discretion to impose different types of sentences rendered the *Miller* holding and its reliance on these two strands of precedent “inapposite.”²⁶³

While the Court’s holding in *Miller*, narrowly read, does only refer to mandatory life-without-the-possibility-of-parole sentences as being unconstitutional,²⁶⁴ courts like the one in *James* conveniently fail to mention what the Court had to say in the immediately succeeding paragraph to its holding (as well as ignoring the rest of the opinion). The Court in *Miller* stated that while its holding is sufficient to decide the two cases, they did not think it necessary to consider the defendants’ argument for imposing a categorical ban on life-without-the-possibility-of-parole on juveniles.²⁶⁵ As *Miller* was a 5-4 opinion, it is easy to see why the majority would leave this question for another day in its effort to secure the five votes.

Moreover, the Court then stated the following: “[b]ut 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.”²⁶⁶ Thus, while the Court in *Miller* is not “foreclos[ing]” a sentencing court’s ability to sentence a juvenile to life-without-the-possibility-of-parole, it clearly is not advocating for this type of sentence to automatically or even typically be used in the alternative.²⁶⁷

Additionally, this may be the Court’s way of implicitly placing the

²⁵⁹ *Id.* at *13.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *See id.* at 2469.

legal world on notice that a categorical ban on life-without-the-possibility-of-parole sentences for juveniles may be coming in the future. A close look at the trend of the Court's Eighth Amendment cases addressing sentencing schemes for juveniles seems to suggest that this type of ban may be likely in the future.

Chief Justice Roberts even acknowledged this point in his dissenting opinion.²⁶⁸ The Chief Justice stated that "[t]oday's holding may be limited to mandatory sentences, but the Court has already announced that discretionary life without parole for juveniles should be . . . 'unusual.'"²⁶⁹ He further stated that the "Court's gratuitous prediction appears to be . . . an invitation to overturn life without parole sentences imposed by juries and trial judges," and that the Court may be on its way to holding that the Eighth Amendment prohibits these sentences for juveniles.²⁷⁰

What does all of this mean? It means that the Court in *Miller* is troubled by the current landscape of juvenile sentencing, especially when it comes to juveniles serving their entire lives in a prison cell. Moreover, it appears that the words *discretionary sentencing* hold much more meaning and weight in the Court's minds than in the minds of a few lower courts.

D. Looking for Alternative Sentencing Schemes

One judicial methodology that may be employed by future courts applying *Miller* is to identify and use alternative sentencing options that are available.²⁷¹ Instead of providing for individualized sentencing as mandated in *Miller*,²⁷² courts may look to their state statutes for the harshest, constitutionally permissible punishment available,²⁷³ or revive a previous version of the sentencing statute that would not technically violate the Court's holding in *Miller*.²⁷⁴

In *People v. Banks*, the defendant, fifteen years old at the time, was convicted of first-degree murder and sentenced to life-without-the-possibility-of-parole in Colorado.²⁷⁵ The appellate court correctly found that *Miller* bars this punishment and remanded the case for resentencing.²⁷⁶

²⁶⁸ See *id.* at 2481 (Roberts, C.J., dissenting).

²⁶⁹ *Id.*

²⁷⁰ See *id.*

²⁷¹ See *People v. Banks*, No.09CA0105, 2012 WL 4459101, at *20-21 (Colo. App. Sept. 27, 2012); *Partlow v. State*, No.1D10-5896, 2013 WL 45743, at *3-8 (Fla. Dist. Ct. App. Jan. 4, 2013) (concurring).

²⁷² *Miller*, 132 S.Ct. at 2475.

²⁷³ *Banks*, 2012 WL 4459101, at *20-21.

²⁷⁴ *Partlow*, 2013 WL 45743, at *4.

²⁷⁵ *Banks*, 2012 WL 4459101, at *1.

²⁷⁶ *Id.* at *20-21.

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If the court in *Banks* had stopped at that point, there would be no issues to speak of; however, the court goes on to provide instructions to the lower court regarding what sentence should be imposed during resentencing.²⁷⁷

Instead of simply remanding for a resentencing hearing so that the lower court may consider mitigating factors, the court in *Banks* decided to apply Colorado's codified severability clause.²⁷⁸ This resulted in the court's instructing that the defendant be sentenced to life-imprisonment-with-the-possibility-of-parole after forty years.²⁷⁹ Although the Court in *Miller* was focused on eliminating mandatory life-without-the-possibility-of-parole sentences,²⁸⁰ the majority of the opinion is devoted to detailing the legal differences between adults and juveniles, and how these differences need to be considered before imposing a sentence with the potential for a lifetime spent in prison.²⁸¹

Moreover, the Court in *Miller* even explicitly stated that "*Roper* and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders."²⁸² But in *Banks*, the court was doing its best "to impose the most serious penalty that is constitutionally permissible for such offenders."²⁸³

A fair reading of *Miller* would suggest that the point is not to merely impose the harshest penalty possible, but rather to make a justified sentencing determination based on all of the relevant information available to the court, including factors associated with the defendant's youth.

The concurrence in *Partlow v. State* brings to light a slightly different proposition than *Banks*, but is similarly based on an apparent effort to side-step *Miller*.²⁸⁴ In *Partlow*, the court correctly reversed the juvenile defendant's mandatory life-without-the-possibility-of-parole sentence for resentencing.²⁸⁵ While Judge Makar agreed with the remand for resentencing under *Miller*, he wrote separately to propose that Florida courts should revive the state's previous sentencing scheme, which would have imposed sentences of life-with-the-possibility-of-parole after twenty-five years.²⁸⁶

²⁷⁷ *Id.*

²⁷⁸ *Id.* at *20.

²⁷⁹ *Id.* at *21.

²⁸⁰ *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012).

²⁸¹ *See generally id.* at 2455.

²⁸² *Id.* at 2465.

²⁸³ *Banks*, 2012 WL 4459101, at *21.

²⁸⁴ *Partlow v. State*, No.1D10-5896, 2013 WL 45743, at *8 (Fla. Dist. Ct. App. Jan. 4, 2013).

²⁸⁵ *Id.* at *1.

²⁸⁶ *Id.* at *4.

With the current sentencing scheme for juvenile homicide offenders in Florida being ruled unconstitutional by the *Miller* Court, Judge Makar believed that reverting back to the old sentencing scheme, which does not involve a mandatory life sentence, would comply with the holding in *Miller*.²⁸⁷ He stated that reverting to this previous sentencing scheme would not contrast with the “individual-centric approach to sentencing juveniles” in *Miller* because a sentence that allows for parole is “quantitatively and qualitatively a far different sentence from mandatory life without parole.”²⁸⁸

While not unreasonable, Judge Makar’s argument is still somewhat contradictory. Judge Makar managed to openly acknowledge that the Court’s intent in *Miller* was for an “individual-centric approach,”²⁸⁹ while at the same time arguing for an across-the-board imposition of this alternative sentence.²⁹⁰ The problem with across-the-board sentencing is that it fails to provide each juvenile previously sentenced to a mandatory life-without-the-possibility-of-parole sentence with the ability to receive an individualized resentencing hearing, which would allow the court to consider any and all mitigating factors.

Granted, if a court imposes a 75 year sentence with the possibility of parole after 25 years, then the argument that the juvenile would not have any meaningful opportunity for release is obviously weakened. But what if the possibility of parole is after 40 years of incarceration, as in *Banks*?²⁹¹ Or 60 years? This becomes a much closer question worth analyzing before states decide to take any sweeping legislative steps.

Judge Makar later points out that it may be “too costly [for the State] to conduct potentially burdensome youth-mitigating hearings in these cases; mitigation litigation is expensive.”²⁹² Additionally, some may argue that it would be difficult for any court to recreate or replicate the circumstances surrounding cases that may have originally occurred ten, twenty, or even thirty years ago. Not to mention the emotional turmoil that the victims’ families and loved ones would have to endure once again, as the Governor from Iowa pointed out.²⁹³

While these are important concerns and should be addressed if possible, any proposed solution to these concerns cannot trample the constitutionally guaranteed right of another. The Court in *Miller* made no mention of these concerns, focusing instead on correcting what it believed

287 *See id.* at *8.

288 *Id.*

289 *Id.*

290 *See id.* at 4-8.

291 *People v. Banks*, No.09CA0105, 2012 WL 4459101, at *21 (Colo. App. Sept. 27, 2012).

292 *Partlow*, 2013 WL 45743, at *10.

293 *Lynch*, *supra* note 215.

to be the most troublesome issue presented to it by the parties that day: a violation of thousands of juveniles' constitutional right against cruel and unusual punishment.

CONCLUSION

It is clear from the Court's recent record that the way juveniles are to be perceived and treated under the law is evolving and crystallizing with every new decision. The Eighth Amendment, as it applies to the youth of America, has taken on a distinct meaning and a unique set of principles for all courts across the nation to adopt and abide by, whether agreeable or not. Society recognizes the cognitive, emotional, and developmental differences between adults and juveniles, and these differences are reflected all around us.

From the disparities in legal rights and obligations owned and owed by adults and juveniles, to the endless volumes of academic studies and research indicating why and how juveniles are different, it would be difficult, to say the least, for anyone to enthusiastically argue against the widely accepted idea that individuals under the age of eighteen are *generally* less emotionally mature, cognitively developed, and "unsalvageable" when compared to adults.

This is not to say that juveniles cannot commit unspeakable and unthinkable crimes, deserving of the harshest penalties available under the criminal justice system. However, as the Court realized in *Miller*, the only true, fair, and constitutional way to determine if a juvenile's devastating crime is deserving of a de facto death sentence, such as life-without-the-possibility-of-parole, is for a sentencing court to take into consideration any and all mitigating factors of youth that may exist prior to imposing this sentence on a juvenile homicide offender.

Maybe this evaluation will turn up nothing worthy of lessening the juvenile's punishment, and maybe a life-without-the-possibility-of-parole sentence is exactly what a convicted juvenile has earned with his crimes. The Court is fine with that conclusion in the most deserving of occasions. But if this conclusion is formed, and this punishment imposed, in the absence of a full consideration of mitigating factors, then sentencing courts are not abiding by the Court's intent.

The juvenile justice system was founded on an ideal that somehow was forgotten and lost over time: juveniles can be rehabilitated. The Court seems to be making an effort to revive this ideal by limiting the sentencing abilities of lower courts when it comes to juveniles. Despite this effort, courts and state entities are having little difficulty finding ways to side-step the intent of *Miller*, and there may be no way to stop them without further action from the Court.

The Court should explicitly address whether actions such as commuting sentences, imposing lengthy term-of-years sentences without a meaningful opportunity for release, and reverting to older sentencing schemes, all of which lack any individualized sentencing mechanism, are sufficient to satisfy the spirit of *Miller*. If these actions are not what the Court had in mind, as I believe is the case, then the Court should lay out exactly what type of procedure or individual hearing should be implemented, and in what circumstances, to ensure that juveniles' constitutional rights are not violated.