

## Evading *Miller*

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## INTRODUCTION

*Miller v. Alabama*<sup>1</sup> appeared to strengthen constitutional protections for juvenile sentencing that the United States Supreme Court recognized in *Roper v. Simmons*<sup>2</sup> and *Graham v. Florida*.<sup>3</sup> In *Roper*, the Court held that executing a person for a crime committed as a juvenile is unconstitutional under the Eighth Amendment.<sup>4</sup> In *Graham*, the Court held that sentencing a person to life without parole for a nonhomicide offense committed as a juvenile is unconstitutional under the Eighth Amendment.<sup>5</sup> In *Miller*, the Court held that a mandatory sentence of life without parole for a homicide offense committed by a juvenile is also unconstitutional under the Eighth Amendment.<sup>6</sup>

When *Miller* was decided, “nearly 2,500 prisoners [were] presently serving life sentences without the possibility of parole for murders they committed before the age of 18,”<sup>7</sup> with over 2,000 of them sentenced under a mandatory sentencing scheme.<sup>8</sup> But with no explicit pronouncement regarding retroactivity, states were left to determine whether *Miller* applied to persons whose sentences were already final by the time *Miller* was decided.<sup>9</sup> States that considered *Miller* retroactive then had to deter-

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

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

3. *Graham v. Florida*, 560 U.S. 48 (2010). Sometimes, a fourth case, *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011), is included in the still-evolving “kids are different” jurisprudence. See Shobha L. Mahadev, *Youth Matters: Roper, Graham, J.D.B., Miller, and the New Juvenile Jurisprudence*, CHAMPION, Mar. 2014, at 14, available at 38-MAR CHAMPION 14 (Westlaw). For further discussion, see Alex Dutton, *The Next Frontier of Juvenile Sentencing Reform: Enforcing Miller’s Individualized Sentencing Requirement Beyond the JLWOP Context*, 23 TEMP. POL. & CIV. RTS. L. REV. 173, 197 (2013) (“On four occasions—*Roper*, *Graham*, *J.D.B.*, and *Miller*—the Court has relied on th[e] doctrine [that juveniles are developmentally different from adults] to require that youth be treated differently than adults by the justice system.”). *J.D.B.* addressed the question of “whether the Miranda custody analysis includes consideration of a juvenile suspect’s age.” *J.D.B.*, 131 S. Ct. at 2401 (citation omitted). *J.D.B.* involves rights under the Fifth Amendment, whereas *Roper*, *Graham*, and *Miller* involve rights under the Eighth Amendment, which is the focus of this Article. However, *J.D.B.* suggests that the developmental difference should have implications far beyond the Eighth Amendment.

4. *Roper*, 543 U.S. at 578.

5. *Graham*, 560 U.S. at 82.

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

7. *Id.* at 2477 (Roberts, J., dissenting).

8. *Id.*

9. See *infra* Part II.A discussing retroactivity. The question of retroactivity may be determined by the Supreme Court this fall. See *Montgomery v. Louisiana*, 135 S. Ct. 1546 (2015) (granting certiorari). We say “may” for two reasons. The first is that the Court certified a question, in addition to the question of retroactivity raised by the petitioner, of whether the U.S. Supreme Court has “jurisdiction to decide whether the Supreme Court of Louisiana correctly refused to give retroactive

mine how those persons should be resentenced. There was also a prospective problem: aside from knowing that certain mandatory sentencing schemes were unconstitutional, states were left to apply the Court's observations regarding the differences between youth and adults for purposes of sentencing.

In the three years since *Miller*, states have responded with a variety of approaches; some state legislatures responded proactively, while others let their courts decide.<sup>10</sup> Some states have been faithful to the premise that juveniles should be sentenced differently from adults, while others have resisted it. The result is a patchwork of sentencing regimes that has benefited some juveniles, but has left thousands of others languishing in prison with no meaningful change to their sentences.<sup>11</sup> Commentator Mary Berkheiser notes: "The worst of it is that those who were sentenced to die in prison when they were as young as fourteen may yet be recondemned to live out that sentence."<sup>12</sup>

That thousands remain in prison with no relief for crimes committed as juveniles—even following *Miller*—is due in part to the Court's failure to explicitly make a pronouncement regarding retroactivity, as well as the lack of clarity regarding what protections are constitutionally required when juvenile offenders are sentenced, and when those protections apply. Without clear guidance, it is unsurprising that the states pri-

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effect in this case to our decision in *Miller v. Alabama*." *Id.* Further, the Court invited an amicus brief to argue against the Court's jurisdiction. See Docket Entry of Mar. 30, 2015, U.S. SUPREME COURT, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/14-280.htm> (last visited Aug. 28, 2015). Also, the Court previously accepted certiorari on identical questions in *Toca v. Louisiana*, but that petition was dismissed. See Docket Entry of Feb. 3, 2015, U.S. SUPREME COURT, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/14-6381.htm> (last visited Aug. 28, 2015); see also Helen Freund, *Release of Angola inmate leaves cases of 1,500 juvenile offenders in limbo, website reports*, TIMES-PICAYUNE (Feb. 20, 2015, 11:56 AM), [http://www.nola.com/crime/index.ssf/2015/02/release\\_of\\_angola\\_inmate\\_at\\_ce.html](http://www.nola.com/crime/index.ssf/2015/02/release_of_angola_inmate_at_ce.html).

10. See *infra* Part II; see also Cara H. Drinan, *Misconstruing Graham & Miller*, 91 WASH. U. L. REV. 785, 787–92 (2014) (discussing and criticizing various state legislative and judicial responses).

11. A number of commentators have been critical of both *Miller* and the states' responses to *Miller*. For further discussion on this topic, see, for example, Mary Berkheiser, *Developmental Detour: How the Minimalism of Miller v. Alabama Led the Court's "Kids Are Different" Eighth Amendment Jurisprudence Down a Blind Alley*, 46 AKRON L. REV. 489, 517 (2013) (concluding that *Miller*, by not going far enough, will result in a lack of uniformity and predictability and will result in a "process that is fraught with opportunities for prejudice and error"); Drinan, *supra* note 10, at 787–92 (discussing and criticizing various state legislative and judicial responses); Marsha L. Levick & Robert G. Schwartz, *Practical Implications of Miller and Jackson: Obtaining Relief in Court and Before the Parole Board*, 31 LAW & INEQ. 369, 408–09 (2013) (concluding that many "lifers" will face "a sentencing void, with no available constitutional sentence to guide re-sentencing courts" and noting the difficulties others will face before hostile parole boards).

12. Berkheiser, *supra* note 11, at 517.

marily responsible for sentencing juvenile offenders to life without parole have found ways to circumvent the premise animating *Miller*: that juvenile offenders should receive an individualized assessment of their biological traits and environmental influences when being sentenced to the law's harshest penalties.

Part I sets forth the holding in *Miller*. Part II describes the incoherent patchwork that has resulted in the three years since *Miller* as states implement and resist *Miller*'s mandate. Part III describes troubling disparities that exist with regard to youth subjected to the "law's most severe punishments"<sup>13</sup> based on geography and race. The Article concludes by observing that sentencing courts have yet to fully appreciate and implement what is constitutionally required to adequately account for the differences between youth and adults.

## II. WHAT *MILLER* SAYS

In order to understand *Miller v. Alabama*, it is necessary to appreciate its predecessor cases. The Court's decisions in *Roper* and *Graham* paved the way for *Miller*, and the cumulative impact of the three cases establishes that youth are different—not just biologically, but also legally.

In *Roper*, the Court concluded that sentencing youth to capital punishment constitutes cruel and unusual punishment.<sup>14</sup> In reaching this decision, the Court highlighted how "[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."<sup>15</sup> The same "signature qualities" that make youth less culpable—"impetuosity and recklessness"—also render youth more capable of reform.<sup>16</sup> Accordingly, the Court held that the death penalty was "disproportionate punishment for offenders under 18," and therefore unconstitutional.<sup>17</sup> *Roper* categorically bars capital punishment for juvenile offenders.

In *Graham*, the Court held that sentencing youth to life without parole for nonhomicide offenses constitutes cruel and unusual punishment.<sup>18</sup> In doing so, the Court relied once more on the biological differ-

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13. *Miller v. Alabama*, 132 S. Ct. 2455, 2471 (2012).

14. *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

15. *Id.* at 569 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

16. *Id.* at 570.

17. *Id.* at 575.

18. *Graham v. Florida*, 560 U.S. 48, 82 (2010).

ences between youth and adults, stating that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”<sup>19</sup> The Court noted how “parts of the brain involved in behavior control continue to mature through late adolescence.”<sup>20</sup> These biological differences in brain development render youth more immature, more likely to engage in risky behavior, and more vulnerable to external influences like peer pressure.<sup>21</sup> The Court reiterated that because youth brains are still developing well into late adolescence, their personality traits are more transient and more “capable of change than are [those of] adults.”<sup>22</sup> These youth-inherent traits led the Court to categorically bar sentences of life without parole for juvenile nonhomicide offenders.

*Miller* extended the Court’s reasoning in *Roper* and *Graham* to invalidate state penalty schemes mandating life without parole sentences for youth convicted of a homicide offense.<sup>23</sup> However, the Court did not categorically bar such sentences, as it did in *Roper* and *Graham*.<sup>24</sup>

*Miller* involved a direct appeal by Evan Miller, who was 14 years old at the time of his crime.<sup>25</sup> A companion case decided at the same time, *Jackson v. Hobbs*, involved a collateral challenge by Kuntrell Jackson, who was also 14 years old at the time of his crime. Evan Miller was charged and convicted of murder in the course of arson; Kuntrell Jackson was charged and convicted of capital felony murder and aggravated robbery.<sup>26</sup> Both the Alabama<sup>27</sup> and Arkansas<sup>28</sup> statutes under which Miller and Jackson were sentenced carried mandatory sentences of life imprisonment without the possibility of parole.<sup>29</sup> The Court ruled that such statutes were unconstitutional. It further made clear that mandatory sen-

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19. *Id.* at 68.

20. *Id.*

21. *Id.* at 91–92.

22. *Id.* at 68.

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

24. *Id.* at 2469 (“Because that holding is sufficient to decide these cases, [the Court does] not consider Jackson’s and Miller’s alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger.”). The narrowness of the holding has been criticized as unprincipled and unsound. See Berkheiser, *supra* note 11, at 514.

25. *Miller*, 132 S. Ct. at 2462.

26. *Id.* at 2461.

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

28. ARK. CODE ANN. § 5-4-104(b) (1997).

29. *Miller*, 132 S. Ct. at 2461, 2463. The Arkansas statute for capital murder actually permits alternative punishments—death or life imprisonment without parole. Life imprisonment without parole was mandatory for Kuntrell Jackson, however, because the Supreme Court prohibited capital punishment for offenders under the age of 16. *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

tencing schemes that treat children the same as adults fail to account for the central considerations underlying *Graham* and *Roper*—that children have “diminished culpability and greater prospects for reform.”<sup>30</sup> Recognizing the “mitigating qualities of youth,” the Court emphasized that sentencing courts must consider a juvenile’s “mental and emotional development.”<sup>31</sup>

In addition to finding it improper to treat children the same as adults, the Court further noted that mandatory sentencing schemes preclude sentencers from considering differences between juvenile offenders. Instead, such schemes treat identically “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.”<sup>32</sup> Mandatory sentencing regimes prevent individualized assessments because “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.”<sup>33</sup> Under mandatory sentencing regimes, the result is that “every juvenile will receive the same sentence as every other.”<sup>34</sup>

In ordering sentencing courts to consider the “characteristics and circumstances attendant to [youth],” the Court stated that “appropriate occasions for sentencing juveniles to the harshest possible penalty will be uncommon.”<sup>35</sup> Before imposing such a serious penalty, a sentencer would have to “take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.”<sup>36</sup>

In sum, the Court’s decisions in *Roper*, *Graham*, and *Miller* “teach that in imposing a State’s harshest penalties, a sentencer misses too much if he treats every child as an adult.”<sup>37</sup> While not exhaustive, the *Miller* Court specifically identified several youth-specific factors for a trial court to consider at sentencing, including:

- (1) “the character and record of the individual offender [and] the circumstances of the offense,”<sup>38</sup>

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30. *Miller*, 132 S. Ct. at 2464.

31. *Id.* at 2467.

32. *Id.* at 2467–68.

33. *Id.* at 2467.

34. *Id.*

35. *Id.* at 2469. As we discuss *infra* Part II.B. regarding the *Miller* sidestep, not all courts agree with this characterization of the holding.

36. *Id.*

37. *Id.* at 2468.

38. *Id.* at 2467.

- (2) “the background and mental and emotional development of a youthful defendant;”<sup>39</sup>
- (3) a youth’s “chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate the risks and consequences;”<sup>40</sup>
- (4) “the family and home environment that surrounds” the youth, “and from which he cannot usually extricate himself—no matter how brutal or dysfunctional;”<sup>41</sup>
- (5) the circumstances surrounding the offense, “including the extent of his participation in the conduct and the way familial and peer pressure may have affected” the youth;<sup>42</sup>
- (6) whether the youth “might have been charged and convicted of a lesser offense if not for incompetencies associated with youth,” for example, the youth’s relative inability to deal with police and prosecutors or to assist his own attorney;<sup>43</sup> and
- (7) the youth’s potential for rehabilitation given that most youth are prone to change and mature for the better.<sup>44</sup>

As explained below, however, too many states are refusing to consider these factors when meting out society’s harshest punishments to children.

### III. AN INCOHERENT PATCHWORK OF *MILLER* IMPLEMENTATION

Though *Miller* extended a measure of relief to juvenile homicide offenders, it left four questions unanswered. When *Miller* was decided, over 2,000 of the approximately 2,500 juvenile offenders serving life without parole had been sentenced under mandatory sentencing schemes.<sup>45</sup> Most of these sentences were final and could be challenged only on collateral review. Would these individuals get relief under the rule announced in *Miller*? For the approximately 380 juvenile offenders sentenced to life imprisonment without parole under discretionary sentencing schemes,<sup>46</sup> does *Miller* offer any relief? Does *Miller* offer any

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39. *Id.*

40. *Id.* at 2468.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 2477 (Roberts, J., dissenting).

46. See *State Distribution of Youth Offenders Serving Juvenile Life Without Parole (JLWOP)*, HUMAN RIGHTS WATCH (Oct. 2, 2009), <http://www.hrw.org/news/2009/10/02/state-distribution-juvenile-offenders-serving-juvenile-life-without-parole> [hereinafter *State Distribution of Youth Offenders Serving JLWOP*].

relief to the uncounted number of juvenile offenders serving lengthy term of years prison sentences for crimes committed as juveniles? Finally, and perhaps most importantly, what, if anything, does *Miller* require when courts sentence juvenile offenders?

#### A. A Patchwork of Retroactivity

The *Miller* Court did not explicitly state that the rule it announced was to be retroactively applied.<sup>47</sup> However, in the companion case, *Jackson v. Hobbs*, the fact that Kuntrell Jackson was granted a measure of relief in his collateral challenge led a number of courts to conclude that the Supreme Court impliedly dictated that its rule was to be retroactive in application.<sup>48</sup> Other courts, though, rejected this notion that the Court's disposition of Jackson's collateral challenge impliedly established, or even supported, retroactive application.<sup>49</sup>

In the absence of an explicit pronouncement regarding retroactivity, state and federal courts were left to struggle with this question and have come to disparate conclusions.<sup>50</sup> Though states may have their own rules regarding retroactivity,<sup>51</sup> retroactivity analysis typically follows the framework laid out by the Supreme Court in *Teague v. Lane*.<sup>52</sup> From *Teague*, an "old rule" is one dictated by precedent existing at the time a person's conviction became final and therefore applies retroactively.<sup>53</sup> In

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47. Cf. *Montgomery v. Louisiana*, 135 S. Ct. 1546 (2015) (granting certiorari on whether the rule announced in *Miller* was retroactive).

48. See, e.g., *Songster v. Beard*, 35 F. Supp. 3d 657, 661–62 (E.D. Pa. 2014) (applying its holding to *Jackson*, the *Miller* Court "made the new rule retroactive"); *People v. Davis*, 6 N.E.3d 709, 722 (Ill. 2014) (though basing retroactivity on its own analysis, finding it "instructive that the *Miller* companion case . . . arose on state collateral review" and "[n]otwithstanding its finality, the Court retroactively applied *Miller*"); *Diatchenko v. Dist. Attorney*, 1 N.E.3d 270, 281–82 (Mass. 2013). Additional cases can be found in Kurtis A. Kemper, Annotation, *Retroactive Application, in Postconviction Proceedings, of Constitutional Rule of Miller v. Alabama*, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), that *Mandatory Life Sentence Without Parole for Those Under Age 18 at Time of Their Homicide Crimes Violates Eighth Amendment's Prohibition of Cruel and Unusual Punishments*, 102 A.L.R.6th 637, at II. § 4 (2015).

49. See, e.g., *State v. Tate*, 130 So. 3d 829, 833 n.1 (La. 2013) (noting that the *Miller* Court did not explicitly address retroactivity, and the "mere fact the Supreme Court remanded *Jackson* for resentencing [does] not constitute a ruling or determination on retroactivity"); *People v. Carp*, 852 N.W.2d 801, 830 (Mich. 2014) (rejecting any inference to be drawn from disposition of Jackson's collateral challenge because the state did not assert retroactivity as an affirmative defense to Jackson's challenge); *Commonwealth v. Cunningham*, 81A.3d 1, 4 (Pa. 2013). For additional cases, see Kemper, *supra* note 48, at II. § 5.

50. See *infra* Table 1.

51. See *Carp*, 852 N.W.2d at 832 (discussing retroactivity under *Teague* and under Michigan's own retroactivity test that may give broader retroactive effect than required by *Teague*).

52. *Teague v. Lane*, 489 U.S. 288 (1989).

53. *Id.* at 310.

contrast, a “new rule” is one not dictated by precedent at the time a person’s conviction became final, and should be applied retroactively “in a collateral proceeding only if (1) the rule is substantive or (2) the rule is a ‘watershed rul[e] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.’”<sup>54</sup>

Courts addressing this issue have determined that *Miller* announced a new rule but have come to differing conclusions with regard to whether it is substantive or constitutes a watershed rule of criminal procedure. Of the twenty-nine jurisdictions (twenty-eight states and the United States) with mandatory sentencing schemes resulting in juvenile life without parole,<sup>55</sup> eleven states have held that *Miller* is retroactive;<sup>56</sup> six states have held that it is not retroactive;<sup>57</sup> five states and the United States are undecided;<sup>58</sup> two states may have addressed the issue through legislation,<sup>59</sup> and one state declared that its status as a mandatory jurisdiction

54. *Whorton v. Bockting*, 549 U.S. 406, 416 (2007) (quoting *Saffle v. Parks*, 494 U.S. 484, 495 (1990)).

55. *See Miller v. Alabama*, 132 S. Ct. 2455, 2471 n.9 (2012).

56. *See, e.g., Hobbs v. Gordon*, 434 S.W.3d 364, 369 (Ark. 2014); *Falcon v. State*, 162 So. 3d 954, 963 (Fla. 2015); *People v. Davis*, 6 N.E.3d 709, 722 (Ill. 2014); *State v. Ragland*, 836 N.W.2d 107, 155 (Iowa 2013); *Diatchenko v. Dist. Attorney*, 1 N.E.3d 270, 281 (Mass. 2013); *Jones v. State*, 122 So. 3d 698, 702–03 (Miss. 2013); *State v. Mantich*, 842 N.W.2d 716, 731 (Neb. 2014), *cert. denied*, 135 S. Ct. 67 (2014); *In re New Hampshire*, 103 A.3d 227, 233–34 (N.H. 2014); *State v. Lovette*, 758 S.E.2d 399, 403–404 (N.C. Ct. App. 2014); *Ex parte Maxwell*, 424 S.W.3d 66, 75 (Tex. Crim. App. 2014).

57. *See Williams v. State*, CR-12-1862, 2014 WL 1392828, at \*15–16 (Ala. Crim. App. Apr. 4, 2014) (finding that *Miller* is a new rule that is neither substantive nor “watershed” and therefore not retroactive); *State v. Tate*, 130 So. 3d 829 (La. 2013); *People v. Carp*, 852 N.W.2d 801 (Mich. 2014) (finding *Miller* not retroactive under either federal retroactivity analysis or Michigan retroactivity analysis); *Chambers v. State*, 831 N.W.2d 311, 331 (Minn. 2013) (finding that *Miller* is neither substantive nor “watershed”); *State v. Shingleton*, No. 25679, 2013 WL 5172952, at \*1 (Ohio Ct. App. Sept. 13, 2013); *Commonwealth v. Cunningham*, 81 A.3d 1, 10–11 (Pa. 2013).

58. Delaware, Missouri, and South Dakota are explicitly undecided. *See Warren v. State*, No. 543, 2012 WL 5873667, at \*1 (Del. Nov. 20, 2012) (remand to superior court for consideration of *Miller* retroactivity); *State ex rel. Lockhart v. Norman*, No. SC93335, *State ex rel. Collier v. Russell*, No. SC92980, *State ex rel. Griffin v. Norman*, No. SC93324, and *State ex rel. McElroy v. Cassady*, No. SC93465 (four nonconsolidated cases granted review by Missouri Supreme Court); *State v. Springer*, 856 N.W.2d 460, 470 (S.D. 2014) (“[W]e need not decide today whether those three cases might apply retroactively.”). New Jersey, with no prisoners serving a mandatory JLWOP sentence, has no direct decisional law, though in a case involving a 315-year sentence, a New Jersey Superior Court engaged in what might be described as a *Miller* sidestep by noting that it had discretion in sentencing, which made *Miller* inapposite. *See State v. James*, 2012 WL 3870349, at \*13 (N.J. Super. Ct. App. Div. Sept. 7, 2012), *cert. denied*, 63 A.3d 229 (N.J. 2013). Connecticut applied *Miller* to a 100-year sentence in a case on direct review, *State v. Riley*, 110 A.3d 1205 (2015), but has yet to explicitly address *Miller* retroactivity. Federal courts are split with regard to *Miller* retroactivity. *Compare Songster v. Beard*, 35 F. Supp. 3d 657 (E.D. Pa. 2014) (finding *Miller* is retroactive), with *McLean v. Clarke*, No. 2:13CV409, 2014 WL 5286515 (E.D. Va. June 12, 2014) (finding *Miller* is not retroactive).

59. *See ARIZ. REV. STAT. § 13-716* (West, Westlaw through the First Regular Session of the Fifty-Second Legislature) (providing parole eligibility for juvenile offenders who have served their

was incorrect because its judges have discretion with regard to sentencing.<sup>60</sup> We describe this state's claim of exclusion from the rule as the *Miller* sidestep and discuss it more fully below.

Expressed differently, based on the uneven distribution of persons serving these sentences,<sup>61</sup> 643 individuals are incarcerated in jurisdictions that have declared *Miller* to be retroactive and presumably will benefit from the new rule when they petition the court; 1,191 are incarcerated in jurisdictions that have declared *Miller* not retroactive, with those whose sentences are final receiving no relief; 177 are incarcerated in undecided jurisdictions; 60 are incarcerated in jurisdictions that will likely receive relief based on legislation; and 48 incarcerated are in a jurisdiction that sidestepped *Miller*.

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mandatory minimum sentences); WASH. REV. CODE § 10.95.035 (2014); *State v. Vera*, 334 P.3d 754, 759 (Ariz. Ct. App. 2014) (“Because we conclude § 13-716 provides an adequate remedy for Vera’s *Miller* claim, we need not consider whether, before the statute was enacted, Arizona law was consistent with the rule announced in *Miller*, or whether *Miller* applies retroactively to cases on collateral review.”); *In re McNeil*, 334 P.3d 548, 553 (Wash. 2014) (“The *Miller* fix explicitly applies retrospectively to acts that occurred before its enactment.”).

60. See *Jones v. Commonwealth*, 763 S.E.2d 823, 826 n.5 (Va. 2014). We were unable to verify the status of three states identified in *Miller* as having mandatory juvenile life without parole: Hawaii, Idaho, and Vermont.

61. It is noteworthy that of the over 2,000 individuals serving mandatory life without parole sentences, 1,610 are in six states—Florida (266), Illinois (103), Louisiana (335), Michigan (346), Missouri (116), and Pennsylvania (444). These numbers, from 2009, approximate those in prison when *Miller* was decided in 2012. See *State Distribution of Youth Offenders Serving JLWOP*, *supra* note 46. In Part III, *infra*, this Article examines racial disproportionality in the four states with the highest number of persons serving life sentences for crimes they committed as juveniles: Florida, Louisiana, Michigan, and Pennsylvania.

	Incarceration by Jurisdiction (# JLWOP)	Total # JLWOP
<i>Miller</i> Retroactive	AR (32), FL (266), IL (103), IA (44), MA (57), MS (24), NE (24), NH (3), NC (44), TX (5), WY (6)	643
<i>Miller</i> Not Retroactive	AL (62), LA (335), MI (346), MN (2), OH (2), PA (444)	1191
Undecided/Split	U.S. (36), CT (9), DE (7), MO (116), NJ (0), SD (9)	177
Legislative Fix	AZ (32), WA (28)	60
<i>Miller</i> Sidestep	VA (48)	48
No Information	HI (4), ID (4), VT (0)	8

Table 1. Post-*Miller* Retroactivity Determinations in Mandatory Jurisdictions

### B. Discretionary Life Without Parole

Although most of the attention in courts and in the scholarly literature has focused on jurisdictions with mandatory juvenile sentencing regimes, 428 individuals were serving life imprisonment without parole for crimes committed as juveniles in sixteen states that had discretionary sentencing schemes.<sup>62</sup> Despite its language directed toward mandatory sentencing schemes, do the considerations underlying *Miller* nevertheless apply to discretionary life without parole sentences?

Currently, six states have adopted the stance that *Miller* does not apply if courts have any modicum of discretion when sentencing a person for a crime committed as a juvenile.<sup>63</sup> In their view, *Miller* created a threshold question—whether a juvenile offender’s sentence was mandatory under the state’s sentencing scheme—which, if resolved in the negative, left these states completely exempt from *Miller*’s remaining consid-

62. See *State Distribution of Youth Offenders Serving JLWOP*, *supra* note 46.

63. *Murray v. Hobbs*, No. 12-880, 2013 WL 593365, at \*4 (Ark. Feb. 14, 2013) (foreclosing a *Miller* analysis when sentences are not mandatory); *Foster v. State*, 754 S.E.2d 33, 37 (Ga. 2014) (confining application of *Miller*’s principles to mandatory sentences); *Conley v. State*, 972 N.E.2d 864, 879 (Ind. 2012) (interpreting *Miller* to “deal[] solely with the issue of mandatory sentencing schemes”); *Rohweder v. State*, No. 63596, 2014 WL 495465 (Nev. Jan. 15, 2014), *cert. denied*, 134 S. Ct. 1896 (2014) (sentencing courts with any discretion cannot run afoul of *Miller*); *Jones*, 763 S.E.2d at 825 (alleging *Miller* could never apply in Virginia); *State v. Redman*, No. 13-0225, 2014 WL 1272553, at \*3 (W. Va. Mar. 28, 2014) (finding that “*Miller* has no applicability” where sentences are not mandatory).

erations regarding the differences between youth and adults, and the differences between youth.<sup>64</sup>

Virginia provides the starkest example of this interpretation. Although *Miller* considered Virginia one of the jurisdictions that had mandatory life without parole,<sup>65</sup> Virginia's high court eschewed this characterization and found that *Miller* simply did not apply in the state.<sup>66</sup> In Virginia, the only punishment available for juveniles convicted of Class 1 felonies "shall be imprisonment for life."<sup>67</sup> Despite the mandatory appearance of this sentencing statute, the court in *Jones v. Commonwealth* disposed of *Miller* as inapplicable to Virginia's sentencing scheme.<sup>68</sup> In *Jones*, a juvenile convicted of capital murder, a Class 1 felony, appealed his sentence of life without the possibility of parole as unconstitutional under *Miller*.<sup>69</sup> Rejecting *Miller* as inapposite, the court explained that Virginia law granted courts the authority to "suspend imposition of [a] sentence or suspend the sentence in whole or part."<sup>70</sup> Thus, the court reasoned that the sentence was necessarily not mandatory because the trial judge had not been entirely "divested . . . of all discretion respecting punishment."<sup>71</sup>

Accordingly, after this determination, life without parole sentences were not mandatory under Virginia's capital sentencing scheme, and the court discarded any remaining propositions embedded in *Miller*. Because Virginia's sentencing scheme was not entirely mandatory, neither *Miller*'s categorical ban on mandatory life without parole sentences, nor its directive to consider a youth's hallmark features, need be followed. Because the state technically cannot impose "a mandatory minimum sentence, *Miller* could never apply in Virginia and, therefore, [the court] need not address Jones' [sic] other arguments."<sup>72</sup> In doing so, Virginia

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64. See *infra* Table 2.

65. See Brief of Respondent, at 17–18, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (No. 10-9646), 2012 WL 588454, at \*21.

66. *Jones*, 763 S.E.2d at 826.

67. VA. CODE ANN. § 18.2-10 (2008).

68. *Jones*, 763 S.E.2d at 826.

69. *Id.* at 823.

70. *Id.* at 824–25 (citing VA. CODE ANN. § 19.2-303 (2011)).

71. *Jones*, 763 S.E.2d at 825. Although Virginia dismissed *Miller* because its courts are statutorily empowered to suspend sentences, other states have explicitly rejected the possibility of clemency as creating a safe harbor from *Miller*'s mandates. For further discussion, see, for example, *Solem v. Helm*, 463 U.S. 277, 300–301 (1983) (distinguishing parole, "an integral part of the penological system," from executive commutation, which lacks "reference to any standards."); *State v. Ragland*, 836 N.W.2d 107, 118 (Iowa 2013) (applying *Miller* to a commuted sentence, because the granting of commutation—let alone the possibility of future clemency—"does not foreclose legal challenges").

72. *Jones*, 763 S.E.2d at 826 n.5.

effectively circumvented the Supreme Court's directive that children should be treated differently.

Other states with "discretionary" life without parole apply *Miller* much like Virginia. In Georgia, courts claim that their state's sentencing scheme cannot violate *Miller* because judges retain some modicum of discretion when sentencing juveniles convicted of the most serious crimes. In *Foster v. State*, the court upheld a juvenile's life without parole sentence as constitutional, even though the trial court failed to consider any of youth's mitigating characteristics, as prescribed by *Miller*.<sup>73</sup> Instead, the court reasoned that *Miller* applied only to mandatory sentences, which Georgia courts are technically incapable of administering.<sup>74</sup> Because Georgia law requires that a person convicted of murder "shall be punished by death, by imprisonment for life without parole, or by imprisonment for life,"<sup>75</sup> the court concluded that the sentencing scheme provided sufficient discretion to satisfy *Miller*.<sup>76</sup> By focusing on one dimension of *Miller*'s holding—that juveniles cannot be sentenced to mandatory life without parole—Georgia effectively precludes consideration of the protections announced in *Miller*.

Likewise, in Nevada, courts avoid *Miller*'s holding by relying on a binary sentencing scheme. In *Rohweder v. State*, the court upheld the sentencing of a juvenile to life imprisonment without parole because the trial court had discretion to constitutionally impose one of three sentences: (1) death; (2) life without the possibility of parole; or (3) life with the possibility of parole after ten years.<sup>77</sup> The sentence was not technically mandatory, but it still disregarded *Miller*'s mandate.<sup>78</sup>

West Virginia, too, confines the juvenile protections from *Miller* to mandatory sentences. In *State v. Redman*, the appellant argued he was unconstitutionally sentenced to life without parole because the circuit court did not hold "a hearing to determine the factors contributing to the sentence pursuant to the dictates of *Miller*."<sup>79</sup> The court rejected this argument, explaining "*Miller* has no applicability herein and therefore, this assignment of error is without merit."<sup>80</sup>

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73. *Foster v. State*, 754 S.E.2d 33, 35 (Ga. 2014).

74. *Id.* at 37.

75. GA. CODE ANN. § 16-5-1 (2014).

76. *Foster*, 754 S.E.2d at 37.

77. *See Rohweder v. State*, No. 63596, 2014 WL 495465, at \*1 (Nev. Jan. 15, 2014), *cert. denied*, 134 S. Ct. 1896 (2014).

78. *Id.*

79. *State v. Riley*, No. 13-0225, 2014 WL 1272553, at \*3 (W. Va. Mar. 28, 2014).

80. *Id.*

In all, at least seven states—Virginia, Georgia, Nevada, New Mexico, Tennessee, West Virginia, and Wisconsin—eviscerate the considerations underlying *Miller* by limiting its application, in any form, to mandatory sentences of life without parole. Instead, the courts rely on nonmandatory sentencing schemes, which often only provide a choice between life without parole and life with parole, and disregard the Court’s directive to treat children differently because “*Miller* could never apply.”<sup>81</sup> As a result, courts in these jurisdictions do not consider the “characteristics and circumstances attendant to [youth]” when sentencing juvenile offenders to life without the possibility of parole.<sup>82</sup>

	Incarceration by Jurisdiction (# JLWOP)	# JLWOP
<i>Miller</i> Retroactive	TN (4)*	275
<i>Miller</i> Not Retroactive		
Undecided/Split	CA (265)*	
Legislative Fix	CA (265)*	265
<i>Miller</i> Sidestep	VA (48), GA (8), NV (16), NM (0), TN (4),* WV (0), WI (16)	92
No Information	ME (0), MD (13), ND (1), OK (48), RI (2), UT (1), VT (0)	17

\* CA and TN appear in two categories.<sup>83</sup>

Table 2. Post-*Miller* Retroactivity Determinations in Discretionary Jurisdictions

### C. *Miller* and the “100 Year” Sentence

The juvenile sentence at issue in *Miller* was life imprisonment without parole.<sup>84</sup> Given the posture of the case and the question present-

81. *Jones v. Commonwealth*, 763 S.E.2d 823, 826 n.5 (Va. 2014).

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

83. The issue of *Miller* retroactivity is before the California Supreme Court. See *In re Rainey*, 168 Cal. Rptr.3d 719, 724 (Cal. Ct. App. 2014), review granted and opinion superseded, 326 P.3d 251 (Cal. 2014). In addition, the legislature has implemented statutes intended to adhere to *Miller* as discussed *infra* Part III. Tennessee is listed twice because one court ruled that *Miller* was retroactive but another ruled that *Miller* is not implicated when the sentence had any discretion. Compare *Darden v. State*, No. M2013-01328-CCA-R3-PC, 2014 WL 992097, at \*10 (Tenn. Crim. App. Mar. 13, 2014) (finding *Miller* is retroactive), with *Dickerson v. State*, No. W2013-01766-CCA-R3-PC, 2014 WL 3744454, at \*5 (Tenn. Crim. App. July 28, 2014) (finding *Miller* not applicable where sentencer had discretion).

ed by the petitioner, it is understandable that the Court did not address sentences for a lengthy term of years that constitutes a de facto life sentence. However, in the same way that it is misleading for a state to reject *Miller* as wholly inapplicable because the sentencing scheme at issue is not technically mandatory, it is disingenuous for a state to say that *Miller* (or *Graham*) does not apply to de facto life sentences.<sup>85</sup>

Whether or not a sentencing scheme is mandatory, *Miller*'s purpose is to ensure that all juvenile offenders receive an individualized assessment of their biological traits and environmental influences.<sup>86</sup> Likewise, a state is misguided to reject *Miller* as irrelevant solely because a term of imprisonment is not labeled "life without the possibility of parole."<sup>87</sup> *Miller*'s concern that youth are subjected to disproportionate punishment does not diminish for a juvenile who faces a century—or more—of imprisonment rather than "life."

*Miller*'s narrowest holding, that the Eighth Amendment shields juveniles from mandatory life without parole sentences, is predicated on two well-established constitutional principles. First, the death penalty can never be imposed on juveniles.<sup>88</sup> Second, a sentence of life without parole, when applied to children, is so similarly punitive to execution that it can never be imposed on juveniles for nonhomicide offenses.<sup>89</sup> However, when states apply *Miller* differently to century-long sentences than they do sentences of life without parole, they overlook the second constitutional underpinning established in *Graham*. Moreover, because *Miller* is designed to guide sentencers administering the longest terms of impris-

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84. Though this Article has focused primarily on the implementation of *Miller*, a number of similar issues also remain unresolved with regard to the implementation of *Graham*, which categorically barred life without parole for juveniles who commit nonhomicide offenses.

85. Other commentators have made similar observations and have discussed disparate state responses to this issue. See, e.g., Theresa Savona, *The Growing Pains of Graham v. Florida: Deciphering Whether Lengthy Term-of-Years Sentences for Juvenile Defendants Can Equate to the Unconstitutional Sentence of Life Without the Possibility of Parole*, 25 ST. THOMAS L. REV. 182 (2013); Kelly Scavone, Note, *How Long Is Too Long?: Conflicting State Responses to De Facto Life Without Parole Sentences After Graham v. Florida and Miller v. Alabama*, 82 FORDHAM L. REV. 3439 (2014); Krisztina Schlessel, Note, *Graham's Applicability to Term-of-Years Sentences and Mandate to Provide a "Meaningful Opportunity" for Release*, 40 FLA. ST. U. L. REV. 1027 (2013).

86. See *Miller*, 132 S. Ct. at 2467–68 (listing factors associated with youth underlying the Court's determination that mandatory sentencing schemes that result in life without parole necessarily preclude consideration of these relevant factors).

87. Cf. Scavone, *supra* note 85, at 3444 (stating that while not categorically barred, "lengthy sentences without parole eligibility create the exact result that the Court was trying to avoid in *Miller* and *Graham*"); Schlessel, *supra* note 85, at 1053 ("Courts ought not to violate a constitutional rule by engaging in a simple play on words.").

88. *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

89. See *Graham v. Florida*, 560 U.S. 48 (2010).

onment, when states misapply its holding, they effectively contravene the Eighth Amendment.

New Jersey is an example of a state that improperly applies *Miller*. In *State v. James*, a juvenile offender was sentenced to serve a minimum of 267 years and nine months of a 315-year sentence before becoming eligible for parole.<sup>90</sup> On appeal, the court acknowledged that *Miller* relied on a strand of precedent that banned sentencing practices “based on the mismatches between the culpability of a class of offenders and the severity of the penalty.”<sup>91</sup> While the court acknowledged that sufficiently severe penalties implicate *Miller*, it squarely rejected *Miller* as inapposite, asserting that a nonmandatory, nonlife without parole sentence “runs afoul of neither precept upon which the Court based *Miller*.”<sup>92</sup>

Similarly, intermediate courts in Florida have ruled that *Miller* does not control unless the sentence at issue is for life without parole. In *Walle v. State*, a thirteen-year-old offender was sentenced to sixty-five years imprisonment to run consecutively with a twenty-seven year sentence previously imposed in a different county. In effect, the child was not eligible for parole until he was ninety-one years old.<sup>93</sup> The court assumed, for argument’s sake, that the sentence equated to life without parole. However, it still rejected *Miller*’s call for an individualized consideration of the offender’s youth, holding that the sentence was not life without parole, but merely “an extraordinary length.”<sup>94</sup>

In contrast, other courts have recognized a sentence as legally equivalent to life without parole when the parole eligibility date falls outside the juvenile offender’s natural life expectancy.<sup>95</sup> When a juvenile faces the functional equivalent of life without parole, “he is entitled to the benefit of what *Miller* termed *Graham*’s ‘categorical ban’ on sentences of life in prison” without meaningful opportunity for release.<sup>96</sup> By confronting the substantive elements of *Graham* and *Miller*, these courts remain faithful to the overarching principle that children are different.

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90. *State v. James*, No. A-4153-08T2, 2012 WL 3870349, at \*1 (N.J. Super. Ct. App. Div. Sept. 7, 2012).

91. *Id.* at \*13 (emphasis added) (quoting *Miller v. Alabama*, 132 S. Ct. 2455, 2463–64 (2012)).

92. *Id.*

93. See *Walle v. State*, 99 So. 3d 967 (Fla. Dist. Ct. App. 2012).

94. *Id.* at 972–73.

95. *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012). Courts have used the Center for Disease Control’s life expectancy tables to determine whether a sentence qualifies as the functional equivalent of life without parole. See, e.g., *Thomas v. Pennsylvania*, No. 10-4537, 2012 WL 6678871, at \*11 (E.D. Pa. June 5, 2012); *People v. Mendez*, 188 Cal. App. 4th 47, 63 (Cal. Ct. App. 2010); *Adams v. State*, No. 1D11-3225, 2012 WL 3193932, at \*2 (Fla. Dist. Ct. App. Aug. 8, 2012).

96. *Caballero*, 282 P.3d at 297 (Werdegar, J., concurring) (quoting *Miller*, 132 S. Ct. at 2465).

Life without parole and death sentences are unique from all other punishment in that they “alter[] the offender’s life by a forfeiture that is irrevocable,” and “deprive[] the convict of the most basic liberties without giving hope of restoration.”<sup>97</sup> A sentencing body therefore overlooks one of *Miller*’s most fundamental constitutional underpinnings when it tells a child, “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, because it would be a mistake to have you back in society.”<sup>98</sup> *Roper, Graham, and Miller* have rejected this explanation as constitutionally repugnant because the Eighth Amendment “forbid[s] States from making the judgment at the outset that those offenders never will be fit to reenter society.”<sup>99</sup> It is a fallacy, then, to describe *Miller* (or *Graham*) as inapposite when a child has been deprived of any “meaningful opportunity to obtain release” simply because of semantics.<sup>100</sup>

#### *D. Sentencing Juvenile Offenders Under Miller*

Putting questions of retroactivity, mandatory versus discretionary life without parole, and lengthy term of years sentences aside, what does *Miller* require when juveniles are sentenced? On one end of the spectrum, some states have concluded that *Miller* must mean more than merely requiring sentencing courts to mechanically impose one set of sentences for everyone under the age of 18. These courts have concluded that sentencers must consider certain characteristics about youth—other than age alone—before imposing significant sentences. For instance, though Pennsylvania courts have rejected applying *Miller* retroactively,<sup>101</sup> in prospective applications, Pennsylvania courts must consider, at a minimum,

a juvenile’s age at the time of the offense, his diminished culpability and capacity for change, the circumstances of the crime, the extent of his participation in the crime, his family, home and neighborhood environment, his emotional maturity and development, the extent that familial and/or peer pressure may have affected him, his past exposure to violence, his drug and alcohol history, his ability to deal with the police, his capacity to assist

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97. *Graham v. Florida*, 560 U.S. 48, 70 (2010).

98. *Bunch v. Smith*, 685 F.3d 546, 548 (6th Cir. 2012).

99. *Graham*, 560 U.S. at 75.

100. *Id.* at 79.

101. *Commonwealth v. Cunningham*, 81 A.3d 1, 10–11 (Pa. 2013) (rejecting *Miller* retroactivity).

his attorney, his mental health history, and his potential for rehabilitation.<sup>102</sup>

Alabama has adopted a similar approach to Pennsylvania. Alabama rejects retroactive application of *Miller*,<sup>103</sup> but has chosen, with regard to prospective application, to adopt the same factors Pennsylvania identified in *Knox* when deciding between life imprisonment with or without parole.<sup>104</sup>

California has a discretionary sentencing scheme under which juveniles convicted of special circumstances murder received a sentence of “confinement in the state prison for life without the possibility of parole, or at the discretion of the court, 25 years to life.”<sup>105</sup> Prior to *Miller*, California courts had consistently construed this statute as creating a presumption of life without parole.<sup>106</sup> After *Miller*, the California Supreme Court could have found *Miller* inapplicable to its discretionary sentencing scheme (*Miller* sidestep); instead, it found that *Miller* required disapproval of this presumption in favor of life without parole.<sup>107</sup> It also ruled that courts must consider “any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty,”<sup>108</sup> and pointed out that *Miller* calls for courts to consider “a range of factors” attendant to youth—not just age.<sup>109</sup> Accordingly, the California Supreme Court held that after *Miller* “a court must consider a juvenile offender’s ‘chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.’”<sup>110</sup> The court also observed that many other states were requiring sentencers to consider factors other than age.<sup>111</sup>

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102. *Commonwealth v. Knox*, 50 A.3d 732, 745 (Pa. Super. Ct. 2012).

103. *See Williams v. State*, CR-12-1862, 2014 WL 1392828 (Ala. Crim. App. 2014).

104. *Ex parte Henderson*, 144 So. 3d 1262, 1283–84 (Ala. 2013) (citing *Knox* as generally helpful).

105. CAL. PENAL CODE § 190.5 (b) (West, Westlaw with urgency legislation through Ch. 224 of 2015 Reg. Sess.).

106. *See generally* *People v. Gutierrez*, 324 P.3d 245 (Cal. 2014) (discussing consistent approach by California courts in the two decades before *Miller*).

107. *Id.* at 267.

108. *Id.* at 268. (discussing CAL. PENAL CODE § 190.3(i) (1978)) (citation and internal quotation marks omitted).

109. *Id.*

110. *Id.* (quoting *Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012)).

111. *Id.* at 269 (citing cases from other jurisdictions to indicate that “the emerging body of post-*Miller* case law has uniformly held that a sentencing court must consider [these factors] before imposing life without parole on a juvenile homicide offender”). Other states such as Iowa and Wyoming have decided that *Miller* applies both retroactively and prospectively and require consideration of factors beyond mere chronological age. *See, e.g., State v. Null*, 836 N.W.2d 41, 74 (Iowa 2013) (“We think the direction from the Supreme Court that trial courts consider everything said about

Likewise, Washington law requires “sentencing bodies [to] engage in individualized consideration of juvenile offenders facing life in prison without the possibility of parole.”<sup>112</sup> Also in line with California, the Washington State Legislature passed what has come to be known as the *Miller* fix, which states:

In setting a minimum term, the court must take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) including, but not limited to, the age of the individual, the youth’s childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth’s chances of becoming rehabilitated.<sup>113</sup>

In contrast, Texas construes *Miller* extraordinarily narrowly and takes a dramatically different approach from that employed by California, Washington, and several other states. Although the Texas Court of Criminal Appeals held that *Miller* is retroactive, the Texas Legislature effectively nullified this ruling when it revised its youth sentencing regime and prevented its courts from individually considering a youth offender’s characteristics.<sup>114</sup> Currently, Texas imposes a mandatory sentence of life imprisonment with the possibility of parole for youth convicted of capital offenses.<sup>115</sup> As a result, Texas courts reject defendants’ requests for individualized sentencing hearings under *Miller*. Instead, a defendant is “only entitled to have his sentence reformed from life without parole to life with the possibility of parole.”<sup>116</sup>

These differing approaches highlight the ways in which states are both construing and misconstruing *Miller*.

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youth in *Roper*, *Graham*, and *Miller* means more than a generalized notion of taking age into consideration as a factor in sentencing.”); *Bear Cloud v. State*, 294 P.3d 36, 47 (Wyo. 2013) (listing factors to consider at an individualized sentencing hearing to include a youth’s “mental and emotional development,” “family and home environment,” and “the way familial and peer pressure may have affected” the crime).

112. *In re McNeil*, 334 P.3d 548, 552 (Wash. 2014) (internal quotation marks omitted).

113. WASH. REV. CODE § 10.95.030(3)(b) (2015). For a more extensive discussion on Washington’s legislative approach, see, for example, Nick Straley, *Miller’s Promise: Re-evaluating Extreme Criminal Sentences for Children*, 89 WASH. L. REV. 963, 995–96 (2014).

114. See TEX. PENAL CODE § 12.31(a)(1) (2013).

115. *Turner v. State*, 443 S.W.3d 128, 129 n.2 (Tex. Crim. App. 2014).

116. *Id.* at 129. See also *Lewis v. State*, 428 S.W.3d 860, 863–64 (Tex. Crim. App. 2014) (“*Miller* does not entitle all juvenile offenders to individualized sentencing. It requires an individualized hearing only when a juvenile can be sentenced to life without the possibility of parole. . . . [U]nder Section 12.31 of the [Texas] Penal Code, juvenile offenders in Texas do not now face life without parole at all.”).

IV. GEOGRAPHIC ANOMALIES AND RACIAL INEQUALITIES EXPOSED BY  
EXAMINING STATES' POST-*MILLER* JURISPRUDENCE

Examining the various approaches to applying *Miller* does more than just illuminate whether states are interpreting the Court's holding faithfully. For instance, a state's method of implementing *Miller*—coupled with data about the juveniles sentenced to life without parole under that sentencing scheme—can provide a lens through which the racial disparities in the greater criminal justice system are even more pronounced.

In March 2012, The Sentencing Project published a comprehensive report about key characteristics of juveniles sentenced to life without parole.<sup>117</sup> In the first-ever national survey of its kind, the Project collected data on many factors including socioeconomic backgrounds, education levels, racial compositions of victims and offenders, and types of physical and emotional trauma experienced by offenders-to-be. Two statistical disparities stood out. One was the high concentration of juvenile lifers being sentenced in only four states. The second was the high rate of black youth sentenced to life without parole.

First, when *Miller* was decided, approximately 2,500 people were serving life sentences for crimes they committed as children. More than half of those sentences occurred in just four states: Pennsylvania (472), Michigan (356), Florida (335), and Louisiana (228).<sup>118</sup> These unusually high concentrations of convictions are possibly explained by mandatory sentencing schemes, which, prior to *Miller*, each of these states had in place. Even in *Miller*'s wake, these states remain committed to keeping juvenile offenders incarcerated. Pennsylvania, Michigan, and Louisiana still refuse to give *Miller* retroactive effect.<sup>119</sup> The criminal justice systems in these states continue to affect youth at a rate that dwarfs the rest of the country.

While thirteen states have banned juvenile life without parole and sixteen others deemed *Miller* retroactive (with fifteen more still consider-

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117. ASHLEY NELLIS, THE SENTENCING PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY (2012), available at [http://sentencingproject.org/doc/publications/jj\\_The\\_Lives\\_of\\_Juvenile\\_Lifers.pdf](http://sentencingproject.org/doc/publications/jj_The_Lives_of_Juvenile_Lifers.pdf).

118. See JOSHUA ROVNER, THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW (2015), available at [http://sentencingproject.org/doc/publications/jj\\_Juvenile\\_Life\\_Without\\_Parole.pdf](http://sentencingproject.org/doc/publications/jj_Juvenile_Life_Without_Parole.pdf). These numbers are slightly different from the 2009 numbers from *State Distribution of Youth Offenders Serving JLWOP*, *supra* note 46.

119. See, e.g., *State v. Tate*, 130 So. 3d 829 (La. 2013) (finding *Miller* is not retroactive), *cert. denied*, 134 S. Ct. 2663 (2013); *People v. Carp*, 852 N.W.2d 801 (Mich. 2014); *Cunningham*, 81 A.3d 1 (Pa. 2013). *But see* *Falcon v. Florida*, 162 So. 3d 954 (Fla. 2015) (finding *Miller* is retroactive).

ing the issue), more than half of the child offenders *Miller* sought to reach remain imprisoned by these four states. For this reason, legal developments in even one of these four states would impact large numbers of juvenile lifers. It is therefore important for the Supreme Court to rule that *Miller* be given retroactive effect. Not only would the Court unify a nationally fractured body of law, it could bring *Miller's* premise—that children are different—to thousands of people that, as children, were sentenced to die in prison.

Second, juvenile life without parole sentences also predominantly affect one race. Though black youth make up approximately 15% of the U.S. population,<sup>120</sup> 56.1% of those sentenced as juvenile offenders to life without parole are black.<sup>121</sup> The rate at which white juvenile offenders are sentenced to life without parole for killing a black person (3.6%), is roughly half the rate at which white juveniles are arrested for killing a black person (6.4%).<sup>122</sup> In contrast, the rate at which black juvenile offenders are sentenced to life without parole for killing a white person (43.4%) is *almost double* the rate at which black persons are arrested for killing a white person (23.2%).<sup>123</sup> It is hard to imagine what legitimate factors could explain such a statistically vast discrepancy. Although the causes of this trend are unclear, it is disturbing that the already disproportionate rate of incarcerated black people also includes children.

#### CONCLUSION

In *Montgomery v. Louisiana*, set for the October 2015 term, the Supreme Court may resolve the retroactivity question and settle once and for all *Miller's* application to the 1,191 juvenile lifers in states rejecting *Miller* retroactivity, and to the 177 juvenile lifers in the undecided jurisdictions. However, the full extent of *Miller's* reach will likely remain unresolved and will be highly contested for years to come.

What is clear is that many jurisdictions are actively resisting *Miller's* mandate to consider youth-specific factors at juvenile sentencing for the law's harshest penalties. The problem with the sentencing

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120. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, JUVENILE POPULATION CHARACTERISTICS (2014), available at <http://www.ojjdp.gov/ojstatbb/population/qa01104.asp?qaDate=2013>.

121. AMERICAN CIVIL LIBERTIES UNION, RACIAL DISPARITIES IN SENTENCING 2 (2014), available at [https://www.aclu.org/sites/default/files/assets/141027\\_iachr\\_racial\\_disparities\\_aclu\\_submission\\_0.pdf](https://www.aclu.org/sites/default/files/assets/141027_iachr_racial_disparities_aclu_submission_0.pdf).

122. JOSHUA ROVNER, THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW 3–4 (2015), available at [http://sentencingproject.org/doc/publications/jj\\_Juvenile\\_Life\\_Without\\_Parole.pdf](http://sentencingproject.org/doc/publications/jj_Juvenile_Life_Without_Parole.pdf).

123. *Id.* at 3.

schemes directly struck down in *Miller* is not simply that they were mandatory, but that the mandatory nature of those sentencing schemes necessarily precluded sentencers from considering the key aspects of youth that make juvenile offenders different from adult offenders. The remedy then is that a sentencer must “follow a certain process—considering an offender’s youth and attendant characteristics—before imposing a particular penalty.”<sup>124</sup> While the particular penalty at issue in *Miller* was life without parole, the Court also clearly pronounced that “youth matters for purposes of meting out the law’s most serious punishments.”<sup>125</sup>

In the years to come, the Court will likely be asked what counts as the “law’s most serious punishments,” and also whether youth matters *only* for the law’s most serious punishments or if youth becomes a factor whenever a juvenile offender is subjected to adult sentencing guidelines. In the meantime, thousands remain in prison, waiting for what was promised in *Miller*.

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124. *Miller v. Alabama*, 132 S. Ct. 2455, 2471 (2012).

125. *Id.*