CASE NOTE

CRIMINAL LAW—A Small Step Forward in Juvenile Sentencing, But Is It Enough? The United States Supreme Court Ends Mandatory Juvenile Life Without Parole Sentences; *Miller v. Alabama*, 132 S. Ct. 2455 (2012)

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INTRODUCTION

"Time eases all things."[1]

—Sophocles

In light of its recent, more progressive rulings, the United States Supreme Court has concluded time does ease the unfortunate immaturity of juvenile homicide offenders, who deserve the opportunity to prove they have demonstrated enough maturity and rehabilitation to reenter society.[2] This conclusion prevailed despite a shift in social perceptions reflecting both a more punitive stance towards crime and an increasing desire to try juveniles as adults, especially those juveniles committing the most serious crimes.[3]

The tension between punitive social perceptions and juvenile rehabilitation collided in 2005 when the United States Supreme Court categorically outlawed the death penalty for juveniles.[4] In 2010, the Court prohibited the imposition of

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[1] SOPHOCLES, OEDIPUS THE KING line 1579 (E. Osborne ed., J.E. Thomas trans., Prestwick Hous. Lit. Touchstone Press 2005) (c. 429 B.C.E.).

[2] *See* Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) ("*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing."); Roper v. Simmons, 543 U.S. 551, 570–71, 578 (2005) (holding that the Eighth Amendment forbids imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed); *see also* Graham v. Florida, 130 S. Ct. 2011, 2034 (2010) (holding that the Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide).

[3] AARON KUPCHIK, PROSECUTING ADOLESCENTS IN ADULT AND JUVENILE COURTS 1–2 (2006) ("Slogans like 'old enough to do the crime, old enough to do the time' offer a new logic to compete with the modern conception of reduced culpability for youths relative to adults by suggesting that youth who commit severe crimes should be treated as adults rather than as juveniles.").

[4] *See Roper*, 543 U.S. at 570–71, 578.

a life without parole sentence on juvenile offenders convicted of a non-homicide offense.[5] In *Miller v. Alabama*, the Court continued to distinguish juveniles from adults for sentencing purposes by determining that imposing a *mandatory* life without parole sentence for any crime was cruel and unusual punishment in violation of the Eighth Amendment.[6]

This case note argues the Court correctly prohibited mandatory life without parole for juveniles but erred when it failed to establish a broad, categorical rule prohibiting all juvenile life without parole sentences.[7] First, this case note provides a background into the evolution of juvenile justice, the treatment of juveniles in sentencing, the Court's important decisions in *Roper* and *Graham*, and a background of Wyoming law before *Miller*.[8] Second, this case note discusses how the Court correctly concluded juveniles are different from adults and may not be mandatorily sentenced to life without parole.[9] Third, this case note questions the Court's decision not to establish a categorical rule prohibiting all juvenile life without parole sentences.[10] Finally, this case note concludes with *Miller's* potential effect on the sentencing of juveniles in Wyoming and the unanswered questions that remain in juvenile sentencing after *Miller*.[11]

BACKGROUND

The Evolution of Juvenile Justice

At the beginning of the Twentieth Century, the United States took a progressive view of juvenile offenders through a preference for rehabilitation over harsh punishment.[12] The dissatisfaction with a criminal court system that detained, tried, and punished children in the same manner as adults led to the

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[5] *See Graham*, 130 S. Ct. at 2034.

[6] *See Miller*, 132 S. Ct. at 2469.

[7] *See infra* notes 160–208 and accompanying text; *see also Roper*, 543 U.S. at 570, 578; *Graham*, 130 S. Ct. at 2034.

[8] *See infra* notes 12–91 and accompanying text.

[9] *See infra* notes 160–69 and accompanying text.

[10] *See infra* notes 170–208 and accompanying text.

[11] *See infra* notes 209–60 and accompanying text.

[12] *See* Audrey Dupont, *The Eighth Amendment Proportionality Analysis and Age and the Constitutionality of Using Juvenile Adjudications to Enhance Adult Sentences*, 78 DENV. U. L. REV. 255, 257 (2000). Reformers preferred a system that nurtured and protected juveniles, rather than one that held them wholly accountable for their offenses. *Id. See also* Claude Noriega, *Stick a Fork In It: Is Juvenile Justice Done?* 16 N.Y.L. SCH. J. HUM. RTS. 669, 676 (2000) ("Historically, the aim of the juvenile justice system, as an entity separate from the adult criminal system, has been purportedly rehabilitative . . . .").

creation of a separate juvenile court system in the 1890s.[13] Juvenile courts provided a rehabilitative alternative to punishment.[14] The system was designed to provide a civil, rather than a criminal, remedy.[15] Accordingly, there was no sentencing, as the court instead entered a "disposition."[16] A specialized judge followed this rehabilitative ideal and made individual decisions that were both therapeutic and in the child's best interests.[17] Consequently, juvenile judges regarded a child's crimes as a symptom of his or her "real needs," and found the nature of the offense irrelevant to the degree and duration of the disposition.[18] Because juvenile proceedings were non-criminal in nature, and juvenile court judges followed the doctrine of *parens patriae*, many of the constitutional rights extended to adults in criminal proceedings were denied to juveniles who committed similar offenses.[19] The doctrine of *parens patriae* allowed the state to act in its sovereign capacity as provider of protection to those unable to care for themselves.[20]

Although the historical characterization of the juvenile justice system was rehabilitative, there has been an increasing trend to one that is punitive.[21] Accordingly, juveniles have been charged as adults more frequently and face more

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[13] William W. Booth, *History and Philosophy of the Juvenile Court*, 2011 Juvl. FL-CLE 1-1 § 1.6 (2011). Massachusetts, Rhode Island, and New York experimented with separate dockets for juveniles in the late 1890s. *Id.* In 1899, Illinois became the first state to create a statewide system of separate juvenile courts in 1899. *Id. See also* SAMUEL M. DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM: CASES AND MATERIALS 857–58 (Robert C. Clark et al. eds., Foundation Press 3d ed. 2004).

[14] Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUST. 189, 192 (1998). However, juvenile courts initially did not provide common procedural safeguards found in adult courts, such as the rights to a jury and counsel. *Id. See also* Marvin Ventrell, *From Cause to Profession: The Development of Children's Law and Practice*, 32 COLO. LAW. 65, 67 (2003) (describing the creation of the juvenile court system).

[15] Ronald D. Spon, *Juvenile Justice: A Work "In Progress"*, 10 REGENT U. L. REV. 29, 33 n.13 (1998) ("The term 'disposition' is customarily used in juvenile court parlance in place of the word 'sentencing' as delinquency cases are generally technically deemed as 'civil' in nature, as opposed to 'criminal.' This is true even though 'delinquency,' by definition, necessarily involves a violation of a criminal statute, law, or ordinance.").

[16] *Id.*

[17] *See* Feld, *supra* note 14, at 193.

[18] *Id.*

[19] *See* Janet E. Ainsworth, *Youth Justice in a Unified Court: Response to Critics of Juvenile Court Abolition*, 36 B.C. L. REV. 927, 935 (1995) (illustrating how the juvenile court shrugged off due process concerns as irrelevant of the court's primary mission, which was to craft dispositions to address the social needs of the offending youth); *see also* Sanford J. Fox, *Juvenile Justice Reform: A Historical Perspective*, 22 STAN. L. REV. 1187, 1221–22 (1970).

[20] BLACK'S LAW DICTIONARY 1221 (9th ed. 2009).

[21] *See supra* notes 12–19 and accompanying text; *see also* Kelly K. Elsea, *The Juvenile Crime Debate: Rehabilitation, Punishment, or Prevention*, 5 KAN. J.L. & PUB. POL'Y 135, 136 (1995) ("Society is beginning to view children as less innocent and more capable of distinguishing right from wrong.").

"adult-like" punishments.[22] Because juvenile courts were structured without the same procedural safeguards as adult courts, the United States Supreme Court began providing certain protections for juveniles.[23] In the 1960s and 1970s, the Court outlined the rights juveniles must receive in juvenile criminal proceedings.[24] In *Kent v. United States*, the Court held juvenile proceedings must, at a minimum, comport with the standards of due process and fairness.[25] One year later, the Court held in *In re Gault* that juveniles possessed the right to a notice of charges, counsel, confrontation of witnesses, and protection against self-incrimination.[26] Finally, the Court decided in *In re Winship* that the Government must prove all charges against juveniles beyond a reasonable doubt.[27] These procedural protections have shifted juvenile courts toward an adjudicatory process more similar to the adult criminal system.[28]

While juvenile justice has shifted towards a more punitive model similar to adult court, more juveniles are being transferred from juvenile to adult court.[29] The most common strategy to transfer a juvenile to adult court is by waiver.[30] State legislatures have passed one of three types of waivers. First, a judicial waiver allows a juvenile court judge to waive jurisdiction on a discretionary basis after conducting a hearing to determine whether a youth is amenable to treatment or

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[22] *See* KUPCHIK, *supra* note 3, at 1–2.

[23] *See infra* notes 24–28 and accompanying text; *see also* Sarah M. Cotton, Comment, *When the Punishment Cannot Fit the Crime: The Case for Reforming the Juvenile Justice System*, 52 ARK. L. REV. 563, 567–69 (1994) (describing how the Supreme Court required juvenile courts to follow certain procedural requirements when adjudicating juvenile offenders' cases).

[24] *See infra* notes 25–27 and accompanying text (describing procedural safeguards now required for juveniles whose cases are adjudicated in juvenile courts).

[25] Kent v. United States, 383 U.S. 541, 562 (1966).

[26] *In re* Gault, 387 U.S. 1, 32–57 (1967).

[27] *In re* Winship, 397 U.S. 358, 368 (1970). *In re Winship* also mandated that juveniles were entitled to criminal due process safeguards. *Id.* at 365–66. However, juveniles in juvenile proceedings are not afforded all the rights afforded to criminal defendants in adult courts. *See, e.g.*, McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971) ("[W]e conclude that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement.").

[28] James E. McDougall, *Crisis in the Juvenile Justice System*, ARIZONA ATTORNEY, Oct. 29, 1992, at 23 ("The process of juvenile justice today is more formalized, [and] the discretion of the Juvenile Judges is more restricted . . . .").

[29] *See* Cynthia Conward, *The Juvenile Justice System: Not Necessarily in the Best Interests of Children*, 33 NEW ENG. L. REV. 39, 52 (1998) ("Today, all states allow juveniles to be tried as adults in criminal court under certain circumstances."); Feld, *supra* note 14, at 195; Randie P. Ullman, Note, *Federal Juvenile Waiver Practices: A Contextual Approach to the Consideration of Prior Delinquency Records*, 68 FORDHAM L. REV. 1329, 1346 (2000).

[30] *See* Feld, *supra* note 14, at 196; Lisa M. Flesch, Note, *Juvenile Crime and Why Waiver Is Not the Answer*, 42 FAM. CT. REV. 583, 586 (2004) ("Every state has its own transfer statute that allows for the transfer of juveniles to adult court in one of three ways: legislative waiver, prosecutorial waiver, or judicial waiver.").

is a threat to the public.[31] Second, an offense exclusion waiver excludes youth accused of certain crimes from juvenile court.[32] Third, some states have given prosecutors discretion to decide whether a juvenile charged with a particular crime should be tried in juvenile or adult court.[33] Once a juvenile is transferred and tried in adult court he or she is afforded the due process an adult would expect to receive during both trial and sentencing.[34] Additionally, juveniles treated as adults would be treated similarly for sentencing and punishment.[35] Later, in some states a parole board will consider various factors to determine whether a juvenile offender should be allowed to re-enter society.[36] Many states provide statutory factors, including a consideration of the offender's personality and his or her maturity.[37]

Wyoming allows juveniles to be transferred to adult court through a judicial waiver.[38] The juvenile court is authorized to hold a transfer hearing and may transfer a juvenile to adult court after considering a number of factors.[39] These

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[31] *See* Jennifer Park, Note, *Balancing Rehabilitation and Punishment: A Legislative Solution for Unconstitutional Judicial Waiver Policies*, 76 GEO. WASH. L. REV. 786, 799–800 (2008) (describing the various formulations of judicial waiver, including full judicial discretion, presumptions for transferring the juvenile to adult court, and automatic waiver to adult court if certain conditions—such as age or the offense—are met).

[32] *See* Feld, *supra* note 14, at 196. For example, a number of states excludes youth sixteen and older and charged with murder from juvenile court. *Id.*; *see also* Conward, *supra* note 29, at 152 (describing the mechanisms by which juveniles may be tried in adult court).

[33] *See* Feld, *supra* note 14, at 197.

[34] *See* Catherine R. Guttman, Note, *Listen to the Children: The Decision to Transfer Juveniles to Adult Court*, 30 HARV. C.R.-C.L. L. REV. 507, 529 (1995); Shannon F. McLatchey, Note, *Juvenile Crime and Punishment: An Analysis of the "Get Tough" Approach*, 10 U. FLA. J. L. & PUB. POL'Y 401, 406 (1999) (discussing how some critics advocate for juveniles to be tried in adult court in order to receive full due process protections).

[35] *See* Douglas A. Hager, *Does the Texas Juvenile Waiver Statute Comport with the Requirements of Due Process?*, 26 TEX. TECH. L. REV. 813, 830 (1995); Jarod K. Hofacket, Comment, *How Young is Too Young for a Child to be Tried and Punished as an Adult?*, 34 TEX. TECH L. REV. 159, 171–72 (2002).

[36] *See* Scott R. Hechinger, *Juvenile Life Without Parole: An Antidote to Congress's One-Way Criminal Ratchet?* 35 N.Y.U. REV. L. & SOC. CHANGE 408, 452 (2011) ("An opportunity for parole is just that: a chance for a prisoner to show strong evidence of rehabilitation. If a juvenile offender does not demonstrate change and is deemed a threat to public safety, the parole board will not grant parole." (citations omitted) (internal quotation marks omitted)).

[37] *See, e.g.,* Greenholtz v. Inmates of Neb. Penal & Corr. Complex, 442 U.S. 1, 16–18 (1979) (outlining the statutory factors Nebraska parole boards must consider when determining whether to release an inmate); N.Y. EXEC. LAW § 259-i (McKinney 2012) (listing factors parole boards must consider before granting discretionary release on parole); COLO. REV. STAT. ANN. § 17-22.5-404 (2011) (same); MICH. ADMIN. CODE. r. 791.7715 (2012) (same).

[38] *See infra* notes 39–40 and accompanying text (describing the judicial waiver process in Wyoming).

[39] WYO. STAT. ANN. § 14-6-237 (2004).

factors take into account the seriousness and nature of the offense, the juvenile's personal background and previous history in the legal system, the prospects for protecting the public and rehabilitating the juvenile, and the potential efficiency of adjudicating the case in juvenile or adult court.[40]

The Eighth Amendment and Proportionality in Sentencing

The Eighth Amendment states "cruel and unusual punishments [shall not be] inflicted."[41] Today, before determining whether a punishment is cruel and unusual, courts are required to look beyond historical conceptions to "the evolving standards of decency that mark the progress of a maturing society."[42] Punishments have been challenged under the Eighth Amendment in two primary ways.[43] First, the Eighth Amendment prohibits inherently barbaric punishments, including the imposition of torture under all circumstances.[44] The essential principle is that, "under the Eighth Amendment, the State must respect the human attributes of even those who have committed the most serious crimes."[45]

Second, when determining whether a sentence is cruel and unusual, courts must consider the proportionality of the sentence to the crime committed.[46] For example, a sentence of twenty-five years to life for a third shoplifting offense was considered grossly disproportionate and thus unconstitutional.[47] The concept of proportionality is central to the Eighth Amendment, because grossly disproportionate sentences are inherently cruel and unusual.[48] The Court's decisions concerning the proportionality of sentences fall within two general classifications.[49] The first classification includes challenges to the particular length

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[40] *Id.* The factors include, in part: the seriousness of the alleged offense; whether the offense was committed in a violent and/or aggressive manner; the sophistication and maturity of the juvenile as determined by considering his home, environmental situation, emotional attitude and pattern of living; the record and previous criminal history of the juvenile; and the prospects of adequate protection of the public and the likelihood of rehabilitation of the juvenile. *Id.*

[41] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). Initially, this amendment was adopted to prohibit certain methods of punishment thought to be cruel and unusual. Harmelin v. Michigan, 501 U.S. 957, 979 (1991) (Thomas, J., dissenting).

[42] Trop v. Dulles, 356 U.S. 86, 100–01 (1958) (plurality opinion); *see, e.g.*, Roper v. Simmons, 543 U.S. 551, 560–61 (2005); Atkins v. Virginia, 536 U.S. 304, 311–12 (2002).

[43] *See infra* notes 44–54 and accompanying text (describing Eighth Amendment challenges to sentences).

[44] *See* Hope v. Pelzer, 536 U.S. 730, 738 (2002); Wilkerson v. Utah, 99 U.S. 130, 136 (1879).

[45] Graham v. Florida, 130 S. Ct. 2011, 2021 (2010).

[46] *Id.*

[47] *See* Ramirez v. Castro, 365 F.3d 755, 775 (9th Cir. 2004).

[48] Miller v. Alabama, 132 S. Ct. 2455, 2463 (2012); *Graham*, 130 S. Ct. at 2021.

[49] *See infra* notes 50, 52 and accompanying text.

of term-of-years sentences given the circumstances in a particular case.[50] Appellate courts often struggle when considering challenges to term-of-years sentences because the United States Supreme Court's sentencing jurisprudence involving non-capital crimes has "not established a clear or consistent path for courts to follow in applying the highly deferential narrow proportionality analysis."[51] In the second classification of decisions, the Court established categorical rules that definitively shaped and defined Eighth Amendment standards.[52] Categorical rules were first established in response to the death penalty.[53] For example, the Court has held that imposing the death penalty for non-homicide crimes, or imposing it on the mentally handicapped, violates the Eighth Amendment.[54]

Categorical Prohibitions on Juvenile Sentencing: Roper v. Simmons *and* Graham v. Florida

Before *Roper* and *Graham*, the Court struggled with imposing limits on juvenile sentencing.[55] In 1988, the Court prohibited the execution of juveniles who committed serious crimes before the age of sixteen.[56] Only one year later, however, and in accord with the trend of punitive sentences over rehabilitation, the Court held imposing capital punishment on a juvenile who committed a capital crime at sixteen or seventeen years of age did not constitute cruel and unusual punishment under the Eighth Amendment.[57]

In 2005, in *Roper v. Simmons*, the Supreme Court reversed its position on capital punishment for juveniles, holding the imposition of the death penalty on individuals under the age of eighteen at the time of their crime was cruel and

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[50] *Graham*, 130 S. Ct. at 2021.

[51] *See* United States v. Farley, 607 F.3d 1294, 1336 (11th Cir. 2010) (quoting *Graham*, 130 S. Ct. at 2036–37 (Roberts, C.J., concurring)) (internal quotation marks omitted); John D. Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism,* 71 OHIO ST. L.J. 71, 75 (2010) ("It has become conventional wisdom that Eighth Amendment proportionality jurisprudence is a mess.").

[52] *Miller*, 132 S. Ct. at 2463 (citing *Graham*, 130 S. Ct. at 2022–23).

[53] *See* Kennedy v. Louisiana, 554 U.S. 407, 446–47 (2008) (holding that imposing the death penalty on individuals convicted of non-homicide crimes was unconstitutional); *see also* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that imposing the death penalty on "mentally retarded" criminals was unconstitutional).

[54] *See Kennedy*, 554 U.S. at 446–47*; Atkins*, 536 U.S. at 321.

[55] *See, e.g.*, Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (holding that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under sixteen at the time of his or her offense). *But see* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (affirming constitutionality of death sentence for juvenile sixteen or older at time of offense), *overruled by* Roper v. Simmons, 543 U.S. 551, 574, 578 (2005).

[56] *See Thompson*, 487 U.S. at 838.

[57] *See Stanford*, 492 U.S. at 380, *overruled by Roper*, 543 U.S. at 574, 578.

unusual under the Eighth Amendment.[58] In *Roper*, the defendant was seventeen when he kidnapped a woman, bound her, and threw her off a bridge where she drowned.[59] The defendant was charged with first-degree murder, convicted, and sentenced to death.[60] On appeal, the Missouri Supreme Court reversed, holding the execution of individuals under eighteen at the time of their offenses was prohibited under the Eighth Amendment.[61]

The United States Supreme Court affirmed.[62] Justice Kennedy, writing for the majority, established a categorical rule prohibiting the imposition of capital punishment on juveniles.[63] In its Eighth Amendment proportionality analysis, the majority considered "the evolving standards of decency that mark progress of a maturing society."[64] To determine whether the "evolving standards" justify a particular sentence, the Court first reviews the objective indicia of consensus, as expressed by state legislatures' enactments that address the particular sentencing question.[65] Then, the Court considers in the exercise of its own independent judgment whether a particular sentence is a disproportionate punishment.[66] The Court first examined objective indicia of consensus by considering the enactments of legislatures that addressed the question.[67] When considering objective indicia, the Court found sufficient evidence of a national consensus rejecting the death penalty for juveniles because a majority of states rejected its use, there was a consistent trend toward continued abolition of the death penalty for juveniles, and for the states retaining it, the penalty was used infrequently.[68]

The Court then considered its own independent judgment to determine whether the death penalty for juveniles violated the Constitution.[69] The majority

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[58] *Roper*, 543 U.S. at 574, 578.

[59] *Id.* at 556–57.

[60] *Id.* at 558.

[61] *Id.* at 559–60.

[62] *Id.* at 578.

[63] *Id.* at 572–74.

[64] *Id.* at 561 (quoting Trop v. Dulles, 356 U.S. 86 100–01 (1958) (plurality opinion)) (internal quotation marks omitted).

[65] *Id.* at 564.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 572. Thirty states prohibited the juvenile death penalty. *Id.* at 564. In the remaining twenty states, only six executed prisoners for crimes committed as juveniles after the Court's decision in *Stanford*. *Id.* at 564–65. The Court also determined that the direction of change, both domestically and internationally, towards abolishing the juvenile death penalty was sufficient evidence of consensus. *Id.* at 565–66, 575–78.

[69] *Id.* at 564. Because "consensus is not dispositive," independent judgment is guided by "the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose." Kennedy v. Louisiana, 554 U.S. 407, 421 (2008).

noted the Eighth Amendment should be applied with "special force" because "the death penalty is the most severe punishment."[70] The Court then relied on scientific and sociological studies to announce three general differences between juveniles and adults: the juvenile's sense of responsibility, vulnerability to negative influences and outside pressures, and the formation of character.[71] Through these differences, the Court concluded juvenile offenders cannot be classified reliably among the worst offenders, and that juveniles' conduct was not as morally reprehensible as adults' conduct.[72] In addition, the Court decided that a case-by-case approach would subject juveniles to an unacceptable risk of receiving the harshest sentences with a level of culpability insufficient for the punishment.[73]

The Court revisited juvenile sentencing in *Graham v. Florida*.[74] There, Graham was sentenced to life without parole for his involvement in an armed burglary where a clerk suffered head injuries from another individual involved in the burglary.[75] Justice Kennedy, again writing for the majority, held the Eighth Amendment prohibited the imposition of a juvenile life without parole sentence on a juvenile who did not commit homicide.[76] In addtion, the state must give a juvenile non-homicide offender a "*meaningful opportunity* to obtain release based on demonstrated maturity and rehabilitation."[77]

The Court established a categorical rule, realizing the risk that the judge's discretionary, subjective judgment may be used to impose a sentence despite a lack of culpability.[78] Furthermore, a case-by-case approach would fail to distinguish between the intransient juvenile offender and the juvenile offender who has the

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[70] *Roper*, 543 U.S. at 568.

[71] *See infra* notes 129–31 and accompanying text (describing the reasons why children are constitutionally different from adults for the purposes of sentencing).

[72] *Roper*, 543 U.S. at 569–70.

[73] *Id.* at 572–73. Justice O'Connor, in dissent, wrote that the objective evidence of contemporary societal values and the Court's moral proportionality analysis failed to justify the ruling. *Id.* at 587 (O'Connor, J., dissenting). Specifically, Justice O'Connor believed that a categorical rule was not proper because some juveniles could act with sufficient moral culpability when committing murders that were "premeditated, wanton, and cruel in the extreme." *See id.* at 600. Justice Scalia wrote a dissent where he criticized both the Court's finding of a national consensus on the "flimsiest of grounds" and the Court's view of itself as the alleged "sole arbiter of our Nation's moral standards" in exercising its own independent moral judgment. *Id.* at 608 (Scalia, J., dissenting).

[74] *See infra* notes 75–82 and accompanying text.

[75] Graham v. Florida, 130 S. Ct. 2011, 2018–20 (2010). Graham initially received a different sentence, but a judge imposed the life without parole sentence after Graham violated probation. *Id.*

[76] *Id.* at 2034.

[77] *Id.* at 2030 (emphasis added).

[78] *Id.* at 2031.

requisite psychological maturity and acts with gross depravity.[79] Rather, the Court found a national consensus against the imposition of juvenile life without parole sentences despite thirty-nine jurisdictions permitting sentences of life without parole for a juvenile non-homicide offender.[80] The Court found additional support in actual sentencing practices, where only 123 juvenile offenders (seventy-seven from Florida) were serving life without parole sentences nationwide.[81] The majority exercised its own independent judgment and relied on the three general differences between juveniles and adults that were utilized in *Roper*.[82] Although the Court established a categorical rule, it did not determine whether a very lengthy fixed term-of-years sentence with no possibility of parole imposed on a juvenile non-homicide offender is cruel and unusual under the Eighth Amendment.[83] Ultimately, these opinions have signaled a shift towards the old prevailing values of juvenile justice: rehabilitation and individualized consideration.[84]

Wyoming Juvenile Sentencing Law after Roper *and* Graham

Wyoming law allows juvenile homicide offenders to be sentenced to life imprisonment, although there is discretion whether the offender may receive the opportunity for parole.[85] Wyoming's first-degree murder statute states:

> (b) A person convicted of murder in the first degree shall be punished by death, life imprisonment *without parole* or life imprisonment *according to law*, except that no person shall be

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[79] *Id.* at 2031–32.

[80] *Id.* at 2023–26.

[81] *Id.* at 2024.

[82] *Id.* at 2026; *see supra* note 71 and accompanying text. Justice Stevens concurred with the majority opinion but emphasized that "[p]unishments that did not seem cruel and unusual at one time may, in the light of reason and experience, be found cruel and unusual at a later time . . . ." *Id.* at 2036 (Stevens, J., concurring). The Chief Justice also concurred but disagreed with the Court's new categorical rule. *Id.* (Roberts, C.J., concurring). Justice Thomas, dissenting, criticized the Court's use of "objective indicia of consensus," and noted the problems that the categorical rule would bring without clear standards. *Id.* at 2043, 2048–49, 2057–58 (Thomas, J., dissenting). Justice Alito noted that nothing would prevent a court from imposing a lengthy term-of-years sentence—effectively a life sentence. *Id.* at 2058–59 (Alito, J., dissenting).

[83] *See* Bunch v. Smith, 685 F.3d 546, 552–53 (6th Cir. 2012) (holding that an eighty-nine-year sentence imposed on a juvenile with no possibility of parole was constitutionally permissible under *Graham*).

[84] *See* Martin Guggenheim, Graham v. Florida *and a Juvenile's Right to Age-Appropriate Sentencing*, 47 HARV. C.R.-C.L. L. REV. 457, 500 (2012) (discussing how, after *Graham*, progressives who launched the juvenile court system more than a century ago to focus on rehabilitation may now be vindicated); *supra* notes 14, 17 and accompanying text.

[85] WYO. STAT. ANN. § 6-2-101(b) (2007).

> subject to the penalty of death for any murder committed before the defendant attained the age of eighteen (18) years.[86]

A Wyoming juvenile, Wyatt Bear Cloud, recently argued his sentence of "life according to law" was unconstitutional under *Graham* because the sentencing judge was statutorily required to sentence Bear Cloud to nothing less than life.[87] The Wyoming Supreme Court upheld the constitutionality of the sentence because there was an option between life with or without parole, and Bear Cloud was afforded the possibility of parole.[88] Bear Cloud also argued his sentence was unconstitutional because it was disproportionate, but the court declined to accept this argument since Bear Cloud was not sentenced to the most severe sentence available.[89] The court rejected Bear Cloud's argument that the sentencing court failed to consider any mitigating circumstances at sentencing because those circumstances were considered, albeit only during Bear Cloud's motion to be tried as a juvenile.[90] The Wyoming Supreme Court stated that once a juvenile's case was transferred to adult criminal court, the public policies affording a juvenile different treatment than adults were no longer applicable.[91]

PRINCIPAL CASE

Background Facts

In 2003, Evan Miller, age fourteen, and a friend were at home when a neighbor, Cole Cannon, arrived to make a drug deal with Miller's mother.[92] The two boys returned with Cannon to his trailer, where the three smoked marijuana and played drinking games.[93] After Cannon passed out, Miller stole Cannon's wallet and split approximately $300 with the other boy.[94] When Miller tried to

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[86] *Id.* (emphasis added). "Life imprisonment according to law" is a life sentence that provides the possibility of parole only after the governor has commuted the person's sentence to a term of years. *See* WYO. STAT. ANN. § 6-10-301(c) (2010); Weldon v. State, 800 P.2d 513, 514 (Wyo. 1990).

[87] *See* Bear Cloud v. State, 275 P.3d 377, 411–13 (Wyo. 2012), *vacated*, 81 U.S.L.W. 3159 (Oct. 1, 2012) The U.S. Supreme Court vacated the Wyoming Supreme Court's decision in *Bear Cloud* for further consideration in light of *Miller*. *See* Bear Cloud v. Wyoming, 81 U.S.L.W. 3159 (Oct. 1, 2012).

[88] *Bear Cloud*, 275 P.3d at 411–13.

[89] *Id.* at 406.

[90] *See id.* at 412; *see also infra* notes 139–42 and accompanying text (describing the *Miller* Court's rejection of the argument that the defendants' sentences were discretionary because of the individualized discretion that took place at the transfer hearing).

[91] *Bear Cloud*, 275 P.3d at 411–13.

[92] *See* Miller v. Alabama, 132 S. Ct. 2455, 2462 (2012).

[93] *Id.*

[94] *Id.*

place the wallet back in Cannon's pocket, Cannon awoke and grabbed Miller by the throat.[95] The other boy smashed Cannon with a baseball bat.[96] When Miller broke free, he grabbed the baseball bat and repeatedly struck Cannon.[97] The boys left and later decided to conceal evidence of their attack.[98] Upon returning to Cannon's trailer, they burnt it to the ground.[99] Cannon ultimately died from his injuries and smoke inhalation.[100] Prosecutors charged Miller with murder in the course of arson, which carried a mandatory life without parole sentence.[101] A jury found Miller guilty and the court mandatorily sentenced him to life without parole.[102]

Alabama's mandatory sentence precluded the court from considering pertinent information about Miller's personal and family background.[103] Miller's childhood was certainly difficult.[104] Miller bounced in and out of foster care because his mother suffered from drug and alcohol addiction and his stepfather abused him.[105] Miller himself regularly used drugs and alcohol.[106] He attempted suicide four times, the first attempt taking place when Miller was six.[107] Ultimately, the Alabama Court of Criminal Appeals affirmed Miller's sentence, ruling that the mandatory sentence was not overly harsh and did not violate the Eighth Amendment.[108]

Miller v. Alabama was combined with another case, *Jackson v. Hobbs*.[109] In *Jackson*, Kuntrell Jackson, like Miller, was fourteen years old when he and two other boys robbed a video store.[110] En route to the store, Jackson learned that one of the boys was carrying a sawed-off shotgun.[111] Jackson decided to stay outside

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[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* at 2462–63. Alabama law required that Miller initially be charged as a juvenile but allowed the District Attorney to seek removal of the case to adult court. *Id.* at 2462.

[102] *Id.* at 2463.

[103] *See infra* notes 104–07 and accompanying text.

[104] *Miller*, 132 S. Ct. at 2462.

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.* at 2463.

[109] *Id.* at 2460. The cases were combined when the Court granted certiorari in both cases in November 2011. *See id.*

[110] *Id.* at 2461.

[111] *Id.*

while the other two robbed the store, but later went inside.[112] The boy with the shotgun shot and killed the store clerk when she threatened to call the police.[113] The state charged and the jury convicted Jackson of capital felony murder and aggravated robbery.[114] Like Alabama, Arkansas law mandated a defendant convicted of capital murder to be sentenced to either death or life without parole.[115] The judge sentenced Jackson to life without parole and noted that "in view of the verdict, there's only one possible sentence."[116]

Jackson also had a troubled childhood.[117] Jackson grew up impoverished and lived in public housing projects rampant with drugs and violence.[118] Jackson's father left him at an early age and his mother's boyfriend was an abusive alcoholic.[119] His mother was sent to prison for shooting a neighbor when Jackson was six.[120] Arkansas's mandatory sentencing scheme also precluded the court from considering any of Jackson's personal and family background.[121]

Majority Opinion

Justice Kagan, writing for a five-to-four majority, held the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders.[122] The Court reasoned that by making youth irrelevant to the imposition of life without parole, a mandatory juvenile sentencing scheme poses too great a risk of disproportionate punishment.[123] Following *Roper* and *Graham*, the Court engaged in its Eighth Amendment proportionality analysis by examining the "evolving standards of decency that mark the progress of a maturing society."[124] The Court considered the "evolving standards of decency"

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[112] *Id.* The parties disputed whether Jackson warned the clerk or made a comment to his friends questioning their actions. *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* (citing ARK. CODE ANN. § 5-4-104(b) (1997)).

[116] *Id.* (internal quotation marks omitted).

[117] *See infra* notes 118–20 and accompanying text.

[118] Petition for Writ of Certiorari at 4, Miller v. Alabama, 132 S. Ct. 2455 (2012) (No. 10-9647), 2011 WL 5322575, at *4.

[119] *Id.* at *4–5.

[120] *Id.* at *5. Jackson previously was detained on other charges and was held at a juvenile detention facility in Arkansas. Jackson v. State, 194 S.W.3d 757, 759 (Ark. 2004). Jackson's other crimes were not explicitly stated. *See id.*

[121] *See supra* notes 115–16 and accompanying text.

[122] Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

[123] *Id.*

[124] *Id.* at 2463 (quoting Estelle v. Gamble, 429 U.S. 97, 102 (1976)) (internal quotation marks omitted).

by considering its own independent judgment and objective indicia of societal consensus by examining the enactments of state legislatures pertaining to life without parole sentences.[125] First, the Court considered its independent judgment to determine the proportionality of juvenile life without parole sentences.[126] The Court considered two strands of its precedent: the categorical bans adopted in *Roper* and *Graham* and previous prohibitions on the mandatory imposition of capital punishment.[127] The Court again relied on the sociological differences between juveniles and adults.[128] First, children lack maturity and have an underdeveloped sense of responsibility.[129] Second, children are more vulnerable to negative influences and outside pressures, including peer pressure.[130] Third, a child's character is not well-formed like an adult's and his or her actions are less likely to be evidence of irretrievable depravity.[131] The Court applied those differences when considering life without parole sentences for juvenile *homicide* offenders because children's distinctive mental traits are not crime-specific.[132] Ultimately, the Court believed *Graham*'s reasoning applies to any juvenile life without parole sentence, especially considering the risk of imposing a disproportionate punishment on a juvenile with diminished culpability.[133]

Second, the Court considered the objective indicia of society's standards.[134] Twenty-nine states mandated life without parole for juvenile homicide offenders.[135] However, the Court found this evidence to be weaker support of a national consensus against prohibition of such sentences.[136] In *Graham*, the

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[125] *See supra* notes 65–66 and accompanying text (describing the two steps the Court takes when considering the "evolving standards of decency" to determine whether a particular sentence is disproportionate and thus unconstitutional).

[126] *Miller*, 132 S. Ct. at 2463–69.

[127] *Id.* at 2463–64, 2467.

[128] *See infra* notes 129–31 and accompanying text.

[129] *Miller*, 132 S. Ct. at 2464 (quoting Roper v. Simmons, 543 U.S. 551, 569 (2005)) ("[C]hildren have a 'lack of maturity and underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking.").

[130] *Id.* (quoting *Roper*, 543 U.S. at 569) ("[C]hildren are more vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited contro[l] over their own environment, and lack the ability to extricate themselves from horrific, crime-producing settings." (internal quotation marks omited)).

[131] *Id.* (quoting *Roper*, 543 U.S. at 570) ("[A] child's character is not as 'well-formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].'").

[132] *Id.* at 2465, 2469.

[133] *Id.* at 2469 (citing *Roper*, 543 U.S. at 573; Graham v. Florida, 130 S. Ct. 2011, 2026–27 (2011)).

[134] *Id.* at 2470–72.

[135] *Id.* at 2471.

[136] *Id.* at 2471–72.

Court prohibited life without parole for juvenile non-homicide offenders even though thirty-nine states permitted that sentence.[137] The Court reasoned *Miller* was similar to *Graham* and *Roper* and was not breaking any new ground in what constitutes objective indicia of society's standards.[138]

The majority rejected the states' argument that Miller's and Jackson's sentences were indeed discretionary because individualized factors were considered when deciding whether to transfer Miller and Jackson to adult court.[139] The Court determined this discretion at the early transfer hearing had limited utility because a judge would have only partial information.[140] The Court noted that the consideration of mitigating circumstances at a transfer hearing may differ dramatically from the issue at a post-trial sentencing, where the judge would have different, and discretionary, sentencing options.[141] Ultimately, the discretion available to a judge at a transfer hearing cannot substitute for the discretion at sentencing without violating the Eighth Amendment.[142]

In *Miller*, the Court did not establish a categorical rule as it did in *Roper* and *Graham*.[143] Rather, the Court held the Eighth Amendment forbids a sentencing scheme that mandates life without parole for juvenile homicide offenders.[144] The Court further held the mitigating factors of youth must be considered, and the differences between adults and children counsel against irrevocably sentencing them to life without parole.[145] The Court stated that appropriate occasions for sentencing juveniles to life without parole would be uncommon due to the difficulty of distinguishing the intransient juvenile offender with the irreparably corrupted juvenile offender.[146] Ultimately, the Court stated that a judge must take into account how children are different and how those differences counsel against imposing a life without parole sentence.[147]

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[137] *Id.*

[138] *Id.* at 2472.

[139] *Id.* at 2469–70.

[140] *Id.* at 2474.

[141] *Id.*

[142] *Id.* at 2475.

[143] *Id.* at 2469.

[144] *Id.*

[145] *Id.* at 2467, 2469.

[146] *Id.* at 2469. Justice Breyer wrote separately, noting that if Jackson did not kill or intend to kill the store clerk, his culpability would be "twice-diminished" and *Graham* would preclude a life without parole sentence. *Id.* at 2475–77 (Breyer, J., concurring).

[147] *Id.* at 2469 (majority opinion).

Dissenting Opinions

Chief Justice Roberts dissented, joined by Justices Scalia, Thomas, and Alito.[148] The dissent disagreed with the majority's interpretation of the objective indicia of society's standards, especially since the number of mandatory juvenile life without parole sentences was over 5,000 times higher than the corresponding statistic in *Graham*.[149] The dissent also attacked the statement that juvenile life without parole sentences would be "uncommon," expressing concern that the Court may have "bootstrapped its way to declaring that the Eighth Amendment absolutely prohibits them."[150] The Chief Justice believed the majority's analysis would lead to prohibiting the prosecution of juveniles in adult courts.[151] Justices Thomas and Alito shared similar concerns, writing that the Court may soon prohibit life without parole sentences for juveniles who commit murder.[152]

ANALYSIS

In *Miller*, the Court correctly prohibited the mandatory imposition of life without parole sentences for juvenile homicide offenders.[153] The Court, however, should have engaged fully in the Eighth Amendment proportionality analysis and adopted a categorical rule prohibiting life without parole sentences for all juveniles.[154] A categorical rule would still give sentencing judges ample discretion to impose a severe punishment that fulfills the penological goals of retribution, deterrence, and incapacitation while properly focusing on the juvenile offender's

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[148] *Id.* at 2477 (Roberts, C.J., dissenting). Justice Alito wrote separately for reasons similar to the Chief Justice's. *Id.* at 2487–90 (Alito, J., dissenting). Justice Thomas wrote to express his continuing dissatisfaction with the Court's proportionality analysis and his belief that the Court has "gone from 'merely' divining the societal consensus of today to shaping the societal consensus of tomorrow." *Id.* at 2482–86 (Thomas, J., dissenting).

[149] *Id.* at 2478–79 (Roberts, C.J., dissenting). In *Graham*, the Court stated that 123 prisoners were serving life without parole for non-homicide offenses committed as juveniles while, in 2007, nearly 400,000 juveniles were arrested for serious non-homicide crimes. *Id.* However, approximately 2000 individuals were serving life without parole for homicides committed as juveniles, and 1170 juveniles were arrested for murder in 2009 alone. CHARLES PUZZANCHERA & BENJAMIN ADAMS, DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, JUVENILE ARRESTS 2009 (2011), *available at* http://www.ojjdp.gov/pubs/236477.pdf.

[150] *Miller*, 132 S. Ct. at 2478, 2481.

[151] *Id.* at 2481.

[152] *See id.* at 2486 (Thomas, J., dissenting); *id.* at 2490 (Alito, J., dissenting). Justice Alito believed that future cases would "extrapolate from [*Miller's*] holding and continue until the majority establishes sentencing practices that line up with what the majority views as truly evolved standards of decency." *Id.*

[153] *See id.* at 2469 (majority opinion) (discussing the Court's holding forbidding the mandatory imposition of juvenile life without parole sentences).

[154] *See infra* notes 173–208 and accompanying text (describing the merits of a categorical rule and how the Court could have engaged in proportionality analysis to reach this result).

rehabilitation and taking youth into account as a mitigating factor.[155] Finally, Wyoming must alter its sentencing scheme to require consideration of mitigating factors at sentencing.[156] The State could best comply with *Miller* in one of two ways.[157] First, the state can require judges to consider mitigating factors at the sentencing hearing.[158] Second, the state can simply eliminate life without parole for juveniles.[159]

Juvenile Life Without Parole Sentences: From Mandatory to Advisory with No Advice

The Court correctly held the Eighth Amendment prohibits sentencing schemes that mandatorily impose life without parole sentences on juveniles.[160] In *Miller*, the Court held a sentencing judge should look at facts such as the offender's youthful age and diminished culpability, his family and personal background, and his role and actions in the commission of the crime in question.[161] The Court correctly followed *Roper* and *Graham* and determined that a mandatory sentencing scheme was flawed.[162] The mandatory scheme gave no significance to the character and record of the offender and excluded from consideration the possibility of compassionate or mitigating circumstances.[163] The Court properly followed previous rulings, insisting that sentencing judges and juries consider the mitigating circumstances of youth.[164]

In addition, the Court's conclusion is supported by *United States v. Booker* and 18 U.S.C. § 3553(a).[165] Since 2005, the Court has retreated from mandatory

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[155] *See* Graham v. Florida, 130 S. Ct. 2011, 2028–30 (2010).

[156] *See infra* notes 210–31 and accompanying text (describing options available to Wyoming to amend its statutory sentencing scheme to better reflect *Miller*'s mandate).

[157] *See infra* notes 212–30 and accompanying text (describing two possibilities to amend Wyoming's sentencing statute to better reflect requirements for juvenile sentencing when life without parole is implicated).

[158] *See infra* notes 212–17 and accompanying text.

[159] *See infra* notes 224–30 and accompanying text.

[160] *See* Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

[161] *Id.* at 2467, 2469.

[162] *See id.* at 2468 (citing Graham v. Florida, 130 S. Ct. 2011, 2032 (2010)).

[163] *Id.*

[164] *See id.* at 2467, 2469; s*ee also* Johnson v. Texas, 509 U.S. 350, 367 (1993) (a sentencer must have the ability to consider the "mitigating qualities of youth"); Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) ("[Y]outh is more than a chronological fact.").

[165] *See* 18 U.S.C. § 3553(a) (2006); United States v. Booker, 543 U.S. 220, 258–65 (2005). In *Booker*, the Court held that, because the Federal Sentencing Guidelines violated the Sixth Amendment's right to a jury trial, the Guidelines could no longer be mandatory but continue to be advisory. *Id.* Under these advisory guidelines, a federal district judge must consider the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the

sentencing schemes in favor of individualized sentencing.[166] Because juvenile offenders have diminished culpability, they are significantly different from adults.[167] This difference militates against a sentence that "forswears altogether the rehabilitative ideal."[168] The majority in *Miller* noted the differences between juvenile and adult offenders counsel against irrevocably sentencing them to life in prison.[169]

However, the Court should have established a broad, categorical ban on juvenile life without parole sentences.[170] Although courts are now required to consider youth as a mitigating factor, the Court provided no guidance for lower courts when sentencing a juvenile homicide offender.[171] The Court's failure to provide further guidance will leave both state legislatures and courts in uncertainty as they attempt to comply with *Miller*.[172]

Establishing a Categorical Rule from Miller

Similar to *Roper* and *Graham*, the Court in *Miller* had the opportunity to establish another broad categorical rule forbidding the imposition of juvenile life without parole.[173] The Court instead concluded that prohibiting the mandatory aspect of the sentence was sufficient to cure the constitutional infirmity.[174] Here, the Court should have engaged in the similar analysis that it undertook

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sentence imposed to reflect the seriousness of the sentence, to afford adequate deterrence to criminal conduct, to protect the public from the defendant's further crimes, and to provide the defendant with rehabilitative opportunities; and the kinds of sentences available. 18 U.S.C. § 3553(a).

[166] *See supra* note 165 and accompanying text; *see also* Guggenheim, *supra* note 84, at 491.

[167] *See Graham*, 130 S. Ct. at 2028–30.

[168] *See id.* at 2030; *see also* Sara Taylor, Comment, *Unlocking the Gates of Desolation Row*, 59 UCLA L. REV. 1810, 1862 (2012) (arguing that an individualized assessment is "necessary to differentiate accurately between those for whom a harsh sentence is appropriate and those for whom such a sentence is grossly disproportionate and thus unconstitutional.").

[169] *Miller*, 132 S. Ct. at 2467–69.

[170] *See infra* notes 173–208 and accompanying text (describing the reasons for establishing a categorical ban prohibiting all juvenile life without parole sentences).

[171] *See Miller*, 132 S. Ct. at 2469.

[172] *See infra* notes 239–60 and accompanying text (describing, for example, Wyoming's challenges in determining how to sentence juveniles who might be convicted of first-degree murder and in determining the disposition of those juveniles already sentenced to life without parole).

[173] *See* Roper v. Simmons, 543 U.S. 551, 570, 578 (2005) (holding that the Eighth Amendment forbids imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed); Graham v. Florida, 130 S. Ct. 2011, 2034 (2010) (holding that the Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide).

[174] *See Miller*, 132 S. Ct. at 2469.

in *Roper* and *Graham*, considering the "evolving standards of decency that mark the progress of a maturing society."[175] If the Court had engaged in its Eighth Amendment proportionality analysis, it would have relied on the objective indicia of societal consensus and its own independent moral judgment to establish a categorical ban on the imposition of juvenile life without parole sentences.[176] This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile offenders who are not sufficiently culpable because such a sentence would be cruel and unusual, thereby violating the Eighth Amendment.[177]

The evidence of objective indicia may not be as strong as it was in *Graham*, but it still lends strong support toward the adoption of a categorical prohibition.[178] Before *Miller*, twenty-nine states made life without parole mandatory for juveniles convicted of murder in adult court.[179] Of these twenty-nine states, more than half disregard the age of the offender.[180] In *Graham*, the Court established a categorical rule despite the fact thirty-nine jurisdictions permitted life without parole for juvenile non-homicide offenders.[181] In *Miller*, the Court noted that ten fewer jurisdictions permitted life without parole for homicide offenders than the corresponding statistic in *Graham*.[182] The majority correctly referred to *Roper*

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[175] *See supra* notes 62–82 and accompanying text (describing the Court's use of objective indicia and its own independent moral judgment to establish categorical prohibitions in *Roper* and *Graham*).

[176] *See infra* notes 178–81 and accompanying text. *See generally* Corinna Lain, *Lessons Learned from the Evolution of "Evolving Standards"*, 4 CHARLESTON L. REV. 661, 674 (2010) ("The cases [*Roper* and *Graham*] that paved the road to evolving standards as a substantive doctrine show the Justices time and again rejecting the result that a cold reading of the law would provide in favor of what they thought was right.").

[177] *See* Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

[178] *See Miller*, 132 S. Ct. at 2464–74 (describing the Court's judgment of the differences between children and adults and the Court's treatment of evidence of objective indicia of society's standards).

[179] *Id.* at 2471. *See, e.g.*, ALA. CODE §13A-5-45 (2005 & Cum. Supp. 2011); ARIZ. REV. STAT. ANN. § 13-751 (2010); ARK. CODE. ANN. § 5-4-104 (2011); CONN. GEN. STAT. § 53a-35a (2011); DEL. CODE. ANN. tit. 11, § 4209(a) (2007); FLA. STAT. § 775.082(1) (2010); IOWA CODE § 902.1 (2011); NEB. REV. STAT. § 29-2522 (2008); S.D. CODIFIED LAWS § 22-6-1 (2005); WASH. REV. CODE §§ 10.95.020, 10.95.030 (2003); WYO. STAT. ANN. § 6-2-101 (2010).

[180] *Miller*, 132 S. Ct. at 2473. *See, e.g.*, ALA. CODE §§ 13A–5–45(f), 13A-6-2(c) (2005 & Cum. Supp. 2011); ARIZ. REV. STAT. ANN. § 13-752 (2010), § 41-1604.09(I) (2011); CONN. GEN. STAT. § 53a-35a(1) (2011); DEL. CODE ANN., tit. 11, § 4209(a) (2007); FLA. STAT. § 775.082(1) (2011); HAW. REV. STAT. § 706-656(1) (1993); IDAHO CODE ANN. § 18–4004 (2004); MICH. COMP. LAWS § 791.234(6)(a) (2012); MINN. STAT. ANN. § 609.106, subd. 2 (2009); NEB. REV. STAT. § 29–2522 (2008); N.H. REV. STAT. ANN. § 630:1–a (2007); S.D. CODIFIED LAWS § 22–6–1(1) (2006); S.D. CODIFIED LAWS § 24–15–4 (2004); VT. STAT. ANN., tit. 13, § 2311(c) (2009); WASH. REV. CODE § 10.95.030(1) (2010).

[181] *Graham*, 130 S. Ct. at 2023.

[182] *Miller*, 132 S. Ct. at 2471 n.10.

and *Graham* when it stated that this objective evidence was not distinguishable from previous cases holding that a sentencing practice violates the Eighth Amendment.[183] There are also indications that imposing a life without parole sentence for a juvenile murderer is not a particularly widespread practice.[184] In the last thirty years, juveniles were involved in 27,371 murders.[185] However, only 2500 were sentenced to serve life without parole in prison.[186] Approximately three percent of individuals serving life without parole were juveniles at the time of their offenses.[187]

Furthermore, the Court had strong support from precedent and scientific and sociological studies to exercise its own independent judgment to establish a broad categorical rule.[188] The Court in *Roper* and *Graham* spent significant time outlining the distinctions between juveniles and adults that gave rise to the conclusion that children are constitutionally different from adults for the purposes of sentencing.[189] The *Miller* Court correctly pointed out that juveniles have diminished culpability and greater prospects for reform, making them less deserving of the most severe punishment.[190] After considering the mitigating characteristics of youth, however, lower courts may still impose a life without parole sentence on a juvenile.[191] Courts can still guarantee that a juvenile homicide offender will die in prison, regardless of what the offender might do to demonstrate rehabilitation and maturity.[192]

In *Graham*, the Court held the Eighth Amendment required that a juvenile non-homicide offender have a meaningful opportunity to rejoin society.[193] Just as in *Roper* and *Graham*, the Court in *Miller* noted the difficulties of distinguishing

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[183] *See id.* at 2470–72.

[184] *See infra* notes 185–86 and accompanying text.

[185] DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, ESTIMATED NUMBER OF HOMICIDE VICTIMS OF KNOWN JUVENILE OFFENDERS, 1980-2010, STATISTICAL BRIEFING BOOK (July 31, 2012), *available at* http://ojjdp.gov/ojstatbb/offenders/qa03105.asp. The statistics used in this note do not include those murders where both juveniles *and* adults were involved. Over the past thirty years, 12,118 homicides occurred where both juveniles and adults were involved. *Id.*

[186] *See Miller*, 132 S. Ct. at 2477 (Roberts, C.J., dissenting).

[187] Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. TIMES, Oct. 2, 2005, http://www.nytimes.com/2005/10/02/national/02life.html.

[188] *See infra* notes 189–96 and accompanying text.

[189] *See supra* notes 62–82 and accompanying text (describing the Court's use of objective indicia and its own independent moral judgment to establish categorical prohibitions in *Roper* and *Graham*); *see also* Guggenheim, *supra* note 84, at 462.

[190] *See supra* notes 128–32 and accompanying text.

[191] *See supra* notes 128–32 and accompanying text.

[192] *See* Graham v. Florida, 130 S. Ct. 2011, 2033 (2010).

[193] *Id.* at 2030, 2033.

"the rare juvenile offender whose crime reflects irreparable corruption."[194] In doing so, the *Miller* Court ignored the similar constitutional question—whether a juvenile homicide offender must receive a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.[195] To correct the constitutional infirmity, the Court in *Miller* should have extended its holding in *Graham* to all juvenile offenders by requiring all courts to provide "some *meaningful opportunity* to obtain release based on demonstrated maturity and rehabilitation."[196]

Contrary to the dissenters' concern, a categorical rule would not lead the Court down a path with "no discernible end point."[197] The Court correctly noted the similarities that life without parole sentences share with death sentences, particularly the fact that life without parole is also an irrevocable forfeiture.[198] The clear distinction between life without parole and other prison sentences favors the creation of a categorical rule.[199] A categorical rule would leave juvenile sentencing jurisprudence with a clear endpoint and consistent rule courts can apply and avoid the confusion stemming from a lack of guidance on the manner in which to apply *Miller*.[200]

Ultimately, a categorical rule would provide judges ample discretion to impose a proper and just sentence on a juvenile offender while ensuring the offender's youth and personal background are properly considered as mitigating factors.[201] The entire Court agreed that Miller, Jackson, and other youth who commit the most heinous crimes deserve severe punishment.[202] Similar to federal sentencing procedures, the length of a juvenile homicide offender's sentence is a decision best left to the sentencing judge, who will consider the attendant circumstances

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[194] Miller v. Alabama, 132 S. Ct. 2445, 2469 (2012) (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)) (internal quotation marks omitted).

[195] *Id.*; *accord Graham*, 130 S. Ct. at 2032–33.

[196] *Graham*, 130 S. Ct. at 2030 (emphasis added). It is not clear whether a lengthy term-of-years sentence with no chance for parole would still provide "a meaningful opportunity for release." *See* Sally Terry Green, *Realistic Opportunity for Release Equals Rehabilitation: How the States Must Provide Meaningful Opportunity for Release*, 16 BERKELEY J. CRIM. L. 1, 10–14 (2011) (arguing that if states impose a life sentence, they do so with the goal of rehabilitation and provide a truly meaningful opportunity for release).

[197] *See Miller*, 132 S. Ct. at 2481 (Roberts, C.J., dissenting).

[198] *Id.* at 2466 (majority opinion).

[199] *See id.*

[200] *See id.* at 2481 (Roberts, C.J., dissenting); *see also* Leonardo P. Caselli, Case Note, *One Small Step for Juveniles, One Giant Leap for Juvenile Justice;* Graham v. Florida, 11 WYO. L. REV. 269, 281–84 (2011) (advocating for the adoption of a categorical ban prohibiting all juvenile life without parole sentences).

[201] *See Miller*, 132 S. Ct. at 2467, 2469 (majority opinion).

[202] *See, e.g.*, *id.* at 2469 ("That Miller deserved severe punishment for killing Cole Cannon is beyond question.").

of the offender's crime and personal background based on the facts and evidence presented.[203] Furthermore, a categorical rule would not preclude the possibility that a juvenile homicide offender with insufficient culpability would spend the remainder of his or her natural life in prison.[204] The juvenile offender would still have to demonstrate maturity and rehabilitation to the satisfaction of a parole board.[205] In addition to obtaining release through parole, a juvenile offender could still gain an opportunity for early release by showing maturity and rehabilitation to correctional officials, who could award "good time" to the offender.[206] The board may determine a juvenile is indeed irredeemable and deserves incarceration for the rest of his or her life.[207] The determination of irredeemable depravity is best made by a parole board after a juvenile has been removed from society, not by a court at the outset.[208]

Miller*'s Impact on Wyoming Law*

Like other states, Wyoming will have difficulty determining which juvenile homicide offenses are "uncommon" as to warrant a life without parole sentence.[209] In light of *Miller*, the Wyoming Legislature should amend its first-degree murder statute to better reflect the necessary procedures a judge must take while sentencing a convicted juvenile.[210] The legislature may do this in one of two ways, as demonstrated in recent legislative proposals.[211] First, the legislature could add an additional clause to the murder statute stating that a juvenile may be punished by life imprisonment without parole only after mitigating factors are considered at

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[203] *See* Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

[204] *See Miller*, 132 S. Ct. at 2469; *see also* Workman v. Kentucky, 429 S.W.2d 374, 377 (Ky. Ct. App. 1968) ("However, a different situation prevails when punishment of this stringent a nature is applied to a juvenile. Juveniles are deprived of many of the benefits of the law of this state, merely because of their immaturity.").

[205] *See supra* note 37 and accompanying text.

[206] *See* James B. Jacobs, *Sentencing by Prison Personnel: Good Time*, 30 UCLA L. REV. 217, 221 (1982) (defining good time and the methods by which it is awarded to inmates).

[207] *See Miller*, 132 S. Ct. at 2467, 2469.

[208] *See supra* notes 37, 40 and accompanying text. Note that, for example, the factors considered during sentencing in a federal court do not mandate consideration of the offender's potential for or actual rehabilitation; rather, the consideration is for rehabilitative opportunities available to the offender. *See* 18 U.S.C. § 3553(a) (2006).

[209] *See Miller*, 132 S. Ct. at 2469.

[210] *See* WYO. STAT. ANN. § 6-2-101 (2007). "Life imprisonment according to law" is a life sentence that provides the possibility of parole only after the governor has commuted the person's sentence to a term of years. *See id.*; *id.* § 6-10-301(c) (2010); Weldon v. State, 800 P.2d 513, 514 (Wyo. 1990).

[211] *See infra* notes 212–17 and accompanying text (discussing how adopting factors to be considered at a special sentencing hearing would meet the United States Supreme Court's mandate in *Miller*).

a separate hearing.[212] In delineating the mitigating factors to consider, Wyoming should adopt a list of specific, but not exclusive, criteria that judges must consider when sentencing a juvenile offender convicted of first-degree murder.[213] Wyoming already has statutory factors for considering whether a juvenile should be transferred to adult court that would be helpful for judges to consider at a juvenile's sentencing.[214] These factors include not only a consideration of the circumstances and nature of the juvenile's offense, but also factors considering the juvenile's maturity, personal background, and potential for rehabilitation.[215] The legislative proposal stated that both the defendant and state may provide evidence of the defendant's age, maturity, intelligence, relative culpability, potential for rehabilitation, ability to appreciate risks and consequences, and any other relevant matter.[216] These factors would help Wyoming avoid future constitutional challenges.[217]

However, because a trial court under Wyoming law can sentence a juvenile convicted of homicide to either life without parole or "life according to law," it is unclear whether these sentences are the same.[218] Under Wyoming law, "life according to law" requires the Governor commute the offender's sentence to a term of years before he or she is eligible for parole.[219] If these sentences are in fact different, then a trial court would not be required to consider the mitigating factors of youth for a life without parole sentence because such a sentence is not truly mandatory.[220] If the United States Supreme Court adopts a categorical ban on all life without parole sentences in the future, Wyoming may face a constitutional challenge as to whether a sentence of "life according to law" would afford a juvenile offender "a meaningful opportunity to obtain release" under *Graham*, especially because executive commutations are rare.[221] Currently, the

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[212] *See* J. Judiciary Interim Comm., 13LSO-0202.C2, 62d Gen. Sess. (Wyo. 2012)

[213] *See infra* notes 214–17 and accompanying text.

[214] *See* WYO. STAT. ANN. § 14-6-237 (2004) (discussing relevant statutory factors a judge must consider before transferring a juvenile to adult court).

[215] *See id.*

[216] *See* J. Judiciary Interim Comm., 13LSO-0202.C2, 62d Gen. Sess. (Wyo. 2012).

[217] *See supra* notes 144–46 and accompanying text (describing the Court's requirement in *Miller* for sentencing courts to consider the mitigating qualities of youth and the circumstances of the offense).

[218] *See* WYO. STAT. ANN. § 6-2-101 (2007).

[219] WYO. STAT. ANN. § 6-10-301(c) (2010).

[220] *Compare* § 6-2-101 ("life imprisonment without parole or life imprisonment according to law"), *with* Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) (holding that the mitigating factors of youth must be considered before sentencing a juvenile to life without parole).

[221] *See* WYO. STAT. ANN. § 7-13-401(f). An inmate seeking commutation must first apply to the Parole Board, which has the power to recommend commutation to the Governor. *Id.* Then, the governor decides whether to commute the sentence. *Id.* In the last three years, the Parole Board made only 24 recommendations for commutation. WYO. BD. OF PAROLE, ANNUAL REPORT at 3 (2012), *available at* http://boardofparole.wy.gov/pdf/ AnnualReport.pdf.

Wyoming Supreme Court is considering the issue of whether these two sentences are the same.[222] However, at the time of this writing, the case is pending.[223]

The second option the Wyoming Legislature is considering is the addition of a clause to its first degree murder statute requiring juveniles to be sentenced to life imprisonment, but not life without parole.[224] A life imprisonment sentence would theoretically impose a life sentence and would raise a similar issue of whether "life imprisonment" and life without parole are identical.[225] Under Wyoming law, a person sentenced to life or life imprisonment is not eligible for parole unless the Governor has commuted the person's sentence to a term of years.[226] If life imprisonment is identical to life without parole, the life imprisonment sentence would not conform to *Miller* unless the mitigating factors of youth are considered before imposing such a sentence.[227] Interestingly, the proposed statutory language does not use the words "life according to law." Rather, it simply states that the sentence shall be life imprisonment.[228] Nevertheless, the structure of a "life imprisonment" sentence would still raise concerns regarding the would-be former "life according to law" sentence.[229] Therefore, this proposed statute may not conform to *Miller* and *Graham*, given that "life imprisonment" may not provide juvenile homicide offenders "a meaningful opportunity to gain release."[230] The Wyoming Legislature's current proposal would avoid this issue, as the statute would be revised to permit a juvenile convicted of first-degree murder to become eligible for parole after serving twenty-five years of his or her life sentence.[231]

Other state legislatures have acted in response to *Miller*. At least two state legislatures have passed statutes that extend *Miller*'s holding and prohibit life

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[222] *See* Bear Cloud v. State, 275 P.3d 377, 411–13 (Wyo. 2012), *vacated*, 81 U.S.L.W. 3159 (Oct. 1, 2012).

[223] *Id.*

[224] *See* J. Judiciary Interim Comm., 13LSO-0234.C2, 62d Gen. Sess. (Wyo. 2012). The proposed statutory revision to section 6-2-101 reads, in relevant part: "[A] person convicted of murder in the first degree who was under the age of eighteen (18) years at the time of the offense shall be punished by life imprisonment." *Id.*

[225] *See infra* notes 226–31 and accompanying text.

[226] WYO. STAT. ANN. § 6-10-301(c) (2010).

[227] *See* Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

[228] *See* J. Judiciary Interim Comm., 13LSO-0234.C2, 62d Gen. Sess. (Wyo. 2012).

[229] *See* WYO. STAT. ANN. § 6-10-301(c) (2010). Any sentence of life or life imprisonment must be commuted by the governor to a term of years before the offender is eligible for parole. *Id.*

[230] *See supra* notes 77, 122 and accompanying text.

[231] J. Judiciary Interim Comm., 13LSO-0234.C2, 62d Gen. Sess. (Wyo. 2012). A juvenile could still be eligible for parole earlier than twenty-five years if the governor commutes his or her sentence. *Id. See also What a Difference a Day Makes*, CASPER STAR-TRIBUNE, Nov. 8, 2012, http://trib.com/opinion/what-a-difference-a-day-makes-for-wyoming-lawmakers/article_c35f3773-30fa-5198-9ad1-92f832b44167.html.

without parole sentences.[232] In Pennsylvania, the state legislature eschewed juvenile life without parole sentences in favor of a sentence of at least twenty to thirty-five years in prison.[233] In California, the Governor signed into law a bill allowing juveniles sentenced to life without parole to ask judges to reconsider their sentences after they serve at least fifteen years in prison.[234] A judge may then reduce the life without parole sentence to twenty-five years to life if the inmate shows remorse and is taking steps toward rehabilitation.[235]

Finally, the decision in *Miller* will require the Wyoming Supreme Court to revisit *Bear Cloud*.[236] The United States Supreme Court vacated Bear Cloud's sentence in light of *Miller* and remanded his case to the Wyoming Supreme Court. Presumably, the issue will be whether life without parole and "life according to law" are the same sentence. If they are the same, then the Wyoming Supreme Court would be required to remand to the trial court to consider Bear Cloud's youth, personal background, and circumstances of his offense before imposing a life without parole sentence.[237] Given *Miller*'s reasoning, the Court implicitly rejected the Wyoming Supreme Court's rationale in *Bear Cloud* that Bear Cloud's sentence was constitutional because the factors in WYO. STAT. ANN. section 14-6-237 were considered during Bear Cloud's transfer hearing when he sought to be tried as a juvenile.[238]

Miller*'s Unanswered Questions*

Miller's holding is clear: no mandatory life without parole for juveniles.[239] However, the Court did not answer several questions regarding juvenile sentencing.[240] Without a categorical rule, lower courts must now struggle to

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[232] *See infra* notes 233–35 and accompanying text.

[233] *Pa. House Votes to Alter Juvenile Murder Sentences*, ASSOCIATED PRESS, Oct. 16, 2012, http://www.pennlive.com/newsflash/index.ssf/story/pa-house-votes-to-alter-juvenile-murder-sentences/9732764717474cde860831d9e5cb0202. The Pennsylvania governor signed this bill into law on October 26, 2012. *Corbett Signs Juvenile Murder Sentence Legislation*, ASSOCIATED PRESS, Oct. 26, 2012, http://articles.philly.com/2012-10-26/news/34750494_1_corbett-second-degree-convictions-legislation. This legislation requires defendants fourteen or younger to serve at least twenty years for second-degree convictions and twenty-five years for first-degree convictions. *Id.* Offenders between fifteen and seventeen would serve at least twenty-five or thirty-five years. *Id.*

[234] Don Thompson, *Gov. Brown Signs Bill Giving Juveniles Second Chance*, Associated Press, Sept. 30, 2012, http://www.montereyherald.com/national/ci_21667150/gov-brown-signs-bill-giving-juveniles-2nd-chance. *Miller* did not directly affect California sentencing law, as judges have discretion to impose a sentence between twenty-five years and life. *Id.*

[235] *Id.*

[236] *See infra* notes 237–38 and accompanying text.

[237] *See* Miller v. Alabama, 132 S. Ct. 2455, 2474–75 (2012).

[238] *See id.*; Bear Cloud v. State, 275 P.3d 377, 411–13 (Wyo. 2012).

[239] *See Miller*, 132 S. Ct. at 2469.

[240] *See infra* notes 242–60 and accompanying text.

determine the manner in which they must apply *Miller*'s holding.[241] First, some state appellate courts have narrowly construed *Miller* but, like the United States Supreme Court, have provided little guidance for sentencing courts regarding what mitigating factors of youth must be considered.[242] These appellate courts stated that *Miller* precluded mandatory life without parole and required consideration of the mitigating factors of youth.[243] However, like the *Miller* Court, these state courts did not elaborate as to what must be included in this consideration.[244]

Next, state courts have struggled with whether *Miller* applies retroactively and covers mandatorily imposed life without parole on juveniles sentenced before *Miller*.[245] A Florida appellate court determined *Miller* does not warrant retroactive application to juvenile offenders whose convictions and sentences were final before the United States Supreme Court issued its decision in *Miller*.[246] However, a dissenting opinion from a recent Indiana Supreme Court decision suggests that even if a juvenile is not mandatorily sentenced to life without parole, *Miller* does not preclude that a discretionarily imposed sentence is unconstitutional.[247] Additionally, California courts have reversed cases where the juvenile faced a presumption of life without parole at sentencing.[248] These decisions are but the first examples of states struggling to determine whether to apply *Miller* to those juveniles already serving life without parole sentences. The United States Supreme Court has stated, in *Teague v. Lane*, that new constitutional rules of criminal procedure would not be applicable to those cases which have become final before the new rules are announced.[249] However, later that year the Court clarified that there were two primary exceptions to the ruling in *Teague*, which would not apply if the rule prohibited a certain category of punishment for a class of defendants

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[241] *See infra* notes 242–60 and accompanying text.

[242] *See, e.g.*, People v. Kelly, 2012 WL 3802280, at *15 (Cal. Ct. App. Sept. 4, 2012) ("[The Court] emphasized *Graham*'s 'categorical bar' to life without parole sentences applied 'only to non-homicide offenses.'"); State v. Lockheart, 2012 WL 2814378, at *3–4 (Iowa Ct. App. July 11, 2012) ("[T]he sentencing court shall 'have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.'").

[243] *See supra* note 242 and accompanying text.

[244] *See supra* note 242 and accompanying text.

[245] *See infra* notes 246–48 and accompanying text.

[246] *See* Geter v. State, No. 3D12-1736, 2012 WL 4448860, at *10 (Fla. Dist. Ct. App. Sept. 27, 2012) ("*Miller* does not warrant retroactive application to Florida juvenile offenders whose convictions and sentences were final as of . . . the date *Miller* was issued.").

[247] *See* Conley v. State, 972 N.E.2d 864, 885 (Ind. 2012) (Rucker, J., dissenting) (stating that the differences between youth and adults that preclude mandatory life without parole for juveniles may also lead to the conclusion that life without parole for a particular youth is unconstitutional).

[248] *See* People v. Moffett, 148 Cal. Rptr. 3d 47, 55 (Cal. Ct. App. 2012); *see also* People v. Hoffman, 2012 WL 3066392 (Cal. Ct. App. July 30, 2012).

[249] 489 U.S. 288, 310 (1989) (plurality opinion).

because of their status or offense.[250] In addition, states theoretically could employ a less restrictive view of applying *Teague* in cases on collateral review.[251] State courts will likely continue to struggle with whether *Miller* should be applied retroactively.[252] In at least one state, the other branches of government have chosen to determine what *Miller*'s effect should be on offenders already serving life without parole for crimes committed while they were juveniles.[253]

In addition, *Miller* did not clarify whether a juvenile homicide offender must be given a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.[254] When announcing its holding in *Miller*, the Court referred to *Graham*'s "meaningful opportunity" requirement but did not address whether juvenile homicide offenders must receive that same opportunity.[255] To date, no court has considered whether the state must give a juvenile homicide offender a meaningful opportunity for release—an issue that likely would require consideration of establishing a categorical rule against all life without parole sentences.[256]

Furthermore, the Court did not address whether a lengthy term of years sentence for juvenile offenders would violate the Eighth Amendment as cruel and unusual.[257] At least one federal circuit court of appeals and one state appellate court have concluded that lengthy term of years sentences do not violate either *Miller* or *Graham*.[258] However, an appellate court in California concluded that a 110 year

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[250] *See* Penry v. Lynaugh, 492 U.S. 302, 330 (1989), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304, 320–21 (2002).

[251] Mary C. Hutton, *Retroactivity in the States: The Impact of* Teague v. Lane *on State Post-conviction Remedies*, 44 ALA. L. REV. 421, 449–58 (1993) (describing various, less restrictive standards states could apply on collateral postconviction reviews).

[252] *See* Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J.L. & PUB. POL'Y 811, 874 (2003); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 333 (1990) (stating that the avoidance of retroactivity is just one other consideration to weigh in the social balance).

[253] *See supra* note 234 and accompanying text (describing how California's Governor signed a bill allowing a juvenile already serving life without parole to petition a judge to review his or her sentence after serving fifteen years).

[254] *Compare supra* note 77 and accompanying text (discussing *Graham*'s requirement of a "meaningful opportunity to obtain release"), *with supra* note 122 and accompanying text (discussing *Miller*'s holding).

[255] *See* Miller v. Alabama, 132 S. Ct. 2455, 2467–69 (2012).

[256] *See id.*

[257] *See infra* notes 258–60 and accompanying text.

[258] *See* Bunch v. Smith, 685 F.3d 546, 552–53 (6th Cir. 2012) (holding that an eighty-nine year sentence imposed on a juvenile with no possibility of parole was constitutionally permissible under *Graham*); Walle v. State, No. 2D11-1393, 2012 WL 4465555, at *6 (Fla. Dist. Ct. App. Sept. 28, 2012) (dismissing defendant's argument that ninety-two year prison sentence was functional equivalent of life without the possibility of release, thus violating *Graham*).

to life sentence imposed against a juvenile non-homicide offender violated the Eighth Amendment's prohibition against cruel and unusual punishment.[259] It is important to note these cases all dealt with juveniles convicted of non-homicide offenses. No case has yet considered whether a lengthy term of years sentence with no possibility of parole imposed on a juvenile *homicide* offender would violate the Eighth Amendment. When a court considers this question, it will find little guidance from *Miller*.[260]

CONCLUSION

The United States Supreme Court correctly held that the mandatory imposition of juvenile life without parole sentences is unconstitutional under the Eighth Amendment.[261] However, the Court should have engaged in its proportionality analysis as it did in *Roper* and *Graham* to prohibit all juvenile life without parole sentences.[262] A categorical prohibition would establish a bright-line rule that simply mandates the State to provide a juvenile offender with "a *meaningful opportunity* to obtain release based on demonstrated maturity and rehabilitation."[263] This rule would help eliminate both the confusion and uncertainty sentencing judges will face while providing clearer guidance for lower courts to follow.[264]

Further, Wyoming should consider one of two proposed bills that would either invalidate life without parole for juvenile homicide offenders or require a separate hearing to consider various factors.[265] Without one of these revisions, Wyoming judges will have to sentence juveniles with very little guidance from *Miller*.[266] A categorical rule against juvenile life without parole sentences would remove this uncertainty and ensure juveniles receive a meaningful opportunity to obtain release based on maturity and demonstrated rehabilitation.[267] Time, along with maturity into adulthood and rehabilitation, will ease the juvenile homicide offender's immaturity to where he or she could successfully reenter society.[268]

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[259] *See* People v. Caballero, 145 Cal. Rptr. 3d 286, 294–96 (Cal. 2012) (holding that 110 year sentence before possibility of parole would not meet *Graham's* requirement providing the offender with an opportunity to demonstrate growth and maturity to try to secure his release). In *Caballero*, the offender was convicted of multiple counts of attempted murder. *Id.* at 288.

[260] *Cf.* Henry v. State, 82 So. 3d 1084, 1089 (Fla. Dist. Ct. App. 2012) ("Without any tools to work with, however, we can only apply *Graham* as it is written. If the Supreme Court has more in mind, it will have to say what that is.").

[261] *See supra* notes 122–45 and accompanying text.

[262] *See supra* notes 173–208 and accompanying text.

[263] *See supra* notes 200–08 and accompanying text.

[264] *See supra* notes 242–48 and accompanying text.

[265] *See supra* notes 210–31 and accompanying text.

[266] *See supra* notes 209–31 and accompanying text.

[267] *See* Graham v. Florida, 130 S. Ct. 2011, 2030 (2010).

[268] *See* SOPHOCLES, *supra* note 1; *see also Graham*, 130 S. Ct. at 2030.