2015

Juvenile Sentencing Post-Miller: Preventive and Corrective Measures

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JUVENILE SENTENCING POST-*MILLER*: PREVENTIVE AND CORRECTIVE MEASURES

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INTRODUCTION

At the end of the twentieth century, the United States was an international outlier in the severity of its juvenile sentencing practices despite having invented the juvenile court model one century earlier.[1] Today, juvenile sentencing reform is underway, particularly in the wake of recent Supreme Court decisions that have cabined the states' capacity to impose extreme sentences on juveniles. In this Article, I propose two additional reform measures that would help to rationalize the sentences imposed on children in the American criminal justice system—one on the front end of the system and one on the back end. In particular, on the front end, in states where life without parole (LWOP) is still a lawful sentence for a juvenile homicide defendant, courts should ensure that children facing that sentence are afforded procedural safeguards akin to those recommended for adults who face the death penalty. On the back end, executive actors should install juvenile-specific clemency boards—what I have called *Miller* Commissions—to give children serving lengthy sentences a second look.

This Article proceeds in three parts. Part I describes the extent and nature of children in the American criminal justice system today. With this context, Part II suggests that juvenile justice reform is underway in

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1. *See infra* note 2 and accompanying text.

part because of collective agreement that policies of the late twentieth century were misguided and, in great part, because of the moral leadership of the Supreme Court in its recent juvenile sentencing decisions. Part III offers two additional reform measures that are timely and defensible in light of the Court's recent decisions: enhanced procedural safeguards for children facing LWOP and clemency provisions tailored to youth serving long sentences.

I. KIDS IN THE CRIMINAL JUSTICE SYSTEM

Historically, the United States has been a leader in juvenile justice policy. The first juvenile justice system was created in Illinois in 1899, and every state in the Union followed suit by instituting a separate system for children accused of a crime or deemed delinquent.[2] Prompted by Progressive-era reforms,[3] the early American juvenile courts shared several notable features: a degree of informality relative to criminal court proceedings, judicial discretion regarding the appropriate intervention for each child, and an animating belief that childhood is a period of dependency during which the state has an obligation to help a child in jeopardy.[4] Developed countries around the world have installed juvenile justice systems modeled after this early American approach to children.[5]

Unfortunately, in a relatively short period of time, the United States went from being a leader on the juvenile justice front to being an international outlier in its harsh treatment of juveniles. By the late 1950s and until the end of the twentieth century, politicians almost uniformly assumed a tough-on-crime stance and codified an ever-growing and ever-harsher set of penal laws.[6] At the same time, determinate sentencing schemes and transfer laws made it increasingly common for children to be tried in adult court and exposed to generally applicable mandatory minimum sentences.[7] Until 2005, the United States was the only

2. Franklin E. Zimring & David S. Tanenhaus, *Introduction* to CHOOSING THE FUTURE FOR AMERICAN JUVENILE JUSTICE 1 (Franklin E. Zimring & David S. Tanenhaus eds., 2014).

3. AARON KUPCHIK, JUDGING JUVENILES 10–11 (2006).

4. *Id.* at 51; FRANKLIN E. ZIMRING, AMERICAN JUVENILE JUSTICE 6–7 (2005).

5. Zimring & Tanenhaus, *supra* note 2, at 1; *see also* ZIMRING, *supra* note 4, at 33 ("No legal institution in Anglo-American legal history has achieved such universal acceptance among the diverse legal systems of the industrial democracies.").

6. Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 10–11 (1999); *see also* Kimberley D. Bailey, *Watching Me: The War on Crime, Privacy and the State*, 47 U.C. DAVIS L. REV. 1539, 1544–48 (2014) (describing the evolution of the war on crime from the 1950s through the 1990s).

7. KUPCHIK, *supra* note 3, at 154–59 (discussing the three primary methods for transfer of jurisdiction from juvenile to adult court); *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, U.S. SENT'G

developed country that subjected children to the death penalty,[8] and today we are the only nation that continues to sentence children to LWOP.[9]

Moreover, juveniles are regularly processed in the adult criminal justice system. Over two million juveniles are arrested each year, and approximately 250,000 of those arrests result in criminal cases in adult court.[10] Just like adults, above and beyond a criminal conviction, these juveniles must contend with a host of collateral consequences, including lost educational opportunities, limited employment prospects, lifetime sex-offender registration, and potential adult sentencing enhancements in future criminal trials.[11] In sum, children are not an insignificant group within the criminal justice system, and they present unique policy issues precisely because they are children.

II. JUVENILE JUSTICE REFORM UNDERWAY

By the turn of the twenty-first century, a nascent consensus emerged regarding the broken nature of our juvenile justice practices. Crime rates overall had been in steady decline for years.[12] Criminologists' predictions of a juvenile super-predator population had been debunked.[13] Social and brain science had illuminated the ways in which juveniles are

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COMMISSION, http://www.ussc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/special-report-congress (last visited Jan. 2, 2015) (discussing the trend toward mandatory minimums at the state level from the 1970s on).

8. *Roper v. Simmons*, 543 U.S. 551, 575 (2005) ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.").

9. Brief of Amnesty Int'l, et al. as Amici Curiae Supporting Petitioners at 2, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647), 2012 WL 174238.

10. Ashley Nellis, *Addressing the Collateral Consequences of Convictions for Young Offenders*, CHAMPION, July-Aug. 2011, at 20, 20.

11. *See generally id.*; *see also* Michael Pinard, *The Logistical and Ethical Difficulties of Informing Juveniles about the Collateral Consequences of Adjudications*, 6 NEV. L.J. 1111, 1114–15 (2006).

12. FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE 5–8 (2007) (documenting the dramatic and consistent decline in both violent and nonviolent crimes in the post-World War II era); *see also* Warren Friedman, *Volunteerism and the Decline of Violent Crime*, 88 J. CRIM. L. & CRIMINOLOGY 1453, 1453–55 (1998) (describing the decline and noting competing explanations).

13. *See* ZIMRING, *supra* note 4, at 120–22; Elizabeth S. Scott & Laurence Steinberg, *Social Welfare and Fairness in Juvenile Crime Regulation*, 71 LA. L. REV. 35, 36 n.6 (2010) (noting that the superpredator theory drove policy in the late twentieth century, but that even its original proponents have acknowledged its inaccuracy over time).

less culpable and more amenable to rehabilitation.[14] And studies had shown that incarceration has a criminogenic effect on youth.[15] As Professor Elizabeth Scott explains, by the early twenty-first century, there had been a marked dissipation of the "moral panic[]" of the 1990s, and "[m]any lawmakers and politicians—from the Supreme Court to big city mayors—appear[ed] ready to rethink the punitive approach of the 1990s."[16]

In this context, the Supreme Court tackled the question whether states could subject juveniles to the most severe criminal sanctions—the death penalty and LWOP. Beginning in 2005, the Court, in a series of cases, developed a new Eighth Amendment jurisprudence around the concept that "children are constitutionally different,"[17] and it significantly limited the extent to which states can impose extreme sentences on children. First, in *Roper v. Simmons*,[18] the Court held that the Eighth Amendment forbids the execution of juveniles, even those convicted of homicide crimes.[19] Five years later, in *Graham v. Florida*,[20] the Court held that the Eighth Amendment also precludes a sentence of LWOP for juveniles convicted of nonhomicide offenses.[21] And most recently, in 2012, the Court held in *Miller v. Alabama*[22] that, even when a juvenile is convicted of a homicide offense, the states cannot impose mandatory LWOP.[23] These three decisions together stand for the

14. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005) (discussing scientific and sociological studies demonstrating that children are less mature and more reckless, that youth are more susceptible to outside influence and peer pressure, and that personality traits in juveniles are not yet fixed).

15. *See* RICHARD A. MENDEL, ANNIE E. CASEY FOUND., NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 10–12 (2011), *available at* http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf (discussing such studies and their results); *see also* Scott & Steinberg, *supra* note 13, at 56–60 (discussing studies examining whether more punitive laws and sanctions for juveniles reduce recidivism and reaching the opposite conclusion); Christopher Slobogin, *Treating Juveniles Like Juveniles: Getting Rid of Transfer and Expanded Adult Court Jurisdiction*, 46 TEX. TECH L. REV. 103, 126–27 (2013) ("Prolonged incarceration is also counterproductive. As the research on deterrence implies, prison is criminogenic. Transfer may keep a troublesome youth off the streets, but it increases the probability that youth will turn to crime once back on the streets.").

16. Elizabeth S. Scott, Miller v. Alabama *and the (Past and) Future of Juvenile Crime Regulation*, 31 LAW & INEQ. 535, 541 (2013).

17. *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) ("To start with the first set of cases: *Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing.").

18. 543 U.S. 551 (2005).

19. *Id.* at 578.

20. 560 U.S. 48 (2010).

21. *Id.* at 74.

22. 132 S. Ct. 2455 (2012).

23. *Id.* at 2469.

proposition that children are different in the eyes of the law, and sentencing practices must reflect that fact.

It is hard to overstate the significance of the *Roper*/*Graham*/*Miller* line of cases whether one looks at them in terms of methodology,[24] implementation,[25] or future implications.[26] I have argued elsewhere that the *Miller* decision was truly revolutionary in its logic and scope,[27] and that it portends significant juvenile justice reform measures.[28] Some of those measures are already underway. For example, a handful of state supreme courts have held that the *Miller* decision applies retroactively, enabling all juveniles currently serving LWOP even for a homicide offense to seek a resentencing hearing.[29] At the same time, some state

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24. For a discussion of the Court's methodology in *Graham* and *Miller*, see, for example, Douglas A. Berman, Graham *and* Miller *and the Eighth Amendment's Uncertain Future*, 27 CRIM. JUST. 19 (2013).

25. A number of scholars, myself included, have weighed in on how the Court's recent juvenile sentencing decisions ought to be implemented. *See, e.g.*, Cara H. Drinan, Graham *on the Ground*, 87 WASH. L. REV. 51 (2012); Cara H. Drinan, *Misconstruing* Graham *&* Miller, 91 WASH. U. L. REV. 785 (2014) [hereinafter Drinan, *Misconstruing*]; Craig S. Lerner, *Sentenced to Confusion:* Miller v. Alabama *and the Coming Wave of Eighth Amendment Cases*, 20 GEO. MASON L. REV. 25 (2012) (identifying challenges of implementation and future litigation issues); Lauren Kinell, Note, *Answering the Unanswered Questions: How States Can Comport with* Miller v. Alabama, 13 CONN. PUB. INT. L.J. 143 (2013).

26. Scholars have only begun to explore the future implications of the Court's recent decisions in the juvenile sentencing arena. *See, e.g.*, Janet C. Hoeffel, *The Jurisprudence of Death and Youth: Now the Twain Should Meet*, 46 TEX. TECH L. REV. 29 (2013) (arguing that *Miller* calls into question current juvenile transfer laws); Shobha L. Mahadev, *Youth Matters:* Roper*,* Graham*,* J.D.B.*,* Miller *and the New Juvenile Jurisprudence*, CHAMPION, Mar. 2014, *available at* https://www.nacdl.org/champion.aspx?id=32599 (articulating plausible extensions of the Court's recent decisions); James Donald Moorehead, *What Rough Beast Awaits?* Graham*,* Miller *and the Supreme Court's Seemingly Inevitable Slouch Towards Complete Abolition of Juvenile Life Without Parole*, 46 IND. L. REV. 671 (2013) (arguing that the Court's decisions indicate future abolition of juvenile LWOP altogether); Michael M. O'Hear, *Not Just Kid Stuff? Extending* Graham *and* Miller *to Adults*, 78 MO. L. REV. 1087 (2013).

27. *See generally* Cara H. Drinan, *The* Miller *Revolution*, 101 IOWA L. REV. (forthcoming 2015) (Soc. Sci. Research Network, Working Paper, 2014), *available at* http://ssrn.com/abstract=2475126.

28. *Id*.

29. *People v. Davis*, 6 N.E.3d 709, 722 (Ill. 2014) (holding that *Miller* announced a substantive rule that applies retroactively); *State v. Mantich*, 842 N.W.2d 716, 732 (Neb. 2014) (same); *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 1 N.E.3d 270, 276 (Mass. 2013) (same); *State v. Ragland*, 836 N.W.2d 107, 121–22 (Iowa 2013) (same); *Jones v. Miss.*, 122 So. 3d 698, 703 (Miss. 2013) (same); *Ex parte Maxwell*, 424 S.W.3d 66, 75 (Tex. Crim. App. 2014) (same). At the same time, many state supreme courts have held otherwise. *See infra* note 65 and accompanying text. Finally, there is also an emerging federal court debate on this question. *Compare In re Pendleton*, 732 F.3d 280, 282 (3d Cir. 2013) (finding that prisoner had made prima facie showing that

legislatures have passed comprehensive legislation in response to *Miller*. In 2013, Delaware enacted a law that removes children from the reach of the state's mandatory first-degree murder sentence of death or LWOP.[30] Under the new law, a judge will impose a discretionary sentence upon a juvenile convicted of first-degree murder; the judge will consider the youth-related sentencing factors as outlined by the *Miller* Court, and she will be able to impose up to a life sentence.[31] Even in cases in which the judge imposes a life sentence for first-degree murder, she may designate the juvenile's sentence as subject to reconsideration after 35 years.[32] The new law also responds to the *Graham* Court's directive by eliminating LWOP for juveniles convicted of nonhomicide offenses, and by making some inmates eligible for a sentencing modification immediately.[33] Finally, the law permits sentencing courts to order that juvenile sentences run concurrently to avoid sentencing a child to a de facto life sentence.[34] This legislation serves as a model for other states, as it reflects not simply technical compliance with the Court's recent juvenile sentencing decisions but a rethinking of the way juveniles are treated in the criminal justice system. West Virginia has enacted similarly broad legislation in response to the Supreme Court's recent juvenile sentencing decisions,[35] and a handful of additional states have moved to at least reduce—if not to eliminate—the sentence of LWOP for children.[36]

While these reform efforts are promising, much remains to be done on the juvenile justice reform front. In the next Part of this Article, I suggest two additional concrete reform measures that are achievable given the political climate, and defensible under the Court's recent juvenile sentencing decisions.

Miller was retroactive), *with In re Morgan*, 713 F.3d 1365, 1368 (11th Cir. 2013) (holding that *Miller* is not retroactive).

30. S. 9, 147th Gen. Assemb. (Del. 2013), *available at* http://legis.delaware.gov/LIS/LIS147.NSF/vwlegislation/1EA0FC1FD4DF714485257AFC0052953C.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. H.B. 4210, 82nd Leg., Reg. Sess. (W. Va. 2014) (making all juveniles eligible for a parole review after 15 years).

36. *Hawaii Becomes Latest State to Abolish Juvenile Life Without Parole Sentences*, EQUAL JUST. INITIATIVE (July 6, 2014), http://www.eji.org/node/924 (citing Hawaii, Delaware, West Virginia, Texas, and Wyoming as states that have recently eliminated juvenile LWOP); *see also Reforms Since* Miller, CAMPAIGN FOR FAIR SENT'G YOUTH, http://fairsentencingofyouth.org/reforms-since-miller/ (last visited Feb. 3, 2015) (demonstrating that 11 states have either eliminated juvenile LWOP or narrowed its application in the two years after *Miller*).

III. ADDITIONAL RESPONSES TO *MILLER*: PREVENTIVE AND CORRECTIVE MEASURES

Despite the reform measures already underway in the wake of the *Miller* decision, additional reforms are necessary in order to right the course of juvenile justice in this country. In this Part of the Article, I suggest two such reforms: 1) procedural safeguards for children facing LWOP on par with what is recommended for adults facing execution and 2) clemency specifically tailored to individuals serving lengthy custodial sentences for a juvenile offense.

A. Procedural Safeguards for Children Facing Life Without Parole

The *Miller* Court did not preclude the possibility of an LWOP sentence for a juvenile homicide defendant; rather, it precluded that sentence as part of a *mandatory* sentencing scheme.[37] As such, juveniles in more than half the states may still be exposed to the second-harshest sentence under law.[38] When the state seeks to impose LWOP upon a juvenile homicide defendant, state court judges should ensure that children facing that sentence have a right to counsel on par with what a capital defendant deserves, specifically a team that includes at least a mitigation specialist.[39] As I explain below, a state court judge would be amply justified in doing so based on Supreme Court precedent.[40]

First, in capital cases, the Supreme Court has held that adequate investigation and presentation of mitigation evidence are required for constitutionally effective representation. For example, in *Williams v. Taylor*,[41] defense counsel failed to discover and present evidence that documented Williams's extensive childhood abuse and mental impairments.[42] Applying the *Strickland v. Washington*[43] test, the Supreme Court held that counsel's representation of Williams had been deficient and that the inefficacy prejudiced the outcome of his case.[44]

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

38. *Id.* at 2471 (identifying 29 jurisdictions that made LWOP mandatory for some juveniles convicted of murder in adult court).

39. *See generally* AM. BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf [hereinafter AM. BAR ASS'N GUIDELINES].

40. I am exploring this concept in greater detail in a forthcoming piece. *See* Drinan, *supra* note 27.

41. 529 U.S. 362 (2000).

42. *Id.* at 370.

43. 466 U.S. 668 (1984) (establishing a two-pronged test for claims of ineffective assistance of counsel).

44. *Williams*, 529 U.S. at 398–99.

Similarly, in *Wiggins v. Smith*,[45] defense counsel failed to put on any evidence regarding the defendant's childhood neglect purportedly for strategic reasons.[46] Again the Court found that counsel's failure to present such "powerful"[47] mitigating evidence prejudiced the outcome of the defendant's case and was ineffective assistance of counsel.[48] As scholars have recognized, in this line of cases culminating in *Wiggins*, the Court "promoted a longstanding guideline of the ABA—that capital counsel thoroughly explore the social background of the defendant—to the level of constitutional mandate."[49]

In addition to employing a heightened standard of review in capital ineffective assistance of counsel claims, the Supreme Court recently suggested that LWOP for children is tantamount to the death penalty. The *Graham* Court employed its categorical approach in assessing Graham's proportionality challenge—an approach it had previously reserved for capital cases.[50] In assessing Graham's challenge, the Court noted that LWOP sentences "share some characteristics with death sentences" in that "[t]he State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable."[51] Further, the *Graham* Court recognized that LWOP as applied to children is especially harsh given the percentage of his life that a child will service in prison as compared to an adult.[52]

The *Miller* Court continued to treat LWOP for children as comparable to a death sentence. The majority recognized that, in capital cases, the Court "has required sentencing authorities to consider the characteristics of a defendant and the details of his offense before sentencing him to death."[53] And it noted that, because "*Graham* . . . likened life without parole for juveniles to the death penalty itself," the same individualized sentencing requirement must apply when a juvenile faces an LWOP sentence.[54] Finally, the *Miller*

45. 539 U.S. 510 (2003).

46. *Id.* at 525.

47. *Id.* at 534.

48. *Id.* at 536.

49. *See The Supreme Court, 2002 Term: Leading Cases*, 117 HARV. L. REV. 226, 282 (2003).

50. *Graham v. Florida*, 560 U.S. 48, 60–62 (2010).

51. *Id.* at 69.

52. *Id.* at 70. ("Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.")

53. *Miller v. Alabama*, 132 S. Ct. 2455, 2463–64 (2012) (citing *Woodson v. North Carolina*, 428 U.S. 280 (1976)).

54. *Id.* at 2463.

Court explained that youth itself is "more than a chronological fact" and may be the most powerful mitigating factor available to a defendant:

> Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.[55]

The Court has now married these two lines of precedent—the line elevating mitigation to a constitutional requirement for capital defendants and the line treating LWOP as tantamount to a death sentence for children. Accordingly, state court judges should ensure that, just as in capital cases, juveniles facing LWOP receive representation on par with best practices for death penalty representation.

The ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (the Guidelines) provide a good starting point for what this kind of juvenile representation might look like.[56] The Guidelines state that defense counsel in capital cases must have sufficient training and expertise in capital representation.[57] In

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55. *Id.* at 2467–68 (citations omitted).

56. *See* AM. BAR ASS'N GUIDELINES, *supra* note 39. As this Article was being edited, the Campaign for the Fair Sentencing of Youth announced the publication of the first Trial Defense Guidelines for counsel representing youth who face a life sentence. Consistent with the arguments I make herein, the new Guidelines are based, in part, on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. To view the new Guidelines, see DEFENSE GUIDELINES FOR CHILD CLIENTS, THE CAMPAIGN FOR THE FAIR SENT'G OF YOUTH (Mar. 2015), *available at* http://fairsentencingofyouth.org/wp-content/uploads/2015/03/Trial-Defense-Guidelines-Representing-a-Child-Client-Facing-a-Possible-Life-Sentence.pdf. It remains to be seen how courts will deal with the enforcement of these standards when reviewing ineffective assistance of counsel claims in the future.

57. *See* AM. BAR ASS'N GUIDELINES, *supra* note 39, Guidelines 5.1, 8.1.

addition, the Guidelines highlight the importance of mitigation evidence in their requirements that defense counsel have sufficient skill in investigating and presenting mitigation evidence, as well as experience working with expert witnesses, especially mental health experts.[58] The Guidelines also recognize that, given the complexity of capital cases, even qualified defense counsel cannot work alone. Thus, the Guidelines describe a "Defense Team," which includes lead counsel and at least one associate counsel, a mitigation specialist, a factual investigator, and at least one member trained to screen for mental or psychological disorders. Finally, the Commentary to the Guidelines makes clear that the Team described in the Standard is a minimum and that lead counsel is responsible for ensuring that, if additional skill and expertise are required, other members will be added to the team (or if funds are not available, the issue is at least preserved for appeal).[59]

If juveniles facing LWOP are analogous to adults facing the death penalty, as I argued above, then it follows that such juveniles should enjoy protections analogous to those set forth in the ABA Guidelines. First, juveniles facing an LWOP sentence should have counsel experienced in the representation of juveniles and, in particular, juveniles facing adult sentences in adult court.[60] Second, because of the emphasis that the *Miller* Court placed upon mitigation evidence in juvenile LWOP cases, it also makes sense for juveniles to have a defense team comparable to that contemplated by the ABA Guidelines for death penalty cases. Theoretically, this means that the juvenile's lawyer should have co-counsel, a factual investigator, a mitigation specialist, and some team member who is trained to screen for mental health issues.[61] Just as the Guidelines state that death penalty counsel should retain "any other members needed to provide high-quality legal representation,"[62] so this is true in juvenile LWOP cases. Because of the unique characteristics of youth, this may require defense counsel to retain an expert who, for example, can testify to the fact that the juvenile brain is not fully developed and to the criminogenic effect of incarceration on youth.[63]

By ensuring that juveniles facing LWOP have representation on par with the ABA's Guidelines for capital cases, state court judges can guarantee that juveniles facing LWOP receive an individualized sentence

58. *See id.* Guideline 5.1.

59. *See id.* Guideline 10.4 Commentary.

60. *See generally* NAT'L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS 21 (2012) (discussing Standard 1.3 "Specialized Training Requirements for Juvenile Defense"), *available at* http://www.njdc.info/pdf/NationalJuvenileDefenseStandards2013.pdf.

61. *See* AM. BAR ASS'N GUIDELINES, *supra* note 39, Guideline 10.4(A), (C).

62. *See id.* Guideline 10.4(C).

63. *See id.*

as contemplated by the *Miller* Court and that the LWOP sentence is imposed only in the most extreme cases. This procedural safeguard would go a long way toward implementing the vision of the *Miller* Court.

B. Child-Friendly Clemency

Even if additional procedural safeguards are made available to juveniles facing LWOP at sentencing, there is a need for executive relief on the back-end of the sentencing process. To begin, many state legislatures have yet to respond to *Miller* in a comprehensive manner, leaving some inmates who may have a claim under *Miller* in limbo. At the same time, state courts are split on the question whether *Miller* applies retroactively. Six state supreme courts—those in Texas, Illinois, Massachusetts, Iowa, Mississippi, and Nebraska—have applied the decision retroactively.[64] Five state supreme courts—those in Michigan, Pennsylvania, Minnesota, Louisiana, and Alabama—have held that *Miller* applies only to future juvenile homicide defendants.[65] In the latter five states, there are approximately 1,200 juveniles serving LWOP.[66] Unless the Supreme Court of the United States holds otherwise,[67] these 1,200 inmates will never have an opportunity to have their

64. *People v. Davis*, 6 N.E.3d 709, 722 (Ill. 2014) (holding that *Miller* announced a substantive rule that applies retroactively); *State v. Ragland*, 836 N.W.2d 107, 117 (Iowa 2013) (same); *Diatchenko v. Dist. Att'y for Suffolk Dist.*, 1 N.E.3d 270, 281 (Mass. 2013) (same); *Jones v. State*, 122 So.3d 698, 703 (Miss. 2013) (same); *State v. Mantich*, 842 N.W.2d 716, 731 (Neb. 2014) (same); *Ex parte Maxwell*, 424 S.W.3d 66, 68 (Tex. Crim. App. 2014) (same).

65. *Ex Parte Williams*, 2015 WL 1388138 (Ala. Mar. 27, 2015) (holding that *Miller* does not apply retroactively); *State v. Tate*, 130 So.3d 829, 841 (La. 2013) (same); *People v. Carp*, 852 N.W.2d 801, 808 (Mich. 2014) (same); *Chambers v. State*, 831 N.W.2d 311, 316 (Minn. 2013) (same); *Commonwealth v. Cunningham*, 81 A.3d 1, 9 (Pa. 2013) (same).

66. *See How Many People Are Serving in My State?*, CAMPAIGN FOR FAIR SENT'G YOUTH, http://fairsentencingofyouth.org/reports-and-research/how-many-people-are-serving-in-my-state/ (last visited Jan. 25, 2015).

67. The Supreme Court will not address this question until sometime during its October Term 2015. After declining to review a state supreme court decision holding that *Miller* was not retroactively applicable, *Cunningham*, 81 A.3d at 6–10, *cert. denied*, 134 S. Ct. 2724 (2014), the Supreme Court granted certiorari on the same question, *see Toca v. Louisiana*, 135 S. Ct. 781 (2014), only to have the case mooted by the named defendant's release. *See generally* John Simerman, *George Toca, La. Inmate at Center of Debate on Juvenile Life Sentences, to Go Free*, NEW ORLEANS ADVOCATE, Jan. 30, 2015, *available at* http://www.theneworleansadvocate.com/news/11462053-123/george-toca-louisiana-inmate-at. Soon thereafter, the Supreme Court granted cert on this question again in *Montgomery v. Louisiana*, see *Certiorari—Summary Dispositions*, SUPREME COURT (Mar. 23, 2015), http://www.supremecourt.gov/orders/courtorders/032315zor_b97d.pdf.

sentences—which are now unconstitutional—reconsidered absent a grant of executive clemency.

Finally, even if held retroactively applicable, *Miller* does not reach all inmates whose cases one may think deserve reconsideration under the Court's rationale. Consider, for example, a 15-year-old convicted of murder and sentenced to 55 years with a mandatory additional 25 years for the use of a firearm. That person is now serving an 80-year sentence, in part because of a discretionary sentence and in part because of a mandatory sentencing enhancement. It is not clear that this 80-year sentence is within the *Miller* Court's ban on mandatory LWOP sentences for juveniles. However, the *Roper*/*Graham*/*Miller* rationale—that kids are less culpable and more amenable to rehabilitation—suggests that this 15-year-old deserves reconsideration of his sentence.

For all of these reasons, state executive actors should appoint *Miller* Commissions specifically designed to examine the validity of extreme sentences for juveniles.[68] At a minimum, the charge of these *Miller* Commissions should be to identify all state inmates affected by the *Graham* and *Miller* decisions, to identify a range of appropriate sentences for such inmates, and to make recommendations to the governor regarding each inmate. This will ensure evenhanded application of constitutional law across the country, and it will afford juveniles relief under *Miller* in an efficient, streamlined manner.

Once in place, these Commissions could provide secondary benefits. That is, Commissions tasked with bringing states into compliance with *Miller* would also be well positioned to review other juvenile claims of excessive sentencing, such as the 80-year hypothetical sentence described above. Moreover, *Miller* Commissions would be equipped to review the claims of those who are no longer incarcerated but who are hampered by the collateral consequences of a juvenile conviction.

In order to accomplish these tasks effectively though, state executive actors must provide a clear mandate for *Miller* Commissions. First, because so many states have abolished parole or narrowed its application,[69] and because clemency grants are rare nationwide,[70]

68. I first proposed this idea in an earlier article in which I suggested that these commissions would be an efficient way for states to comply with the mandate of the *Miller* Court. *See* Drinan, *Misconstruing*, *supra* note 25, at 794. Here, I am developing that idea further and suggesting that the role of such Commissions could be broader and more ambitious.

69. *See generally* Joan Petersilia, *Parole and Prison Re-entry in the United States*, 26 CRIME & JUST. 479 (1999) (describing abolition of and limitations on use of parole nationwide).

70. *See* Adam M. Gershowitz, *Rethinking the Timing of Capital Clemency*, 113 MICH. L. REV. 1, 4 (2014) ("Over the last half century, clemency has become a rarity.

executive actors must articulate the rationale for *Miller* Commissions and be willing to use their bully pulpit to support them.

Second, executive actors should provide clear criteria for the *Miller* Commissions to employ in their review of juvenile cases. Standard criteria for parole and/or early release may provide a starting point. For example, relevant variables have historically included: "the offender's participation in prison programs; infractions of prison rules; job opportunities upon release; family ties; the seriousness of the original offense; expressions of remorse and repentance; the risk of recidivism; and the views of victims, community members, prosecutors, or sentencing judge."[71]

But *Miller* Commissions also must undertake a deeper inquiry—at least in reviewing cases in which an inmate is serving LWOP. A juvenile serving LWOP is already serving a sentence that, as the *Miller* Court explained, should be "uncommon" given everything the Court has said "about children's diminished culpability and heightened capacity for change."[72] And, according to the *Miller* Court, an LWOP sentence may only be imposed after an individualized hearing.[73] In this sense, the Commissions need to undertake something closer to a resentencing hearing than a parole hearing. The *Miller* Court set out factors that should be relevant at a juvenile's individualized hearing, and *Miller* Commissions should employ these factors in their decision making. These factors include:

> [C]hronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences[,] . . . family and home environment[,] . . . the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him[,] . . . incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement)

While there have been more than 1,300 executions since the Supreme Court reinstated capital punishment in 1976, there have been only 66 individualized commutations. By contrast, in the first half of the twentieth century, 1 out of every 4 or 5 death sentences was commuted to life imprisonment.") (citations omitted); *see also* Rachel E. Barkow, *Clemency and the Unitary Executive*, 90 N.Y.U. L. REV. (forthcoming 2015), *available at* http://ssrn.com/abstract=2484586 (describing the decline of federal clemency).

71. Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1750–51 (2012).

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

73. *Id.* at 2475.

> or his incapacity to assist his own attorneys[,] [and capacity for rehabilitation].[74]

Finally, in asking whether an inmate has undertaken to rehabilitate himself, the Commissions must take into account what services have actually been made available to the applicant.[75]

There is the question of who should serve on *Miller* Commissions. Many jurisdictions do not have parole boards in place that regularly review parole applications, let alone parole applications from inmates who were convicted as juveniles.[76] Scholars are in agreement that boards, rather than individuals, tend to make better clemency decisions.[77] Further, there are some accepted best practices in terms of executive clemency board composition. Such boards should give equal voice to the law enforcement community and to those who advocate for holistic criminal justice reform and effective reentry. And such boards should reflect diversity in race, ethnicity, and gender.[78] Above and beyond these general principles, a Commission designed to review the parole and/or clemency applications of inmates serving time for a juvenile conviction must have expertise regarding juveniles on a variety of fronts. Preferably, there should be members of the Commission who have a working knowledge of juvenile brain development, juvenile representation within the jurisdiction, and juvenile modes of incarceration within the jurisdiction.

Miller Commissions as I have described herein would provide an additional path toward correcting the course of American juvenile justice.

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74. *Id.* at 2468.

75. As I have written about previously, a court or executive body cannot assess whether an inmate has demonstrated growth and rehabilitation without examining the conditions of confinement the inmate endures. *See* Drinan, Graham *on the Ground*, *supra* note 25, at 78–81; Drinan, *Misconstruing*, *supra* note 25, at 793; *see also* Tamar Birckhead, *Children in Isolation: The Solitary Confinement of Youth*, 50 WAKE FOREST L. REV. (forthcoming 2015), *available at* http://ssrn.com/abstract=2512867 (describing the most extreme type of confinement for youth, its reasons, and its harms).

76. *See supra* note 36 and accompanying text (describing the widespread elimination and narrowing of state parole provisions).

77. Cara H. Drinan, *Clemency in a Time of Crisis*, 28 GA. ST. U. L. REV. 1123, 1152 (2012).

78. *Id.* at 1154.

CONCLUSION

The *Miller* decision was capacious in its language, breadth, and vision. Already, some states have responded in ways that bode well for holistic juvenile justice reform. These responses suggest that the two proposals I make in this Article may be timely and achievable.

Having said that, the proposals I make here are short-term solutions to long-term problems. There needs to be a national conversation about juvenile justice and how we deviated so far from the original concept of rehabilitation for juveniles. Only in the context of that conversation can we begin to unravel the many problems with the status quo and to implement the vision of the *Miller* Court.