

# GETTING JUVENILE LIFE WITHOUT PAROLE “RIGHT” AFTER *MILLER V. ALABAMA*

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## I. INTRODUCTION

In its 2012 decision in *Miller v. Alabama*,<sup>1</sup> the United States Supreme Court declared unconstitutional a mandatory sentence of life without the possibility of parole for children, barring states from automatically imposing the sentence on the basis of the crime committed and without individualized consideration of the defendant’s status as a child or of the child’s particular life circumstances.<sup>2</sup> In the process, the Court declined to impose a categorical ban on such sentences because of the possibility that—although the instances should be “uncommon”—jurors could find some children are “irreparably corrupted”<sup>3</sup> or “irretrievably depraved.”<sup>4</sup> The Court also declined to decide the issue whether there

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1. 132 S. Ct. 2455 (2012).

2. *Id.* at 2461. According to the Court, the sentence of mandatory life without parole for juveniles “runs afoul of our cases’ requirement of individualized sentencing for defendants facing the most serious penalties.” *Id.* *Miller* consolidates two cases, *Miller v. Alabama*, which was on writ of certiorari to the Court of Criminal Appeals of Alabama, and *Jackson v. Hobbs*, which was on writ of certiorari to the Supreme Court of Arkansas. The majority opinion in *Miller* was written by Justice Kagan and joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor. Chief Justice Roberts and Justices Scalia, Thomas, and Alito dissented.

3. *Id.* at 2469.

4. The Court has primarily used the term “irretrievably depraved” in this context. *See, e.g.,* *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010) (“Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of ‘irretrievably depraved character’ than are the actions of adults.”); *Roper v. Simmons*, 543 U.S. 551, 553 (2005) (“The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.”).

is an age below which life without parole for children, also known as “juvenile life without parole” (JLWOP),<sup>5</sup> is categorically unconstitutional; Evan Miller and Kuntrell Jackson, the petitioners in *Miller*, had urged the Court to draw such a line for children who were under fifteen at the time of their crimes.<sup>6</sup>

In this essay, we argue that the *Miller* Court should have categorically barred LWOP as a sentencing option for children because, given the stakes, the risk of an erroneous determination about a child’s “retrievability” is unacceptably high. Specifically, in Part II we argue that the Court should have stayed true to its recent recommitment to treating children as children even when they have committed violent crimes. The attributes of childhood and adolescence make it difficult (if not impossible) to know that a particular child cannot be rehabilitated, and the understandable politics and emotions associated with the sentencing process make it likely that the sentence of LWOP will sometimes be imposed in circumstances where the child can be rehabilitated. Consistent with these concerns, in Part III we attempt to provide some guidance to lawmakers who must abide by *Miller*’s terms and who are inclined to do this “right” according to traditional principles of blameworthiness and consistent with our modern concept of the child as a dependent, developing individual. The essay concludes that the states’ approaches to juvenile justice will continue to lack integrity until they are fully consistent with this concept, including with the obligations it imposes on adults and the government to provide affected children with the opportunities necessary for decent outcomes.

## II. THE PROBLEM WITH LIFE WITHOUT THE POSSIBILITY OF PAROLE AS A SENTENCING OPTION FOR CHILDREN

*Miller* is the third in a series of recent decisions in which the Court recognized that “children are different”<sup>7</sup> in ways that diminish their blameworthiness and thus implicate the Eighth Amendment’s prohibition of “cruel and unusual punishments.”<sup>8</sup> *Roper v. Simmons*,<sup>9</sup>

5. See, e.g., Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89 *passim* (2009) (using the acronym “JLWOP”).

6. *Miller*, 132 S. Ct. at 2469.

7. *Id.* at 2470.

8. The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

9. 543 U.S. 551 (2005).

decided in 2005, categorically barred the juvenile death penalty.<sup>10</sup> *Graham v. Florida*,<sup>11</sup> decided in 2010, categorically barred life without parole for juveniles convicted of non-homicide offenses.<sup>12</sup> As the Court explained in *Miller*, *Roper* and *Graham* identified “three significant gaps between juveniles and adults”:

First, children have a “lack of maturity and an underdeveloped sense of responsibility,” leading to recklessness, impulsivity, and heedless risk-taking. Second, children “are more vulnerable . . . to negative influences and outside pressures,” including from their families and peers; they have limited “contro[l] over their own environment” and lack the ability to extricate themselves from horrific, crime-producing settings. And third, 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].”<sup>13</sup>

In all three cases the Court found that these differences are constitutionally significant because they “diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.”<sup>14</sup> Specifically, the Court found that such sentences cannot be justified by the law’s interest in retribution, deterrence, incapacitation, or rehabilitation.<sup>15</sup>

In recognizing these factual and penological distinctions between children and adults, the Court did not ignore that children sometimes commit heinous crimes; nor did it ignore the resulting harm and damage done to others.<sup>16</sup> Rather, consistent with its Eighth Amendment jurisprudence generally, it required that punishments be proportional *both* to the crime *and* to the blameworthiness of the criminal.<sup>17</sup> It thus reaffirmed that our modern criminal justice system

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10. *See id.* at 578 (“The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.”).

11. 130 S. Ct. 2011 (2010).

12. *See id.* at 2034 (“The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide.”).

13. *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (citations omitted) (quoting *Roper*, 543 U.S. at 569–70).

14. *Id.* at 2465.

15. *Id.*

16. *See, e.g., id.* at 2469 (“No one can doubt that [Miller] and Smith committed a vicious murder.”); *id.* (“That Miller deserved severe punishment for killing Cole Cannon is beyond question.”). In addition to these express recognitions of the violence and personal loss at issue in the cases are the recognitions implicit in the Court’s use of the victims’ names throughout its opinion. *See, e.g., id.* at 2468 (referring to Jackson’s victim by her name, “Laurie Troup” and “Troup,” in its description and analysis of the crime).

17. *Id.* at 2453, 2465–66.

is no longer, as it was in centuries past, based on the “eye-for-an-eye” principle.<sup>18</sup> The Court also fully embraced the modern concept of the child as a still-developing individual and citizen who, because of this, sometimes makes bad decisions and thus requires the continuing guidance and protection of responsible adults, including of the state as *parens patriae*, until the age of majority.<sup>19</sup>

The *Miller* Court parted ways with these philosophical guideposts, however, at least in part because of the nagging possibility that some particular child might be “irreparably corrupted” and thus warranting permanent incapacitation.<sup>20</sup> We believe that the Court was wrong to do so. The imposition of *any* terminal punishment such as the death penalty or life without parole, which reflects a final judgment that a child is, in Justice Ginsburg’s words, a “throwaway person,”<sup>21</sup> is both negligent and cruel.

Imposing terminal punishments on children is negligent because it allows the responsible adults and the state as “back-up parent” to abandon their childrearing and child protection obligations with impunity, and (relatedly) because it assumes that we can know without ever trying that a child cannot be rehabilitated. The two children in *Miller* are paradigmatic examples of this lack of accountability: Both were involved in brutal, senseless crimes when they were only fourteen. Up to that point, however, neither had ever had the benefit of parents or guidance of the sort (either personal or institutional) that our society assumes is required if children are to grow into good adults and citizens.<sup>22</sup> In effect, before they were

18. O. Carter Snead, *Memory and Punishment*, 64 VAND. L. REV. 1195, 1247–48 (2011).

19. *Miller*, 132 S. Ct. at 2464 (noting that children have an “underdeveloped sense of responsibility” and that their characters are “not as ‘well formed’ as an adult’s” (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005))); SAMUEL M. DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM 1–2 (Robert C. Clark et al. eds., 4th ed. 2009); Doriane Lambelet Coleman, *The Legal Ethics of Pediatric Research*, 57 DUKE L.J. 517, 614–18 (2007).

20. *Miller*, 132 S. Ct. at 2469. The specter of the irretrievably depraved child who would get away was first debated in *Roper*. Justice O’Connor, writing in dissent, was particularly animated on the point that a seventeen-year-old murderer can be sufficiently and irretrievably depraved so as to merit the death penalty, and thus the sentence ought not to have been categorically barred. *Roper*, 544 U.S. at 599 (O’Connor, J., dissenting). She argued that sentencing should be individualized to enable decisionmakers to distinguish among those who are and are not so depraved. *Id.* at 602–03. In the course of her opinion, she rejected the notion that the differences between children and adults, which she described as established “beyond cavil,” require a finding that no individual child should be subject to the death penalty. *Id.* at 599.

21. Justice Ginsburg used this description during oral argument in *Miller* and *Jackson*. Transcript of Oral Argument at 34, *Miller*, 132 S. Ct. 2455 (2012) (No. 10-9647).

22. See *Miller*, 132 S. Ct. at 2462, 2469 (discussing *Miller*’s childhood); *id.* at 2468 (noting

incarcerated at the age of fourteen, they might as well have been raised in the wild by the violent and irresponsible adults who populated their inescapable lives.<sup>23</sup> Miller’s background is particularly extraordinary in this respect. As the Court explained, his “stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times, the first when he should have been in kindergarten.”<sup>24</sup> Because the prosecutors assigned to Miller’s and Jackson’s cases chose to try them as adults and not as juveniles, they were also never “parented” by the state either before or following their incarcerations; they were simply transferred by their *parens patriae* from one child-unfriendly environment to another.<sup>25</sup>

Imposing such a terminal punishment on children is also cruel (in the common if not also the legal sense of this term) because the judgment, at the time it is made, can never be based on evidence “beyond reasonable doubt,” which we should require for the extraordinary decision to “throw away” a child.<sup>26</sup> Beyond reasonable doubt evidence of “irretrievable depravity” in children and adolescents likely does not exist: despite some high-profile suggestions to the contrary,<sup>27</sup> neither social science nor neurobiology in their current states can support the claim that a particular child, even one who has been especially violent, will always be this way.<sup>28</sup>

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the pertinent facts of Jackson’s background).

23. *Id.* at 2462, 2468–69; *see also* Brief of Amici Curiae J. Lawrence Aber et al. in Support of Petitioners at 21–28, 30–31, *Miller*, 132 S. Ct. 2455 (No. 10-9646) (explaining the significance of the child’s environment to both delinquency and rehabilitation).

24. *Miller*, 132 S. Ct. at 2469.

25. *Id.* at 2461–62.

26. *See In re Winship*, 397 U.S. 358, 363–64 (1970) (explaining that the reasonable doubt standard is necessary to ensure “that the moral force of the criminal law [is] not . . . diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned”); *id.* at 369–72 (Harlan, J., concurring) (noting that the reasonable doubt standard “is bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free”); *see also* Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173, 198–99 (1977) (elaborating on this commitment).

27. *See, e.g.*, Jennifer Kahn, *Can You Call a 9-Year-Old a Psychopath?*, N.Y. TIMES MAGAZINE (May 11, 2012), <http://www.nytimes.com/2012/05/13/magazine/can-you-call-a-9-year-old-a-psychopath.html> (reporting on controversial therapists who believe they can diagnose psychopathy in children); Elizabeth S. Scott, *Juvenile Crime Regulation and the Moral Panic Problem passim* (2012) (unpublished paper) (on file with author) (describing unfounded concerns about adolescent “superpredators”).

28. The Court in *Roper* explained that:

It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. . . . [T]his difficulty

This is especially true when the subject of the inquiry is a younger adolescent.<sup>29</sup> And given the stakes involved in the decision to abandon a child in prison, the issue of his irretrievability should not be resolved permanently on the basis of anecdote, hunch, or even common sense. The risk of error associated with these more traditional evidentiary approaches is simply too high.<sup>30</sup> Moreover, the Court itself noted in *Roper*, “[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender’s objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.”<sup>31</sup>

Because this risk of error increases as the child’s age decreases, it is particularly troubling that the *Miller* Court declined to decide the issue whether there is an age below which JLWOP violates the Eighth Amendment. Given the passions that are typically aroused by violent

underlies the rule forbidding psychiatrists from diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others.

*Roper v. Simmons*, 543 U.S. 551, 573 (2005) (citations omitted); *see also id.* at 570 (“The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.”).

29. Brief of Amici Curiae J. Lawrence Aber et al. in Support of Petitioners, *supra* note 23, at 29–31. Amici explained that:

Sentencing adolescents to life without parole is especially perverse from a rehabilitative standpoint, because compared to adults, adolescents are particularly amenable to change as they mature and develop. Studies demonstrate that most adolescents will “age out” of their risk-taking behavior, fully develop their ability to control impulses, and respond to meaningful incentives and opportunities to succeed. Studies and statistics confirm that crime rates typically rise in early adolescence, peak during mid-to-late adolescence, and then decline. Research indicates that most violent adolescent offenders’ “criminal careers” span a period of less than one year. Thus, a large majority of young adolescents will limit their deviant and antisocial behaviors to their adolescent years.

*Id.* at 29–30 (footnotes omitted).

30. *See, e.g.*, Neil Vidmar, James E. Coleman, Jr., and Theresa Newman, *Rethinking Reliance on Eyewitness Confidence*, 94 JUDICATURE 16, 18 (2010) (explaining that jurors’ confidence in their common sense judgments about eyewitness identifications are misplaced).

31. *Roper*, 543 U.S. at 573. If there was any doubt about the latter, the *Roper* prosecutor’s argument that, where a heinous crime is at issue, “youth [is] aggravating rather than mitigating,” should cement the point. *Id.*; *see also id.* at 558 (“Age . . . Think about age. Seventeen years old. Isn’t that scary? Doesn’t that scare you? Mitigating? Quite the contrary I submit. Quite the contrary.”); *id.* at 573 (explaining the prosecutor’s error in this regard). This claim is not merely intuitive; as Professor Terry Maroney has shown, it also has empirical support. *See Maroney, supra* note 5, at 123–26 (noting that judges tend to discount such evidence where the facts of the crime are particularly violent); Scott, *supra* note 27, at 29–34 (describing the “moral panic” phenomenon that causes decisionmakers in criminal cases to exaggerate the future threat and thus to react with more emotion than rational judgment in the sentencing process).

crime—passions that understandably cloud the judgment of even well-meaning people—it is likely an insufficient safeguard merely to suggest, as the Court did, that the sentence should be “uncommon” in general, or that there may be some kind of sliding scale of acceptability based on age.<sup>32</sup> Indeed, in our view it is inevitable that prosecutors, courts, and juries in individual cases will often presume that their particular circumstances are uncommon—because the crime itself should be, and because we hope that only the rare child would be so involved—and thus it will take time, the commitment of untold numbers of children to JLWOP, additional litigation against sentencing regimes designed to circumvent *Miller*, and the establishment of new jurisdictional patterns before a justiciable measure of “(un)commonality” emerges.<sup>33</sup>

It is not our position that the law ought to ignore the “rare case . . . in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a [terminal] sentence.”<sup>34</sup> As Justice O’Connor suggested in her dissent

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

33. This may indeed be a very long process. In Pennsylvania, where defense lawyers have already begun the process of seeking parole for inmates currently under mandatory life sentences for murders committed when they were juveniles, prosecutors show no willingness to concede that any of the inmates were inappropriately sentenced to JLWOP. In testimony before the Pennsylvania Senate Judiciary Committee on July 12, 2012, the Pennsylvania District Attorneys Association argued against applying *Miller* retroactively and called for a minimum sentence of sixty years before an inmate would be eligible for parole under a life sentence with parole. See generally *Hearing Before the Senate Judiciary Comm. Regarding Juveniles Serving Life Without Parole* (2012) (testimony of Craig Stedman, Lancaster Cnty. Dist. Att’y), available at <http://senatorgreenleaf.com/judiciary/2012/071212/stedman.pdf>. In Iowa, the Governor peremptorily commuted the sentences of all inmates serving life without parole for murders they committed as juveniles, but conditioned their parole on each inmate serving a minimum of sixty years in prison. *Brandstad Moves to Prevent the Release of Dangerous Murderers in Light of Recent U.S. Supreme Court Decision*, IOWA.GOV (July 16, 2012), <https://governor.iowa.gov/2012/07/brandstad-moves-to-prevent-the-release-of-dangerous-murderers-in-light-of-recent-u-s-supreme-court-decision/>. According to the Governor’s press release, his action “gives the opportunity for parole in compliance with the recent Supreme Court decision; however, the action also protects victims from having to be re-victimized each year by worrying about whether the Parole Board will release the murderer who killed their loved one.” *Id.* The Governor’s action has been criticized by others and is being challenged in court. See discussion *infra* note 54.

34. *Roper*, 543 U.S. at 572. Justice O’Connor, dissenting in *Roper*, made the point that the evidence did not support the claim that such offenders are “rare.” *Id.* at 599–600. However one might characterize that evidence, in our view it is reasonable to extrapolate from the scientific facts of child development that fewer adolescents are irretrievable than retrievable, and that the younger the adolescent is, the more likely he is to be retrievable. The latter is likely the basis for the *Miller* majority’s dictum that the JLWOP sentence should be “uncommon,” particularly when the defendant was fourteen at the time he committed the crime at issue. *Miller*, 132 S. Ct. at 2469.

in *Roper*, the public is understandably afraid of and has an interest in permanently incapacitating true psychopaths as well as others whose environments have so deeply and permanently damaged them that they are, in effect, the equivalent of psychopaths.<sup>35</sup> Moreover, sentencing requires consideration of both proportionality and blameworthiness, which means that serious attention must be paid both to the crime and to the individual criminal. Because of this, it is also important not to ignore the small risk of error in the other direction: that a process that disallows JLWOP might result in an “irretrievably depraved” child one day being paroled.<sup>36</sup> This risk is more theoretical than real, however, because it can be corrected by the parole process itself; that is, as evidence of irretrievability mounts over the years—either because the individual remains violent or becomes increasingly so—the possibility of release becomes (or should become) ever more remote.<sup>37</sup> Of course the same cannot be said of the individual who is prematurely labeled a “throwaway.” By definition, the sentence of LWOP offers no possibility of error correction.<sup>38</sup>

### III. GETTING JUVENILE LIFE WITHOUT PAROLE “RIGHT” AFTER *MILLER*

Given the foregoing analysis, we turn to the difficult problem of how to implement the Court’s decision in *Miller*, which allows states to pursue JLWOP for a small number of juvenile offenders who are “irretrievably depraved,” but provides little guidance for doing so. This problem is especially difficult, because in our view, based on the state of the scientific evidence, it is impossible to get JLWOP “right,” especially when the sentencing decision is made soon after the conviction. But because our goal in this essay is to offer suggestions

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35. See *Roper*, 543 U.S. at 598–603 (O’Connor, J., dissenting) (exploring when offenders are sufficiently depraved to merit the death penalty).

36. This could happen for the same reason we should not permit terminal sentences: given the state of the relevant science, we simply cannot know whether a child is retrievable. See *supra* note 27 and accompanying text (elaborating on this point).

37. See, e.g., *Charles Manson Skips His 12th Parole Hearing*, FOXNEWS.COM, April 11, 2012, <http://www.foxnews.com/us/2012/04/11/manson-skips-12th-parole-hearing-may-be-his-last/> (making clear that Manson’s periodic, required parole hearings are basically *pro forma* and given that he apparently remains both unrepentant and dangerous, it is widely expected that he will die in jail).

38. See *Miller*, 132 S. Ct. at 2466 (“Imprisoning an offender until he dies alters the remainder of his life ‘by a forfeiture that is irrevocable.’” (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2027 (2010))).



for how states might implement *Miller* responsibly, we proceed on the basis it is possible at least to get it more right than not, and that there are approaches that might be effective to minimize the risk of error. The three approaches we present below meet *Miller's* minimum dictates, are consistent with the need to ensure that sentences in these cases are proportional both to the crime and to the blameworthiness of the individual, and are consistent with our prevailing concept of the child.

A. *The Legislative Choice to Eliminate JLWOP*

As we have already intimated, the approach that is most faithful to the trend in recent Supreme Court decisions dealing with severe punishment of juveniles, to the modern concept of the child including the appropriate role of the state in the child's life, and to the scientific facts about child development, is to eliminate JLWOP as a sentencing option. We will not repeat this argument, which is set out in Part II, except to emphasize that it does not put public safety at risk so long as the parole process functions with integrity. A child who turns out to be “irretrievably depraved” will not be paroled if he receives a sentence less than JLWOP; his depravity will continue to manifest over time and will be taken into consideration when a decision about release must be made. The only implication for the state and society is administrative: the obligation periodically to review the case to establish either continued depravity or rehabilitation. It is our view that such a relatively small burden is justified in circumstances where the state incarcerates a child, potentially for life.

This approach is consistent with *Miller*, which merely sets minimum constitutional requirements for states that choose to permit children to be sentenced to LWOP. Indeed, the case can be viewed as an invitation to the states to examine comprehensively their sentencing laws to determine if the JLWOP option was intentional or the unintended consequence of their waiver statutes.<sup>39</sup> The opportunity to remedy the negative effects of what Professor Elizabeth Scott has called a “moral panic” about an imaginary generation of child “superpredators” that caused legislatures in the

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39. *Id.* at 2472–73. For another (particularly troubling) example of the unintended consequences of waiver statutes, see Editorial, *Adolescents in Grown-Up Jails*, N.Y. TIMES (Oct. 15, 2012), <http://www.nytimes.com/2012/10/16/opinion/adolescents-in-grown-up-jails.html?src=recg> (describing how, in order to separate them from the adult prisoner population, adolescent prisoners are sometimes placed in solitary confinement).

1990s improvidently to enact many of the associated statutes could be sufficiently appealing in the current political and criminological period.<sup>40</sup>

*B. The Legislative Choice to Delay the Parole Decision*

A second, intermediate approach would be to impose a conditional sentence of life in prison, but to delay the parole decision to give the state, in its role as *parens patriae*, an opportunity to stabilize and evaluate the child. Depending upon his age at the time of the conviction, the interim period could extend from conviction until the child reaches the age of majority, or it could be established for some predetermined number of years. In any event, the period selected would have to be sufficient to permit a meaningful decision about parole, taking into consideration the offender's development, his background up to the time of his offense, and the evidence of potential for rehabilitation. During this period, the state would provide the child with an age-appropriate environment and evidence-based opportunities for rehabilitation. Once this interim period was over, an appropriate board or commission would hear relevant evidence from both the child and the state and make the final determination whether the child's life sentence was with or without the possibility of parole.

In addition to ensuring that the state was not "throwing away" a child upon conviction and that it was undertaking its own child welfare and child protection responsibilities, this interim period between conviction and the parole eligibility decision would afford the state valuable evidence of retrievability or irretrievability. This new evidence would not eliminate the risk of an erroneous decision about the child's essential nature, but it could significantly reduce it. Importantly, the interim period would also provide a cooling off period between the crime and conviction on the one hand and the parole decision on the other, thus further ensuring that the emotions surrounding the crime were properly balanced against the child's culpability.

Structuring the delay and delineating the terms of the state's responsibilities necessarily would be decided on a state-by-state basis. This would permit experimentation and development of best practices. Nevertheless, to have the desired impact, certain conditions

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40. Scott, *supra* note 27, at 11.

would have to be mandatory for all states.

First, there would be no consideration of parole at the time of conviction so as to avoid a decision dictated largely by the emotional impact of the crime on the jury. Otherwise, the likely inclination of jurors would be to deny parole eligibility. Even an interim suggestion to deny parole would make it politically difficult for a subsequent jury or parole board to reach a contrary decision.

Second, for evidence of potential for rehabilitation to be meaningful, there would have to be a real and sustained effort by the state to “retrieve” the child during the period between conviction and the parole decision; indeed, that would be the principal reason to delay the parole eligibility decision.

Third, the actual parole decision would be made only at the end of the interim period, when fully-developed evidence would be available for the decision. Any interim decision would be inadequately informed and likely to change the focus of the final decision from whether the evidence supports giving the offender an opportunity for parole to whether subsequent evidence changed the interim decision.

Fourth, the parole decision-maker optimally would be a judicial or quasi-judicial board whose members would include experts in the fields of child development and psychopathology, as well as parole experts. Such a board fits nicely with current parole systems following best practices.<sup>41</sup>

### C. *The Legislative Choice to Permit the Sentence of JLWOP According to Strict Procedural Safeguards*

The third approach is the least protective of the three. It assumes a political environment in which the first two approaches are not viable and is based on the features suggested or mandated by *Miller*. Relatedly, it mirrors individualized sentencing in capital cases, with which states allowing JLWOP at the time of *Miller* are familiar.<sup>42</sup> Its

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41. For an example of current best practices, see generally NAT’L INST. OF CORRECTIONS, CORE COMPETENCIES: A RESOURCE FOR PAROLE BOARD CHAIRS, MEMBERS, AND EXECUTIVE STAFF 23 (2010), available at <http://static.nicic.gov/Library/024197.pdf> (recommending collaborative approaches and evidence-based decisionmaking in parole).

42. See generally, e.g., *Woodson v. North Carolina*, 428 U.S. 280 (1976) (requiring individualized sentencing in capital cases); *Gregg v. Georgia*, 428 U.S. 153 (1976) (same). In *Miller*, the Court identified fifteen jurisdictions that permit the sentence of JLWOP and twenty-nine that make it mandatory in certain circumstances. *Miller*, 132 S. Ct. at 2471 n.10 (citing *State Distribution of Youth Offenders Serving Juvenile Life Without Parole (JLWOP)*), HUMAN RIGHTS WATCH (Oct. 2, 2009), <http://www.hrw.org/news/2009/10/02/state-distribution-juvenile>

exact contours would emerge over time, but should include at least the following:

First, sentencing should occur in a separate phase of the trial that follows conviction. Although *Miller* does not dictate this, it is the only practical way to implement those conditions that the Court has mandated. This is because the decision whether to make the offender eligible for parole involves consideration of information and factors that would be inappropriate for consideration in the portion of the trial focused primarily on the murder and whether the defendant is guilty. As the Court recognized in *Gregg v. Georgia*<sup>43</sup> and *Woodson v. North Carolina*,<sup>44</sup> the individualized decision contemplated in *Miller* requires a procedural mechanism that ensures the focus for the decision will be on all of the relevant factors and not just the crime.<sup>45</sup>

Second, the sentencing phase of the trial should be designed in such a way as to ensure to the extent possible that the jurors' emotional reactions to the crime do not unduly influence its consideration of the child's blameworthiness.<sup>46</sup> Thus, the presentation of and response to the prosecution's aggravating evidence should be formally separated from the presentation of and response to the defendant's mitigating evidence. The rules of evidence also should be relaxed in this part of the proceeding to permit a more natural presentation of information to the jury.<sup>47</sup>

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offenders-serving-juvenile-life-without-parole). The majority of those jurisdictions are also death penalty states. See *States With and Without the Death Penalty*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Sept. 22, 2012).

43. 428 U.S. 153 (1976).

44. 428 U.S. 280 (1976).

45. See *id.* at 304 (“[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.” (citation omitted)); *Gregg*, 428 U.S. at 206 (“The new Georgia sentencing procedures . . . focus the jury’s attention on the particularized nature of the crime and the particularized characteristics of the individual defendant,” and “[i]n this way the jury’s discretion is channeled.”).

46. See *supra* note 31 and accompanying text (noting that prosecutors have cast defendants’ young age as “scary” rather than as a mitigating factor, that judges tend to discount evidence of youth, and that decisionmakers exaggerate future threat).

47. In the sentencing phase of a capital trial, some rules of evidence are relaxed. In Florida, for example, a juror can find a mitigating circumstance if it is proven by a preponderance of the evidence. Fla. Std. Jury Instr. (Crim.) 7.11, available at [http://www.floridasupremecourt.org/jury\\_instructions/instructions.shtml#](http://www.floridasupremecourt.org/jury_instructions/instructions.shtml#). In addition, the U.S. Supreme Court has reversed a death sentence because a state court barred the use of hearsay evidence to prove a mitigating circumstance. See generally *Green v. Georgia*, 442 U.S. 95 (1979). In North Carolina, hearsay evidence is permitted if the other side has an opportunity to rebut it.

Third, specifically with respect to mitigating evidence, *Miller* requires that the sentencing authority, in its consideration of the child’s blameworthiness, hear and consider *both* scientific evidence about child development in general *and* evidence concerning the particular child defendant’s life circumstances and role in the crime.<sup>48</sup> Specifically with respect to child development science, *Miller* requires that jurors hear about and consider the child’s “chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences” and “how those [features] counsel against irrevocably sentencing [him] to a lifetime in prison.”<sup>49</sup> And with respect to the child himself, *Miller* requires that jurors hear about and consider “the family and home environment that surrounds him—and from which he cannot usually extricate himself . . . [and] 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.”<sup>50</sup> Importantly, the Court emphasized that a violent childhood and environment and violent adult role models are to be considered mitigating, not aggravating.<sup>51</sup> We would anticipate that, over time, developing this evidence would allow states to decide before going to a sentencing phase that a sentence of life without the possibility of parole was inappropriate in particular cases.

Fourth, the final sentencing decision should require the jury to balance the aggravated nature of the crime against the child’s blameworthiness.<sup>52</sup> In this context, the jury should be required to determine if the state has shown beyond a reasonable doubt that the

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*See generally* State v. Strickland, 488 S.E.2d 194 (N.C. 1997). Some states may permit the prosecutor to use hearsay evidence to rebut mitigating evidence but not to prove aggravating circumstances. The prosecution’s use of hearsay may be barred in some circumstances as a matter of constitutional law. *See generally* Crawford v. Washington, 541 U.S. 36 (2004) (holding that some out-of-court statements may violate the Confrontation Clause of the Sixth Amendment).

48. Providing this template for sentencing at least minimizes the extent to which judges can ignore or give short shrift to relevant scientific evidence about child development. *See* Maroney, *supra* note 5, at 119–28.

49. *Miller v. Alabama*, 132 S. Ct. 2455, 2468–69 (2012).

50. *Id.* at 2468.

51. *Id.* (discussing “Jackson’s family background and immersion in violence” and noting as an example that “[b]oth his mother and his grandmother had previously shot other individuals”). *See also supra* note 24 and accompanying text (elaborating on Jackson’s violent upbringing).

52. *See supra* note 17 and accompanying text (emphasizing that punishments must be proportional to the blameworthiness of the criminal, in addition to the crime).

defendant is “irretrievably deprived.”<sup>53</sup> If the jury has a reasonable doubt about that ultimate issue, it should sentence the juvenile to life with the possibility of parole, after some minimum number of years in prison, likely between fifteen and thirty years.<sup>54</sup>

One final, cautionary note about this approach: The inclination of some states will be simply to duplicate the individualized sentencing process used in capital cases whenever a child is convicted of a murder for which an adult would automatically be sentenced to LWOP. But going immediately to the sentencing phase of a trial in that manner likely would expose too many children—such as Kuntrell Jackson, for example, who neither killed nor likely intended to kill—to an erroneous JLWOP sentence.<sup>55</sup> Because of this, states should

53. Capital sentencing generally requires that a jury find the existence of aggravating factors, not just the elements of the crime, beyond a reasonable doubt. See, e.g., *Ring v. Arizona*, 536 U.S. 584, 608–09 (2002) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000)).

54. North Carolina, for example, amended its sentencing for minors subject to life imprisonment without parole to provide that the alternative “life imprisonment with parole” means “the defendant shall serve a minimum of 25 years imprisonment prior to becoming eligible for parole.” An Act to Amend the State Sentencing Laws to Comply with the United States Supreme Court Decision in *Miller v. Alabama*, S.L. 2012-148, 2012 N.C. Sess. Laws (to be codified at N.C. GEN. STAT. §15A-1476). But some states may try to circumvent *Miller* by establishing a minimum term for life with parole that effectively will be a life sentence without parole. In Iowa, at about the same time that the North Carolina statute was enacted, the Governor announced that he would “commute the life without parole sentences today to life with the possibility of parole only after 60 years for the 38 people who were convicted of First Degree Murder while a juvenile.” *Brandstad Moves to Prevent the Release of Dangerous Murderers in Light of Recent U.S. Supreme Court Decision*, IOWA.GOV (July 16, 2012), <https://governor.iowa.gov/2012/07/brandstad-moves-to-prevent-the-release-of-dangerous-murderers-in-light-of-recent-u-s-supreme-court-decision/>. His action has been challenged as being inconsistent with *Miller*. See *State v. Lockheart*, No. 10-1815, 2012 WL 2814378 (Iowa Ct. App. July 11, 2012). We believe that a minimum term for life with the possibility of parole should be consistent with principles of child development. Some states might decide that a JLWOP sentence is categorically inappropriate for juveniles below a certain age or for juveniles who did not kill and whose role in the homicide was relatively minor. Compare *Tison v. Arizona*, 481 U.S. 137, 137–38 (1987) (holding the death penalty not disproportionate for defendants who have major participation in murder with the mental state of reckless indifference), with *Enmund v. Florida*, 458 U.S. 782, 782 (1982) (holding the death penalty disproportionate for a robber who does not take human life). These cases do not reference age. Eventually, a trend in such policies might result in the Supreme Court revisiting issues left open in *Miller*. Cf. *Roper v. Simmons*, 543 U.S. 551 (2005); *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

55. See *Miller*, 132 S. Ct. at 2475 (Breyer, J., concurring) (opining that unless the State can show that Jackson intended to kill the victim in his case, Laurie Troup, he should not be eligible for JLWOP on re-sentencing). The majority’s opinion explains that “Jackson did not fire the bullet that killed Laurie Troup nor did the State argue that he intended her death.” *Id.* at 2468 (majority opinion). Jackson’s conviction was instead based on an aiding-and-abetting theory, and the appellate court affirmed the verdict only because the jury could have believed that when Jackson entered the store, he warned Troup that “[w]e ain’t playin’,” not “I thought you all was playin’.” *Id.* at 2468. In capital cases, the Court has barred categorically the death

consider a threshold, gatekeeping mechanism to ensure that only those children who are potentially “irretrievably depraved” will face a sentencing phase trial to determine if they should be subject to LWOP. The jury could make that decision as a threshold matter, in the same way that capital juries first determine if a statutory aggravating circumstance exists to make a capital defendant eligible for the death penalty.<sup>56</sup> The parties could prepare for such a hearing as they are preparing the case for trial, in the same manner as a capital case. Both sides could have ready, almost immediately after trial, prepared reports by their experts setting out general information about child development, information about the particular child’s development and potential for rehabilitation, and information about the child’s role in the murder. That would be sufficient to permit the court to decide whether the case involves an “uncommon” child who may be “irretrievably depraved.”

#### IV. CONCLUSION

It is inherent in our culture and law that, biological distinctions aside, children are a *tabula rasa*.<sup>57</sup> It is because of this idea that we give the adults in their lives so much freedom and power to control their environments and to form their characters. It is also because of this idea that periodically we fight as a body politic about the balance of that freedom and power among parents and the state.<sup>58</sup> Importantly,

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penalty for accomplices such as Jackson whose roles in the underlying felony were relatively minor and who did not act with reckless indifference to the life of the victim. *Cf.*, *Tison*, 481 U.S. at 137–38 (“The Eighth Amendment does not prohibit the death penalty as disproportionate in the case of a defendant whose participation in a felony that results in murder is major and whose mental state is one of reckless indifference.”); *Enmund*, 458 U.S. at 797 (“[T]he death penalty . . . is an excessive penalty for the robber who, as such, does not take human life.”).

56. If the question whether the defendant is “irretrievably depraved” is considered an aggravating factor, beyond what is necessary to convict the juvenile of murder, the Sixth Amendment likely would require the determination to be made by a jury. *See, e.g.*, *Ring*, 536 U.S. at 589. In that event, the Constitution also would prevent the state from shifting the burden to the defendant by establishing a rebuttable presumption that any juvenile who commits murder is irretrievably depraved. *See, e.g.*, *Francis v. Franklin*, 471 U.S. 307, 318 (1985).

57. *See, e.g.*, NEIL POSTMAN, *THE DISAPPEARANCE OF CHILDHOOD* 57 (1982) (describing the origins of this idea in John Locke’s view of childhood and the role of education in society); *Locke, John (1632-1704)*, *ENCYCLOPEDIA OF CHILDREN AND CHILDHOOD IN HISTORY AND SOCIETY*, <http://www.faqs.org/childhood/Ke-Me/Locke-John-1632-1704.html> (last visited Sept. 30, 2012) (describing the origins of the idea in elaborate detail).

58. The so-called “culture wars” throughout modern United States history have been motivated primarily by these concerns. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (involving politicians and citizens battling over whether immigrants have the right to inculcate their children according to their “foreign tongues and ideals”); *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 1060 (6th Cir. 1987) (involving a school board and citizens battling over

adults seek to control children through the age of majority at least in part because we believe that it is possible to have real influence over the child's character, values, and commitments through late adolescence.<sup>59</sup> Indeed, examples abound of our conviction that children in mid-to-late adolescence are particularly malleable in these respects—from parents who take their children out of high school to minimize the extent to which they can be socialized by teachers and peers<sup>60</sup> to high school administrators who, often with the support of parents' associations, devote significant (and precious) time and money to co-curricular behavior management and values education.<sup>61</sup>

We cannot simultaneously subscribe to this idea and its associated politics and also believe that we are reasonable when first we abandon a child and then imprison him for life without the possibility of parole when he goes astray. Our approach to children in the law is one of rights and responsibilities: adults, including both parents and the state, have rights of control that they are responsible to exercise in the children's best interests.<sup>62</sup> When we fail, utterly, to write a good or at least a minimally decent childhood onto the *tabula rasa*, we have failed in our responsibilities. In such cases, we are blameworthy.

To assure that we do not fail the child who is subject to the penal system, we must continue to treat him as the child he is. Until we are provided with unassailable evidence of his irreparable corruption as an adult, we must continue to assume—as we do for our other children who are not subject to the penal system—that the story of his character, values, and potential is not yet entirely written. In the

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whether fundamentalist Christians have the right to influence the curriculum of the public schools).

59. See *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972) (seeking control over children's associations and education especially beginning at age fourteen); *Meyer*, 262 U.S. at 397–98 (seeking control over the curriculum of children through the eighth grade).

60. *Yoder* is the best-known Supreme Court decision ratifying the legitimacy of this view, but it is certainly not limited to the Court or to the Amish. See, e.g., *Benefits to Homeschooling: A Growing List from Our Homeschool Family to Yours*, PEAH'S HOMESCHOOL-CURRICULUM-SAVINGS.COM, <http://www.homeschool-curriculum-savings.com/benefits-to-homeschooling.html> (last visited Sept. 7, 2012) (listing “more opportunities for character building,” “less peer pressure,” and “more control over outside influences” as reasons to homeschool children and teenagers).

61. See, e.g., Edward J. Klesse and Jan A. D'Onofrio, *The Value of Co-Curricular Activities*, PRINCIPAL LEADERSHIP, Oct. 2000, at 6, available at [www.nassp.org/portals/0/content/48943.pdf](http://www.nassp.org/portals/0/content/48943.pdf) (describing the development of co-curricular programs and opportunities for children, including in high school, to minimize their engagement in risk-taking behaviors and to “foster positive character traits . . . [and] success in later life”).

62. DAVIS, *supra* note 19, at 1–2.



process, we cannot allow ourselves to think that merely re-labeling him a “juvenile” somehow transforms either his essential nature or our essential responsibilities toward him. We cannot have it both ways: he is and remains a child until the age of majority, and we largely write his story.