RETURN TO REHABILITATION: ILLINOIS' EVOLVING JUVENILE SENTENCING PRACTICES IN LIGHT OF MILLER V. ALABAMA

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I. INTRODUCTION

Illinois holds a special place in the history of juvenile justice. In response to social outrage at the indiscriminate incarceration of children along with adult offenders, the Illinois legislature created the nation's first juvenile justice system in 1899.[1] In *Miller v. Alabama*, the U.S. Supreme Court held that the Eighth Amendment forbids courts from sentencing juvenile offenders to life in prison without the possibility of parole, without considering mitigating factors.[2] Building on *Roper v. Simmons*[3]and *Graham v. Florida*,[4] the Court determined that an offender may only be sentenced to life-without-parole (LWOP) for a crime committed as a juvenile, if the crime reflected true "incorrigibility."[5] The Court ultimately required sentencing courts to base that determination on whether a crime reflected truly "irreparable corruption,"[6] or was merely a product of "immaturity, recklessness, and impetuosity."[7] While the ruling undoubtedly altered the landscape of juvenile justice for those offenders tried as adults, the lasting effects of this landmark case are still unclear. Now, under *Miller*, Illinois has an opportunity to return to its historical place as a pioneer in juvenile justice.[8] The state, with the support of *Miller*, should focus on rehabilitating juvenile

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1 *See* JAMES W. BURFEIND & DAWN JEGLUM BARTUSCH, JUVENILE DELINQUENCY: AN INTEGRATED APPROACH 18 (3d ed. 2011) (attributing the system's creation to, in large part, the aptly named "Child-Savers"); Cynthia Soohoo, *You Have the Right to Remain a Child: The Right to Juvenile Treatment for Youth in Conflict with the Law*, 48 COLUM. HUM. RTS. L. REV. 1, 36 (2017).

2 Miller v. Alabama, 567 U.S. 460, 479 (2012).

3 *See generally* 543 U.S. 551, 578 (2005) (holding that the Eighth and Fourteenth Amendments prohibit the death penalty for crimes committed by offenders under the age of 18).

4 *See generally* 560 U.S. 48, 72-73 (2010) (holding a life sentence without parole for any crime, except homicide, to be unconstitutional when imposed on juvenile offenders).

5 *See Miller*, 567 U.S. at 473.

6 *Id.* at 479-80 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).

7 *Id.* at 472 (quoting Graham v. Florida, 560 U.S. 48, 68 (2010)).

8 Patrick N. McMillin, *From Pioneer to Punisher: America's Quest to Find Its Juvenile Justice Identity*, 51 HOUS. L. REV. 1485, 1489 (2014) (describing the creation of the first American juvenile court system, in Illinois).

offenders in light of the Proportionate Penalties Clause of the Illinois Constitution, instead of merely incarcerating them.[9]

The American juvenile justice system first arose in Illinois in the late nineteenth century.[10] As a legal outgrowth of the Child Saver's Movement, the court "shifted the focus . . . within that court from punishment to rehabilitation."[11] The juvenile justice system, however, swung away from a rehabilitative agenda and towards retributive justice in the 1980's.[12] This shift in goals of punishment carried with it many changes to the juvenile justice system that by the close of the twentieth century made the juvenile justice system much more like its adult counterpart.[13] During this "get tough on crime" period, state and federal legislators enacted numerous statutes to reform the criminal justice system, reflecting a punitive approach to punishment that focused on the severity of the crime and not on the status of the offender.[14] It is against that social backdrop that the Court decided *Miller*[15] and states were left to decide: does this signal a genuine transition back towards rehabilitative justice for juvenile offenders?[16]

As the birth place of America's juvenile justice system,[17] Illinois has a unique history as an advocate of rehabilitative goals when adjudicating juvenile offenders.[18] Now, in light of *Miller*'s interpretation of the Eighth Amendment, Illinois must consider whether these recent cases represent the first step back towards a rehabilitative focus or merely a modest limitation

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9 *See* ILL. CONST. art. I, § 11.

10 *See* BURFEIND & BARTUSCH, *SUPRA* NOTE 1, AT 18; Lahny R. Silva, *The Best Interest is the Child: A Historical Philosophy for Modern Issues*, 28 BYU J. PUB. L. 415, 421-22 (2014); David Wolcott, "*The Cop Will Get You": Police and Discretionary Juvenile Justice*, 1890-1940, 35 J. SOC. HIST. 349, 350 (2001).

11 McMillin, *supra* note 8.

12 *See* BURFEIND & BARTUSCH, *supra* note 1, at 26. *See also* Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 397 (1997) (discussing the abandonment of the rehabilitative model of criminal justice). *See generally* Peter J. Benekos, Alida V. Merlo & Charles M. Puzzanchera, *In Defence of Children and Youth: Reforming Juvenile Justice Policies*, 15 INT'L J. POLICE SCI. & MGMT. 125, 126 (2013) (pointing to the overreaction in the 1980s to the juvenile 'super predators'); R. Ross Myers, *"Society Must be Protected from the Child": The Construction of US Juvenile Detention as Necessary and Normal*, 20 CRITICAL CRIMINOLOGY 395, 396-97 (2012) (discussing media representations of juvenile crime as a backdrop for get-tough juvenile punishment agendas).

13 *See* BURFEIND & BARTUSCH, *supra* note 1, at 26-27. *See generally* Soohoo, *supra* note 1.

14 *See generally* BURFEIND & BARTUSCH, *supra* note 1, at 26-27; Soohoo, *supra* note 1, at 4.

15 *See* Miller v. Alabama, 567 U.S. 460 (2012).

16 *See id.* at 479. *See generally* Brian Jay Nicholls, *Justice in the Darkness: Mental Health and the Juvenile Justice System*, 2 UTAH L. REV. 603, 604 (2009) (describing the juvenile justice system as a "dumping ground for mentally ill, learning disabled, [and] behaviorally disordered juveniles").

17 *See* BURFEIND & BARTUSCH, *supra* note 1, at 26-27 ("The Illinois Juvenile Court Act was the first statutory provision in the United States to provide for an entirely separate system of juvenile justice.").

18 McMillin, *supra* note 8, at 1489 (noting that, as the first juvenile court system in the United States, Illinois "sought to evaluate the needs of the juvenile offender and then, with those needs in mind, determine the best rehabilitative solution.").

on the state's primarily retributive model of punishment. However, even if the *Miller* Court did not intend to encourage rehabilitation when sentencing juveniles, Illinois should do so anyway. Ultimately, Illinois should implement *Miller* to support a transition back to rehabilitative justice, and a departure from retribution as a policy focus when punishing juveniles.

Part I includes a brief history on juvenile justice in Illinois and Part II will explore the implementation of Illinois' Proportionate Penalties Clause[19] prior to *Roper*, *Graham*, and *Miller*. Part III expounds on *Roper*, *Graham*, and *Miller*, specifically addressing whether they represent a minimum level of protection for serious juvenile offenders, or a broader signal that the "evolving standards of decency" require states to tailor punishments around utilitarian goals.[20] Part IV examines post-*Miller* Illinois cases regarding the imposition of LWOP sentences for crimes committed by juveniles and seeks to identify points of conflict between practice and policy. Part V recommends a two-step analytic framework that will (1) identify which sentences constitute LWOP and (2) what factors a court must consider prior to imposing such a sentence. Further, Part V suggests that courts apply the factors test implementing the rehabilitative policy goal behind the *Miller* and *Holman*[21] decisions.

II. ILLINOIS' PROPORTIONATE PENALTIES CLAUSE, PRE-*MILLER*

When examining the permissive severity of criminal sanctions in Illinois, it is important to remember that the Proportionate Penalties Clause of the Illinois Constitution operates independently from the U.S. Constitution's Eighth Amendment, but with a related function.[22] The Proportionate Penalties Clause requires that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."[23] The Illinois Supreme Court has interpreted this clause to establish two requirements: (1) that a sentence be proportional to the crime; and (2) that an offender's punishment be calculated and imposed in order to rehabilitate him or her.[24]

In contrast, the Eighth Amendment of the U.S. Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[25] The U.S. Supreme Court has noted the prohibition against cruel and unusual punishment impacts the

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19 ILL. CONST. art. I, § 11.
20 *Miller*, 567 U.S. at 494 (quoting Estelle v. Gamble, 429 U.S. 97 (1976)).
21 *See* People v. Holman, 2017 IL 120655, 91 N.E.3d 849.
22 *Compare* U.S. CONST. amend. VIII *with* ILL. CONST. art. I, § 11.
23 ILL. CONST. art. I, § 11.
24 *See* People v. Taylor, 464 N.E.2d 1059, 1062 (Ill. 1984).
25 U.S. CONST. amend. VIII.

imposition of criminal sentences in three ways: (1) "it limits the kinds of punishment that can be imposed on those convicted of crimes"; (2) "it proscribes punishment grossly disproportionate to the severity of the crime"; and (3) "it imposes substantive limits on what can be made criminal and punished as such."[26] As both operate to limit the State's power to punish criminal offenders, challengers to sentences in Illinois often allege violations of both the Eighth Amendment of the U.S. Constitution and the Illinois Proportionate Penalties Clause.[27]

Given that the Court found the Eighth Amendment's prohibition on cruel and unusual punishment applied to the states by the Fourteenth Amendment's Due Process Clause, it has represented the constitutionally minimal level of protection against disproportionate punishment imposed by state and federal governments.[28] While the Illinois Constitution and the Proportionate Penalties Clause specifically could not offer less protection, it could potentially have offered more.[29] Despite that possibility, and Illinois' history as the birthplace of rehabilitative-focused juvenile justice, two cases illustrate how the Proportionate Penalties Clause may not have provided any additional protection for defendants, prior to the Court's holding in *Miller*.

A. The Dual Purposes of Illinois' Proportionate Penalties Clause in *People v. Taylor*

The Illinois Proportionate Penalties Clause provides, "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."[30] On its face, the clause required (1) criminal punishments match the crime in severity and (2) penalties be designed to rehabilitate the offender. The clause applies with equal force to legislative action when it establishes criminal penalties and to the courts when they exercise discretion in imposing those penalties.[31] These dual purposes can, in some circumstances, conflict.

Namely, for very serious offenses, society cannot punish a murderer with severity equal to the offense while simultaneously rehabilitating the offender. The offense of murder under a retributive model of punishment

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26 Ingraham v. Wright, 430 U.S. 651, 667 (1977).

27 *See generally* People v. Patterson, 2014 IL 115102, 25 N.E.3d 526; People v. Clemons, 2012 IL 107821, 968 N.E.2d 1046; People v. Buffer, 2017 IL App (1st) 142931, 74 N.E.3d 470; People v. Hoy, 2017 IL App (1st) 142596, 89 N.E.3d 821; People v. Wilson, 2016 IL App (1st) 141500, 62 N.E.3d 329; People v. Gipson, 2015 IL App (1st) 122451, 34 N.E.3d 560.

28 *See* Robinson v. California, 370 U.S. 660, 667 (1962).

29 *See Robinson*, 370 U.S. at 675 ("The command of the Eighth Amendment, banning 'cruel and unusual punishments' . . . is applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment").

30 ILL. CONST. art. I, § 11.

31 *See* People v. Moore, 304 N.E.2d 696, 698 (Ill. App. Ct. 1st 1973).

can only be matched in severity by the forfeiture of the offender's life, either through the imposition of the death penalty or LWOP. Such a punishment, however, forecloses the possibility of the offender ever returning to "useful citizenship."[32] Illinois courts have approached this seeming constitutional contradiction with deference to the legislature. The death penalty and LWOP sentences are permissible under the Illinois Constitution because the Illinois legislature may determine that some offenders are beyond rehabilitation.[33] Illinois courts have applied the same reasoning to crimes committed by juveniles, including the Illinois Supreme Court in *People v. Taylor*.[34]

On January 12, 1981, sixteen-year-old Andre Taylor murdered Cedrick Maltbia at the command of his aunt.[35] Taylor was tried as an adult, convicted, and sentenced to LWOP per Illinois' mandatory sentencing scheme.[36] Taylor appealed, arguing that his LWOP sentence violated the Proportionate Penalties Clause.[37] That is, if Taylor's sentence required him to spend the rest of his life in prison, then he could never be restored to useful citizenship.[38]

The Illinois Supreme Court noted that the state legislature had to consider the two requirements of the Proportionate Penalties Clause when passing sentencing guidelines: that a sentence be intended to "restor[e] an offender to useful citizenship," and provide a penalty proportionate to the severity of the crime.[39] The Illinois Constitution, however, did not specify which goal the legislature had to prioritize.[40] If the legislature determined that "no set of mitigating circumstances could allow a proper penalty of less than natural life," then a LWOP sentence satisfied the Proportionate Penalties Clause.[41] Therefore, the Illinois Supreme Court interpreted the Proportionate Penalties Clause as including an implicit caveat - that a legislature may set mandatory minimum sentences proportional to the severity of the crime with

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32 ILL. CONST. art. I, § 11.

33 *See generally* People v. Taylor, 464 N.E.2d 1059, 1062 (Ill. 1984) (holding LWOP imposed on a minor did not violate the Proportionate Penalties Clause of the Illinois Constitution); People v. Brownell, 404 N.E.2d 181, 197 (Ill. 1980) (holding that the death penalty did not violate the Illinois Constitution); People *ex rel.* Ward v. Moran, 301 N.E.2d 300, 302 (Ill. 1973) (holding that the rehabilitative mandate of the Proportionate Penalties Clause does not outweigh the requirement that the severity of the offense match the severity of the punishment); People v. Moore, 304 N.E.2d 696, 698 (Ill. App. Ct. 1st 1973) (holding that mandatory minimum sentences for rape do not violate the Illinois Constitution).

34 *See* 464 N.E.2d 1059 (Ill. 1984) (describing the circumstances of Taylor's crime and conviction, the Supreme Court of Illinois noted Taylor's age only once in its opinion and failed to consider it as a factor relevant to his culpability).

35 *Id.* at 1061.

36 *Id.*

37 *Id.*

38 *See id.*

39 *Id.* at 1062.

40 *See id.*

41 *Id.*

a goal of rehabilitation, *if* rehabilitation was possible.[42] The court concluded the Illinois Constitution, "should not and does not prevent the legislature from fixing mandatory minimum penalties . . . of less than natural life."[43] In other words, the Illinois Constitution permitted the legislature to emphasize retribution at the cost of rehabilitation.[44]

By imposing a mandatory life sentence, the legislature was presumed to have weighed the possibility of rehabilitation, severity of the crime, and the public interest in incapacitating violent offenders.[45] The Proportionate Penalties Clause required consideration of rehabilitative potential, but the legislature had authority to impose LWOP when an offense's severity indicated that the offender was beyond any meaningful hope of rehabilitation.[46] As such, the Illinois Supreme Court upheld Taylor's LWOP sentence for the crime his aunt commanded him to commit when he was sixteen years old.[47]

B. Illinois' Proportionate Penalties Clause Did Not Bar LWOP Sentence Under an Accomplice Theory of Liability in People v. Griffin

The years following *People v. Taylor* brought a significant national shift in public perception of juvenile offenders.[48] Instead of viewing juvenile offenders as "children who happen to commit crimes," Alfred Regnery, Administrator of the U.S. Office of Juvenile Justice and Delinquency Prevention under President Reagan, characterized juvenile offenders as, "criminals who happen to be young."[49] Between 1962 and 1981, the United States averaged two juvenile LWOP sentences per year; in contrast, 50 juveniles received LWOP sentences in 1989, and 152 juveniles received the same sentence in 1996.[50] In stark contrast to the principles originally

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42 *See id.*

43 *Id.*

44 Prior to *Miller*, Illinois courts used this reasoning to justify several statutorily mandated LWOP sentences, where the sentencing court had little or no discretion to reduce it. *See generally* People v. Brown, 2012 IL App (1st) 091940, ¶ 76, 967 N.E.2d 1004, 1024-25 (holding that the Proportionate Penalties Clause did not bar a LWOP sentence for a mentally retarded offender); People v. Allen, 2015 IL App (1st) 131771-U, ¶ 23; People v. Smolley, 873 N.E.2d 8, 13 (Ill. App. Ct. 3rd, 2007) (holding that the legislature had the authority to "prescribe mandatory sentences that restrict the judiciary's discretion and ability to consider mitigating factors"); *but cf.* People v. Miller 781 N.E.2d 300, 308 (Ill. 2002) (finding that the mandatory imposition of a LWOP sentence would violate the Illinois Constitution's Proportionate Penalties Clause if LWOP was mandatory regardless of any mitigating circumstances).

45 *See* People v. Taylor, 464 N.E.2d 1059, 1062 (Ill. 1984).

46 *See id.*

47 *Id.*

48 *See* McMillin, *supra* note 8, at 1500.

49 *Id.*

50 Frank Butler, *Extinguishing All Hope: Life-Without-Parole for Juveniles*, 49 J. OF OFFENDER REHABILITATION 273, 275 (2010).

defining the juvenile justice movement, juveniles convicted of murder were actually more likely than their adult counterparts to be sentenced to LWOP between 1985 and 2001.[51] During that period, Illinois courts repeatedly imposed and upheld LWOP sentences on juveniles.[52] The 1980's and early 1990's also saw a rise in arrests for violent and drug related offenses, often unfairly attributed to African American and Latino youths.[53]

Although the topic of racial disparity was not explicitly addressed in the *Miller* line of cases, there remains a significant correlation between racial minority status and sentencing severity.[54] In 2010, African Americans comprised only 17% of the juvenile population in the United States but accounted for 31% of all juvenile arrests.[55] This disparity existed despite few group differences in rates of actual commission of offenses "between youth of color and white youth."[56] Further, some studies show 60% of all individuals serving a life sentence for crimes committed as juveniles are African American.[57] While *Miller* and subsequent cases did not address

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51 *Id*.

52 *See* People v. Morgan, 758 N.E.2d 813, 844 (Ill. 2001) (reversing an appellate court's order for a new trial, and reinstating a 75 year sentence for crimes committed by a 14 year old boy); People v. Cooks, 648 N.E.2d 190, 201 (Ill. App. Ct. 1st 1995) (upholding a mandatory sentence of LWOP for two murders committed by a 14-year-old); People v. Banks, 569 N.E.2d 1388, 1391 (Ill. App. Ct. 5th 1991) (upholding a life-sentence based on a determination that the defendant was a habitual offender, in part based on a conviction for a crime committed when he was a juvenile); People v. Beck, 546 N.E.2d 1127, 1137 (Ill. App. Ct. 5th 1989) (upholding a sentence of 120 years for six-counts of attempted murder committed by a 14-year-old). *But cf.* People v. Clark, 518 N.E.2d 138, 147 (Ill. 1987) (reversing a sentence of LWOP and ordering a new trial for deficiencies in the juvenile's transfer to adult court).

53 *See generally* BURFEIND & BARTUSCH, SUPRA NOTE 1, at 26; Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 261 (2009) ("Race has been and remains inextricably involved in drug law enforcement, shaping the public perception of and response to the drug problem."); Ojmarrh Mitchell & Michael S. Caudy, *Race Differences in Drug Offending and Distribution Arrests*, 63 CRIME AND DELINQ., 91, 108 (2017) (noting that the racial disparity between white and non-white offenders for drug arrests may be explainable by conscious or unconscious racial bias from law enforcement personnel); Patrick Ibe, Charles Oche & Evaristus Obiyan, *Racial Misuse of "Criminal Profiling" by Law Enforcement: Intentions and Implications*, 6 AFR. J. OF CRIM. AND JUST. STUD. 177, 188 (2012) ("Because police are suspicious and search for drugs primarily among African Americans and Latinos, they find a disproportionate number of them with contrabands."); Uniform Crime Report Data Tool, UNIFORM CRIME REPORTING STATISTICS, https://www.ucrdatatool.gov (follow "go to the table building tool" hyperlink; then follow "all states and U.S. total" hyperlink; then select "Data with one variable"; then select "United States-Total"; then select "violent crime total"; then select years 1983 and 2014) (showing that violent crime totals in the United States rose almost every year beginning in 1983 until they plateaued between 1993-95).

54 *See generally Disproportionate Minority Contact in the Juvenile Justice System*, THE SENTENCING PROJECT 1 (May 2014), http://www.sentencingproject.org/wp-content/uploads/2015/11/Dispro-portionate-Minority-Contact-in-the-Juvenile-Justice-System.pdf.

55 *Id.* at 1.

56 *Id.* at 3.

57 *Racial Inequality in Youth Sentencing*, THE CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, http://fairsentencingofyouth.org/the-issue/advocacy-resource-bank/racial-inequality-in-youth-sentencing/ (last visited Nov. 4, 2017).

racial disparity in sentencing, they have mandated the consideration of factors in mitigation when sentencing juveniles; it is worth asking whether the use of these factors will ameliorate, maintain, or worsen the racial disparity already present in juvenile sentencing.[58]

In August of 2001, seventeen-year old Charles Griffin participated in a robbery with two other men.[59] While Griffin waited in the getaway car, his two accomplices performed the robbery and, Griffin would learn later, shot and killed three people.[60] Griffin drove them home, but declined to accept his portion of the "proceeds from the robbery."[61] Griffin was tried and convicted of three counts of first-degree murder under an accomplice theory of liability.[62] For the murders, Griffin received a mandatory sentence of LWOP, which was imposed without consideration of any mitigating factors, like Griffin's age at the time of the crime or degree of culpability, such as Griffin's minimal role in planning or carrying out the murders.[63]

Griffin appealed his conviction and argued his sentence violated the Illinois Proportionate Penalties Clause because Illinois' mandatory sentencing scheme prevented the judge from imposing any sentence intended to rehabilitate him.[64] The First District Appellate Court of Illinois disagreed, holding that mandatory sentences did not violate the Proportionate Penalties Clause even if the imposed sentence eliminated any possibility for Griffin's restoration to useful citizenship.[65] The court carefully distinguished Griffin's case from a prior case where a fifteen-year-old's sentence of LWOP violated the Proportionate Penalties Clause[66] by noting that seventeen-year-old Griffin: (1) "at the time of the crime, [] was an adult for criminal justice purposes" and (2) "had a full week to contemplate whether to act as the lookout and getaway driver for the robbery."[67] Ultimately, the court concluded neither Griffin's age, nor his level of culpability in the crimes should have a significant effect on his sentence under Illinois' mandatory sentencing guidelines.[68]

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58 The subject of racial disparity in juvenile sentencing is beyond the scope of this note but is an important topic on the need for rehabilitation for all incarcerated youth regardless of demographic factors.

59 People v. Griffin, 857 N.E.2d 889, 892 (Ill. App. Ct. 1st 2006).

60 *Id*.

61 *Id*.

62 *Id.* at 892-93.

63 *Id.* at 898.

64 *See Id.* at 892.

65 *See id.* at 898-899.

66 People v. Miller, 781 N.E.2d 300, 308 (Ill. 2002).

67 *Griffin*, 857 N.E.2d at 898-899.

68 *See id.* at 899. *See also* People v. Brown 967 N.E.2d 1004, 1019 (Ill. App. Ct. 1st, 2012) (holding that a LWOP "sentence [was] not rendered unconstitutional when the underlying conviction [was] premised upon a theory of accountability").

The Proportionate Penalties Clause requirement that a sentence restore an offender to useful citizenship did not prevent Andre Taylor, aged sixteen when he committed his crimes, or Charles Griffin, aged seventeen when he acted as an accomplice in three murders, from being effectively removed from society for the remainder of their lives.[69] Prior to *Miller*, Illinois courts interpreted the Proportionate Penalties Clause to have only one practical mandate, that the punishment should fit the crime, and one ideological suggestion, that the offender should be rehabilitated, if possible.[70] At least until *Miller*, the Illinois state legislature emphasized punishment severity and retribution by enacting a sentencing scheme that reflected the belief that some offenders could never be rehabilitated.[71]

III. THE U.S. SUPREME COURT'S EVOLVING INTERPRETATION OF EIGHTH AMENDMENT REQUIREMENTS CONCERNING CRIMES COMMITTED BY JUVENILES

Illinois was not alone when it responded to growing public fear of juvenile "super-predators" with stiffer penalties for juvenile offenders; state legislatures across the nation, as well as Congress, toughened their approach to juvenile justice.[72] Nearly every state passed or revised legislation allowing for more juveniles to be tried in adult court, either by lowering the threshold age or broadening the scope of offenses triable in adult court.[73] In response, juvenile litigants challenged the more severe punishments under the U.S. Constitution's prohibition against cruel and unusual punishment.[74]

As of 1988, the U.S. Supreme Court was closely divided on how the Eighth Amendment impacted juvenile sentencing. In *Thompson v. Oklahoma*, a plurality of the Court held that a fifteen-year-old was categorically incapable of acting with the requisite culpability to justify a death sentence.[75] Therefore, imposing a sentence of death for any crime a fifteen-year-old might commit would violate the Eighth Amendment's prohibition against cruel and unusual punishment.[76] The plurality in *Thompson* approached the question of evolving standards of human decency

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69 *See* People v. Taylor, 464 N.E.2d 1059, 1062 (Ill. 1984); *Griffin*, 857 N.E.2d at 892.

70 *See Taylor*, 464 N.E.2d at 1062 (observing "that there is no indication that the possibility of rehabilitating an offender was to be given greater weight and consideration than the seriousness of the offense in determining a proper penalty").

71 *See generally id.*

72 *See* BURFEIND & BARTUSCH, *supra* note 1, at 26; Vitiello, *supra* note 12, at 395-96; Benekos, Merlo & Puzzanchera, *supra* note 12, at 126; Butler, *supra* note 49, at 275; McMillin, *supra* note 8, at 1502.

73 *See* Benekos, Merlo & Puzzanchera, *supra* note 12, at 128.

74 *See generally* McMillin, *supra* note 8, at 1507.

75 *See* 487 U.S. 815 (1988); Lauren Kinell, *Answering the Unanswered Questions: How States Can Comport with* Miller v. Alabama, 13 CONN. PUB. INT. L.J. 143, 144 (2013).

76 *See* 487 U.S. 815 (1988); Kinell, *supra* note 75.

narrowly by limiting its examination to states that explicitly set a threshold age to permit the imposition of the death penalty.[77]

In contrast, only one year later, a majority of the Court upheld the death penalty in two consolidated cases for crimes committed by a seventeen-year-old in Kentucky and a sixteen-year-old in Missouri.[78] As in *Thompson*, the Court used state law to determine whether the Eighth Amendment prevented a state from sentencing a sixteen-year-old to death.[79] The majority in *Stanford*, however, approached the question more broadly than the plurality in *Thompson* by analyzing the law of every state authorizing capital punishment.[80] The majority found that of the thirty-seven states that permitted the death penalty, only fifteen refused to impose it on sixteen-year-olds.[81] Such a split "did not establish the degree of national consensus [the] Court ha[d] previously thought sufficient to label a particular punishment cruel and unusual."[82]

The Court would not, by a majority, recognize that the Eighth Amendment impacted juvenile sentence severity due to juveniles' reduced moral culpability until 2005.[83] In *Roper v. Simmons*, the Court would begin its reevaluation of how the Eighth Amendment affected juvenile punishments.[84] *Roper* was the first of three cases, culminating in *Miller v. Alabama*, that would reform how juvenile offenders could be sentenced in the United States.

A. The Build-Up to *Miller*: *Roper* and *Graham*[85]

After convicting Simmons of a heinous murder he committed at age seventeen, a trial court sentenced Simmons to death.[86] Perhaps because of the extreme degree of Simmons' culpability and the severity of the crime, the

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77 *See* Thompson v. Oklahoma, 487 U.S. 815, 826 (1988).

78 *See* Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (holding that capital punishment for crimes committed by a sixteen or seventeen-year-old did not constitute cruel and unusual punishment).

79 *Id.* at 370-71.

80 *See id.* at 370.

81 *Id.* at 370-71 (noting that at the time, California, Colorado, Connecticut, Illinois, Maryland, Nebraska, New Hampshire, New Jersey, New Mexico, Ohio, Oregon, and Tennessee precluded capital punishments for offenders under age eighteen while Georgia, North Carolina, and Texas precluded capital punishments for offenders under age seventeen).

82 *Id.* at 371.

83 *See* Roper v. Simmons, 543 U.S. 551, 578 (2005) ("It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime").

84 *See id.*

85 For detailed discussion of the Court's reasoning in *Roper* and *Graham*, *see* Benekos, Merlo & Puzzanchera, *supra* note 12, at 131; Butler, *supra* note 49, at 277; Kinell, *supra* note 74, at 144-45; McMillin, *supra* note 8, at 1508-10.

86 *Roper*, 543 U.S. at 551, 556.

U.S. Supreme Court granted certiorari in order to determine whether anyone who committed a crime before the age of eighteen had the requisite culpability to justify a sentence of death.[87]

Justice Kennedy, writing for the 5-4 majority, concluded that a death sentence for a crime committed by someone under the age of eighteen was "irreconcilable with the Eighth Amendment."[88] The Court cited three key differences between juvenile and adult offenders: (1) juveniles' lack of maturity and responsibility result in a greater degree of impetuosity; (2) juveniles have less control over their surroundings and are more susceptible to outside influence than adults; and (3) juveniles' characters are not "well-formed" and generally reflect transitory traits, rather than permanent fixtures of personality.[89] Taken together, these three key differences led the Court to conclude that juveniles, as a class, were less culpable for their actions and had a greater potential for rehabilitation.[90] The majority also found near international consensus prohibiting the execution of juveniles as persuasive, much to the dissent's chagrin.[91] The primary purposes of the death penalty were retribution and deterrence.[92] As juveniles were categorically less culpable than adults, the imposition of a death sentence, which was typically reserved to punish only the most culpable offenders for the most heinous acts, would be inappropriate.[93]

The Court further noted "it [was] unclear whether the death penalty ha[d] any significant or even measurable deterrent effect on juveniles," but that deterrence might be equally-well served by the threat of a LWOP sentence.[94] Juveniles' culpability, even for the most heinous acts, could not justify the imposition of a death sentence, and neither could its questionable deterrent effect. Because the Court could not justify the imposition of a death sentence for any crimes committed by a person under the age of eighteen in light of any recognized goals, it held that the penalty would be cruel and unusual, and in violation of the Eighth Amendment.[95]

In 2010, the Court revisited the issue of permissible punishment for crimes committed by juveniles in *Graham v. Florida*.[96] Justice Kennedy wrote for the 6-3 majority. [97] Terrence Graham, a seventeen-year-old on

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87 *See id.* at 555-56.

88 McMillin, *supra* note 8, at 1508.

89 *See Roper*, 543 U.S. at 569-70.

90 *See id.* at 570.

91 *See id.* at 575-78, 604 (Scalia, J., dissenting) ("Though the views of our own citizens are essentially irrelevant to the Court's decision today, the views of other countries and the so-called international community take center stage."); McMillin, *supra* note 8, at 1509.

92 *See Roper*, 543 U.S. at 571.

93 *See id.*

94 *Id*. at 571-72.

95 *See id.* at 578.

96 *See* 560 U.S. 48, 52 (2010).

97 *Id.*

probation for attempted robbery, committed two home invasion robberies on December 2, 2004.[98] The trial court sentenced Graham to the maximum sentence of life imprisonment for the armed burglary and fifteen years for the attempted armed robbery.[99] Florida had no parole system at the time, so Graham would never have an opportunity for release.[100]

In *Graham*, the Court reiterated its holding and reasoning from *Roper*, noting the Eighth Amendment takes on a different meaning for juveniles compared to adults, "because juveniles have lessened culpability they are less deserving of the most severe punishments."[101] Further, a LWOP sentence has a quantifiably greater impact on a juvenile offender than an adult offender because a juvenile offender would spend a greater portion of his or her life in prison than would an adult offender.[102] The Court relied on *Roper* when it held that a LWOP sentence could not be justified by the penological goals of retribution and deterrence for a juvenile nonhomicide offender.[103] As juveniles had a greater potential for positive change, it would be cruel and unusual to impose a LWOP sentence for nonhomicide offenses, as doing so would foreclose the possibility of eventual release in spite of any potential maturation and rehabilitation.[104] Justice Kennedy further noted that, "[a]n offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."[105]

Roper and *Graham* set the stage for *Miller* in that they established: (1) juveniles, as a category, were less culpable and had greater potential for rehabilitation than adults; and (2) the Eighth Amendment proscribed sentencing juveniles to LWOP for nonhomicide offenses given the purpose of the punishment, as well as the unique characteristics of juveniles.[106] Neither case, however, specifically addressed whether the Eighth Amendment prevented a court from imposing a LWOP sentence for a homicide offense committed by a juvenile.

B. Miller v. Alabama

Miller concerned two cases where two fourteen-year-old males each received a mandatory LWOP sentence for a homicide offense.[107]

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98 *Id.* at 54.
99 *Id.* at 57.
100 *See id.*
101 *Id.* at 68.
102 *See id.* at 70.
103 *See id.* at 75.
104 *See id.* at 74-75.
105 *Id.* at 76.
106 *See id.*; Roper v. Simmons, 543 U.S. 551, 578 (2005).
107 *See* Miller v. Alabama, 567 U.S. 460, 465 (2012).

Like Charles Griffin, Kuntrell Jackson was convicted of homicide under an accomplice theory of liability for a murder committed during the course of a robbery.[108] Evan Miller's case was similar to that of Andre Taylor,[109] in that his troubled home and family life led him to a life of criminality and eventual homicide.[110] Both Jackson and Miller received a mandatory minimum sentence of LWOP.[111]

On appeal to the Supreme Court, Justice Kagan wrote for the 5-4 majority.[112] The Court restated its findings on juveniles from *Roper* and *Graham*: juveniles lack maturity; they are more susceptible to negative influence; and their characters are not as "well-formed" as those of adults.[113] Further, only a small proportion of juveniles who engage in criminal activity "develop entrenched patterns of problem behavior."[114] In sum, the Court affirmed its conclusion that juveniles (1) were less culpable for their actions, and (2) had a greater potential for positive change.[115]

Characteristics of youth made a LWOP sentence problematic because no acknowledged goal of punishment could justify it.[116] The Court gave careful consideration to its previous findings in *Graham* and *Roper* that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."[117] Parts of the brain responsible for behavioral control were not fully developed in juveniles.[118] The Court relied on "developments in psychology and brain science . . . to show fundamental differences in juvenile and adult minds," especially areas of the brain responsible for impulse control and recklessness.[119] Research at this time indicated that adolescents, between the ages of fourteen and twenty-one, "exhibit a reduced ability to plan alternative and less risky methods to obtain desired goals."[120] The Court noted that "transient rashness, proclivity for risk, and inability to assess consequences" reduced the moral culpability because a juvenile offender was psychologically incapable of fully appreciating the consequences of his or

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108 *See* People v. Griffin, 857 N.E.2d 889, 892 (Ill. App. Ct. 1st 2006).

109 People v. Taylor, 464 N.E.2d 1059, 1061 (Ill. 1984).

110 *See Miller*, 567 U.S. at 467-68.

111 *See id.* at 466-69.

112 *Id.* at 464.

113 *Id.* at 471.

114 *Id.* (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005)).

115 *See id.* at 472.

116 *See id.*

117 *Id.* at 471-72 (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005)).

118 *See id.* at 472 (citing Graham v. Florida, 560 U.S. 48, 68 (2010)).

119 *Id.* at 471-72 (citing Graham v. Florida, 560 U.S. 48, 68 (2010)).

120 Raymond Corrado & Jeffrey Mathesius, *Developmental Psycho-Neurological Research Trends and Their Importance for Reassessing Key Decision-Making Assumptions for Children, Adolescents, and Young Adults in Juvenile/Youth and Adult Criminal Justice Systems*, 2 BERGEN J. CRIM. L. & CRIM. JUST. 141, 148 (2012).

her actions.[121] Additionally, as an adolescent brain in not fully developed, minors exhibit an increased potential for change and, ultimately, rehabilitation.[122] Surprisingly, the high court's acknowledgment that adolescent brain development is relevant to sentence severity has largely gone unheeded by state courts.[123]

Retribution was an inappropriate goal because only the most blameworthy offenders deserved such a severe punishment and juveniles generally lacked the requisite culpability to justify LWOP.[124] Deterrence was similarly unjustifiable as juveniles were categorically more impetuous than adults and unlikely to perform the requisite weighing of risks and benefits prior to committing a crime necessary to give effect to deterrence.[125] Further, the Court reasoned a LWOP sentence could not advance the goals of incapacitation and rehabilitation when imposed on juveniles.[126] A LWOP sentence designed to permanently incapacitate an offender would only be proper if the offender was "incorrigible" and lacked all possibility of reformation, but "incorrigibility [was] inconsistent with youth."[127] Lastly, the Court noted a LWOP sentence could not be justified with the goal of rehabilitation in mind because such a sentence foreclosed all possibility of release and rendered any rehabilitative progress irrelevant.[128]

The Court, however, did not eliminate the possibility of a LWOP sentence for murder committed by a juvenile.[129] Jackson's and Miller's sentences were the products of mandatory minimum sentencing schemes that precluded the possibility of a judge considering mitigating factors before imposing sentence.[130] The Court noted the most severe penalties, like death or a LWOP sentence, required individualized sentencing consideration of juveniles, who are characterized by unique and relevant traits less prevalent in the adult population.[131] As such, a mandatory sentence of LWOP for a crime committed by a juvenile was cruel and unusual and violated the Eighth Amendment.[132] Strangely, although the Court noted that the juveniles'

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121 *Miller*, 567 U.S. at 472.

122 *See id.*

123 *See generally* Terry A. Maroney, *Adolescent Brain Science After Graham V. Florida*, 86 NOTRE DAME L. REV. 765 (2011); Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 NOTRE DAME L. REV. 89, 115 (2009) ("Though courts sometimes cite the science approvingly, they do so only to buttress conclusions otherwise fully explained.").

124 *See Miller*, 567 U.S. at 472.

125 *See id.*

126 *See id.* at 472-73.

127 *Id.*

128 *See id.* at 473.

129 *See id.* at 483 ("Our decision does not categorically bar a penalty for a class of offenders or type of crime . . . Instead, it mandates only that a sentencer follow a certain process.").

130 *See id.* at 466-69.

131 *See id.* at 477.

132 *Id.* at 479.

sentences were the product of multiple sentencing practices, like mandatory or discretionary transfer of juveniles to adult courts and mandatory minimum sentences, it did not address the validity of those individual practices.[133]

While a mandatory LWOP sentence for juvenile offenders was prohibited, a court could impose a discretionary LWOP sentence if the sentencing authority takes into account what would later be described as *Miller*-type protections. *Miller*-type protections required a court to consider mitigating factors associated with "chronological age and its hallmark features," such as: "immaturity," "impetuosity," "failure to appreciate risks and consequences," "family and home environment," "circumstances of the homicide offense, including the extent of his participation," "family and peer pressure," "inability to deal with police officers or prosecutors," and "incapacity to assist his own attorney."[134] By permitting discretionary LWOP sentences only after considering mitigating factors associated with youth, the Court struck a necessary balance between the broad general policies of severely punishing heinous acts and protecting juveniles from inappropriately harsh sentences.

The *Miller* ruling created a new "substantive rule of constitutional right," and therefore, was to be applied retroactively.[135]

Chief Justice Roberts dissented, as he viewed the *Miller* ruling as contrary to the Court's Eighth Amendment precedents and characterized the majority opinion as replacing the "objective indicia of society's standards, as expressed in legislative enactments and state practice" with the majority's own "subjective values or beliefs."[136] Justice Thomas also dissented, but based his argument on the original interpretation of the Eighth Amendment as prohibiting "torturous *methods* of punishment," and not implicated if "a particular lawful method of punishment . . . is imposed pursuant to a mandatory or discretionary sentencing regime."[137] Lastly, Justice Alito wrote a separate dissent, in which he reiterated Chief Justice Robert's concern about the lack of objective criteria guiding the court's discretion.[138] All four dissenting Justices agreed that the decision of whether a LWOP sentence for a juvenile offender was appropriate was better left to state legislatures.[139]

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133 *See* Ioana Tchoukleva, *Children Are Different: Bridging the Gap Between Rhetoric and Reality Post* Miller v. Alabama, 4 CAL. L. REV. CIRCUIT 92, 94 (2013).

134 *Miller*, 567 U.S. at 477-78.

135 Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016).

136 *Miller*, 567 U.S. 460, 494 (Roberts, C.J., dissenting).

137 *Id.* at 503-04 (Thomas, J., dissenting) (emphasis in original).

138 *See id.* at 510 (Alito, J., dissenting).

139 *See id.* at 502 (Roberts, C.J., joined by Scalia, Thomas, and Alito, JJ., dissenting) ("Neither the text of the Constitution nor our precedent prohibits legislatures from requiring that juvenile murderers be sentenced to life without parole.").

The *Miller* ruling required states to distinguish between "children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption."[140] To make that determination, a court must "consider[] an offender's youth and attendant characteristics–before imposing a particular penalty."[141] Aside from the broad mandate of requiring sentencing courts to consider mitigating factors associated with youth, the Court limited the scope of its instructions so that the states, in keeping with the "important principle of federalism," might develop their own means of enforcing the new substantive rule.[142]

C. The Impact of *Miller* on State Sentencing[143]

Outside the criminal justice system, some argued that the *Miller* decision would harm public safety by more quickly returning violent offenders to society. After all, the juvenile justice system was reformed in the 1990's in response to fear of juvenile "super-predators."[144] The changes reflected a growing concern that juvenile offenders presented a threat to public safety, and LWOP sentences for serious offenders was necessary to protect the public.[145] These fears, however, were largely unfounded at the time, and adherence to them serves no practical function today.[146] It should be noted that the *Miller* Court based its holding, at least in part, on emerging psychological evidence that a juvenile's brain is not yet fully developed.[147] Juvenile offenders are consequently less morally culpable and have a greater capacity for rehabilitation than do adult offenders.[148] This is problematic, however, because developmental psychology suggests that most brains are not fully "mature" until age 25-26, a full seven to eight years after one attains legal adulthood.[149]

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140 *Montgomery*, 136 S. Ct. at 734.

141 *Id.*

142 *Id.* at 735.

143 This Note is not intended to be a comprehensive review of the various states' implementations of *Miller*'s holding. It will, however, offer some examples of how states have reacted, for better or worse, in order to better illustrate how Illinois might proceed.

144 John D. Elliot & Anna M. Limoges, *Deserts, Determinacy, and Adolescent Development in the Juvenile Court*, 62 S.D. L. REV. 750, 754 (2017).

145 *See* McMillin, *supra* note 8, at 1501.

146 *See* Butler, *supra* note 49 (characterizing the 1980s and 1990s as a period of "moral panic [that] prevailed in the United States with regard to youth criminality."); McMillin, *supra* note 8, at 1500-01 ("[I]n America today, no population poses a greater threat to public safety than juvenile criminals."); Myers, *supra* note 12, at 396-97 (noting that sensationalized media coverage of juvenile delinquency contributed to public outrage and fear).

147 *See* Miller v. Alabama, 567 U.S. 460, 472 (2012).

148 *See id.*

149 The significance of this discrepancy is notable, and worth exploring, but exceeds the scope of this Note. For detailed information regarding the importance of brain development on legal proceedings, *see* Corrado & Mathesius, *supra* note 119, at 154.

In Michigan, some legal scholars questioned the validity of the state's use of LWOP sentences for juveniles even before the *Miller* ruling.[150] Like Illinois' Constitution, the Michigan Constitution provides potentially greater protections for offenders than those found in the U.S. Constitution, but those protections did not prevent juveniles from being sentenced to LWOP.[151] Following *Miller*, Michigan courts applied the restriction on juvenile LWOP sentences narrowly.[152] One Michigan Court of Appeals did, however, find the Michigan sentencing scheme was unconstitutional as it applied to juvenile homicide offenders,[153] but the Michigan Supreme Court reversed the lower court's ruling and upheld the Michigan law as constitutional.[154] The refusal to apply *Miller* retroactively was quickly and expressly overruled by the Supreme Court in 2016 in *Montgomery v. Louisiana*.[155]

Pennsylvania, on the other hand, was quick to pass legislation to bring its sentencing scheme into compliance with the *Miller* ruling.[156] The Pennsylvania General Assembly passed Senate Bill (S.B.) 850 in October of 2012.[157] The bill prohibited mandatory LWOP sentences for crimes committed by juveniles but left open a possible LWOP sentence for juveniles convicted of first-degree murder.[158] The determination was to be guided by a list of factors, including: "impact of the offense on each victim," "impact of the offense on the community," "threat to the safety of the public or any individual posed by the defendant," "nature and circumstances of the offense committed by the defendant," "degree of the defendant's culpability," "[g]uidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing," and the defendant's "age-related characteristics."[159] Age-related characteristics were defined as: age, mental capacity, maturity, degree of criminal sophistication, prior delinquent or criminal history, probation or institutional reports, and other relevant

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150 *See* Kimberly A. Thomas, *Juvenile Life Without Parole: Unconstitutional in Michigan?*, 2011 MICH. B.J. 34 (2011).

151 *See* MICH. CONST. art. 1, § 16 ("Excessive bail shall not be required; excessive fines shall not be imposed; cruel or unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained.").

152 *E.g.*, People v. Carp, 852 N.W.2d. 801, 844, 846 (Mich. 2014) (holding that neither federal nor state constitutions categorically prohibited LWOP sentences for juveniles). *See* Kinell, *supra* note 74, at 156-57 (NOTING THAT MICHIGAN COURTS INITIALLY REFUSED TO APPLY *MILLER* RETROACTIVELY).

153 *See* People v. Carp, 828 N.W.2d 685, 723 (Mich. Ct. App. 2012).

154 *See* People v. Carp, 852 N.W.2d 801, 844 (Mich. 2014).

155 *See* 136 S. Ct. 718, 736 (2016).

156 Kinell, *supra* note 75, at 149.

157 *See* 18 PA. CONS. STAT. § 1102.1 (2012); Kinell, *supra* note 75, at 149.

158 *See* 18 PA. CONS. STAT. § 1102.1 (2012); Kinell, *supra* note 75, at 149.

159 18 PA. CONS. STAT. § 1102.1(d) (2012) (Age related characteristics were defined as: "age," "mental capacity," "maturity," "degree of criminal sophistication exhibited by the defendant," "nature and extent of any prior delinquent or criminal history, including the success or failure of any previous attempts by the court to rehabilitate the defendant," "[p]robation or institutional reports," and "[o]ther relevant factors.").

factors.[160] Although not without its critics, including the American Civil Liberties Union,[161] this approach represented a balanced application of the *Miller* ruling to state law criminal proceedings.

Iowa Governor Terry Branstad took a different approach.[162] One week after *Miller* was handed down, the governor commuted the sentences of all affected juveniles to "life with parole after 60 years."[163] This executive action, although efficient, raised new constitutional concerns.[164] The mass-commutation failed to consider the individualized sentencing requirement that was a bedrock principle of the *Miller* decision.[165]

Further, the new sentences were merely de facto life sentences. The sixty-year requirement would keep affected juveniles in prison past their expected life expectancy, and was apparently done in an attempt to obfuscate the *Miller* ruling.[166] The Supreme Court of Iowa struck down one of the affected juveniles' commuted sentences in *State v. Ragland* because the court found the commuted sentence amounted to a de facto life sentence and *Miller* still applied.[167]

Ragland was sentenced to LWOP without consideration of mitigating factors associated with youth in an individualized sentencing hearing, and the commutation did not correct that deficiency.[168] As such, Ragland's sentence remained cruel and unusual, per *Miller*, and in violation of the Eighth Amendment.[169] By commuting juveniles' LWOP sentences en masse, Governor Branstad attempted to comply with *Miller* in the least meaningful way possible – the continued life imprisonment of juveniles without consideration for their age or attendant characteristics. This approach, as recent history has made clear, represented a poor approach to state compliance to *Miller*.[170]

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160 18 PA. CONS. STAT. § 1102.1(d) (2012).

161 Kinell, *supra* note 75, at 150.

162 *See* Matthew Clarke, *Iowa's Governor Commutes Juvenile Life-Without-Parole Sentences to 60 Years* Flat, PRISON LEGAL NEWS (Aug. 20, 2016), https://www.prisonlegalnews.org/news/2016/aug/24/iowas-governor-commutes-juvenile-life-without-parole-sentences-60-years-flat/.

163 Kinell, *supra* note 75, at 151; Steve Eder, *Iowa Governor Commutes Sentences of Teen Killers*, WALL ST. J. (July 16, 2012, 3:53 PM), https://blogs.wsj.com/law/2012/07/16/iowa-governor-commutes-sentences-of-teen-killers/.

164 *See* Michelle Kirby, *Juvenile Sentencing Laws and Court Decisions after* Miller v. Alabama, CONN. GEN. ASSEMBLY, OFF. OF LEGIS. RES. (Mar. 16, 2015), https://www.cga.ct.gov/2015/rpt/pdf/2015-R-0089.pdf.

165 *See* Miller v. Alabama, 567 U.S. 460, 465 (2012); Kinell, *supra* note 75, at 149; Clarke, *supra* note 161; Kirby, *supra* note 163.

166 *See* Eder, *supra* note 162 (noting that Gov. Branstad claimed to have commuted the sentences "to ensure that the convicts will not have the possibility of parole until they have served 60 years").

167 *See* State v. Ragland, 836 N.W.2d 107, 121-22 (Iowa 2012).

168 *See id.* at 122.

169 *See id.*

170 Gov. Branstad's executive action failed to correct the Eighth Amendment deficiencies in these juveniles' LWOP sentences. The mass-commutation was exactly the opposite of the individualized sentencing considerations that the Court mandated in *Miller* and done with the express purpose of

The states have responded to *Miller* in a number of different ways. Iowa's approach, through executive action, proved problematic and undesirable.[171] Michigan sought to correct its state's deficiencies through judicial action, but the holding of the Michigan Supreme Court[172] was subsequently overturned by the U.S. Supreme Court.[173] Pennsylvania amended its sentencing laws to accord with *Miller* with S.B. 850.[174] Pennsylvania's legislative response has enjoyed more success than Iowa's executive action approach and Michigan's judicial approach.

IV. ILLINOIS' APPLICATION OF *MILLER* TO EXISTING AND FORTHCOMING JUVENILE SENTENCES

It is important to note that while both the Eighth Amendment and the Illinois Constitution's Proportionate Penalties Clause prohibit disproportionately lengthy sentences, the Proportionate Penalties Clause actually was intended to provide greater protection than the Eighth Amendment.[175] In 1970, Illinois amended its Constitution to include new language in the Proportionate Penalties Clause, intended "to provide a limitation on penalties beyond those afforded by the eighth amendment."[176]

Unfortunately, the 1980s' "get tough on crime" enthusiasm for punitive penalties stifled any real progress towards advancing rehabilitation as a primary goal of juvenile criminal punishment.[177] Now, with *Miller*, Illinois has an opportunity to genuinely commit itself to the ideal that rehabilitation should not be a mere consideration of juvenile punishment but rather its primary purpose. It was this ideal that led to the founding of America's first juvenile justice system in Chicago, Illinois[178] and led the framers of Illinois' 1970 revised Constitution to include within its Bill of Rights a mandate that a court must calculate all penalties "with the objective of restoring the offender to useful citizenship."[179]

However, Illinois' statutory sentencing scheme, as it applied to juveniles who commit serious offenses, operated as a significant barrier to rehabilitative justice in some cases. First, the mandatory transfer provision

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not giving any of the offenders a meaningful opportunity to be released. The Supreme Court of Iowa was right to strike down Ragland's commuted sentence and call into doubt the validity of the remaining commuted juvenile LWOP sentences in Iowa.

171 *See* Kirby, *supra* note 163.

172 *See* People v. Carp, 852 N.W.2d 801, 844 (Mich. 2014).

173 Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016).

174 18 PA. CONS. STAT. § 1102.1 (2012).

175 *See* People v. Clemons, 2012 IL 107821, ¶ 40, 968 N.E.2d 1046, 1057.

176 *Id.*

177 *See* BURFEIND & BARTUSCH, *supra* note 1, at 26-27.

178 *ID.* AT 20-21.

179 ILL. CONST. art. I, § 11.

of Illinois' Juvenile Court Act of 1987 required that juveniles age sixteen or older charged with first-degree murder, aggravated criminal sexual assault, or aggravated battery with a firearm must be tried in adult court where protections specifically created to protect juveniles did not apply.[180] If convicted in adult court, a court will sentence a juvenile according to Illinois' mandatory sentencing scheme.[181] Finally, per Illinois' Truth-in-Sentencing Act, [182] an offender must serve at least "50% of the time indicated by the court," but those convicted of serious crimes must serve 85-100% of their sentence.[183] At least one author has suggested that *Miller* fell short when merely barring a mandatory LWOP for juveniles, while failing to address the sentencing mechanisms, like those still in practice in Illinois, that lead to juveniles receiving LWOP sentences.[184]

A. Illinois State Courts' Initial Reaction to *Miller*

Following *Miller*, the Supreme Court of Illinois heard a case arguing that Illinois' sentencing scheme violated the Eighth Amendment and Illinois' Proportionate Penalties Clause.[185] In *People v. Patterson*, the Illinois Supreme Court heard an appeal by Ronald Patterson who was sentenced to 36 years in prison for three counts of aggravated criminal sexual assault he allegedly committed when he was fifteen years old.[186] Per Illinois' Truth-in-Sentencing Act, Patterson was required to serve at least 85% of his thirty-six year sentence.[187] He challenged the constitutionality of Illinois' mandatory transfer provision, in light of *Miller*, and in combination with other Illinois statutes.[188] The Illinois Supreme Court, however, noted the transfer provision was a procedural mechanism and did not function to impose a penalty.[189] As such, the provision was constitutionally permissible.[190]

Further, the court rejected Patterson's argument that the provision, in conjunction with other statutes, imposed a cruel and unusual punishment under *Miller*, as *Miller* concerned LWOP and Patterson was only sentenced to thirty-six years in prison.[191] Since *Patterson*, the Supreme Court of Illinois

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180 Juvenile Court Act of 1987, 705 ILL. COMP. STAT. 405/5-130 (2017).
181 730 ILL. COMP. STAT. 5/5-8-4 (2017).
182 Truth in Sentencing Act, 705 ILL. COMP. STAT. 5/3-6-3 (2017).
183 Sami Azhari, *Truth-in-Sentencing: Defendants Must Serve More Than 50% of the Sentence Imposed*, CRIM. LAW. ILL. (Mar. 20, 2013), http://www.criminallawyerillinois.com/2013 /03/20 /truth-in-sentencing-defendants-must-serve-more-than-50-of-the-sentence-imposed/.
184 *See* Tchoukleva, *supra* note 132.
185 People v. Patterson, 2014 IL 115102, ¶ 35, 25 N.E.3d 526, 536.
186 *Id.* ¶¶ 4, 29, 25 N.E.3d at 530, 535.
187 *Id.* ¶ 172, 25 N.E.3d at 567.
188 *Id.* ¶ 35, 25 N.E.3d at 536.
189 *Id.* ¶ 104, 25 N.E.3d at 551.
190 *Id.*
191 *See id.* ¶ 110, 25 N.E.3d at 553.

has revisited the question of how broadly to apply *Miller* and how that ruling must guide Illinois' sentencing of juvenile offenders in the future.

Patterson set the stage for Illinois' initially narrow application of *Miller*. The courts held *Miller* prevented only a mandatory imposition of a LWOP sentence for a homicide offense committed by a juvenile. If the sentence was discretionary, rather than mandatory, then *Miller* did not apply.[192] If a court sentenced a juvenile for a nonhomicide offense, then a court was not required to apply *Miller*-type protections, even if the cumulative sentence amounted to a de facto life sentence.[193]

Despite the courts' reluctance to embrace *Miller*, the Illinois General Assembly passed Public Act (P.A.) 99-0069 on July 20, 2015, which amended the Illinois Criminal Code and provided for the mandatory consideration of certain factors during a sentencing hearing for individuals under the age of eighteen at the time of the crime's commission.[194] The bill became effective January 1, 2016, and required that sentencing courts consider: (1) "the person's age, impetuosity, and level of maturity at the time of the offense;"[195] (2) "whether the person was subjected to outside pressure, including peer pressure, familial pressure, or negative influences;"[196] (3) "the person's family, home environment, educational and social background;"[197] (4) "the person's potential for rehabilitation;"[198] (5) "the circumstances of the offense;"[199] (6) "the person's degree of participation and specific role in the offense;"[200] (7) "whether the person was able to meaningfully participate in

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192 *See* People v. Hoy, 2017 IL App (1st) 142596, ¶ 47, 89 N.E.3d 821, 833-34; People v. Edwards, 2017 IL App (3d) 130190-B, ¶ 81, 75 N.E.3d 282, 296.

193 *See Patterson*, 2014 IL 115102, ¶ 110, 25 N.E.3d at 553; People v. Gibson, 2015 IL App (1st) 122451, ¶ 57, 34 N.E.3d 560, 576.

194 Bill Status of HB2471, ILL. GEN. ASSEMBLY, http://www.ilga.gov/legislation/billstatus.asp?DocNum=2471&GAID=13&GA=99&DocTypeID=HB&LegID=87718&SessionID=88&SpecSess= (last visited Nov. 4, 2017).

195 This factor directly bears on the *Miller* ruling and is significantly listed first. A sentencing court must consider an offender's age and any characteristic attendant to age as a mitigating factor. Older, more mature offenders will be considered less susceptible to rehabilitative measures than their juniors.

196 Considering external pressure to commit crime is not a novel idea but is certainly relevant as it gives judicial recognition to familial and peer pressure as a mitigating factor. An offender pressured to commit a crime will be considered less culpable for their crimes than those not so pressured, and Illinois has recognized that their respective sentences must reflect that.

197 Family, home, educational, and social background calls attention to cases like that of Evan Miller, who suffered from a deeply troubling familial environment. The conditions of one's upbringing may bear on one's mental health, which may in turn affect culpability. Further, it would almost certainly influence sentencing decisions like regarding Andre Taylor, who committed a murder at the command of his aunt. *See supra* notes 33-42 and accompanying text.

198 Potential for rehabilitation seems to encompass consideration of all other factors, as well as a sentencing authority's consideration of the offender's personal characteristics.

199 Although this factor may, in some cases, lend itself to increasing sentence severity, it may only be considered in mitigation and should not be confused with degree of culpability.

200 This factor harkens back to *People v. Griffin*, where Griffin was convicted under an accomplice theory of liability. *See supra* notes 58-65 and accompanying text.

his or her defense;"[201] (8) "the person's prior juvenile or criminal history; and"[202] (9) "any other information[203] the court finds relevant and reliable, including an expression of remorse."[204]

This bill was meaningful for multiple reasons. First, it codified and required the court to consider the factors the *Miller* court recognized as "distinctive attributes of youth [that] diminish the penological justifications for imposing the harshest sentences on juvenile offenders."[205] Further, the bill required a court to consider these factors regardless of the offense, whether homicide or nonhomicide, and regardless of the potential sentence.[206]

This approach was similar to Pennsylvania's legislative action requiring consideration of certain factors during a sentencing hearing, but actually went a step further towards encouraging rehabilitation. Most prominently, the Illinois statute explicitly required a court to consider all the factors listed "in mitigation," but a Pennsylvania court could consider any of the listed factors as aggravating or mitigating.[207] Further, Pennsylvania required a court to consider age as a relevant factor for sentencing juveniles just for homicide offenses, whereas Illinois required it when sentencing a juvenile for any offense.[208] Lastly, Illinois, but not Pennsylvania, explicitly required a court to consider an offender's potential for rehabilitation in mitigation.[209] This last point reinforces the Proportionate Penalties Clause of the Illinois Constitution, which requires that all penalties be formulated to rehabilitate an offender.[210] Although Illinois courts have interpreted the Proportionate Penalties Clause as requiring a sentence designed to rehabilitate an offender only if an offender could be rehabilitated, Illinois' revised criminal code, in

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201 This factor similarly bears on degree of culpability. For example, a court may consider a getaway driver less culpable than an accomplice directly responsible for the crime.

202 Prior criminal history is a significant factor and may, in some case, overshadow all other factors. Still, this is a factor that may only be considered in mitigation. Therefore, a sentencing authority may note a lack of criminality in favor of the defendant but is not permitted to consider an extensive criminal history as an aggravating factor.

203 With this catch-all provision the legislature may have acknowledged that it should not limit judges who recognized unlisted characteristics as mitigating factors.

204 730 ILL. COMP. STAT. 5/5-4.5-105 (2017).

205 Miller v. Alabama, 567 U.S. 460, 472 (2012).

206 *See* 730 ILL. COMP. STAT. 5/5-4.5-105 (2017).

207 *Compare* 730 ILL. COMP. STAT. 5/5-4.5-105 (2017) (requiring a court to consider a list of factors only as mitigating factors), *with* 18 PA. CONS. STAT. §1102.1 (2012) (allowing a court to consider the statutory factors as mitigating or aggravating).

208 *Compare* 730 ILL. COMP. STAT. 5/5-4.5-105 (2017) (applying mitigating factors when sentencing a juvenile offender for any crime), *with* 18 PA. CONS. STAT. §1102.1 (2012) (requiring the factors be considered only when sentencing a juvenile offender convicted of first-degree murder).

209 *Compare* 730 ILL. COMP. STAT. 5/5-4.5-105 (2017) (listing the fourth mitigating factor as "the person's potential for rehabilitation or evidence of rehabilitation, or both"), *with* 18 PA. CONS. STAT. §1102.1 (2012) (containing a reference to "success or failure of any previous attempts by the court to rehabilitate the defendant," which will almost always be seen as an aggravating factor).

210 *See* ILL. CONST. art. I, § 11.

the wake of *Miller*, may signal a willingness to consider rehabilitation as a genuine goal of punishment for juvenile offenders.[211]

In addition, in August of 2015, Illinois amended its Juvenile Court Act of 1987 to eliminate the mandatory transfer of juveniles aged fifteen or younger and limited permissive transfer of older juveniles.[212] The legislature considered the importance of individualized punishment in rehabilitation and found that automatic transfer worked against that goal in many cases.[213] In fact, researchers at MIT and Brown found that incarcerating juveniles actually worked against rehabilitative measures by reducing the likelihood that they would graduate high school and increasing the rate of recidivism once the juveniles became adults.[214]

B. The New Standard of Sentencing Juvenile Offenders in Illinois

Since *Patterson*, the Supreme Court of Illinois revisited the issue of how Illinois must comport with *Miller* twice, first in *People v. Reyes* and then in *People v. Holman*.[215]

Zachary Reyes was sentenced to "a mandatory minimum aggregate sentence of 97 years' imprisonment," for a crime he committed when he was sixteen years old.[216] Reyes appealed his sentence, arguing that the various sentencing statutes at play removed all possibility of discretion from the sentencing process, and therefore, he had been subjected to a mandatory de facto life sentence without consideration of his youth or attendant characteristics.[217]

The Illinois high court chose to apply *Miller* more broadly than it had in *Patterson*, perhaps because *Patterson* involved a much shorter sentence for a nonhomicide offense whereas the facts in *Reyes* were much closer to those in *Miller*. The court explicitly held that "sentencing a juvenile to a *mandatory* term of years that is the functional equivalent of life without the possibility of parole constitutes cruel and unusual punishment in violation of the eighth amendment."[218] The court noted that a mandatory de facto life

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211 *See* People v. Taylor, 464 N.E.2d 1059, 1062 (Ill. 1984).

212 *See* Bill Status of HB3718, ILL. GEN. ASSEMBLY, http://www.ilga.gov/legislation/billstatus.-asp?DocNum=3718&GAID=13&GA=99&DocTypeID=HB&LegID=89922&SessionID=88 (last visited Nov. 19, 2017) (amending the Illinois Criminal Code to stop mandatory transfer of some juveniles to adult court and limit the transfer of others).

213 Bryant Jackson-Green, *New Law Ends Automatic Transfer of Some Juveniles to Adult Court*, ILL. POL'Y (Aug. 4, 2015), https://www.illinoispolicy.org/illinois-poised-to-update-juvenile-transfer-policy/.

214 *Id.*

215 *See* People v. Holman, 2017 IL 120655, ¶ 1, 91 N.E.3d 849, 851; People v. Reyes, 2016 IL 119271, ¶ 1, 63 N.E.3d 884, 886; People v. Patterson, 2014 IL 115102, ¶ 35, 25 N.E.3d 526, 536.

216 *Reyes*, 2016 IL 119271, ¶ 1, 63 N.E.3d at 886.

217 *See id.* ¶ 3, 63 N.E.3d at 886-87.

218 *Id.* ¶ 9, 63 N.E.3d at 888 (emphasis added).

sentence violated the Eighth Amendment because it was not an individualized sentence, and specifically, because it prevented a court from weighing rehabilitative potential in mitigation.[219] Reyes, per Illinois' Truth-in-Sentencing Act, was required to serve at least eighty-nine of his ninety-seven-year sentence and would have been at least 105 years old when he was released from prison.[220] This virtually prevented Reyes from ever being eligible for release.[221] As Reyes' sentence amounted to a mandatory de facto life sentence, imposed without individualized consideration of his youth, it was cruel and unusual and a violation of Reyes' Eighth Amendment rights.[222]

While the *Reyes* court concluded that *Miller* applied to all mandatory sentences amounting to LWOP sentences for crimes committed by juveniles, several questions remained. Primarily, whether a court was required to consider youth and its attendant circumstances before imposing a discretionary term-of-years sentence amounting to a LWOP sentence for a crime committed as a juvenile. The Supreme Court of Illinois answered that question in *People v. Holman*.[223]

A court convicted Richard Holman of murder in 1981 for a crime he committed when he was seventeen.[224] After finding no mitigating factors but several aggravating factors, the court imposed a discretionary LWOP sentence.[225] In 2017, the Illinois Supreme Court heard Holman's appeal for leave to file a successive postconviction petition to determine whether *Miller* applied to discretionary life sentences, as well as mandatory ones.[226] The court noted some states had applied *Miller* narrowly, whereas others had applied *Miller* broadly.[227] Courts in Alabama, Ohio, and Indiana interpreted *Miller* narrowly by holding that the U.S. Supreme Court had not set forth a specific standard.[228] On the other hand, courts in California, Connecticut, Iowa, Louisiana, Missouri, Minnesota, Mississippi, Oklahoma, Pennsylvania, South Carolina, and Wyoming held that *Miller* set forth, at the least, a non-exhaustive list of factors that a court must consider prior to sentencing a juvenile offender.[229]

The court, in a unanimous decision, ultimately adopted the broad approach, noting it was more consistent with Illinois' case law and section

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219 *See id.*

220 *Id.* ¶ 10, 63 N.E.3d at 888.

221 *See id.*

222 *See id.*

223 *See* People v. Holman, 2017 IL 120655, ¶ 40, 91 N.E.3d 849, 861-62.

224 *Id.* ¶¶ 6, 17, 91 N.E.3d at 852-53, 855.

225 *See id.*

226 *Id.* ¶¶ 20, 23, 91 N.E.3d at 856.

227 *See id.* ¶¶ 42-43, 91 N.E.3d at 862 (considering whether the factors set forth in *Miller* were mandatory or merely an advisory list).

228 *Id.* ¶ 42, 91 N.E.3d at 862.

229 *Id.* ¶ 43, 91 N.E.3d at 862.

5-4.5-105 of Illinois' Unified Code of Correction.[230] Under the broad approach, a court may sentence an offender for a crime committed as a juvenile to LWOP, whether discretionary or statutorily mandated, only after it has determined that a juvenile's crime reflected "irretrievable depravity, permanent incorrigibility, or irreparable corruption beyond the possibility of rehabilitation."[231] To guide that determination, a sentencing court must weigh, in mitigation:

> (1) [T]he juvenile defendant's chronological age at the time of the offense and any evidence of his particular immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the juvenile defendant's family and home environment; (3) the juvenile defendant's incompetence, including his inability to deal with police officers or prosecutors and his incapacity to assist his own attorneys; and (5) the juvenile defendant's prospects for rehabilitation.[232]

The court concluded that sentencing courts must weigh mitigating factors prior to sentencing a person to LWOP for a crime committed as a juvenile but also noted the sentencing court in Holman's case had done just that.[233] In addition to considering Holman's maturity level, family and home environment, and competence, the court took note of a statement from his probation officer who indicated that Holman had "no predilection for rehabilitation."[234] The court held, even after considering all the mitigating factors noted in *Miller*, Holman's sentence was constitutionally permissible.[235]

Holman set the new standard in Illinois for LWOP sentences imposed for crimes committed as juveniles. The Supreme Court of Illinois reiterated the Eighth Amendment required special consideration of factors attendant to youth when potentially sentencing an individual to LWOP for a crime he or she committed as a juvenile.[236] The court declined to extend *Miller* to a prohibition against all LWOP for juveniles but instead elected to defer to the Illinois General Assembly to determine the continued validity of such sentences.[237] Following the Illinois legislature's passing of Public Act (P.A.) 99-0069,[238] the *Holman* case represented a modest, but significant and

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230 *Id.* ¶¶ 44-45, 91 N.E.3d at 863.
231 *Id.* ¶ 46, 91 N.E.3d at 863.
232 *Id.* ¶ 46, 91 N.E.3d at 863-864
233 *See id.* ¶¶ 48-49, 91 N.E.3d at 864-65.
234 *Id.* ¶ 48, 91 N.E.3d at 864.
235 *Id.* ¶ 49, 91 N.E.3d at 865.
236 *See id.* ¶ 45, 91 N.E.3d at 863.
237 *Id.* ¶ 51, 91 N.E.3d at 864.
238 730 ILL. COMP. STAT. 5/5-4.5-105 (2017).

intentional, step towards the realignment of Illinois' sentencing scheme for juveniles as a system focused on rehabilitation.

V. THE ROAD TO REHABILITATION: ILLINOIS' SENTENCING PRACTICES POST-*HOLMAN*

Holman settled the debate of how strictly a court must apply *Miller* when sentencing juveniles by outlining a list of factors that must be considered before imposing such a sentence.[239] There remains, however, questions on how to apply these rules in order to best balance Illinois' competing interests of incarcerating those whose crimes reflect "irretrievable depravity," and rehabilitating all others.[240] A desirable approach might be to shape discretionary judgments based on the policy considerations. By passing P.A. 99-0069, [241] the Illinois General Assembly signaled its support of the policy informing the *Miller* ruling, namely that juveniles are categorically less culpable, have a greater potential for rehabilitation, and the state has an interest in returning them to useful citizenship. Similarly, the Supreme Court of Illinois echoed that support by choosing to apply *Miller* broadly in its *Holman* ruling.[242] Further, citizens of several states, including Illinois, have voiced support for rehabilitation of youthful offenders as a worthwhile agenda and on average would be willing to pay more in taxes if rehabilitative programs were implemented, as opposed to punitive punishments.[243] Public fear of youthful offenders, prevalent in the 1990's, may be waning in favor of a belief that rehabilitation of juvenile offenders is not only usually possible, but preferred.[244]

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239 *Holman*, 2017 IL 120655, ¶ 46, 91 N.E.3d at 863-864 ("Those characteristics include, but are not limited to, the following factors: (1) the juvenile defendant's chronological age at the time of the offense and any evidence of his particular immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the juvenile defendant's family and home environment; (3) the juvenile defendant's degree of participation in the homicide and any evidence of familial or peer pressures that may have affected him; (4) the juvenile defendant's incompetence, including his inability to deal with police officers or prosecutors and his incapacity to assist his own attorneys; and (5) the juvenile defendant's prospects for rehabilitation.").

240 *Id.*

241 Bill Status of HB2471, ILL. GEN. ASSEMBLY, http://www.ilga.gov/legislation/billstatus.asp-?DocNum=2471&GAID=13&GA=99&DocTypeID=HB&LegID=87718&SessionID=88&SpecSess= (last visited Nov. 4, 2017) (amending the Illinois Criminal Code to require courts to consider in mitigation factors attendant to youth prior to sentencing offenders for crimes committed as juveniles).

242 *See Holman*, 2017 IL 120655, ¶ 44, 91 N.E.3d at 863.

243 *See* Alex R. Piquero, *Youth Matters: The Meaning of Miller for Theory, Research, And Policy Regarding Developmental/Life-Course Criminology*, 39 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 347, 359-60 (2013).

244 *See* James Bernard, Katie Haas, Brian Siler & Georgie Ann Weatherby, *Perceptions of Rehabilitation and Retribution in the Criminal Justice System: A Comparison of Public Opinion and Previous Literature*, 5 J. FORENSIC SCI. & CRIM. INVESTIGATIONS 1, 7 (2017) (noting that, for those convicted of drug crimes, "the majority of people favored rehabilitation over retribution . . .

Further support for a pro-rehabilitation policy on juvenile sentencing is found in the Illinois Constitution and the courts' most recent interpretation of it. The Illinois Constitution requires that courts impose all punishments with a purpose to return the offender to useful citizenship, unless the offender cannot be rehabilitated.[245] The Illinois Supreme Court held the Eighth Amendment proscribes the possibility of a juvenile LWOP sentence if the offender can be rehabilitated.[246] Per the Illinois Supreme Court's interpretation of the Illinois Constitution, a court must impose a sentence in order to rehabilitate the offender unless the offender is beyond all rehabilitative potential. As the U.S. Supreme Court indicated, juveniles beyond rehabilitation are extremely rare.[247] Therefore, juvenile LWOP sentences should be equally rare.

Despite that support, several sentencing mechanisms still in use prevent individual consideration, namely Illinois' mandatory consecutive sentencing scheme[248] and Illinois' Truth-in-Sentencing Act, which requires that anyone convicted of serious crimes must serve 85-100% of their sentence.[249] The Illinois State Legislature should consider providing for exceptions to mandatory minimum sentences for juveniles, and implementing utilitarian programs to further rehabilitation, in place of incarceration.[250] Once statutory roadblocks to individualized sentences for juveniles are removed, Illinois courts can more flexibly and effectively comport with *Miller* and *Holman*.

To that end, a sentencing court should apply the two-step analytical framework described below.

The Illinois Criminal Code now requires courts to consider factors attendant to youth in mitigation for all crimes committed by juveniles, but the determination of whether a sentence constitutes LWOP is still an important distinction.[251] This is especially true when considering petitions for postconviction relief, as *Miller* applies retroactively.[252] When determining whether a term-of-years sentence amounts to a life sentence, the 2009 case of *People v. Buffer* is instructive.

Dmitri Buffer was convicted of four counts of first-degree murder and sentenced to fifty years in prison for crimes he committed with he was sixteen years old.[253] Buffer argued his sentence amounted to a de facto life sentence

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[in] direct disagreement with the current 'tough-on-crime' policies in place"); Piquero, *supra* note 242, at 360.

245 *See* People v. Taylor, 464 N.E.2d 1059, 1062 (Ill. 1984).

246 *See Holman*, 2017 IL 120655, ¶ 46, 91 N.E.3d at 863.

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

248 730 ILL. COMP. STAT. 5/5-8-4 (2017).

249 Azhari, *supra* note 182.

250 *See* Tchoukleva, *supra* note 132, at 102.

251 *See generally* 730 ILL. COMP. STAT. 5/5-4.5-105 (2017).

252 Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016).

253 People v. Buffer, 2017 IL App (1st) 142931, ¶¶ 1, 26, 75 N.E.3d 470, 471, 475.

and the sentencing court had not afforded him *Miller*-type protections.[254] The appellate court noted the average life expectancy in a general population prison was sixty-four years, and Buffer would not be released until he was least sixty-six years old.[255] As Buffer's prison sentence was longer than his life expectancy, his sentence amounted to a de facto life sentence.[256] The court noted that, per *Reyes,* juvenile de facto life sentences should receive the same *Miller*-protections as mandatory LWOP sentences in Illinois.[257]

As a matter of practical concern, a court should consider whether a sentence amounts to a de facto LWOP sentence when imposing sentence or hearing a petition for post-conviction relief. To do so, a court can determine the earliest possible date in light of a considered or imposed sentence and compare that with the defendant's age on the date of earliest possible release. If the defendant would be sixty-four years old or older on that date, then the sentence should be considered a de facto life sentence.[258]

While sentencing a defendant for a crime committed as a juvenile, the Illinois Criminal Code requires a court to consider, in mitigation, the factors outlined in section 5-4.5-105.[259] These factors largely echo the Court's holding in *Miller*[260] but also build on them, and the Illinois Supreme Court reiterated them in its *Holman* ruling.[261] It bears noting, however, that the purpose for these factors were to guide judges in determining which defendants could be rehabilitated and which were "beyond the possibility of rehabilitation."[262] These factors must be considered only in mitigation and never as aggravating factors. The Supreme Court noted that juveniles were categorically less culpable and had a greater potential for rehabilitation.[263] As such, a presumption of rehabilitative potential should not be defeated by a misinterpretation of a mitigating factor. Further still, the Illinois General Assembly, when codifying the factors to consider when sentencing offenders for crimes committed as juveniles, explicitly required the sentencing court to consider the factors "in mitigation,"[264] but did not offer any additional aggravating factors.

As an example, a judge must consider the family and home environment of an offender accused of committing a serious crime as a juvenile. Both the

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254 *See id.* ¶ 35, 75 N.E.3d at 475-76.

255 *Id.* ¶ 62, 75 N.E.3d at 482.

256 *See id.*

257 *Id.* ¶ 64, 75 N.E.3d at 483 (holding that any statutorily mandated sentence that "cannot be served in one lifetime" constituted a mandatory LWOP sentence).

258 *Id.* ¶ 59, 75 N.E.3d at 481-82 (finding that the average life expectancy of a prisoner in general population is 64 years).

259 730 ILL. COMP. STAT. 5/5-4.5-105 (2017).

260 *See* Miller v. Alabama, 567 U.S. 460, 477-78 (2012).

261 People v. Holman, 2017 IL 120655, ¶ 46, 91 N.E.3d 849, 863.

262 *Id.*

263 *See* Roper v. Simmons, 543 U.S. 551, 570 (2005).

264 730 ILL. COMP. STAT. 5/5-4.5-105 (2017).

Illinois Criminal Code[265] and the Supreme Court of Illinois cited family and home environment as a requisite mitigating factor when sentencing an individual for a crime committed as a juvenile.[266] If the offender, however, has a close-knit, supportive, middle-class family largely unknown to the criminal justice system, a reasonable judge might mistakenly consider that as a mark against the offender. The offender, after all, had ample opportunity to succeed in life without resorting to crime, and a court should not excuse the behavior. According to this perfectly sensible line of reasoning, a sentencing court may see a positive home environment as an aggravating factor.

Alternatively, an offender might have been born into a family prone to criminality, and the juvenile might have been routinely encouraged to commit crime. In such a situation, a similarly reasonable judge might note that the offender, without a solid support network to assist him or her, was likely to recidivate following release. A judge in this case might view the offender's family situation as a reason to prolong the juvenile's sentence, in order to delay his or her return to crime. Again, a sensible line of reasoning could lead a reasonable judge to conclude that this is actually an aggravating factor. The same could be true for any of the list of factors set forth by the courts, or the legislature.

As such, it is important that a sentencing judge apply factors attendant to youth only in mitigation. To do otherwise would be to work against the policy that courts calculate sentences for juveniles in light of their reduced culpability and greater potential for rehabilitation. Only when any possible mitigating factor is so heavily outweighed by the egregiousness of the crime and the culpability of the juvenile should a court consider him or her to be beyond any hope of rehabilitation.

VI. CONCLUSION

In *Miller*, the U.S. Supreme Court acknowledged that most modern goals of punishment are inappropriate justifications for sentencing juveniles to LWOP.[267] The lessened culpability of youth renders a lifetime sentence disproportionately long.[268] Their general impetuosity renders the deterrent effect of a threat of a life sentence impractical.[269] Finally, incapacity and community safety are not served by a LWOP sentence, because most youthful offenses reflect transient characteristics, not permanent depravity.[270]

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265 *Id.*

266 *Holman*, 2017 IL 120655, ¶ 46, 91 N.E.3d at 863-64.

267 Miller v. Alabama, 567 U.S. 460, 472 (2012).

268 *Id.*

269 *Id.*

270 *Id.*

Rehabilitation remains an attainable and justifiable goal, but any positive change would be irrelevant under a LWOP sentence.[271]

The state has valid interests in both rehabilitating juvenile offenders and preventing incorrigible offenders from harming others. To that end, and in accordance with the Proportionate Penalties Clause of the Illinois Constitution, Illinois has enacted legislation that requires courts to consider factors attendant to youth before imposing sentences for crimes committed by juveniles.[272] The Illinois Supreme Court has laid down guidelines in order to separate the majority of youths that can be rehabilitated from the rare, truly incorrigible youth who is beyond rehabilitation.[273]

Both the Illinois legislature and the Illinois Supreme Court have signaled their support of rehabilitation as an appropriate and preferable goal of sentencing for juveniles. Illinois courts should now implement the *Miller* factors to distinguish between incorrigible youthful offenders and juveniles capable of rehabilitation. Courts should encourage rehabilitation of juvenile offenders and reserve the imposition of LWOP sentences except in the most extreme circumstances. While a LWOP sentence precludes rehabilitation, a lesser penalty does not guarantee it. It is left to federal and state legislatures to adopt meaningful and effective programs to rehabilitate juvenile offenders.[274]

Over one-hundred years ago, Illinois became the birthplace of the American juvenile justice system.[275] This system was conceived as a mechanism to rehabilitate youthful offenders, not simply punish them.[276] Illinois chose to enshrine the concept that a sentence must be calculated to rehabilitate an offender within its constitution.[277] The "get-tough-on-crime" period of American history pushed the juvenile justice system away from its original purpose and towards retribution.[278] Now, following *Miller* and the

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271 *See id.*

272 *See* 730 ILL. COMP. STAT. 5/5-4.5-105 (2017) (listing mitigating factors that a court must consider when sentencing individuals who were younger than eighteen at the time of offense, in order to prevent a youthful offender from receiving an automatic, non-individualized LWOP sentence despite potential for rehabilitation).

273 People v. Holman, 2017 IL 120655, ¶ 46, 91 N.E.3d 849, 863.

274 *Miller* and *Holman* merely made rehabilitation possible for juvenile offenders in Illinois. A reduced sentence does not necessarily further that goal. The practical and ideological barriers to an effective rehabilitative system for juvenile offenders are worthy topics of discussion but exceed the scope of this Note. For discussion of the *Miller* and *Holman* holdings, s*ee supra* notes 133, 138-40, 229-36 and accompanying text.

275 McMillin, *supra* note 8.

276 *Id.*

277 *See* ILL. CONST. art. I, § 11 ("All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."); People v. Taylor, 464 N.E.2d 1059, 1062 (Ill. 1984) ("Thus section 11 requires the legislature, in defining crimes and their penalties, to consider the constitutional goals of restoring an offender to useful citizenship.").

278 *See generally* BURFEIND & BARTUSCH, *supra* note 1, at 26-27; Soohoo, *supra* note 1, at 4.

Illinois Supreme Court's broad reading of its holding, Illinois is once again poised to pursue a rehabilitative agenda for juvenile offenders. Illinois should embrace the opportunity to return to rehabilitation and its courts should liberally consider the statutory factors attendant to youth in mitigation when sentencing juvenile offenders.[279]

[279] For discussion of factors relevant to sentencing of juvenile offenders in Illinois, *see supra* notes 203, 231 and accompanying text.