

2014

How Long Is Too Long?: Conflicting State Responses to De Facto Life Without Parole Sentences After *Graham v. Florida* and *Miller v. Alabama*

Kelly Scavone
Fordham University School of Law

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Kelly Scavone, *How Long Is Too Long?: Conflicting State Responses to De Facto Life Without Parole Sentences After Graham v. Florida and Miller v. Alabama*, 82 Fordham L. Rev. 3439 (2014).
Available at: <https://ir.lawnet.fordham.edu/flr/vol82/iss6/25>

This Note is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

**HOW LONG IS TOO LONG?:
CONFLICTING STATE RESPONSES
TO DE FACTO LIFE WITHOUT PAROLE
SENTENCES AFTER *GRAHAM V. FLORIDA*
AND *MILLER V. ALABAMA***

*Kelly Scavone**

*A juvenile offender waits for sentencing while a court calculates his life expectancy and determines the point at which his sentence effectively becomes his entire life. This is the scenario posed by recent U.S. Supreme Court decisions that have struck down life without parole (LWOP) sentences for most juvenile offenders but have left open the possibility of lengthy term-of-years sentences. Consecutive term-of-years sentences may leave many juvenile offenders in prison for the majority of their lives despite the holdings in *Miller v. Alabama* and *Graham v. Florida* that juveniles are different and more capable of reform than most adult offenders.*

*This Note examines the issues created by long term-of-years sentences or “virtual LWOP” after *Miller* and *Graham*. Specifically, this Note addresses the (1) unconstitutionality of virtual LWOP sentences under *Graham*; and (2) inconsistencies created between sentences given to homicide and nonhomicide juvenile offenders after *Miller*. Ultimately, this Note analyzes statutory responses to juvenile LWOP sentences and proposes that either parole restrictions for juveniles must be removed entirely or comprehensive statutory schemes must be enacted to provide multiple opportunities for release.*

TABLE OF CONTENTS

INTRODUCTION.....	3441
I. THE HISTORY OF JUVENILE SENTENCING AND LWOP	
UNDER THE EIGHTH AMENDMENT.....	3444
A. <i>The Eighth Amendment Bars Cruel and Unusual Punishment</i>	3445
B. <i>Roper v. Simmons and Graham v. Florida Consider Juvenile Culpability and Potential for Reform</i>	3446

* J.D. Candidate, 2015, Fordham University School of Law; B.A., 2010, Georgetown University. I would like to thank Professor John Pfaff for his guidance on this Note.

1. Two Lines of Precedent Converge When the Supreme Court Is Confronted with Severe Forms of Punishment for Juvenile Offenders	3446
2. Juveniles Are Different: The Supreme Court Strikes Down the Death Penalty for Juvenile Offenders in <i>Roper v. Simmons</i>	3447
3. Applying <i>Roper</i> Outside of Capital Punishment: The Supreme Court Holds LWOP for Juvenile Nonhomicide Offenders Unconstitutional in <i>Graham v. Florida</i>	3449
C. Extending the “ <i>Juveniles Are Different</i> ” Framework to Homicide Offenses: <i>Miller v. Alabama</i>	3453
1. <i>Miller</i> Establishes the Rule That Mandatory LWOP and Juvenile Offenders Are Largely Incompatible and Thus Disproportionate	3453
2. Dissenting Opinions in <i>Miller</i> Challenge the Validity of the Majority’s Holding.....	3455
II. <i>MILLER AND GRAHAM</i> CREATE CONFLICTING RESPONSES WHEN STATE COURTS ARE FACED WITH THE ISSUE OF VIRTUAL LWOP SENTENCES	3456
A. <i>California and Iowa Recognize Virtual LWOP Sentences for Juvenile Homicide Offenders As Unconstitutional Under Miller</i>	3457
1. California Recognizes Virtual LWOP Sentences for Both Nonhomicide and Homicide Offenders As Unconstitutional Under <i>Graham</i> and <i>Miller</i>	3457
2. Iowa Supreme Court Strikes Down Lengthy Sentences for Juvenile Homicide Offenders	3460
B. <i>Florida and Louisiana Decline To Extend Miller and Graham to Virtual LWOP Sentences</i>	3463
1. Florida District Courts Are Divided on Lengthy Term-of-Years Sentences Under <i>Graham</i>	3463
2. Louisiana Declines To Extend <i>Graham</i> to Lengthy Term-of-Years Sentences	3467
III. CALIFORNIA DIRECTLY ADDRESSES VIRTUAL LWOP SENTENCES, WHILE LEGISLATIVE REFORM IN OTHER STATES FAILS TO ADEQUATELY ENACT COMPREHENSIVE JUVENILE SENTENCING REFORM.....	3469
A. <i>Louisiana and Wyoming Respond to Graham and Miller Through Statutory Reform Providing Juveniles Sentenced to LWOP with Some Hope for Release</i>	3470
1. Louisiana Provides Parole Eligibility for Homicide Offenders Only Prior to Sentencing	3470

2. Wyoming Allows Juveniles an Opportunity for Parole After Twenty-Five Years Served Regardless of the Offense 3472

B. *Statutory Schemes in Montana and California May Present Potential Solutions to Virtual LWOP Sentences*..... 3473

1. The Montana Statute May Present a Solution to the Issue of Virtual LWOP Sentences for All Juvenile Offenders..... 3473

2. California Gives Juvenile LWOP Offenders Multiple Chances for Resentencing and Enacts Comprehensive Reform To Address Virtual LWOP 3474

CONCLUSION 3478

INTRODUCTION

The Eighth Amendment of the U.S. Constitution prohibits cruel and unusual punishment.¹ In recent years, courts have become increasingly concerned with the Eighth Amendment in the context of juvenile sentencing. These concerns culminated in a series of U.S. Supreme Court decisions that questioned the validity of imposing the highest forms of punishment on juvenile offenders.² In 2010, the Supreme Court categorically banned life without parole (LWOP) for juvenile offenders convicted of nonhomicide offenses.³ In 2012, the Supreme Court in *Miller v. Alabama* struck down mandatory LWOP sentences for juvenile homicide offenders.⁴ The Court found mandatory LWOP sentences to be an unconstitutional violation of the Eighth Amendment.⁵ Unlike in *Miller's* predecessor, *Graham v. Florida*,⁶ the Supreme Court in *Miller* did not impose a categorical ban on LWOP sentences for nonhomicide juvenile offenders.⁷ Instead, the Court left open the possibility that the worst juvenile homicide offenders may be deserving of an LWOP sentence but closed the door on any sentencing schemes that include a mandatory LWOP sentence for juveniles.⁸

The narrow holding of *Miller* has left several residual questions regarding the future of juvenile sentencing and how states should incorporate both the *Miller* and *Graham* decisions into their sentencing structure.⁹ Specifically, state courts have dealt with the question of lengthy

1. U.S. CONST. amend. VIII.
 2. See *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 130 S. Ct. 2011 (2010); *Roper v. Simmons*, 543 U.S. 551 (2005).
 3. *Graham*, 130 S. Ct. at 2034.
 4. *Miller*, 132 S. Ct. at 2457–58.
 5. *Id.* at 2460.
 6. 130 S. Ct. 2011.
 7. See *infra* Part I.C.
 8. See *infra* Part I.C.
 9. See Krisztina Schlessel, Note, *Graham's Applicability to Term-of-Years Sentences and Mandate To Provide a "Meaningful Opportunity" for Release*, 40 FLA. ST. U. L. REV.

term-of-years sentences given to both nonhomicide and homicide juveniles that are essentially synonymous with LWOP sentences, given the young age of the offenders.¹⁰ These lengthy term-of-years sentences constitute virtual or de facto LWOP sentences that may pose the same constitutional questions for juveniles as mandatory LWOP sentences.¹¹

Responses in state courts to the issue of virtual LWOP sentences after *Miller* and *Graham* have varied significantly.¹² Some state courts, including those of California and Iowa, have held that based on the distinct characteristics of juvenile offenders that result in diminished culpability, *Miller* and *Graham* must apply equally to both LWOP and virtual LWOP sentences given to juvenile homicide offenders.¹³ These courts have focused on the spirit of both *Miller* and *Graham*, which insists on a “meaningful opportunity to obtain release” for all juvenile offenders.¹⁴

However, other state courts, including those of Florida and Louisiana, have adopted a different reading of *Miller* and *Graham*.¹⁵ These states, examining virtual LWOP sentences of nonhomicide offenders, have upheld lengthy sentences that amount to the equivalent of LWOP sentences.¹⁶ State courts in Florida and Louisiana have applied only the holding of *Graham* and have held that virtual LWOP sentences do not fall under the ban against LWOP sentences for juvenile nonhomicide offenders.¹⁷ This has resulted in a scenario where a court might strike down *mandatory* LWOP sentences for juvenile *homicide* offenders but uphold *virtual* LWOP sentences for juvenile *nonhomicide* offenders.¹⁸ This dichotomy has resulted in punishments that are seemingly disproportionate with not only the age of the offenders but also with the crimes that they have committed. In light of the Supreme Court decisions that have held LWOP sentences to be disproportionate punishment for the vast majority of juvenile offenders, sentences that keep juveniles in prison for the majority or entirety of their lives seem disproportionate with the diminished culpability of youths.

Several states have reformed their sentencing statutes to comply with *Miller* and *Graham*.¹⁹ States including California and Wyoming have removed parole restrictions on sentences given to all juvenile offenders,

1027, 1037–38 (2013) (“The first issue is whether *Graham* applies to a lengthy term-of-years-without-parole sentence The second issue *Graham* leaves unresolved concerns the manner in which states can achieve compliance with its holding.”). In addition to the question of how *Miller* and *Graham* should impact term-of-years sentences, many states have grappled with whether the *Miller* decision should be applied retroactively. See Marsha L. Levick & Robert G. Schwartz, *Practical Implications of Miller and Jackson: Obtaining Relief in Court and Before the Parole Board*, 31 LAW & INEQ. 369, 374–75 (2013).

10. See, e.g., *People v. Caballero*, 282 P.3d 291 (Cal. 2012); *State v. Brown*, 118 So. 3d 332 (La. 2013).

11. See *infra* Part II.

12. See *infra* Part II.

13. See *infra* Part II.A.

14. *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010).

15. See *infra* Part II.B.

16. See *infra* Part II.B.

17. See *infra* Part II.B.

18. See *infra* Part II.B.

19. See *infra* Part III.

regardless of the offense committed.²⁰ Juvenile offenders sentenced to LWOP or life imprisonment become eligible for parole after a certain number of years behind bars.²¹ The time served ranges from fifteen years in California, after which the offender may petition a sentencing court for recall and resentencing, to thirty-five years in Louisiana for juvenile homicide offenders.²² Although these sentencing schemes comport with *Miller's* holding and offer juveniles originally sentenced to LWOP an opportunity to demonstrate parole eligibility, these statutes only apply to LWOP or life sentences and do not take lengthy term-of-years sentences into account.²³ Juvenile offenders are only considered under these statutes if they have specifically been sentenced to LWOP or life imprisonment, as indicated in the legislation.²⁴ Any mandatory sentencing scheme that results in virtual LWOP sentences without parole eligibility does not fall under these statutes.

An adequate response to the issue of virtual LWOP sentences may lie in sentencing reform similar to a juvenile sentencing statute in Montana. The Montana statute,²⁵ although enacted before both *Graham* and *Miller*, could potentially address both LWOP and virtual LWOP sentences.²⁶ In Montana, any offenders who were convicted of a crime committed before the age of eighteen are exempted from both LWOP sentences and sentences with restrictions on parole eligibility.²⁷ These exemptions apply to all juvenile offenders regardless of the nature of the offense committed.²⁸ This ensures that juveniles are given an opportunity for release before spending lengthy sentences in prison that result in either geriatric release or no release at all.²⁹

California has enacted comprehensive statutory reform, both in response to *Miller's* ban on mandatory LWOP sentences and to virtual LWOP sentences.³⁰ The California state legislature recently passed statutory revisions that will enable juvenile offenders, both homicide and nonhomicide, to petition for parole after serving between fifteen and twenty-five years of a lengthy term-of-years sentence.³¹ This statutory scheme uses the same rationale as legislative reform for LWOP offenders in Louisiana and Wyoming and applies it to virtual LWOP sentences. Both the California and Montana statutes pose possible solutions to the issue of virtual LWOP sentences after *Graham* and *Miller*.

20. See *infra* Part III.

21. See *infra* Part III.

22. See CAL. PENAL CODE § 1170(d)(2)(A)(i) (West Supp. 2014); LA. REV. STAT. ANN. § 15:574.4(D) (2013).

23. See *infra* Part III.

24. See *infra* Part III.

25. MONT. CODE ANN. § 46-18-222 (West Supp. 2013).

26. See *infra* Part III.B.1.

27. See *infra* Part III.B.1.

28. See MONT. CODE ANN. § 46-18-222.

29. See *infra* Part III.B.1.

30. See *infra* Part III.B.2.

31. See *infra* Part III.B.2.

This Note discusses the “children are different”³² rationale behind *Miller* through which the various state responses can be analyzed. Ultimately, this Note proposes that lengthy term-of-years sentences be viewed through the same lens as LWOP sentences primarily due to the emphasis in *Miller* on the need for individualized sentencing in juvenile cases, which considers the mitigating characteristics of youth. Although virtual LWOP sentences are not categorically barred for juvenile homicide offenders under *Miller*, lengthy sentences without parole eligibility create the exact result that the Court was trying to avoid in *Miller* and *Graham*. Juveniles must be afforded individualized sentencing that accounts for the mitigating factors of youth and, in the majority of cases, must be given an opportunity to reenter society before spending their entire lives behind bars.

Part I of this Note discusses the background of juvenile sentencing under the Eighth Amendment, culminating in the *Miller* decision in 2012. Part II addresses responses to *Graham* and *Miller* in state courts and the inconsistencies in juvenile sentencing that *Miller* created. Part III discusses statutory responses to *Graham* and *Miller* and how the majority of legislative approaches to juvenile offenders are inadequate. Finally, this Note proposes that state legislatures develop a more streamlined response to the issue of juvenile parole such as those seen in Montana and California.³³ State courts and legislatures must implement the rationale behind *Miller* and its predecessors in order to ensure that juveniles obtain the opportunity for release during their lifetimes.³⁴

I. THE HISTORY OF JUVENILE SENTENCING AND LWOP UNDER THE EIGHTH AMENDMENT

This Part provides an overview of recent juvenile sentencing cases in the Supreme Court and the rationale that led the Court to strike down mandatory LWOP sentences for juvenile homicide offenders in *Miller*. Part I.A gives a brief overview of the Eighth Amendment and how courts analyze it with regard to cruel and unusual punishment. Part I.B discusses *Roper v. Simmons*³⁵ and *Graham*, the two cases leading up to *Miller*. These two cases established the “juveniles are different” framework that guided the majority decision in *Miller*. Part I.C provides an in-depth look at the *Miller* decision and how the holding poses potential problems in application in both state courts and legislatures.

32. See generally Ioana Tchoukleva, Note, *Children Are Different: Bridging the Gap Between Rhetoric and Reality Post Miller v. Alabama*, 4 CALIF. L. REV. 92 (2013) (urging courts to adhere to the rationale that youth is a mitigating factor in juvenile sentencing practices).

33. See *infra* Part III.

34. See *infra* Part III.

35. 543 U.S. 551 (2005).

A. *The Eighth Amendment Bars Cruel and Unusual Punishment*

The Eighth Amendment of the U.S. Constitution states, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”³⁶ This constitutional protection guarantees “the right not to be subjected to excessive sanctions.”³⁷ The Eighth Amendment stems from the concept that punishment must be “graduated” and “proportioned” to the offense so as to accomplish justice.³⁸ Recently, the Supreme Court has adopted a more narrow proportionality principle.³⁹ To violate the Eighth Amendment, a particular sentence must be “grossly disproportionate” to the crime committed.⁴⁰ If the sentence appears to be grossly disproportionate on its face, a court may consider sentences that other offenders in the same jurisdiction received for similar crimes, as well as sentences given in other jurisdictions.⁴¹ If the sentence is disproportionate in comparison, the court may find that the sentence violates the Eighth Amendment as cruel and unusual punishment.⁴²

In addition, an analysis of punishment under the Eighth Amendment considers whether the sanction is proportional to the offender.⁴³ Specifically, the Supreme Court has been concerned with “mismatches between the culpability of a class of offenders and the severity of a penalty.”⁴⁴ Recently, this consideration has led the Supreme Court to categorically ban certain types of punishment for specific groups of offenders.⁴⁵ Specifically, the Supreme Court found capital punishment unconstitutional for mentally retarded and juvenile offenders based on the lack of sufficient culpability in both groups.⁴⁶

Another crucial consideration under the Eighth Amendment is the “evolving standards of decency that mark the progress of a maturing society.”⁴⁷ The Supreme Court considers societal opinions reflected in objective criteria⁴⁸ as to whether a particular punishment is outdated or

36. U.S. CONST. amend. VIII.

37. *Roper*, 543 U.S. at 560.

38. *Id.* (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). Although the proportionality analysis remains crucial to considerations of punishment under the Eighth Amendment, scholars have noted that the concept of proportionality is entirely dependent on the different justifications for punishment. See Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 NW. U. L. REV. 1336, 1336 (1997) (arguing that an analysis of disparities in sentences must consider the justifications for punishment).

39. *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010).

40. *Id.* (citing *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991)).

41. *Id.* at 2022.

42. *Id.*

43. *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012).

44. *Id.*

45. See generally *Roper v. Simmons*, 543 U.S. 551 (2005) (holding capital punishment for juvenile offenders unconstitutional); *Atkins v. Virginia*, 536 U.S. 304 (2002) (categorically banning capital punishment for mentally retarded offenders).

46. See *infra* Part I.B.2.

47. *Miller*, 132 S. Ct. at 2463 (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)).

48. This criteria includes state legislation and any patterns or changes in societal standards. See *id.* at 2470.

rejected by the majority of state legislatures.⁴⁹ The Supreme Court also looks to national consensus, most often tallying up state laws to garner the level of support, or lack thereof, for the considered punishment.⁵⁰ In addition, reviewing courts look beyond enacted legislation and examine the practice of imposing the punishment and to what extent society has been willing to carry out that punishment.⁵¹ Societal consensus and proportionality are the key concerns for courts in the analysis of sentencing under the Eighth Amendment.

B. Roper v. Simmons and Graham v. Florida Consider Juvenile Culpability and Potential for Reform

Part I.B gives a background for the Supreme Court's decision in *Miller*. Part I.B.1 explains the two lines of precedent regarding the Eighth Amendment that converged with *Graham* and later *Miller*. Part I.B.2 explains the holding in *Roper*, a landmark case that paved the way for the Court in *Graham*. Part I.B.3 discusses *Graham*, the case immediately preceding *Miller* in which the Supreme Court created the "juveniles are different" rationale that ultimately framed its decision to strike down mandatory LWOP sentences for juvenile homicide offenders.

1. Two Lines of Precedent Converge When the Supreme Court Is Confronted with Severe Forms of Punishment for Juvenile Offenders

The *Graham* and *Miller* decisions represent the convergence of two lines of precedent in Supreme Court sentencing cases. The first line of precedent struck down sentencing practices that resulted in overly harsh sentences despite the diminished culpability of the offenders.⁵² These cases adopted a policy of individualized sentencing by "consider[ing] all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive."⁵³ Under this analysis, the concept of proportionality became key as the Court "compar[ed] the gravity of the offense and the severity of the sentence."⁵⁴

The second line of cases used categorical rules to analyze punishment under the Eighth Amendment based on the nature of either the offender or the offense.⁵⁵ This string of precedent struck down death penalty sentences for the least culpable offenders, namely juveniles and those "whose intellectual functioning is in a low range."⁵⁶

49. *Graham v. Florida*, 130 S. Ct. 2011, 2023 (2010).

50. *Id.* ("[T]he 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" (quoting *Atkins*, 536 U.S. at 312)).

51. *Id.* (noting that although juvenile LWOP for nonhomicide offenders was a legal sentence in a majority of states, the practice of imposing that sentence was highly rare).

52. *Miller*, 132 S. Ct. at 2463.

53. *Graham*, 130 S. Ct. at 2021.

54. *Id.* at 2022.

55. *Id.*

56. *Id.*

The two lines of precedent met when the Supreme Court was faced with the issues surrounding life imprisonment for juvenile offenders.⁵⁷ The cases immediately preceding *Miller* analogized LWOP sentences to the death penalty for juvenile offenders.⁵⁸ Thus, the need for individualized sentencing in death penalty cases and the emphasis on “consider[ing] the ‘mitigating qualities of youth’” led the *Miller* Court to strike down mandatory LWOP sentences for juvenile offenders.⁵⁹ These two categories of cases converged with regards to the sentencing of juvenile offenders “because of their lesser culpability.”⁶⁰ Two landmark cases, *Roper* and *Graham*, established the framework for considering LWOP sentences for juvenile offenders under the Eighth Amendment and paved the way for the *Miller* decision.

2. Juveniles Are Different: The Supreme Court Strikes Down the Death Penalty for Juvenile Offenders in *Roper v. Simmons*

In 2005, the Supreme Court considered the constitutionality of death penalty sentences for juvenile offenders in *Roper*.⁶¹ The Court previously faced this issue in *Stanford v. Kentucky*⁶² and held that capital punishment did not constitute cruel and unusual punishment for juvenile offenders between the ages of fifteen and eighteen.⁶³ *Roper* overturned the *Stanford* decision and created a categorical ban on capital punishment for juvenile offenders under the age of eighteen.⁶⁴ The Court held that the death penalty was disproportionate punishment for juveniles and thus constituted cruel and unusual punishment in violation of the Eighth Amendment.⁶⁵

The Court noted, “Capital punishment must be limited to those offenders who commit ‘a narrow category of the most serious crimes’ and whose extreme culpability makes them ‘the most deserving of execution.’”⁶⁶ *Roper* established the principle that due to their lesser culpability, juveniles must be treated differently for sentencing purposes.⁶⁷ The Court outlined three general distinctions between juveniles and adults that placed juvenile offenders squarely outside the boundaries of those exceptional offenders deserving the death penalty.⁶⁸

57. *See id.* at 2021–23.

58. *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012).

59. *Id.* at 2467 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

60. *Id.* at 2463.

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

62. 492 U.S. 361 (1989).

63. *Id.* at 380.

64. *Roper*, 543 U.S. at 578–79; *see also* *Graham v. Florida*, 130 S. Ct. 2011, 2038 (2010) (“More recently, in *Roper* . . . we extended the prohibition on executions to those who committed their crimes before the age of 18.”).

65. *Roper*, 543 U.S. at 575.

66. *Id.* at 568 (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)).

67. *Graham*, 130 S. Ct. at 2026 (“*Roper* established that because juveniles have lessened culpability they are less deserving of the most severe punishments.”).

68. *Roper*, 543 U.S. at 569–70.

First, juveniles are decidedly immature and irresponsible.⁶⁹ As a result, adolescents as a whole are more inclined toward reckless behavior and rash decisions.⁷⁰ This reality is reflected in society's laws that prohibit juvenile participation in certain adult activities.⁷¹ Thus, juvenile conduct is not as "morally reprehensible" as that of an adult and cannot be punished in the same manner.⁷²

This immaturity played a significant role in the Court's second distinction about juveniles as a class of offenders.⁷³ The *Roper* decision highlighted that juveniles are "more vulnerable or susceptible to negative influences and outside pressures."⁷⁴ The Court equated this vulnerability with a lack of control over one's surroundings and thus an inability to resist potentially criminal influences.⁷⁵ Culpability is diminished if one's decisions are more likely to be outside the control of the offender.⁷⁶

The third characteristic of juveniles that the Court discussed is the underdeveloped character of a juvenile as compared to an adult.⁷⁷ This transient character of juveniles indicates that the recklessness and susceptibility evident in the first two characteristics are subject to change.⁷⁸ In this regard, *Roper* emphasized the greater possibility for reform in juvenile offenders.⁷⁹

When viewed as a whole, these three character traits evident in juveniles create the presumption that juvenile offenders can never be among those most deserving of capital punishment.⁸⁰ Although the Court noted that drawing categorical lines always poses difficulties, society's decision to create its own categorical distinctions at the age of eighteen indicates that a line can be drawn with regard to capital punishment.⁸¹

69. *Id.* at 569.

70. See Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 341 (1992) (noting that the "sensation seeking" and "egocentrism" associated with adolescence as a developmental phase lead to recklessness); see also Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy: Roper, Graham, Miller/Jackson, and the Youth Discount*, 31 LAW & INEQ. 263, 284 (2013) ("To assess risks, a person has to be able to identify potential outcomes, estimate their likelihood of occurring, and make valuations of possible consequences. Adolescents underestimate the amount and likelihood of risks, emphasize immediate outcomes, and focus on gains rather than losses to a greater extent than do adults.").

71. *Roper*, 543 U.S. at 569 ("In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.").

72. *Id.* at 570 (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988)).

73. *Id.* at 569.

74. *Id.*

75. *Id.* at 570.

76. *Id.* at 569–70.

77. *Id.* at 570.

78. *Id.*

79. *Id.*

80. *Id.* at 572–73 ("The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability.").

81. *Id.* at 574.

As stated above, analysis of punishment under the Eighth Amendment includes an assessment of “evolving standards of decency that mark the progress of a maturing society.”⁸² Accordingly, a major factor in the *Roper* decision was an evolution in the states with regard to capital punishment for juvenile offenders since the *Stanford* decision.⁸³ The Court compared this change to the evolution of state laws concerning the death penalty for the mentally retarded.⁸⁴ On the same day that the *Stanford* decision came down, the Supreme Court held in *Perry v. Lynaugh*⁸⁵ that capital punishment for mentally retarded offenders did not amount to cruel and unusual punishment under the Eighth Amendment.⁸⁶ When the Court reconsidered this issue in *Atkins v. Virginia*,⁸⁷ the evolving standards of decency, measured by changes in state practices, led the Court to hold that death penalty sentences for the mentally retarded did, in fact, constitute cruel and unusual punishment.⁸⁸

Similarly, the *Roper* Court looked to changing attitudes toward juvenile offenders and the death penalty through “objective indicia,” including state laws and common practices.⁸⁹ Although less dramatic than the societal shift seen with capital punishment for the mentally retarded, the Court noted that the direction of state practices and laws indicated a consistent shift away from executing juvenile offenders.⁹⁰

3. Applying *Roper* Outside of Capital Punishment: The Supreme Court Holds LWOP for Juvenile Nonhomicide Offenders Unconstitutional in *Graham v. Florida*

The framework established in *Roper* became the basis for the landmark *Graham* decision to ban LWOP sentences for nonhomicide juvenile offenders.⁹¹ The *Graham* Court first indicated that LWOP sentences are analogous to capital punishment for juvenile offenders.⁹² Capital punishment and LWOP share characteristics that are “shared by no other sentences.”⁹³ The Court noted that LWOP sentences are especially harsh

82. *Miller v. Alabama*, 132 S. Ct. 2455, 2463 (2012) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

83. *Roper*, 543 U.S. at 565 (“Five States that allowed the juvenile death penalty at the time of *Stanford* have abandoned it in the intervening 15 years—four through legislative enactments and one through judicial decision.”).

84. *Id.* at 564–65.

85. 492 U.S. 302 (1989).

86. *See id.* at 335.

87. 536 U.S. 304 (2002).

88. *Roper*, 543 U.S. at 563.

89. *Id.* at 563–64.

90. *Id.* at 566 (“Since *Stanford*, no State that previously prohibited capital punishment for juveniles has reinstated it. This fact, coupled with the trend toward abolition of the juvenile death penalty, carries special force in light of the general popularity of anticrime legislation.”).

91. *Graham v. Florida*, 130 S. Ct. 2011, 2022 (2010).

92. *Id.* at 2027 (“[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences . . . [both sentences alter] the offender’s life by a forfeiture that is irrevocable.”).

93. *Id.*

for juvenile offenders when “a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender.”⁹⁴ Both the death penalty and LWOP constitute a denial of any hope of release or restoration into society.⁹⁵ Thus, the analysis of *Graham* proceeded to evaluate LWOP sentences under a similar framework as previously used in *Roper*.⁹⁶

The *Graham* opinion went on to deny any penological justifications for LWOP sentences for juvenile nonhomicide offenders.⁹⁷ Using the distinct characteristics of juveniles outlined in *Roper*, the Court determined that LWOP for juvenile nonhomicide offenders is incompatible with effective retribution, deterrence, and incapacitation.⁹⁸ As the Court stated in *Graham*, retribution is a theory of punishment that is based upon the idea that “[s]ociety is entitled to impose severe sanctions on a[n] . . . offender to express its condemnation of the crime and to seek restoration of the moral imbalance caused by the offense.”⁹⁹ Retribution is not an appropriate justification when the sentence imposed is disproportional with the culpability of the offender.¹⁰⁰ As first articulated in *Roper*, “[r]etribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”¹⁰¹ Moreover, *Graham* stated that the justification for retribution was further diminished in cases where the juvenile offenders were not convicted of homicide.¹⁰² Retribution therefore does not justify LWOP sentences given the diminished culpability of juveniles combined with the diminished culpability of nonhomicide offenders.¹⁰³

Turning to the deterrence justification, *Graham* noted that any deterrent effect of LWOP sentences was insufficient given the immaturity of juvenile offenders.¹⁰⁴ Punishment is justified under the deterrence theory if offenders are likely to consider the potential punishment prior to acting.¹⁰⁵ The recklessness associated with juvenile behavior discussed in both *Roper* and *Graham* indicates that “[juveniles] are less likely to take a possible punishment into consideration when making decisions.”¹⁰⁶ Thus, deterrence has a diminished effect when dealing with juvenile offenders.¹⁰⁷

94. *Id.* at 2028.

95. *Id.* at 2027.

96. *Id.* at 2027–28.

97. *Id.* at 2028.

98. *Id.* at 2028–29.

99. *Id.* at 2028.

100. *Id.* (“The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.” (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987))).

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

102. *Graham*, 130 S. Ct. at 2028.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 2028–29.

107. *Id.* at 2029.

The Court further noted that deterrence is even less likely when the punishment in question is rarely imposed.¹⁰⁸ Even assuming that there is a minimal deterrent effect of LWOP on nonhomicide offenders, *Graham* held that even limited deterrence is insufficient to justify LWOP based on the gross disproportionality of the sentence.¹⁰⁹

Finally, incapacitation does not form a satisfactory justification for LWOP sentences for juvenile offenders.¹¹⁰ The theory of incapacitation rests on the belief that criminals should be incarcerated to prevent future crime.¹¹¹ In the case of LWOP, incapacitation suggests that the “offender forever will be a danger to society” and thus must be incarcerated permanently.¹¹² For a court to justify permanent incapacitation, there must be some consensus that the offender is incorrigible and therefore must be removed from society.¹¹³ However, the characteristics of youth indicate that reform is more probable for juvenile offenders.¹¹⁴ In fact, the transient qualities of juveniles make it nearly impossible for a court to determine at the time of sentencing that the juvenile offender will pose a threat to society for the entirety of his or her natural life.¹¹⁵ While incapacitation provides some justification for sentencing juvenile offenders, the Court held that the extent of incapacitation achieved with LWOP cannot be justified as applied to juvenile nonhomicide offenders.¹¹⁶

The Court also noted that LWOP is impermissible for juvenile offenders given their potential for rehabilitation.¹¹⁷ Thus, rehabilitation is not an appropriate justification for imposing LWOP on juvenile offenders.¹¹⁸ In imposing an LWOP sentence and removing the offender from the community permanently, “the State makes an irrevocable judgment about that person’s value and place in society.”¹¹⁹ This irreversible judgment is not appropriate in light of the high probability for reform in juvenile offenders.¹²⁰ An additional concern with LWOP in the context of rehabilitation is that “defendants serving life without parole sentences are often denied access to vocational training and other rehabilitative services that are available to other inmates.”¹²¹ The Court even goes so far as to say

108. *Id.*

109. *Id.*

110. *Id.*

111. See Mark T. Freeman, *Meaningless Opportunities: Graham v. Florida and the Reality of De Facto LWOP Sentences*, 44 MCGEORGE L. REV. 961, 979 (2013) (“The incapacitation theory of punishment suggests that a state should imprison some criminals so that those individuals do not commit more crimes.”).

112. *Graham*, 130 S. Ct. at 2029.

113. *Id.*

114. *Id.*

115. *Id.* (“To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible. The characteristics of juveniles make that judgment questionable.”).

116. *Id.*

117. *Id.* at 2030.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

that the lack of rehabilitative services available for LWOP inmates factors into the proportionality of the sentence.¹²² The incompatibility of LWOP and rehabilitation further adds to the Court's determination that LWOP for juvenile nonhomicide offenders is grossly disproportionate and thus cruel and unusual punishment.¹²³

Justice Thomas, joined in part by Justice Scalia and Justice Alito, wrote a dissenting opinion in *Graham*.¹²⁴ Justice Thomas's dissent argued that the Court should not make these moral judgments on juvenile sentencing when "Congress, the District of Columbia, and 37 States allow judges and juries to consider this sentencing practice in juvenile nonhomicide cases."¹²⁵ Justice Thomas argued that the majority highly overstates any evolution in state courts and legislatures regarding LWOP sentencing.¹²⁶ He noted that state legislatures should ultimately decide the proportionality of an offense.¹²⁷ Despite the majority's argument that only 123 juvenile offenders were serving LWOP for nonhomicide offenses at the time of the opinion, Justice Thomas stated that both objective societal indicia and the evolving standards of decency indicated that public opinion supported the possibility that some juvenile nonhomicide offenders should serve LWOP.¹²⁸ In addition to the large majority of states with LWOP sentences, Justice Thomas's dissent noted that "states over the past 20 years have consistently *increased* the severity of punishments for juvenile offenders."¹²⁹ In Justice Thomas's view, the rare imposition of LWOP did not negate the strong consensus among state legislatures that the sentence should remain available to those juveniles most deserving of LWOP.¹³⁰

Justice Alito, in his own dissenting opinion in *Graham*, briefly touched on the issue of lengthy term-of-years sentences.¹³¹ Justice Alito noted that the majority's holding applied to LWOP sentences alone, stating, "Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole."¹³² Justice Alito followed the rationale that *Graham*'s narrow holding did not reach outside the strict LWOP sentence despite rhetoric to the contrary in the *Graham* opinion—an approach that was later employed by state courts faced with imposing virtual LWOP sentences.¹³³

122. *Id.*

123. *Id.*

124. *Id.* at 2043 (Thomas, J., dissenting).

125. *Id.*

126. *See id.* at 2048–49.

127. *Id.* at 2045.

128. *Id.* at 2048–49.

129. *Id.* at 2050 (citations omitted).

130. *Id.* at 2051.

131. *Id.* at 2058 (Alito, J., dissenting).

132. *Id.* ("Indeed, petitioner conceded at oral argument that a sentence of as much as 40 years without the possibility of parole [likely] would be constitutional.")

133. *See infra* Part II.

C. Extending the “Juveniles Are Different” Framework to Homicide Offenses: Miller v. Alabama

Part I.C.1 gives an overview of the Court’s rationale in *Miller* and how *Graham* and *Roper* set the stage for the ultimate holding. Part I.C.2 discusses the two dissenting opinions in *Miller* that form important counterarguments to the ban on mandatory LWOP for juvenile homicide offenders.

1. *Miller* Establishes the Rule That Mandatory LWOP and Juvenile Offenders Are Largely Incompatible and Thus Disproportionate

Two years after the *Graham* decision banned LWOP sentences for nonhomicide juvenile offenders, the Supreme Court was faced with the issue of LWOP sentences given to two juvenile offenders convicted of homicide.¹³⁴ Both offenders were fourteen at the time that they committed the crime.¹³⁵ In both instances, the sentencing court did not have any discretion in imposing an LWOP sentence.¹³⁶ Using the framework established in *Graham*, the Court struck down mandatory LWOP sentences for juvenile homicide offenders.¹³⁷

Miller applied the concept articulated in *Graham* that “youth matters” in juvenile sentencing when invoking the state’s harshest punishments.¹³⁸ The analysis in *Miller* was centered on the premise that “none of what [*Graham*] said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific.”¹³⁹ Thus, the Supreme Court saw no distinction in the lesser culpability of juveniles between nonhomicide and homicide offenses for the purposes of what constitutes cruel and unusual punishment.¹⁴⁰ The *Miller* decision emphasized the need for discretion in juvenile cases, regardless of the crime committed.¹⁴¹

The *Miller* decision did not create a categorical ban on LWOP sentences for juvenile homicide offenders.¹⁴² Instead, the Court was more concerned with the absence of any discretionary tactics available in mandatory sentencing schemes.¹⁴³ “Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender’s age and the wealth of characteristics and circumstances attendant to it.”¹⁴⁴ The Court noted that the lack of individualized considerations in mandatory sentencing

134. *Miller v. Alabama*, 132 S. Ct. 2455, 2460 (2012).

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 2465.

139. *Id.*

140. *Id.* (“So *Graham*’s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.”).

141. *Id.* at 2466. (“[I]mposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.”).

142. *Id.* at 2469.

143. *Id.* at 2467.

144. *Id.*

schemes for juveniles did not satisfy the proportionality test under the Eighth Amendment,¹⁴⁵ stating:

By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment.¹⁴⁶

Although the Court's opinion focused on LWOP sentences in this regard, the analysis of mandatory sentences seemed to indicate that individualized sentencing that incorporates the mitigating factors of youth must always be used when considering harsh or lengthy sentences for juvenile offenders.¹⁴⁷ The Court further predicted that LWOP sentences for juveniles would become uncommon once courts were required to use discretion.¹⁴⁸

The Supreme Court considered arguments from Alabama and Arkansas that mandatory sentencing schemes had been upheld in the past under the Eighth Amendment and thus should not be struck down as cruel and unusual.¹⁴⁹ The majority rejected this argument, distinguishing *Miller* from past mandatory sentencing cases.¹⁵⁰ The Court was faced specifically with mandatory sentences for juvenile offenders.¹⁵¹ It noted, "We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children."¹⁵² This reiterates the rationale that children are different from adults in the sentencing context and indicates that any mandatory sentencing scheme for "society's harshest punishments" cannot be imposed on juvenile offenders.¹⁵³

The Court's views on the lack of proportionality between juvenile offenders and LWOP may be reflected in the nature of offenders that are

145. *Id.*; see also Feld, *supra* note 70, at 327 ("Moreover, proportionality is a retributive concept, not a utilitarian one, and the Court decided *Roper*, *Graham*, and *Miller/Jackson* firmly on retributive grounds—reduced culpability—even after examining the relevant utilitarian justifications for punishment. Accordingly, there is no basis on which to disregard the categorical mitigating role of youthfulness at sentencing to incapacitate some youths who may be deemed to be life-course persistent offenders.").

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

147. *Id.* ("[O]ur individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.").

148. *Id.* at 2469; see also Aryn Seiler, *Buried Alive: The Constitutional Question of Life Without Parole for Juvenile Offenders Convicted of Homicide*, 17 LEWIS & CLARK L. REV. 293, 319–20 (2013) ("It is unclear why the Court refused to extend *Graham*'s categorical rule to all juvenile offenders because the Court offered no expanded explanation. The Court merely stated that it anticipated the sentence would be uncommon once courts and juries were required to consider age as a mitigating factor.").

149. *Miller*, 132 S. Ct. at 2470. Alabama and Arkansas cited *Harmelin v. Michigan*, 501 U.S. 957 (1991), in which the Supreme Court held that a sentence was not unconstitutional under the Eighth Amendment simply because it was mandatory. *Miller*, 132 S. Ct. at 2470. The States argued that striking down mandatory LWOP for juvenile offenders would effectively overrule *Harmelin*. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

sentenced to LWOP.¹⁵⁴ “A review of juvenile life without parole cases contradicts the general assumption that these sentences are reserved only for the most chronically violent youth.”¹⁵⁵ In fact, many juvenile offenders sentenced to LWOP were first-time offenders at the time of conviction.¹⁵⁶ However, the mandatory nature of state sentencing laws does not give judges any discretion to consider these factors, as seen in a major portion of the Court’s analysis in *Miller*.¹⁵⁷

2. Dissenting Opinions in *Miller* Challenge the Validity of the Majority’s Holding

In his dissenting opinion, Chief Justice Roberts wrote that the majority had ignored objective societal indicia that state courts and legislatures approved mandatory LWOP sentences for juvenile homicide offenders.¹⁵⁸ Under the Eighth Amendment analysis, a court must consider “objective indicia of society’s standards, as expressed in legislative enactments and state practice.”¹⁵⁹ The dissent emphasized the distinction between LWOP for juvenile homicide offenders and the sentences considered in the past under the *Miller* line of precedent.¹⁶⁰ Specifically, the dissent focused on the subject of *Graham*: LWOP sentences given to nonhomicide offenders.¹⁶¹ In *Graham*, the Court noted that although thirty-seven states, the District of Columbia, and the federal government authorized LWOP for nonhomicide juvenile offenders,¹⁶² the sentence was in fact incredibly rare.¹⁶³ Chief Justice Roberts noted that, at the time of the *Miller* opinion, there were “nearly” 2,500 offenders serving LWOP for homicide offenses committed as juveniles, and 2,000 of these offenders received these sentences because they were legislatively mandated.¹⁶⁴ Thus, the dissent argued that mandatory LWOP sentences are far from unusual but, to the contrary, are embraced by more than half of state legislatures.¹⁶⁵

The *Miller* majority responded to this argument by noting that many states did not have specific provisions for juvenile mandatory LWOP

154. See generally ASHLEY NELLIS & RYAN S. KING, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA (2009), available at http://www.sentencingproject.org/doc/publications/publications/inc_NoExitSept2009.pdf.

155. *Id.* at 31.

156. *Id.* (“This fact runs contrary to the commonly-held assumption that individuals serving LWOP sentences are chronic, repeat offenders.”).

157. *Id.*

158. *Miller*, 132 S. Ct. at 2478 (Roberts, C.J., dissenting).

159. *Id.* at 2477–78 (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2022 (2010)).

160. *Id.*

161. *Id.*

162. *Graham*, 130 S. Ct. at 2023.

163. *Id.* at 2026. “The Court explained that only 123 prisoners in the entire Nation were serving life without parole for nonhomicide crimes committed as juveniles.” *Miller*, 132 S. Ct. at 2478.

164. *Miller*, 132 S. Ct. at 2477.

165. *Id.* at 2478 (noting that mandatory LWOP for juvenile homicide offenders was a practice in twenty-nine states).

sentences.¹⁶⁶ Many jurisdictions implicitly authorized juvenile LWOP through two separate statutory provisions, “often in . . . far-removed part[s] of the code”¹⁶⁷—juvenile transfer to adult court and mandatory LWOP for homicide offenses.¹⁶⁸ Depending on the offense committed, juvenile offenders may be transferred to adult court where they are then subject to the penalties and sentences given to adult offenders.¹⁶⁹ The Court stated that although this “confluence” of state legislation created mandatory juvenile LWOP in twenty-nine states, it did not reflect that the sentence was in fact supported by full legislative consideration and deliberation.¹⁷⁰ In light of the Court’s recent precedent regarding juvenile sentencing, the Court did not regard the existence of mandatory LWOP in twenty-nine states as indicating that societal standards pointed toward an acceptance of the harsh sentence, even for juvenile homicide offenders.¹⁷¹

Furthermore, the Court noted that because *Miller* did not create a categorical ban on LWOP sentences, instead striking down any mandatory schemes that prevented the consideration of mitigating factors, any “tall[ying of] legislative enactments” was far less compelling.¹⁷² The Court did not foreclose the possibility that societal standards may point in favor of lifetime incarceration for the worst juvenile homicide offenders.¹⁷³ The majority instead argued that there is no indication that state legislatures have expressly condoned LWOP sentences for juveniles without considering the mitigating qualities of youth and the nature of the offenses committed.¹⁷⁴

II. *MILLER* AND *GRAHAM* CREATE CONFLICTING RESPONSES WHEN STATE COURTS ARE FACED WITH THE ISSUE OF VIRTUAL LWOP SENTENCES

This Part examines state court responses to *Miller* and *Graham* with regard to virtual LWOP sentences. Outside of California and Iowa, most state courts have not yet dealt with virtual LWOP sentences for juvenile homicide offenders. As Part II.A discusses, California and Iowa state courts have struck down virtual LWOP sentences for homicide offenders, because they do not provide juvenile offenders with a meaningful opportunity for release. Part II.B gives an overview of state court decisions regarding virtual LWOP sentences for nonhomicide offenders, including courts in Florida and Louisiana that have come down on both sides of the debate. As articulated below, Florida state courts are divided on the issue of virtual LWOP sentences and what exactly constitutes geriatric release for juveniles. This has created a question of when exactly a lengthy term-of-

166. *Id.* at 2472.

167. *Id.*

168. *Id.* at 2473.

169. *Id.* at 2472.

170. *Id.* at 2473.

171. *Id.*

172. *Id.* at 2471.

173. *Id.* at 2469.

174. *Id.* at 2472–73.

years sentence becomes LWOP and whether juveniles given these sentences should be considered LWOP offenders under *Graham* and *Miller*.

The absence of any guidance for states as to how to apply *Graham* and *Miller* beyond the narrow confines of the mandatory LWOP sentence has created conflicting results in state courts and legislatures. Despite the principle that “[t]he concept of proportionality is central to the Eighth Amendment,”¹⁷⁵ state court decisions have created virtual LWOP sentences that are highly disproportional considering the lower culpability of juvenile offenders.¹⁷⁶

A. *California and Iowa Recognize Virtual LWOP Sentences for Juvenile Homicide Offenders As Unconstitutional Under Miller*

Part II.A.1 looks at California’s response to virtual LWOP sentences for both nonhomicide and homicide offenders. Part II.A.2 describes an Iowa state case that struck down virtual LWOP sentences under *Miller*. Both states recognize that lengthy term-of-years sentences produce the same results as LWOP and warrant the same concerns as those seen in *Miller*.

1. California Recognizes Virtual LWOP Sentences for Both Nonhomicide and Homicide Offenders As Unconstitutional Under *Graham* and *Miller*

After the Supreme Court struck down LWOP sentences for nonhomicide juvenile offenders in *Graham*, the California Supreme Court was faced with the question of virtual LWOP sentences in *People v. Caballero*.¹⁷⁷ Caballero was convicted of three counts of attempted murder and was sentenced to one term of forty years to life and two terms of thirty-five years to life, to be served consecutively.¹⁷⁸ This resulted in a total sentence of 110 years to life.¹⁷⁹ The Court considered whether *Graham* applied to Caballero’s de facto LWOP sentence despite the State’s argument that the sentence was constitutional because “each [sentence] included the possibility of parole within his lifetime.”¹⁸⁰

The California Supreme Court held that despite the State’s narrow reading of *Graham*, Caballero’s sentence violated the Eighth Amendment and constituted cruel and unusual punishment.¹⁸¹ The court looked behind *Graham*’s categorical ban on LWOP sentences for nonhomicide juvenile offenders and focused on the rationale that juvenile offenders must be treated distinctly for sentencing purposes.¹⁸² The court found that the distinct characteristics of juveniles that formed the basis for the *Graham*

175. *Id.* at 2463 (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010)).

176. *See infra* Part II.A–B.

177. 282 P.3d 291 (Cal. 2012).

178. *Id.* at 293.

179. *Id.*

180. *Id.* at 294.

181. *Id.* at 295.

182. *See Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010) (“[B]ecause juveniles have lessened culpability they are less deserving of the most severe punishments.”).

decision supplied an equally important foundation for a categorical ban on virtual LWOP sentences.¹⁸³

Specifically, the court focused on *Graham*'s mandate that juvenile offenders must be provided a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."¹⁸⁴ The *Caballero* court concluded that because a virtual LWOP sentence denies such an opportunity, the categorical ban established in *Graham* applied to such sentences.¹⁸⁵ Furthermore, the lack of penological justifications for LWOP sentences for juveniles, as outlined in *Graham*, applies equally to virtual LWOP sentences.¹⁸⁶ The inability to deter juveniles, the lack of retribution due to lowered culpability, the high chance for reform that negates incapacitation, and the incompatibility of LWOP sentences with rehabilitation all apply with equal force to de facto LWOP sentences.¹⁸⁷

After the *Caballero* decision, California state courts were faced with the issue of virtual LWOP sentences that were given to juvenile homicide offenders.¹⁸⁸ In *People v. Ramirez*,¹⁸⁹ the California Fourth District Court of Appeal faced a constitutional challenge to a virtual LWOP sentence given to a juvenile offender following *Miller*.¹⁹⁰ Both defendants in *Ramirez* faced virtual LWOP sentences for first- and second-degree murder.¹⁹¹ The *Ramirez* decision applied the *Miller* holding to de facto LWOP sentences for homicide offenders using the "juveniles are different" rationale articulated in *Graham* and later in *Caballero*.¹⁹² The California Fourth District Court of Appeals held that discretion and individualized sentencing are crucial for determining the appropriate punishment for juvenile offenders, regardless of the offense committed.¹⁹³

A major factor in the *Ramirez* decision was the statutory provision California Penal Code section 1170, enacted by the California legislature shortly before the case was decided.¹⁹⁴ The court stated: "Section 1170, subdivision (d)(2) provides, in substance, that when a juvenile is sentenced to LWOP . . . he is entitled to submit a petition for recall of his sentence

183. *Caballero*, 282 P.3d at 294–95.

184. *Graham*, 130 S. Ct. at 2030.

185. *Caballero*, 282 P.3d at 295.

186. *Id.* at 298 (Werdegar, J., concurring) ("These concerns remain true whether the sentence is life without parole or a term of years exceeding the offender's life expectancy.").

187. *Id.*

188. See *People v. Ramirez*, 162 Cal. Rptr. 3d 128 (Ct. App. 2013), review granted, 314 P.3d 488 (Cal. 2013); *People v. Perez*, 154 Cal. Rptr. 3d 114 (Ct. App. 2013).

189. 162 Cal. Rptr. 3d 128.

190. *Id.* at 134.

191. *Id.* at 138. Although *Ramirez* was originally sentenced to LWOP for the first-degree murder charge, the court noted that this sentence would have to be reversed in light of *Miller*, leaving *Ramirez* with twenty-five years to life for this count and a total sentence of ninety-years to life. *Id.* at 151–52.

192. *Id.* at 152 ("[S]uch a sentence, which effectively precludes a defendant from ever being paroled, must still be treated as an LWOP for purposes of analyzing whether it qualifies as cruel and unusual punishment.").

193. *Id.* at 153.

194. *Id.* at 154–55.

after he has served at least 15 years.”¹⁹⁵ The court viewed the recently enacted provision as a rejection of lengthy sentences constituting the equivalent of LWOP for juvenile offenders.¹⁹⁶ It stated:

[T]he very fact the Legislature has *enacted* that statutory provision suggests it does not endorse the imposition of unduly lengthy sentences against juvenile offenders, without at least ensuring they are afforded a meaningful opportunity to seek reconsideration of the sentence within some reasonable time, based on a demonstration of their positive character and rehabilitation.¹⁹⁷

The court further stated that in enacting section 1170, the California legislature was granting “parole-type review” to the worst juvenile offenders—those sentenced to LWOP.¹⁹⁸ In doing so, the statute could not be read to exclude those juvenile offenders who were sentenced to “theoretically lesser”¹⁹⁹ sentences from similar sentencing review based on remorse, maturity, and rehabilitation.²⁰⁰ Thus, although section 1170 only applies to LWOP sentences, the court read this to mean that if the worst juvenile offenders are eligible for release, all juveniles should be given the same opportunity.²⁰¹

The *Ramirez* decision acknowledges that, as articulated in *Miller*, there may be a rare juvenile offender who warrants a lifetime in prison.²⁰² However, the court, in light of California’s juvenile-sentencing scheme under section 1170, held that this determination should be made later in a juvenile offender’s sentence.²⁰³ The court noted that “trial courts are simply ill-equipped to make reliable *lifetime judgments* about juvenile offenders in the immediate wake of their convictions.”²⁰⁴ California took the mandate from *Miller* to consider the lesser culpability of juvenile homicide offenders in sentencing and applied the reasoning to all offenders regardless of the sentence given.²⁰⁵

195. *Id.* at 151 (citing CAL. PENAL CODE § 1170(d)(2)(A)(i) (West Supp. 2014)). The California statute is discussed in depth below in Part III.

196. *Id.* at 154.

197. *Id.*

198. *Id.* at 155.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 154.

203. *Id.* (“Under our sentencing scheme, the ultimate decision to keep a juvenile offender in prison for life is a judgment which can be made at a later point, after the juvenile has had a chance to gain maturity and demonstrate rehabilitation (or not) and both he and the system have had a chance to gain valuable perspective.”).

204. *Id.* at 155.

205. *Id.* at 155–56.

2. Iowa Supreme Court Strikes Down Lengthy Sentences for Juvenile Homicide Offenders

The Iowa Supreme Court was faced with a unique response to *Miller* in *State v. Ragland*.²⁰⁶ The defendant under consideration in *Ragland* was convicted of first-degree murder for an offense committed when he was seventeen years old.²⁰⁷ Under a mandatory sentencing scheme in Iowa, the defendant was given LWOP.²⁰⁸ After the *Miller* decision came down, the governor of Iowa commuted the mandated LWOP sentences of thirty-eight juvenile homicide offenders in Iowa prison at the time, including Ragland, to life with no possibility for parole for sixty years.²⁰⁹ The defendant in *Ragland* appealed the sixty-year sentence, arguing that the commutation “was unconstitutional because it failed to follow the individualized considerations mandated by *Miller*.”²¹⁰ Assuming that the governor had the authority to commute Ragland’s sentence, the court then analyzed whether the sixty-year sentence violated *Miller*.²¹¹

The court first looked to whether the commuted sixty-year term constituted a mandatory sentence.²¹² The court determined that the commuted sentence was mandatory in nature, because it did not take into account the individual offender but simply changed the length of the sentence.²¹³ In this regard, the Iowa governor simply substituted one sentence for another in order to avoid constitutional issues.²¹⁴ No aspects of youth or any other factors were taken into account in the governor’s decision to commute the thirty-eight LWOP sentences.²¹⁵ The court found, “Even with the commutation in 2012 by the Governor, Ragland has been deprived of the constitutional mandate that youths be sentenced pursuant to the *Miller* factors.”²¹⁶ The court held that the Iowa governor could not circumvent *Miller* by simply shortening the sentence.²¹⁷

After concluding the mandatory nature of the commuted sentence, the *Ragland* court turned to the issue of de facto LWOP sentences under *Miller*.²¹⁸ The defendant would not be eligible for parole until he reached the age of seventy-eight.²¹⁹ Furthermore, “[u]nder standard mortality tables, his life expectancy [was] 78.6 years.”²²⁰ The defendant argued that

206. 836 N.W.2d 107 (Iowa 2013).

207. *Id.* at 110.

208. *Id.*

209. *Id.* at 110–11.

210. *Id.* at 112.

211. *Id.* at 119.

212. *Id.*

213. *Id.* (“The commutation by the Governor of Ragland’s sentence to a term of years did not affect the mandatory nature of the sentence or cure the absence of a process of individualized sentencing considerations mandated under *Miller*.”).

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

this was the functional equivalent of LWOP.²²¹ The court agreed with Ragland and noted that “[f]or all practical purposes, the same motivation behind the mandates of *Miller* applie[d] to the commuted sentence in this case or any sentence that is the practical equivalent to life without parole.”²²²

Notably, *Ragland* asserted that “[o]ftentimes, it is important that the spirit of the law not be lost in the application of the law. This is one such time.”²²³ The court held that the same concerns in *Miller* applied with equal force to LWOP sentences and de facto LWOP sentences.²²⁴ The *Ragland* decision asserted that the mandate for individualized sentencing for juvenile homicide offenders in *Miller* was aimed at preventing all juveniles from spending their lives in prison.²²⁵

On the same day, the Supreme Court of Iowa also considered *State v. Null*,²²⁶ a case in which a juvenile homicide offender had received a cumulative sentence of seventy-five years.²²⁷ The defendant argued that because he was sixteen years old at the time of the offense, and thus, his first chance for release would occur at age sixty-nine years and four months, his sentence constituted a de facto LWOP sentence that fell under the purview of *Miller*.²²⁸ The court held that the rationale of *Miller* and *Graham* included de facto LWOP sentences for juvenile homicide offenders and mandated that such offenders should be considered in the same way as those given LWOP.²²⁹

As seen in the *Ramirez* decision, the Iowa court focused on the mandate from both *Graham* and *Miller* that juveniles be granted a “meaningful opportunity to obtain release” based on lesser culpability and high chance for behavioral reform.²³⁰ Despite the State’s argument that the defendant would in fact be released from prison during his lifetime, rendering *Miller* inapplicable, the Iowa Supreme Court found this to be unavailing.²³¹ Instead, the court looked to what truly constituted a “meaningful opportunity” for release under *Miller*.²³²

221. *Id.*

222. *Id.* at 121.

223. *Id.*

224. *Id.* (“[T]he rationale of *Miller*, as well as *Graham*, reveals that the unconstitutional imposition of a mandatory life-without-parole sentence is not fixed by substituting it with a sentence with parole that is the practical equivalent of a life sentence without parole.”).

225. *Id.* (“[A] government system that resolves disputes could hardly call itself a system of justice with a rule that demands individualized sentencing considerations common to all youths apply only to those youths facing a sentence of life without parole and not to those youths facing a sentence of life with no parole until age seventy-eight.”).

226. 836 N.W.2d 41 (Iowa 2013).

227. *Id.* at 45. The defendant would have become parole eligible after fifty-two-and-a-half years of his sentence at the age of sixty-nine years and four months. *Id.*

228. *Id.*

229. *Id.* at 72.

230. *Null*, 836 N.W.2d at 72 (quoting *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010)).

231. *Id.* at 71.

232. *Id.*

According to the court's rationale, *Miller* and *Graham* were clearly aimed at providing juvenile offenders the chance to rehabilitate themselves given the unique qualities of youth that create such a possibility.²³³ The court in *Null* was highly skeptical that release at the age of sixty-nine years old escaped the concerns of the *Miller* Court regarding juveniles spending a lifetime in prison.²³⁴ According to the *Null* court, "The prospect of geriatric release . . . does not provide a 'meaningful opportunity' to demonstrate the 'maturity and rehabilitation' required to obtain release and reenter society."²³⁵ The court also noted that this consideration was further complicated by life expectancy concerns.²³⁶ However, *Null* stressed that courts should not embark on an in-depth analysis of the actual life expectancy of the defendant.²³⁷ The principles of *Miller* and *Graham* dictate that most juveniles should be given the opportunity for release significantly before the end of their lifetime based on a showing of maturity and reform.²³⁸

The *Null* court stressed that just as with the imposition of a mandatory LWOP sentence, discretion must be used to consider youth as a mitigating factor when aggregate term-of-years sentences combine to create virtual LWOP sentences for juvenile homicide offenders.²³⁹ The court took this one step further and held that *Miller* required "more than a generalized notion of taking age into consideration as a factor in sentencing."²⁴⁰ *Null* directs trial courts to apply a "generally applicable rule" that juveniles are constitutionally different from adults.²⁴¹

If the trial court were to determine that a defendant represented a "rare or uncommon"²⁴² juvenile incapable of reform, there must be more than "a mere recitation of the nature of the crime."²⁴³ Instead, a court must give an

233. *Id.*

234. *Id.* ("Even if lesser sentences than life without parole might be less problematic, we do not regard the juvenile's potential future release in his or her late sixties after a half century of incarceration sufficient to escape the rationales of *Graham* or *Miller*.")

235. *Id.* (citing *Graham*, 130 S. Ct. at 2030).

236. *Id.* at 72 (noting that a review of standard mortality statistics is required for each defendant, and "long-term incarceration presents health and safety risks that tend to decrease life expectancy as compared to the general population"); see also Therese A. Savona, *The Growing Pains of Graham v. Florida: Deciphering Whether Lengthy Term-of-Years Sentences for Juvenile Defendants Can Equate to the Unconstitutional Sentence of Life Without the Possibility of Parole*, 25 ST. THOMAS L. REV. 182, 209–10 (2013) ("The issue of where to draw the line on when an individual's life will end presents a[n] . . . improbable task. Courts have considered a defendant's life expectancy under the National Vital Statistics Report . . . guidelines to determine an individual's life expectancy ascertained by one's age and race. Yet . . . these scientific studies do[] not account for the health, environment, genetic disposition, as well as geographical and socioeconomic influences that could lean towards a longer or shorter life span.")

237. *Null*, 836 N.W.2d at 72.

238. *Id.*

239. *Id.* at 75–76.

240. *Id.* at 74.

241. *Id.*

242. *Id.* at 75.

243. *Id.* at 74–75 ("[T]he Supreme Court has cautioned [that this] cannot overwhelm the analysis in the context of juvenile sentencing.")

in-depth analysis as to why the particular defendant falls outside the general rule that juveniles are undeserving of spending a lifetime in prison.²⁴⁴ The Iowa Supreme Court held that lower courts “*must* recognize that most juveniles who engage in criminal activity are not destined to become lifelong criminals.”²⁴⁵ On the contrary, the majority of juveniles should be given an opportunity for release and sentenced accordingly, regardless of the nature of their crime.²⁴⁶

*B. Florida and Louisiana Decline To Extend
Miller and Graham to Virtual LWOP Sentences*

In contrast to the decisions in California and Iowa, state courts in Florida and Louisiana have held that de facto LWOP sentences do not fall under *Miller* and thus do not constitute cruel and unusual punishment.²⁴⁷ The cases discussed below deal with nonhomicide juvenile offenders as opposed to the homicide offenders in the California and Iowa cases.²⁴⁸ Applying *Miller* to both homicide and nonhomicide virtual LWOP has resulted in outcomes that are not only inconsistent but also raise proportionality issues under the Eighth Amendment.²⁴⁹ Juvenile nonhomicide offenders are forced to serve the equivalent of LWOP sentences, while juvenile homicide offenders are granted the protections under *Miller* that afford meaningful opportunity for release. Part II.B.1 discusses a split in Florida state courts of appeals, and Part II.B.2 gives an overview of Louisiana court decisions that resulted in disproportional outcomes for juvenile nonhomicide offenders.

1. Florida District Courts Are Divided on Lengthy
Term-of-Years Sentences Under *Graham*

Florida state appellate courts are split on virtual LWOP sentences given to juvenile offenders. The Fourth and Fifth District Courts of Appeals have held that, as a matter of law, virtual LWOP sentences do not violate the Eighth Amendment under *Miller* or *Graham*. However, the First District Court of Appeals has recognized a lengthy term-of-years sentence as the equivalent of LWOP and struck down that virtual LWOP sentence as unconstitutional under *Graham*.

In *Henry v. State*,²⁵⁰ the Fifth District Court of Appeals declined to extend the applicability of *Graham* in cases with virtual LWOP sentences given to nonhomicide juvenile offenders.²⁵¹ The defendant had been sentenced to an aggregate term of ninety years for nonhomicide offenses.²⁵²

244. *Id.* at 74.

245. *Id.* at 75 (emphasis added).

246. *Id.*

247. *See infra* Part II.B.1–2.

248. *See supra* Part II.A.

249. *See infra* Part II.B.2.

250. 82 So. 3d 1084 (Fla. Dist. Ct. App. 2012).

251. *Id.* at 1089.

252. *Id.* at 1086.

The *Henry* court recognized the difficulty in adopting any bright-line rule to prohibit virtual LWOP sentences.²⁵³ The court noted that the exact point at which a lengthy term-of-years sentence becomes the equivalent of LWOP cannot be determined without drawing some sort of seemingly arbitrary line based on discretionary judgment calls.²⁵⁴ In *Mediate v. State*,²⁵⁵ the Fifth District was presented with a juvenile defendant who had been sentenced to a cumulative 130 years for kidnapping and four counts of sexual battery.²⁵⁶ The court followed the earlier decision in *Henry* and upheld the virtual LWOP sentence.²⁵⁷

Shortly after *Mediate*, the Fourth District Court of Appeals also refused to extend *Graham* to virtual LWOP sentences in the case of juvenile offenders in *Guzman v. State*.²⁵⁸ In *Guzman*, the defendant received a sixty-year sentence for nonhomicide offenses committed at the age of fourteen.²⁵⁹ Ultimately, the Fourth District followed the same line of reasoning that the Fifth District articulated in *Mediate*.²⁶⁰ Absent any language in *Graham* about de facto life sentences, the court found that the defendant's sixty-year sentence was constitutional.²⁶¹ The *Guzman* court certified two questions to the Florida Supreme Court: "1. Does *Graham v. Florida* apply to lengthy term-of-years sentences that amount to de facto life sentences? 2. If so, at what point does a term-of-years sentence become a de facto life sentence?"²⁶² These questions have been certified to the Florida Supreme Court on several other occasions,²⁶³ but the court has yet to respond or provide lower courts with otherwise meaningful guidance as to how to apply *Graham* to de facto LWOP sentences.²⁶⁴

The *Guzman* court noted that the Florida Court of Appeals districts are split on this issue.²⁶⁵ Both the Fourth and Fifth Districts have declined to extend *Graham* to lengthy term-of-years sentences.²⁶⁶ However, the First District "has taken different approaches" to the issue of virtual LWOP

253. *Id.* at 1089 ("At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number? Would gain time be taken into account? Could the number vary from offender to offender based on race, gender, socioeconomic class or other criteria? Does the number of crimes matter?").

254. *Id.*

255. 108 So. 3d 703 (Fla. Dist. Ct. App. 2013).

256. *Id.* at 704–05.

257. *Id.* at 706–07.

258. 110 So. 3d 480 (Fla. Dist. Ct. App. 2013).

259. *Id.* at 481 ("Because we believe that the express holding of *Graham* established a bright-line and all-encompassing prohibition on actual life sentences without the possibility of parole for nonhomicide juvenile offenses, we hold that *Guzman*'s sixty-year sentence was not unconstitutional . . .").

260. *Id.*

261. *Id.* at 483.

262. *Id.* (citation omitted).

263. See *Rosario v. State*, 122 So. 3d 412, 415–16 (Fla. Dist. Ct. App. 2013); *Taylor v. State*, 117 So. 3d 844, 844 (Fla. Dist. Ct. App. 2013).

264. Review was granted in *Gridine v. State*, 103 So. 3d 139 (Fla. 2012), but the Florida Supreme Court has yet to rule on this issue.

265. *Guzman*, 110 So. 3d at 482–83.

266. *Id.* at 482.

sentences under *Graham*.²⁶⁷ In *Thomas v. State*,²⁶⁸ the court held that a fifty-year sentence given to a seventeen-year-old for nonhomicide offenses was constitutional.²⁶⁹ The court stated, “While we agree that at some point, a term-of-years sentence may become the functional equivalent of a life sentence, we do not believe that situation has occurred in the instant case.”²⁷⁰

In *Gridine v. State*,²⁷¹ the First District echoed the *Thomas* opinion and held that although a term-of-years sentence will at some point become the equivalent of an LWOP sentence, a seventy-year sentence given to a fourteen-year-old offender did not create that situation.²⁷² This seems to be in direct contrast with the Iowa Supreme Court’s interpretation of *Graham* and *Miller*, which deemed geriatric release as violating *Graham*’s mandate to provide meaningful release to juvenile offenders in *Null*.²⁷³

However, Judge Wolf’s dissenting opinion in *Gridine* argued that the appellant would spend the rest of his life in prison, thus violating “the spirit, if not the letter, of the *Graham* decision.”²⁷⁴ Judge Wolf’s dissent appeared to follow the rationale of the Iowa and California cases that extended *Miller* to de facto LWOP sentences.²⁷⁵ Nevertheless, Judge Wolf also noted that absent any statutory provisions on juvenile parole from the Florida legislature, the Florida Supreme Court would have to guidance to the lower courts on how to apply *Graham* in the larger context of lengthy sentences.²⁷⁶

One year later, the First District Court of Appeals changed its tune. In *Floyd v. State*,²⁷⁷ the defendant was sentenced to eighty years in prison on two counts of armed robbery committed at the age of seventeen.²⁷⁸ The court addressed the prior cases that upheld similar sentences as constitutional but disagreed with the holding that “a lengthy term-of-years sentence cannot constitute the functional equivalent of a life sentence without parole.”²⁷⁹ In *Floyd*, the defendant would not have been released until he was ninety-seven years old, ensuring a lifetime in prison.²⁸⁰ The court determined that by sentencing the defendant to eighty years in prison, the trial court had foreclosed any possibility that the defendant would eventually be refit to enter society.²⁸¹ The First District held that this

267. *Id.*

268. 78 So. 3d 644 (Fla. Dist. Ct. App. 2011).

269. *Id.* at 647.

270. *Id.* at 646.

271. 89 So. 3d 909 (Fla. Dist. Ct. App. 2011), *review granted*, 103 So. 3d 139 (Fla. 2012).

272. *Id.* at 911.

273. *See supra* Part II.A.

274. *Gridine*, 89 So. 3d at 911 (Wolf, J., dissenting).

275. *Id.*; *see also supra* Part II.A.

276. *Gridine*, 89 So. 3d at 911.

277. 87 So. 3d 45 (Fla. Dist. Ct. App. 2012) (*per curiam*).

278. *Id.* at 45–46.

279. *Id.* at 47.

280. *Id.* at 46.

281. *Id.* at 45–46.

violated *Graham* and was therefore unconstitutional, seemingly reaching the point at which a lengthy sentence became the equivalent of LWOP.²⁸²

The division among the Florida State District Courts of Appeals is further complicated by the manner in which certain districts have dealt with LWOP sentences under *Miller*. In *Horsley v. State*,²⁸³ the Fifth District Court of Appeals struck down an LWOP sentence given to a defendant convicted of a first-degree murder that he committed at the age of seventeen.²⁸⁴ In doing so, the court held that Florida statute section 775.082 was unconstitutional under *Miller*.²⁸⁵ Section 775.082 stated that the only available sentences for capital murder are mandatory LWOP and capital punishment.²⁸⁶ The court noted that although other district courts of appeals in Florida had recognized the problem with section 775.082 after *Miller*, “none of them [had] given definitive direction to trial courts regarding the available sentencing alternatives after *Miller*.”²⁸⁷

Horsley held that through statutory revival, courts should sentence juvenile homicide offenders to life with the possibility of parole after twenty-five years.²⁸⁸ The 1993 version of *Florida Statutes* section 775.082(1) included such a provision.²⁸⁹ This concept was first articulated in a concurring opinion from the First District regarding a juvenile homicide offender sentenced to LWOP.²⁹⁰ The *Horsley* court noted that the judiciary was left with no current statutory alternatives after *Miller* had rendered section 775.082 unconstitutional²⁹¹:

[T]he judiciary’s role in a case like this—where a legislative enactment is declared unconstitutional and the alternative of having no option to address the subject would be untenable—is largely guided by the doctrine of separation of powers. In other words, the judiciary is attempting to fill a statutory gap while remaining as faithful as possible to expressed legislative intent, but also attempting to avoid judicial intermeddling by crafting our own statute to address the issue with original language.²⁹²

Thus, *Horsley* held that the 1993 version of section 775.082 must be revived.²⁹³ By adopting this ruling, the court was avoiding any attempt to

282. *Id.* at 46 (“While the trial court was correct that the Eighth Amendment does not foreclose the possibility that juveniles who commit nonhomicide crimes will remain in prison for life, *Graham* also cautioned that states are foreclosed from making the judgment at the outset that those offenders will never be fit to reenter society.”).

283. 121 So. 3d 1130 (Fla. Dist. Ct. App. 2013), *review granted*, Nos. SC13-1938, SC13-2000, 2013 WL 6224657 (Fla. Nov. 14, 2013).

284. *Id.* at 1131.

285. *Id.*

286. FLA. STAT. ANN. § 775.082(1) (West Supp. 2013).

287. *Horsley*, 121 So. 3d at 1131.

288. *Id.*

289. *Id.* at 1132.

290. *Partlow v. State*, No. 1D10-5896, 2013 WL 45743, at *4 (Fla. Dist. Ct. App. Jan. 4, 2013) (Makar, J., concurring).

291. *Horsley*, 121 So. 3d at 1132.

292. *Id.*

293. *Id.*

rewrite section 775.082 in original language, a decision that would likely be considered legislating from the bench.²⁹⁴

The court further stated, “We also strongly believe that many of the considerations outlined in *Miller* would be far better addressed years after sentencing in a parole-type setting, once the juvenile has matured into an adult and his or her conduct during decades of confinement has been evaluated.”²⁹⁵ This statement seems puzzling in light of decisions like *Mediate* in the Fifth District that declined to extend parole eligibility to juvenile nonhomicide offenders given virtual LWOP sentences.²⁹⁶ Thus, the Fifth District has advocated for a revival of a statute that would ensure parole eligibility for juvenile homicide offenders after twenty-five years but has upheld virtual LWOP sentences for nonhomicide offenders. The division among Florida courts regarding parole eligibility under *Miller* and *Graham* has created occasions in which juvenile homicide offenders are given parole opportunities after serving twenty-five years of their sentence, but nonhomicide offenders must serve sixty years or more without any hope of release.

2. Louisiana Declines To Extend Graham to Lengthy Term-of-Years Sentences

In *State v. Brown*,²⁹⁷ the Supreme Court of Louisiana also invoked a narrow reading of *Graham*’s holding.²⁹⁸ In *Brown*, the defendant was convicted of aggravated kidnapping and armed robbery.²⁹⁹ The defendant received an LWOP sentence for the aggravated kidnapping charge and four consecutive ten-year sentences for the armed robbery charges.³⁰⁰ The court evaluated a forty-year sentence with no parole eligibility as a virtual LWOP sentence that the defendant challenged under *Graham*’s holding.³⁰¹

The district court overturned both the LWOP sentence and the forty-year cumulative sentence under *Graham*.³⁰² The intermediate court reversed the decision only with regard to the armed robbery sentences, and the Louisiana Supreme Court granted review of the case to determine whether the consecutive sentences were permissible under *Graham*.³⁰³ In this case, based on the State’s calculations, the defendant would receive a sentence of seventy years and would be eligible for parole at age eighty-six.³⁰⁴

294. *Id.* (“The advantage of relying upon the doctrine of statutory revival is that we simply revert to a solution that was duly adopted by the legislature itself.”).

295. *Id.*

296. *See supra* Part II.B.1.

297. 118 So. 3d 332 (La. 2013).

298. *Id.* at 332.

299. *Id.* at 333–34.

300. *Id.* at 334.

301. *Id.*

302. *Id.*

303. *Id.* at 334–35.

304. *Id.* at 335 (“According to our calculations, if we accept the State’s argument that the original armed robbery sentences should be reinstated, defendant will be eligible for parole on the life sentence after serving 30 years . . . at approximately age 46, but will not be

As explained in *Brown*, the Louisiana state legislature had amended its sentencing laws to comply with *Graham*.³⁰⁵ Section 15:574.4(D)(1) of the *Louisiana Revised Statutes* states that any juvenile offender serving a life sentence may be eligible for parole after serving thirty years.³⁰⁶ However, the court noted that the revised statutes did not cover the issue at hand and thus provided no parole requirements for lengthy term-of-years sentences.³⁰⁷

The Louisiana Supreme Court noted that absent any clear direction from the U.S. Supreme Court on de facto LWOP sentences, “state courts are left to grapple with sentences such as the one possibly at issue here, i.e., a term of years that may exceed the life span of the defendant.”³⁰⁸ The *Brown* decision focused on the limited holding of *Graham* and the absence of any application outside of LWOP sentences: “[W]e see nothing in *Graham* that even applies to sentences for multiple convictions, as *Graham* conducted no analysis of sentences for multiple convictions and provides no guidance on how to handle such sentences.”³⁰⁹

Based on the lack of guidance in *Graham*, the Louisiana Supreme Court reversed the lower court’s decision to remove the parole eligibility restrictions on the four consecutive ten-year sentences.³¹⁰ The court also cited Justice Alito’s dissent in *Graham*, which had declined to extend the rationale behind prohibiting LWOP sentences to lengthy term-of-years sentences.³¹¹ The *Brown* decision created a situation in which a juvenile offender sentenced to LWOP will be eligible for parole earlier, after thirty years in this particular case, than a juvenile offender sentenced to a term-of-years constituting virtual LWOP.

This conflict is further evident when considering the multiple cases in Louisiana that have remanded LWOP sentences for juvenile homicide offenders.³¹² On at least three separate occasions, Louisiana courts have overturned LWOP sentences given to juvenile offenders convicted of second-degree murder based on the absence of the consideration of the mitigating factors described in *Miller* in the sentencing courts’ decisions.³¹³ The courts “grant[ed] remand . . . to reconsider the sentence after

entitled to release . . . because his armed robbery sentences would run consecutively to the life sentence . . . thus, he would not be subject to release until possibly age 86.”)

305. *Id.* at 340; see also LA. REV. STAT. ANN. § 15:574.4 (Supp. 2014).

306. LA. REV. STAT. ANN. § 15:574.4. In order to become parole eligible, juvenile offenders must also meet a list of criteria including “mandatory minimum of one hundred hours of prerelease programming,” substance abuse treatment, and a General Equivalency Degree certificate or an equivalent. *Id.* § 15:574.4(D)(1)(a)–(e).

307. *Brown*, 118 So. 3d at 341.

308. *Id.* at 336.

309. *Id.* at 341.

310. *Id.* at 342.

311. *Id.* at 336 (citing *Graham v. Florida*, 130 S. Ct. 2011, 2058 (2010) (Alito, J., dissenting)).

312. See *State v. Williams*, 108 So. 3d 1169 (La. 2013) (per curiam); *State ex rel. Landry v. State*, 106 So. 3d 106 (La. 2013) (per curiam); *State v. Fletcher*, 112 So. 3d 1031 (La. Ct. App. 2013).

313. *Williams*, 108 So. 3d at 1169; *State ex rel. Landry*, 106 So. 3d at 106–07; *Fletcher*, 112 So. 3d at 1037.

conducting a new sentencing hearing in accordance with the principles enunciated in *Miller v. Alabama*.³¹⁴ Yet, a juvenile nonhomicide offender subject to a lengthy sentence was not granted the same remand of his sentence so that a sentencing court could consider his individual characteristics and qualities of youth.³¹⁵

Ultimately, these holdings have led to outcomes in which juvenile *homicide* offenders may be eligible for parole far before juvenile *nonhomicide* offenders who are sentenced to lengthy term-of-years sentences that result in the equivalent of LWOP.³¹⁶ The juvenile offenders in *Mediate*, *Henry*, and *Guzman* are, at the time of publishing, serving lengthy sentences constituting virtual LWOP for nonhomicide offenses.³¹⁷ Yet homicide juvenile offenders serving de facto LWOP sentences were granted reprieve in California and Iowa state courts under *Miller*.³¹⁸

III. CALIFORNIA DIRECTLY ADDRESSES VIRTUAL LWOP SENTENCES, WHILE LEGISLATIVE REFORM IN OTHER STATES FAILS TO ADEQUATELY ENACT COMPREHENSIVE JUVENILE SENTENCING REFORM

As several authors have noted, the issue of virtual LWOP sentences under *Graham* creates constitutional questions and likely invites arbitrary line drawing as to how long a sentence must be to trigger constitutional protections against LWOP under *Graham* and *Miller*.³¹⁹ This Note proposes that the only adequate manner in which states can address both LWOP and virtual LWOP given to all juvenile offenders is through statutory provisions that remove parole restrictions from juvenile offenders.

Several states have taken actions toward compliance with *Miller* and *Graham* by enacting statutory revisions that provide an opportunity for resentencing and parole for those juvenile offenders sentenced to LWOP or life imprisonment.³²⁰ These statutes set forth certain requirements that must be met for inmates who were sentenced to LWOP for crimes committed as juveniles to become eligible for resentencing and possibly parole.³²¹ As Part III outlines, states including Louisiana and Wyoming have enacted this type of legislation, although the states vary on how many

314. *Williams*, 108 So. 3d at 1169.

315. *See generally* *State v. Brown*, 118 So. 3d 332 (La. 2013).

316. *See supra* Part II.

317. *See supra* Part II.

318. *See supra* Part II.

319. Schlessel, *supra* note 9, at 1054 (“[E]xtending *Graham* to term-of-years sentences would generate a multitude of line-drawing problems. Undeniably, holding *Graham* applicable to lengthy term-of-years sentences would trigger significant questions. For example, at what point does a term-of-years sentence become unconstitutional?”); *see also* Freeman, *supra* note 111, at 983 (“[S]entencing law is notoriously complicated and legislatures tend to grant sentencing judges a healthy amount of discretion. Unfortunately, this means that some prosecutors and judges might pursue sentences that are just short of an unconstitutional de facto LWOP sentence.”).

320. *See infra* Part III.A.

321. *See infra* Part III.A.

years of an LWOP sentence an offender must serve before he or she becomes eligible for reconsideration.³²²

Unfortunately, these statutes do not apply to offenders outside of those who were explicitly sentenced to LWOP or life imprisonment.³²³ Thus, although the statutory revisions discussed below are in compliance with *Miller* and *Graham*, they do not adequately address the issue of lengthy term-of-years sentences that constitute virtual LWOP. However, as explained in Part III.B, other states, including Montana, already had statutory provisions in place that remove parole restrictions from any sentence given to a juvenile offender before the *Miller* decision. This type of law ensures that juveniles will at least be eligible for release and that a sentencing court can make the determination at a later point as to whether a juvenile falls among the limited number of offenders who deserve life in prison.³²⁴ Removing parole restrictions for all juvenile offenders, regardless of the offense committed or the sentence given, may be the only viable method of confronting the issue of virtual LWOP sentences. Part III.B also discusses the comprehensive juvenile sentencing reform in California that directly takes into account virtual LWOP sentences after *Caballero*.

A. *Louisiana and Wyoming Respond to Graham and Miller
Through Statutory Reform Providing Juveniles
Sentenced to LWOP with Some Hope for Release*

Part III.A.1 provides an overview of Louisiana's sentencing reform post-*Miller* and explains why the state's statute that pertains to juvenile homicide offenders may be inadequate to provide opportunities for parole. Part III.A.2 discusses a similar Wyoming statute enacted to provide the potential for parole for all juvenile offenders, regardless of the offense. The Wyoming statute also only applies to juvenile LWOP offenders, and while it represents a comprehensive response to *Miller*, it does not address the issues posed by virtual LWOP.

1. Louisiana Provides Parole Eligibility for
Homicide Offenders Only Prior to Sentencing

The Louisiana State Senate eliminated parole restrictions on life sentences for juvenile offenders who committed nonhomicide offenses.³²⁵ Under section 15:574.4 of the *Louisiana Revised Statutes*, any juvenile offender serving a life sentence for a nonhomicide offense is eligible for parole after serving thirty years of his or her sentence.³²⁶ To qualify for parole eligibility, a three-person panel must consider the offender.³²⁷ This

322. See *infra* Part III.A.

323. See *infra* Part III.A.

324. See *infra* Part III.B.

325. LA. REV. STAT. ANN. § 15:574.4(D) (2014).

326. See *supra* note 306 and accompanying text.

327. LA. REV. STAT. ANN. § 15:574.4(D)(2).

panel is provided with a written evaluation from an “expert[] in adolescent brain development.”³²⁸

Recent statutory revisions in Louisiana also include a provision that provides parole eligibility for juvenile homicide offenders convicted of first- or second-degree murder.³²⁹ Offenders that have served thirty-five years of their life sentence may be entitled to parole “if a judicial determination has been made that the person is entitled to parole eligibility pursuant to Code of Criminal Procedure Article 878.1.”³³⁰ Article 878.1 mandates that any juvenile convicted of first- or second-degree murder must be subject to a hearing prior to sentencing to determine parole eligibility on a sentence of life imprisonment.³³¹ Juvenile offenders may present mitigating factors³³² to establish if they qualify for parole eligibility.³³³ The statute parrots the *Miller* decision in mandating that “[s]entences imposed without parole eligibility should normally be reserved for the worst offenders and the worst cases.”³³⁴

Although Louisiana provides juvenile homicide offenders sentenced to life imprisonment with some chance for release, this opportunity only arises before sentencing, pursuant to article 878.1.³³⁵ As outlined above, sentencing courts are likely not well equipped to make decisions about a juvenile’s potential for reform at this early stage.³³⁶ *Miller* did not rule out the possibility that some juveniles may fall into the category of offenders meriting a lifetime in prison; however, the spirit of both *Miller* and *Graham* suggest that this determination should be made later, after the mitigating characteristics of youth can no longer account for criminal behavior.³³⁷

Furthermore, section 15.574.4 only applies to life sentences and does not address any juveniles, such as the defendant in *Brown*,³³⁸ who may have been sentenced to lengthy term-of-years sentences, which can potentially span much longer than thirty-five years with no parole eligibility until the end of the sentence. In this regard, Louisiana has not provided a solution to the virtual LWOP sentences problem.

328. *Id.*

329. *Id.* § 15:574.4(E)(1).

330. *Id.*

331. LA. CODE CRIM. PROC. ANN. art. 878.1(A) (Supp. 2014).

332. *Id.* art. 878.1(B) (mitigating factors outlined in § 878.1 include those discussed in *Miller*: “the offender’s level of family support [and] social history”).

333. *Id.*

334. *Id.*

335. *Id.* art. 878.1(A).

336. *See supra* Part II.A.1.

337. *See supra* Part II.A.1.

338. *See supra* Part II.B.2.

2. Wyoming Allows Juveniles an Opportunity for Parole After Twenty-Five Years Served Regardless of the Offense

Wyoming also enacted sentencing reform after the Supreme Court's ban on mandatory juvenile LWOP sentences from *Miller*.³³⁹ In 2013, the Wyoming State legislature amended several statutory provisions through House Bill 23 (H.B. 23), effectively eliminating juvenile LWOP.³⁴⁰ Prior to H.B. 23, section 6-2-101 of the *Wyoming Statutes* mandated a sentence of LWOP for first-degree murder.³⁴¹ Through H.B. 23, section 6-2-101 was amended to include an exception for juvenile offenders convicted of first-degree murder for whom the statutory punishment is now a sentence of life imprisonment.³⁴² H.B. 23 also amended section 6-10-301, the Wyoming statute that previously prohibited parole for offenders serving LWOP or life imprisonment unless the governor commuted the sentence to a term of years.³⁴³

A juvenile offender is now eligible for parole after serving twenty-five years of their sentence regardless of the offense committed under section 6-10-301.³⁴⁴ The only exceptions outlined in section 6-10-301 are for those offenders who assaulted any employee of a correctional institution with a deadly weapon or who attempted to escape from incarceration while serving their sentence.³⁴⁵ This statutory provision seems to follow the logic articulated in *Miller* that nothing the Supreme Court said in *Graham* regarding juvenile culpability is "crime specific."³⁴⁶

In contrast to the similar legislation in Louisiana, no specific factors or requirements are listed in section 6-10-301 for a juvenile to be considered eligible for parole in front of a sentencing or parole board.³⁴⁷ This may prove to be a lower bar for juvenile offenders when petitioning a parole board for release. On the other hand, the parole board may simply be allotted more discretion in making its determination about the eligibility of the offender. In either case, section 6-10-301 only applies to juvenile

339. See WYO. STAT. ANN. § 6-10-301(c) (2013).

340. H.B. 23, 62nd Leg., 2013 Gen. Sess. (Wyo. 2013), available at <http://legisweb.state.wy.us/2013/Enroll/HB0023.pdf> ("An Act relating to crimes and offenses; modifying provisions relating to life sentences for juvenile offenders generally; eliminating life sentences without parole for juvenile offenders; and providing for an effective date.").

341. *Id.*

342. *Id.*

343. *Id.*

344. *Id.* ("A person sentenced to life imprisonment for an offense committed before the person reached the age of eighteen (18) years shall be eligible for parole after commutation of his sentence to a term of years or after having served twenty-five (25) years of incarceration.").

345. WYO. STAT. ANN. § 7-13-402(b) (2013) (stating that those juvenile offenders who, while serving their sentence, after the age of eighteen either: "(i) Made an assault with a deadly weapon upon any officer, employee or inmate of any institution; or (ii) Escaped, attempted to escape or assisted others to escape from any institution" are not considered eligible for parole after twenty-five years).

346. *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012).

347. WYO. STAT. ANN. § 6-10-301(c).

offenders sentenced to life imprisonment and, like the Louisiana statutes, does not adequately address virtual LWOP.

B. Statutory Schemes in Montana and California May Present Potential Solutions to Virtual LWOP Sentences

Part III.B.1 looks at a Montana state law enacted prior to *Graham* and *Miller* that may present a potential solution to the issue of virtual LWOP sentences not seen in statutory responses post *Miller*. The Montana statute removes parole restrictions for all juvenile offenders. Part III.B.2 discusses California Penal Code section 1170, mentioned above in Part II, in detail and the multiple opportunities juvenile offenders may have for resentencing and parole. Part III.B.2 also looks at Senate Bill 260 in California, recently signed into law in September 2013. Senate Bill 260 directly addresses the issue of virtual LWOP and represents the only comprehensive statutory reform specifically aimed at resolving issues posed by lengthy term-of-years sentences given to both homicide and nonhomicide juvenile offenders.

1. The Montana Statute May Present a Solution to the Issue of Virtual LWOP Sentences for All Juvenile Offenders

Montana's Code of Criminal Procedure provides an opportunity for release for all juvenile offenders regardless of the crime or the nature of the sentence imposed.³⁴⁸ Although this statutory provision was not enacted in response to *Graham* or *Miller*, Montana's treatment of juvenile offenders addresses both the issue of homicide versus nonhomicide offenders and de facto LWOP sentences. Section 46-18-222 of the *Montana Code* provides an exception to mandatory life sentences for offenders who committed offenses while under the age of eighteen.³⁴⁹ This exception applies to all juvenile offenders, regardless of the offense committed.³⁵⁰ This statute does not differentiate between nonhomicide and homicide juvenile offenders.³⁵¹ Furthermore, section 46-18-222 removes the "restrictions on parole eligibility" for all juvenile offenders.³⁵² Thus, a juvenile sentenced to a lengthy term-of-years sentence constituting the equivalent of LWOP would be eligible for parole under this statute.

This would directly impact offenders such as the defendant in *State v. Brown*, who was faced with a forty-year sentence with no parole despite *Miller's* mandate that all juveniles receive an opportunity for release.³⁵³ Courts would not be able to circumvent *Miller's* ban on mandatory LWOP

348. See MONT. CODE ANN. § 46-18-222 (West Supp. 2013).

349. *Id.* ("Mandatory minimum sentences prescribed by the laws of this state, mandatory life sentences . . . and restrictions on parole eligibility . . . do not apply if: (1) the offender was less than 18 years of age at the time of the commission of the offense for which the offender is to be sentenced . . .").

350. *See id.*

351. *See id.*

352. *See id.*

353. *See supra* Part II.B.2.

sentences by upholding lengthy term-of-years sentences that ensure a lifetime in prison for juvenile offenders under a statutory provision such as that enacted in Montana. The Montana statute still leaves open the possibility that the rare juvenile homicide offender who shows no capability of reform will spend the remainder of his or her life in prison. The availability of parole does not guarantee that parole will be granted. To ensure that the worst offenders are not guaranteed parole, requirements such as those seen in California Penal Code section 1170 could be listed in a juvenile parole statute to implement the *Miller* holding.³⁵⁴ However, these requirements pose problems for those juveniles who may be deserving of resentencing or even release but are unable to demonstrate that they meet the extensive list of requirements.

2. California Gives Juvenile LWOP Offenders Multiple Chances for Resentencing and Enacts Comprehensive Reform To Address Virtual LWOP

California enacted comprehensive juvenile sentencing reforms in response to *Miller* and *Graham*. The California State legislature passed the “Fair Sentencing for Youth Act” in September of 2012 in the wake of the *Miller* decision.³⁵⁵ As a response to *Miller*’s mandate to provide juveniles with a “meaningful opportunity to obtain release,”³⁵⁶ the Fair Sentencing for Youth Act gives all juvenile offenders with LWOP sentences multiple opportunities for parole eligibility.³⁵⁷ Juvenile defendants may petition for a recall of an LWOP sentence after serving fifteen years.³⁵⁸ The offender may be either resentenced or granted parole.³⁵⁹ If, after the sentencing court has considered the defendant’s potential for rehabilitation, the offender is not recalled for resentencing, the defendant may repetition for review after serving twenty, twenty-four, and twenty-five years of an LWOP sentence.³⁶⁰ As evidenced by the California Senate’s legislative history for section 1170, this sentencing scheme in California also follows the insistence of the *Miller* Court that the logic of *Graham* apply to all juvenile offenders, regardless of the crime committed.³⁶¹ Thus, juvenile homicide offenders are given the same opportunities to reform as those juveniles convicted of nonhomicide offenses.

354. See CAL. PENAL CODE § 1170(d)(2)(F) (West Supp. 2014).

355. S.B. 9, 2012 Leg. (Ca. 2012), available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120SB9 (codified at CAL. PENAL CODE § 1170 (West 2013)).

356. *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010).

357. CAL. PENAL CODE § 1170(d)(2).

358. *Id.* § 1170(d)(2)(A)(i).

359. *Id.*

360. *Id.* § 1170(d)(2)(H).

361. See SENATE FLOOR REP. ON S.B. 9, S.B. 9, 2011–2012 Sess., at 11 (Ca. 2012), available at http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0001-0050/sb_9_cfa_2012_0817_125307_sen_floor.html (“While [juvenile offenders] should be held accountable for their actions, even those who commit serious crimes should have the opportunity to prove they have matured and changed.”).

Although section 1170 seems to take large steps toward incorporating *Miller*'s holding into state law, the statute "hardly throws open the prison doors for all violent offenders."³⁶² Prisoners who were convicted of offenses committed as juveniles must meet several criteria demonstrating remorse and rehabilitation.³⁶³ Even after this consideration, resentencing is entirely at the discretion of the sentencing court.³⁶⁴ In fact, proponents of the California statute concede that those juveniles eligible for resentencing after years in prison are likely small in number.³⁶⁵ Furthermore, juvenile offenders subject to resentencing are not ensured parole.³⁶⁶ In reality, section 1170 "will probably only benefit a small percentage of inmates, those whose crimes were so grave that they were given LWOP sentences, but whose actions were more the result of adolescent delinquency rather than inherent evil."³⁶⁷ However, *Miller* did not foreclose the possibility that LWOP may be an appropriate sentence for some juvenile homicide offenders who are beyond reform.³⁶⁸ Thus, section 1170 complies with *Miller* in providing juvenile offenders the opportunity for parole but may not actually be effective in providing any meaningful chance at rehabilitation and release for the majority of juvenile LWOP offenders.

As seen with both the Louisiana and Wyoming statutes, section 1170 only applies to those juveniles sentenced to LWOP.³⁶⁹ Under all three statutory schemes, a juvenile homicide offender sentenced to LWOP or life imprisonment will be provided opportunities for parole at various stages in his sentence. However, potential exists that a juvenile offender convicted of either nonhomicide or homicide offenses, who is sentenced to a lengthy term-of-years sentence, will not be eligible for parole. This is especially true in states like Louisiana where courts have upheld virtual LWOP sentences as outside the scope of *Graham* and *Miller* and thus have upheld parole restrictions, ensuring that the offender spends the majority or entirety of his or her life in prison.³⁷⁰

362. Roman Edwards, *Getting a Break from Forever: Chapter 828 Provides an Opportunity for Juveniles Sentenced to Life Without Parole To Get Their Lives Back*, 44 MCGEORGE L. REV. 744, 757 (2013).

363. CAL. PENAL CODE § 1170(d)(2)(F)(iv)–(viii). Some factors that the Court may consider include: "[T]he defendant had insufficient adult support or supervision and had suffered from psychological or physical trauma, or significant stress The defendant has performed acts that tend to indicate rehabilitation or the potential for rehabilitation, including, but not limited to, availing himself or herself of rehabilitative, educational, or vocational programs The defendant has maintained family ties or connections with others The defendant has had no disciplinary actions for violent activities in the last five years in which the defendant was determined to be the aggressor." *Id.*

364. Edwards, *supra* note 362, at 757.

365. *Id.* at 758 ("[The] authors concede that because juvenile offenders enter the prison system at such a young and impressionable age, it is unlikely many will develop the interpersonal and communication skills necessary to be successful in the rigorous resentencing process.").

366. *Id.* at 757–58.

367. *Id.* at 761.

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

369. The Louisiana and Wyoming statutes are applicable to juvenile offenders with sentences of life imprisonment. *See supra* Part III.A.

370. *See supra* Part II.A.2.

The California State legislature has continued to enact sentencing reform that responds directly not only to *Miller* but also to *People v. Caballero* and the issue of de facto LWOP sentences given to juvenile offenders. In September 2013, California Governor Jerry Brown signed Senate Bill 260 (S.B. 260),³⁷¹ which addresses juvenile offenders given lengthy sentences outside of LWOP. S.B. 260 “requires the state parole board to consider releasing juvenile offenders who have served at least 15 years of a long sentence.”³⁷² S.B. 260 creates “youth offender parole hearing[s]” for any juvenile offender given a lengthy prison sentence.³⁷³ Furthermore, S.B. 260 directly codifies the central holdings of *Miller* and *Graham* by mandating that youth offender parole boards “shall provide for a meaningful opportunity to obtain release.”³⁷⁴ Parole boards considering offenders who were convicted as juveniles are instructed to take growth, maturity, and “the diminished culpability of juveniles as compared to adults” into account.³⁷⁵

S.B. 260 added section 3051 to the California Penal Code, creating provisions for youth offender parole hearings.³⁷⁶ Under the provisions of section 3051, any juvenile offender who is still incarcerated after serving fifteen years of his or her “determinate” or term-of-years sentence becomes parole eligible.³⁷⁷ A juvenile offender sentenced to a life term of less than twenty-five years to life becomes eligible for parole before a youth offender parole hearing during his or her twentieth year of incarceration.³⁷⁸ Finally, a juvenile offender given a life sentence of twenty-five years to life is eligible for parole during his or her twenty-fifth year of that sentence.³⁷⁹

Section 1 of S.B. 260 describes the legislative intent behind the bill:

The purpose of this act is to establish a parole eligibility mechanism that provides a person serving a sentence for crimes that he or she committed as a juvenile the opportunity to obtain release when he or she has shown that he or she has been rehabilitated and gained maturity, in accordance with the decision of the California Supreme Court in *People v. Caballero* and the decisions of the United States Supreme Court in *Graham v. Florida* and *Miller v. Alabama*.³⁸⁰

The mention of *People v. Caballero* seems to indicate that the legislature was directly addressing the issue of virtual LWOP sentences after the California Supreme Court held that virtual LWOP must be considered in the

371. S.B. 260, 2013 Leg., 2013–2014 Reg. Sess. (Ca. 2013), available at http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_02510300/sb_260_bill_20130916_chaptered.pdf.

372. Jesse Wegman, *Once Again, California Eases Harsh Sentencing Laws*, N.Y. TIMES (Sept. 25, 2013, 12:15 PM), http://takingnote.blogs.nytimes.com/2013/09/25/once-again-california-eases-harsh-sentencing-laws/?_r=0.

373. S.B. 260 § 4 (codified at CAL. PENAL CODE § 3051 (West Supp. 2014)).

374. *Id.*

375. *Id.* § 5 (codified at CAL. PENAL CODE § 4801(c)).

376. *Id.* § 4.

377. CAL. PENAL CODE § 3051(b)(1).

378. *Id.* § 3051(b)(2).

379. *Id.* § 3051(b)(3).

380. S.B. 260 § 1 (citations omitted).

same manner as LWOP under *Graham*.³⁸¹ Section 1 further mentions *Miller* and thus incorporates the *Caballero* rationale to extend to all juvenile offenders, including those convicted of homicide.³⁸² Juveniles convicted of LWOP are exempt from S.B. 260, further indicating that the bill was aimed at comprehensive sentencing reform that takes virtual LWOP into account.³⁸³

The California legislature takes sentencing reform a step further in S.B. 260 and sets up early mechanisms for inmates that further promote rehabilitation and a “meaningful opportunity for release.”³⁸⁴ Section 2 of S.B. 260 amends California Penal Code section 3041 and mandates that the Board of Parole Hearings meet with inmates six years prior to the minimum date of parole eligibility.³⁸⁵ These meetings are conducted for the “purposes of reviewing and documenting the inmate’s activities and conduct pertinent to both parole eligibility and to the granting or withholding of post conviction credit.”³⁸⁶ The Board is required to inform the inmate of the details of the parole hearing process and of specific information regarding the individual’s suitability for parole.³⁸⁷ Section 3041 thus follows the mandate to provide a meaningful opportunity to release, as articulated in *Miller* and its progeny. Juvenile offenders will be informed early in their sentences about the requirements for parole and how to meet them.³⁸⁸ The board considers such factors as “work assignments, rehabilitative programs, and institutional behavior.”³⁸⁹

Finally, S.B. 260 created California Penal Code section 4801(c), which gives guidance to the Board of Parole Hearings on the manner in which youth should be taken into account in the parole context.³⁹⁰ The newly amended section 4801(c) instructs the board to “give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law.”³⁹¹ S.B. 260 represents a comprehensive effort on the part of the California State legislature to address the issues created by virtual LWOP sentences, as seen initially in *Caballero* with juvenile nonhomicide offenders. The new parole system created for juvenile inmates with lengthy sentences further incorporates juvenile homicide offenders with virtual LWOP sentences, such as the defendant in *Ramirez*. S.B. 260 gives parole boards until July 1, 2015, to

381. *People v. Caballero*, 282 P.3d 291 (Cal. 2012).

382. S.B. 260 § 1.

383. *Id.* § 4(h) (“This section shall not apply to cases in which . . . an individual was sentenced to life in prison without the possibility of parole.”).

384. *Id.* §§ 1, 4.

385. *Id.* § 2.

386. *Id.*

387. *Id.*

388. CAL. PENAL CODE § 3041(a) (West Supp. 2014).

389. *Id.*

390. S.B. § 5.

391. CAL. PENAL CODE § 4801(c).

comply with the statutory revisions and complete parole hearings to those offenders eligible for parole consideration under S.B. 260.³⁹²

Opponents of statutory reform like S.B. 260 may argue that this type of sentencing reform goes too far in ensuring release for what potentially may be the worst violent juvenile offenders. Specifically, opponents have noted that eliminating parole restrictions for all juvenile offenders likely places an undue burden on the families of the victims, especially with regard to juvenile homicide offenders.³⁹³ Statutory schemes that provide for multiple opportunities for inmates to be considered for parole may force families of victims or, in some cases of severe nonhomicide crimes, the victims themselves, to relive the experience over and over again. This is likely especially true if states are to enact statutory reform similar to that in California, where juvenile offenders have multiple opportunities to obtain parole during lengthy sentences.

Although these concerns about the practical implications of statutory reform such as S.B. 260 or statutes similar to section 46-18-222 of Montana's Code of Criminal Procedure are certainly valid, removing restrictions on parole eligibility for juvenile offenders may be the only valid way to avoid arbitrary line-drawing problems that apply to virtual LWOP. Furthermore, statutes like S.B. 260 ensure that juvenile nonhomicide offenders will not be left serving more time than juvenile homicide offenders because of a virtual LWOP sentence. By providing inmates who were convicted as juveniles with multiple opportunities at various stages of their lengthy sentences, a sentencing court or a parole board will not be asked to determine exactly at what point a lengthy term-of-years sentence becomes LWOP. Instead, juvenile offenders are given equal opportunity for reform and the parole board must determine whether or not each offender represents the rare juvenile homicide offender who may be beyond reform and must spend the remainder of his or her life in prison.

CONCLUSION

Ultimately, virtual LWOP sentences given to juvenile offenders pose the same issues considered with mandatory LWOP sentences in *Miller*. By refusing to extend the holdings of *Miller* and *Graham* to virtual LWOP, state courts have created situations in which juveniles convicted of homicide may be eligible for parole before nonhomicide juvenile offenders in the same state. State legislatures should take this problem into account when drafting statutory revisions to comply with *Miller* and *Graham*. If

392. *Id.* § 3051(i).

393. *Florida Struggles To Craft Juvenile Sentencing Policy*, CBS MIAMI (Oct. 16, 2013, 10:16 AM), <http://miami.cbslocal.com/2013/10/16/florida-struggles-to-craft-juvenile-sentencing-policy> (discussing concerns over victims' families reliving crimes through the endless hearings associated with parole); see also Peggy Senzarino, *Teens Sentenced to Life in Limbo; Families Need Closure*, GLOBE GAZETTE (Dec. 8, 2013, 9:00 AM), http://globegazette.com/news/local/teens-sentenced-to-life-in-limbo-families-need-closure/article_d3b68477-12e7-5310-a2ca-87e15e18b9d4.html (noting that parole hearings and resentencing create an "endless run of hearings and court appearances [that] is disturbing to the families").

virtual LWOP sentences are not incorporated into sentencing laws, state courts may have to embark on some sort of arbitrary determination as to how long a sentence must be in order to constitute virtual LWOP. This would inevitably include some life expectancy calculations, which, as articulated above, are likely impossible based on demographic factors and on the effect that prison may have on life span. To avoid this potentially problematic analysis, states can include provisions that provide for parole at certain stages of lengthy sentences regardless of the offense committed or the sentence imposed.

Statutory reform that deals directly with juveniles sentenced to LWOP or life imprisonment, such as that enacted in Louisiana and Wyoming, does not adequately address the constitutional questions that arise with juvenile offenders sentenced to virtual LWOP. In order to avoid circumstances in which a juvenile nonhomicide offender sentenced to LWOP is eligible for parole later than a juvenile homicide offender given a sentence of LWOP or life, states must either remove all parole restrictions on juvenile offenders or create opportunities for parole for lengthy term-of-years sentences. Following either the reforms of the California State legislature or the Montana statute that ensures parole eligibility for all juveniles, states will likely be able to avoid any constitutional issues surrounding juveniles given virtual LWOP sentences.