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Note

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At only fourteen, Kuntrell Jackson was sentenced to life without parole.[1] In 1999 Kuntrell and his friends agreed to rob a video store, and on the way to the robbery Kuntrell's friend revealed that he was carrying a gun.[2] During the robbery Kuntrell's friend shot and killed the storeowner.[3] Kuntrell was found liable on a felony-murder theory, which required a mandatory minimum sentence of life without parole.[4] Eventually, in a 2012 opinion for *Miller v. Alabama* the Supreme Court held that sentencing juvenile homicide offenders to life without parole is unconstitutional unless the sentencing court takes the unique circumstances of youthfulness into account.[5] The Supreme Court stressed that juveniles have transitory personalities and should have an opportunity for reform.[6] Now, as a result of *Miller*, Kuntrell Jackson could receive a lesser sentence and one day be granted parole and released from prison.[7] The Arkansas Supreme Court granted Kuntrell Jackson the benefit

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1. *Inmate Details of Kuntrell Jackson*, ARK. DEP'T OF CORR., http://adc.arkansas.gov/inmate_info/search.php?dcnum=128638&a=1&firstname=ku (last visited Dec. 3, 2014) (providing information about Jackson's age and sentence).
2. Jackson v. Arkansas, 194 S.W.3d 757, 758 (Ark. 2004).
3. *Id.* at 759.
4. *Id.*; Jackson v. Norris, 426 S.W.3d 906, 907–08 (Ark. 2013).
5. Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012).
6. *See id.* at 2469.
7. *See id.* at 2475 (remanding both Miller's and Jackson's cases).

of retroactive application of *Miller*, reopening his case and ordering a new sentencing trial.[8] Several other states such as Mississippi and Massachusetts have granted Jackson's fellow juvenile lifers the benefit of *Miller*, placing a mass of resentencing trials on sentencing courts' dockets.[9]

Kuntrell is no longer fourteen though; he is a twenty-nine[10] year old man who spent his critical character-developing years in prison, without any hope of freedom.[11] Kuntrell no longer carries the unique circumstances of youthfulness, because he is no longer a child.[12] His character has developed, and some factors the Supreme Court requires courts to consider when sentencing juveniles to life without parole are no longer relevant.[13] Many other juvenile lifers throughout the country facing resentencing hearings are in this unusual situation along with Kuntrell Jackson.[14]

Miller fails to address this common[15] paradox of taking youthfulness into account when re-sentencing a juvenile lifer who is no longer a juvenile.[16] The Supreme Court simply states that youthfulness must be taken into account during sentencing because juveniles have three unique characteristics: undeveloped sense of responsibility, vulnerability to environmental

8. *Norris*, 426 S.W.3d at 909–10.

9. *See, e.g.*, Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 275–76 (Mass. 2013); Jones v. State, 122 So. 3d 698, 701–03 (Miss. 2013) (en banc).

10. Note that all references to the age of offenders are ages at the time of this writing.

11. *Inmate Details of Kuntrell Jackson*, *supra* note 1.

12. *See* Jeffery Jensen Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Twenties*, 55 AM. PSYCHOLOGIST 469, 469 (2000) (arguing that the key development years for people run through the mid-twenties).

13. *See Miller*, 132 S. Ct. at 2464, 2466, 2469 (outlining the three most important differences between adults and juveniles: lack of maturity, vulnerability, and transitory personality). For the argument that the "transitory personality" factor is no longer relevant to adult juvenile lifers, see *infra* Part II.B.

14. *See infra* Part II.B.1 (pointing out examples of adult juvenile lifers throughout the country).

15. *See* Ashby Jones, *Life Sentences' Blurred Line*, WALL ST. J., Sept. 4, 2013, at A3, *available at* http://online.wsj.com/public/resources/documents/print/WSJ_-A003-20130904.pdf (stating that there were approximately 2,100 juvenile lifers sentenced pre-*Miller*).

16. *Miller*, 132 S. Ct. at 2475 (remanding Miller's and Jacksons' cases for further proceedings without explaining how evidence of their youthfulness should matter in a re-sentencing hearing).

influences, and lack of a defined character.[17] It is unclear how to take the third characteristic, often referred to as "transitory personality,"[18] into account during a re-sentencing hearing. There is no longer a present interest in giving the juvenile offender a chance to reform his or her personality. This is a problem because *Miller* relies on this characteristic more heavily than the others.[19] In the cases following *Miller* no lower courts have identified this problem.[20] In Kuntrell Jackson's case the Arkansas Supreme Court simply granted him a re-sentencing hearing where he can present "*Miller* evidence," without describing how this evidence should be used in determining Jackson's sentence.[21]

This Note argues that it is paradoxical to re-sentence juvenile lifers who are now adults by taking youthfulness characteristics into account. It is moot for a court to determine that a lower sentence than life without parole is warranted because of the juvenile offender's transitory personality when the offender no longer has a transitory personality.[22] This Note offers a solution for retroactively applying *Miller* to juvenile offenders who are now adults without requiring complete re-sentencing hearings that look at crimes in a vacuum. Part I overviews the Supreme Court's juvenile justice cases, the retroactivity doctrine, and courts' treatment of *Miller*'s retroactivity thus far. Part II determines that *Miller* is retroactive, and discusses the problems inherent in re-sentencing juvenile lifers and/or offering them parole. Part III proposes a "hybrid hearing" solution,

17. *Id.* at 2464, 2475 ("[Our] cases relied on three significant gaps between juveniles and adults. First, children have a 'lack of maturity and an underdeveloped sense of responsibility,' leading to recklessness, impulsivity, and heedless risk-taking. Second, children 'are more vulnerable . . . to negative influences and outside pressures,' including from their family and peers . . . . And third, a child's character is not as 'well formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievable depravity.'" (quoting Roper v. Simmons, 543 U.S. 551, 569–70 (2005))).

18. *See, e.g.*, *id.* at 2465, 2469 (using the terms "transient rashness" and "transient immaturity" to describe an essential characteristic of juveniles).

19. *See infra* Parts I.B. and II.B.

20. A handful of lower courts have ordered re-sentencing hearings. *See infra* Part I.C.

21. Jackson v. Norris, 426 S.W.3d 906, 907, 910 (Ark. 2013) ("We also instruct that a sentencing hearing be held in the Mississippi County Circuit Court where Jackson may present for consideration evidence that would include that of his 'age-related characteristics, and the nature of' his crime." (quoting *Miller*, 132 S. Ct. at 2475)).

22. *See* Arnett, *supra* note 12, at 469 ("For most people, the late teens through the midtwenties are the most *volitional* years of life.").

which would allow courts to conduct hearings that are a mixture between sentencing and parole hearings. In "hybrid hearings," courts would look at some of the "youthfulness" characteristics from *Miller* as related to the crime, but also the offender's current characteristics. This allows courts to address the transitory personality characteristic *ex-post*, while avoiding the problem a simple re-sentencing hearing presents when addressing this characteristic.

I. THE LEGAL CONTEXT FOR RETROACTIVELY APPLYING *MILLER V. ALABAMA*

The problem presented by *Miller* occurs at the intersection of two areas of law: a presumption of lessened culpability for juvenile offenders and the retroactivity doctrine.[23] Understanding the evolution of both areas of law is necessary to properly analyze retroactive application of *Miller*. Part A overviews the Supreme Court's juvenile justice cases. Part B of this section provides background of the retroactivity doctrine. Part C explains how state and federal courts have interacted with *Miller's* retroactivity thus far.

A. "YOUTHFULNESS" AND THE SUPREME COURT

Over the last decade the Supreme Court has issued a steady stream of opinions requiring lessened culpability for juveniles in criminal convictions.[24] Although not formally known as the "youthfulness" doctrine, the Court repeatedly references important characteristics of youthfulness throughout these decisions that are central to the *Miller* holding.[25] Understanding this trend of Supreme Court reasoning is necessary to fully understand what *Miller* requires in re-sentencing trials.

In a 1979 case, *Bellotti v. Baird*, the Supreme Court held that there are three reasons children's constitutional rights do not equal adults' rights: (1) the peculiar vulnerability of children, (2) children's inability to make critical decisions in an informed and mature manner, and (3) the importance of the pa-

23. *See generally* Douglas A. Berman, *Assessing* Miller *and Its Aftermath*, SENT'G L. & POL'Y, http://sentencing.typepad.com/sentencing_law_and_policy/assessing-miller-and-its-aftermath (last updated Nov. 9, 2014) (following post-*Miller* problems relating to juvenile justice and retroactivity).

24. *See* Barry C. Feld, *Adolescent Criminal Responsibility, Proportionality, and Sentencing Policy:* Roper, Graham, Miller/Jackson*, and the Youth Discount*, 31 LAW & INEQ. 263, 263–64 (2013).

25. *See id.* at 312–14.

rental role in child rearing.[26] This holding formally separated adults' and children's constitutional rights, and although it did not concern juvenile criminal conviction, the Court used this reasoning in later juvenile criminal cases.[27]

A few years after *Bellotti*, the Court held in *Eddings v. Oklahoma* that youthfulness is a relevant mitigating factor that a sentencer cannot be precluded from considering during sentencing.[28] The Court reasoned that youthfulness is relevant when mitigating sentences because "[i]t is a time and condition of life when a person may be most susceptible to influence and to psychological damage."[29] This is the first time the Court referenced the idea of lessened culpability in criminal convictions because of youthfulness.[30]

Over the last decade there have been four critical Supreme Court opinions where the Court held particular sentences for juvenile offenders constitute cruel and unusual punishment and violate the Eighth Amendment.[31] In *Thompson v. Oklahoma* a plurality held that sentencing juveniles under the age of sixteen to death is cruel and unusual punishment.[32] The Court reasoned that a juvenile's "[i]nexperience, less education, and less intelligence" makes him or her less able to evaluate the consequences of his or her actions', and therefore death is too severe a punishment, especially since it will not have a deterrence effect.[33] The Court later extended this holding to *all* juveniles up to eighteen years old in a majority opinion for *Roper v. Simmons*.[34] *Roper* laid out three characteristics demonstrating that "juvenile offenders cannot with reliability be classified among the worst offenders": (1) they lack maturity and are more likely to have an underdeveloped sense of responsibility,[35] (2) they are more vulnerable or susceptible to negative influ-

26. Bellotti v. Baird, 443 U.S. 622, 634–35, 637 (1979).
27. *See* Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982).
28. *Id.* at 115.
29. *Id.*
30. *See id.*; Feld, *supra* note 24, at 272.
31. U.S. CONST. amend. VIII.
32. Thompson v. Oklahoma, 487 U.S. 815, 838 (1988).
33. *Id.* at 835, 837.
34. Roper v. Simmons, 543 U.S. 551, 578–79 (2005). In a case that fell between *Thompson* and *Roper*, the Court upheld the death penalty for sixteen- or seventeen-year-old juveniles convicted of murder, acknowledging that juveniles have diminished culpability but rejecting a categorical ban of the sentence. Stanford v. Kentucky, 492 U.S. 361, 380 (1989), *overruled by Roper*, 543 U.S. at 575.
35. *Roper*, 543 U.S. at 569.

ences and outsides pressures,[36] and (3) their characters are not as well-formed as an adult's.[37] The first two characteristics are pulled from *Bellotti* and *Eddings*, and the last characteristic is new to *Roper*.[38]

In *Graham v. Florida,* the Supreme Court went beyond the death penalty, holding that subjecting non-homicide juvenile offenders to life without parole violates the Eighth Amendment.[39] *Graham* emphasized that a life without parole sentence for a juvenile offender assumes "that the juvenile offender forever will be a danger to society," and that this assumption is not founded in psychology and brain science.[40] The Court stressed that incorrigibility is inconsistent with the characteristics of juveniles, and that "juveniles are more capable of change than are adults . . . their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults."[41] The Court reasoned that since juveniles' personalities are not fixed, a life without parole sentence for non-homicide offenders is disproportionate because it denies juveniles "a chance to demonstrate growth and maturity."[42]

Most recently, in *Miller* the Court held that requiring mandatory sentences for juvenile homicide offenders violates the Eighth Amendment.[43] The Court reiterated the three factors from *Roper*, and found that mandatory life without parole sentences for juvenile homicide offenders precludes consideration of these three factors.[44] Similar to *Graham*, the Court

36. *Id.*

37. *Id.* at 570 ("The personality traits of juveniles are more transitory, less fixed."); *see also* Feld, *supra* note 24, at 277.

38. *See Roper*, 543 U.S. at 570; Eddings v. Oklahoma, 455 U.S. 104, 115–16 (1982); Bellotti v. Baird, 443 U.S. 622, 634–35, 637 (1979).

39. Graham v. Florida, 560 U.S. 48, 81–82 (2010). *Graham* is a complete categorical ban on life without parole sentences for juvenile non-homicide offenders, so courts cannot sentence non-homicide juveniles to life without parole even after taking youthfulness into account. Feld, *supra* note 24, at 299.

40. *Graham*, 560 U.S. at 68 ("As petitioner's *amici* point out, developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.").

41. *Id.* (quoting *Roper*, 543 U.S. at 570).

42. *Id.* at 72–73. The Court also points out that even though the state claims Graham is incorrigible because of later prison misbehavior, a life without parole sentence was still disproportionate because the judgment of Graham's incorrigibility was made at the outset, before he had chance to reform. *Id.*

43. Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012).

44. *Id.* at 2468.

stressed that mandatory life without parole for juveniles is disproportionate because it treats juveniles the same as adults, without considering their differences.[45] The punishment is also disproportionate because it "disregards the possibility of rehabilitation even when the circumstances most suggest it."[46]

Since the *Miller* holding was only a categorical ban on *mandatory* life without parole sentences for juvenile homicide offenders, and not a complete ban of the sentence (like in *Roper* or *Graham*),[47] courts can still sentence juvenile homicide offenders to life without parole after taking an offender's "youth and attendant circumstances" into account.[48] A judge or jury must have the opportunity to consider a juvenile offender's immaturity, impetuosity, and failure to appreciate risks and consequences before issuing a life without parole sentence.[49] The Court points out that the instances when a court will still find a juvenile deserves life without parole after taking youthfulness into account will be rare.[50] The Court reasons that since there is "great difficulty . . . distinguishing between . . .'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption,'" courts will unlikely find that juvenile homicide offenders deserve life without parole.[51]

B. THE RETROACTIVITY DOCTRINE

The Supreme Court's "retroactivity doctrine," although a relatively recent development,[52] has a volatile history.[53] Throughout its existence the doctrine has undergone substan-

45. *Id.* at 2466.

46. *Id.* at 2468.

47. Feld, *supra* note 24, at 272–73, 299.

48. *See Miller*, 132 S. Ct. at 2471.

49. *Id.* at 2468–69.

50. *Id.* at 2469 ("But given all we have said in *Roper, Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.").

51. *Id.* (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).

52. *See* Linkletter v. Walker, 381 U.S. 618, 629 (1965) (holding for the first time that there is no constitutional mandate to apply new rules of criminal procedure retroactively).

53. *See generally* Timothy Finley, *Habeas Corpus—Retroactivity of Post-Conviction Rulings: Finality at the Expense of Justice*, 84 J. CRIM. L. & CRIMINOLOGY 975, 977–88 (1994) (providing a summary of all the changes the retroactivity doctrine has undergone).

tial changes several times,[54] and some parts are still contested.[55] Since the retroactivity doctrine is unstable, it is necessary to track the evolution of the doctrine to understand its current form, and how it applies to *Miller*.

Throughout most of the twentieth century the Court retroactively applied new constitutional rules to all cases on direct review (cases on direct appeal) *and* collateral review (cases involving post-conviction challenges after direct appeals are exhausted).[56] Eventually, in 1965 the Supreme Court issued an opinion in *Linkletter v. Walker* stating that there is no constitutional mandate to apply new constitutional rules retroactively, and that the decision to apply a new rule retroactively is determined by weighing several factors.[57] This holding created the retroactivity doctrine.[58]

The Court did not distinguish between cases on direct and collateral review, and subsequent cases used the *Linkletter* factors for both case types.[59] Eventually, in a 1989 plurality opinion for *Teague v. Lane* the Supreme Court diverged from this approach,[60] adopting a new doctrine that requires new constitutional rules apply retroactively to cases on direct review, but not to cases on collateral review.[61] The Court found two exceptions to the non-retroactivity generally afforded collateral review cases.[62] The first exception allows retroactive application of new substantive rules that "place[] 'certain kinds of primary, private individual conduct beyond the power of the criminal

54. *Id.*

55. *See* Schriro v. Summerlin, 542 U.S. 348, 358–59 (2004) (Breyer, J., dissenting) (disagreeing about whether the retroactivity doctrine only applies to determinations of convictions and not determinations of sentences).

56. Finley, *supra* note 53, at 977–78.

57. *Linkletter*, 381 U.S. at 629 ("[W]e must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation.").

58. Finley, *supra* note 53, at 978.

59. *See id.*

60. Teague v. Lane, 489 U.S. 288 (1989). The *Teague* plurality's retroactivity doctrine was accepted by majorities throughout subsequent opinions, so the doctrine is binding precedent. *See* Finley, *supra* note 53, at 982 ("In a series of Supreme Court cases, the major aspects of the plurality's opinion in *Teague* gained support from majorities of the Court.").

61. *Teague*, 489 U.S. at 310.

62. *Id.* at 311–15.

law-making authority to proscribe.'"[63] The second exception allows retroactive application of "watershed" procedural rules that implicate the fundamental fairness and the accuracy of the conviction.[64] If neither exception is met, new constitutional rules are not retroactively applied to cases on collateral review.[65]

Although the retroactivity doctrine laid out in *Teague* represents the Court's current retroactivity approach, the Court has clarified and shifted certain aspects of the doctrine over time. For example, the Court has clarified that substantive rules not only include new rules that alter the range of conduct the law punishes, but also classes of individuals the law punishes, such as juveniles.[66] The Court has also defined and narrowed the parameters of "watershed" procedural rules.[67] The Court has made it clear that the essential element of a watershed procedural rule is not that it implicates the fundamental fairness of a conviction, but that it "so '*seriously* diminishe[s]' accuracy that there is an 'impermissibly large risk' of punishing conduct the law does not reach."[68] For example, in *Schriro v. Summerlin*, the Court held that a new constitutional rule's requirement that a jury, not a judge, must find an aggravating circumstance necessary to impose the death penalty was not a watershed procedural rule and should not be applied retroactively.[69] The Court stressed that even though evidence shows

63. *Id.* at 311 (holding that the "fair cross section requirement to the petit jury" is not a substantive rule because it would not accord constitutional protection to any primary activity).

64. *Id.* at 311–12, 315 ("Because the absence of a fair cross section on the jury venire does not undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction, we conclude that a rule requiring that petit juries be composed of a fair cross section of the community would not be a 'bedrock procedural element' that would be retroactively applied under the second exception we have articulated.").

65. *Id.* at 311.

66. *See* Schriro v. Summerlin, 542 U.S. 348, 350, 353 (2004) ("A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes.").

67. Although this Note only highlights the confusion surrounding the definition of "watershed procedural rule," the Court also struggled with simply defining "new rule" in the cases following *Teague*. *See* Finley, *supra* note 53, at 981–88. The current accepted iteration defines "new rule" as a rule not dictated by precedent at the time the defendant's conviction became final. Whorton v. Bockting, 549 U.S. 406, 416 (2007).

68. *Schriro*, 542 U.S. at 355–56 (alteration in original) (quoting *Teague*, 489 U.S. at 312–313).

69. *Id.* at 357–58.

juries are more accurate fact-finders, a trial in which a judge finds aggravating factors could not be so impermissibly inaccurate to require retroactive application of the new rule, and ultimately a new trial.[70] As a result of the Court's narrowing the procedural rule exception, only one rule has ever satisfied the exception: *Gideon v. Wainwright*'s[71] requirement that indigent defendants charged with felonies must be appointed counsel.[72]

To clarify, in its current state the retroactivity doctrine precludes retroactive application of new rules to cases on collateral review unless the rule satisfies one of two exceptions.[73] If the new rule is substantive, for example it alters the class of individuals the law punishes, then the rule is retroactive.[74] If the new rule is procedural it is only retroactive if the rule affects the accuracy of conviction and implicates the fundamental fairness of a conviction, with more focus on accuracy than fairness.[75] Since the procedural rule exception is extremely narrow, usually only new substantive rules retroactively apply to cases on collateral review.[76]

C. *MILLER* AND THE COURTS

When the Supreme Court decided *Miller v. Alabama,* twenty-eight states had sentencing schemes subjecting some juvenile homicide offenders to mandatory life without parole sentences.[77] There are now at least 2,100 juvenile homicide offenders serving sentences of life without parole,[78] and many

70. *Id.* at 356–57.

71. 372 U.S. 335 (1963).

72. *Whorton*, 549 U.S. at 419 (pointing to *Gideon* as the only procedural rule meeting the exception). No procedural rules have passed the test since the modern inception of the doctrine. *See* Tadhg Dooley, Whorton v. Bockting *and the Watershed Exception of* Teague v. Lane, 3 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 1, 1 (2007), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1021&context=djclpp_sidebar ("Since the *Teague* standard was announced, the Court has not found a single rule that satisfies its requirements."); *see, e.g.*, *Whorton*, 549 U.S. at 418, 420 (holding that new rule requiring cross-examination to admit prior testimonial statements of witness that have since become unavailable is not a watershed procedural rule).

73. *Schriro*, 542 U.S. at 351–52.

74. *Id.* at 353.

75. *See id.* at 355–56.

76. *See* Dooley, *supra* note 72.

77. *See* Jones, *supra* note 15 (providing map that shows states with mandatory life without parole sentences).

78. *Id.*; *see also Map: Juveniles Serving Life Without Parole in the U.S.*, FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/whenkidsgetlife/etc/map.html (last updated May 21, 2009).

state and federal courts must grapple with the retroactivity doctrine and determine how *Miller* applies to these juveniles.[79]

1. State Courts

Eleven state supreme courts have issued opinions concerning *Miller*'s retroactivity.[80] The courts' treatment of *Miller*'s retroactivity varies widely, and there is no clear trend regarding whether and how state courts will retroactively apply *Miller*.[81]

In *Jackson v. Norris,* the Arkansas Supreme Court applied *Miller* retroactively to a case on collateral review without deciding the retroactivity issue, remanding the defendant's case to the lower court for a new sentencing trial comporting with *Miller*.[82] The court did not give detailed instructions for how the lower court should conduct the re-sentencing hearing. The Arkansas court simply ordered a sentencing hearing in which the defendant "may present . . . evidence that would include that of his 'age-related characteristics, and the nature of' his crime.'"[83]

The highest courts in Iowa, Massachusetts, Mississippi, Nebraska, Illinois, and Texas applied *Miller* retroactively to cases on collateral review after conducting full retroactivity analyses.[84] All six courts held that *Miller* created a new substantive rule, and is retroactive under the first *Teague* exception.[85] Iowa and Nebraska reasoned that, even though *Miller* looks like a procedural rule on the surface and has procedural components, it is a substantive change in the law because it categorically bans mandatory life without parole sentences.[86] Nebraska elaborated that *Miller* requires sentencers to consider new facts before sentencing juveniles to life without parole,

79. *See infra* Part II.B.

80. *See infra* notes 82–106 and accompanying text.

81. *Id.*

82. Jackson v. Norris, 426 S.W.3d 906, 907 (Ark. 2013).

83. *Id.* (quoting Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012)).

84. People v. Davis, 6 N.E.3d 709, 722 (Ill. 2014); State v. Ragland, 836 N.W.2d 107, 115–17 (Iowa 2013); Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 278–82 (Mass. 2013); Jones v. State, 122 So. 3d 698, 701–02 (Miss. 2013) (en banc); State v. Mantich, 842 N.W.2d 716, 729–31 (Neb. 2014); *Ex parte* Maxwell, 424 S.W.3d 66, 75 (Tex. Crim. App. 2014).

85. *Davis,* 6 N.E.3d at 722; *Ragland*, 836 N.W.2d at 115; *Diatchenko,* 1 N.E.3d at 278–82; *Jones*, 122 So. 3d at 702; *Mantich*, 842 N.W.2d at 731; *Ex parte Maxwell*, 424 S.W.3d at 75.

86. *Ragland*, 836 N.W.2d at 115; *Mantich*, 842 N.W.2d at 729–30 ("[T]he *Miller* rule includes a substantive component. *Miller* did not simply change what entity considered the same facts. And *Miller* did not simply announce a rule that was designed to enhance accuracy in sentencing.").

and is therefore substantive.[87] Massachusetts and Mississippi similarly reasoned that, because states cannot subject juveniles to life without parole for all murder convictions, *Miller* created a substantive change in the law.[88] Nebraska was also persuaded by the fact that the Nebraska legislature had to change its first-degree murder sentencing range for juveniles after *Miller*.[89] The Iowa, Massachusetts, Illinois and Nebraska courts additionally pointed out that since the Supreme Court remanded Kuntrell Jackson's case, which was on collateral review, for re-consideration after *Miller*, the Supreme Court wants *Miller* to be retroactive.[90]

Some of these courts slightly explained what they expect out of new sentencing hearings.[91] In *Jones v. State*, the Mississippi Supreme Court required the lower court to consider all circumstances from *Miller* before sentencing the defendant to life without parole.[92] In *State v. Mantich*, the Nebraska Supreme Court ordered re-sentencing according to a revised Nebraska sentencing statute, allowing the offender to submit evidence relating to the youthfulness characteristics from *Miller*.[93]

87. *Mantich*, 842 N.W.2d at 730 ("Effectively, then, *Miller* required a sentencer of a juvenile to consider new facts, i.e., mitigation evidence, before imposing a life imprisonment sentence with no possibility of parole. In our view, this approaches what the Court itself held in *Schriro* would amount to a new substantive rule: The Court made a certain fact (consideration of mitigating evidence) essential to imposition of a sentence of life imprisonment without parole.").

88. *Diatchenko,* 1 N.E.3d at 278–82 ("The rule explicitly forecloses the imposition of a certain category of punishment – mandatory life in prison without the possibility of parole – on a specific class of defendants: those individuals under the age of eighteen when they commit the crime of murder."); *Jones*, 122 So. 3d at 702 ("Following *Miller*, Mississippi's current sentencing and parole statutes could not be followed in homicide cases involving juvenile defendants. Our sentencing scheme may be applied to juveniles only after applicable *Miller* characteristics and circumstances have been considered by the sentencing authority. As such, *Miller* modified our substantive law by narrowing its application for juveniles.").

89. *Mantich*, 842 N.W.2d at 731.

90. *Davis,* 6 N.E.3d at 722; *Ragland*, 836 N.W.2d at 116; *Diatchenko,* 1 N.E.3d at 281–82.

91. *Ragland*, 836 N.W.2d at 112–13, 122; *Jones*, 122 So. 3d at 703; *Mantich*, 842 N.W.2d at 732. In *Diatchenko*, the Massachusetts Supreme Court also determined that discretionary sentences of life without parole are unconstitutional under state law, so the defendant's sentence was automatically mitigated to life with the possibility of parole after fifteen years. 1 N.E.3d at 286.

92. *Jones*, 122 So. 3d at 701 n.4.

93. *Mantich*, 842 N.W.2d at 732; *see also* NEB. REV. STAT. § 28-105.02(2) (2013) (explicitly pointing to age at the time of the offense, impetuosity, family

In *Ex parte Maxwell*, the highest court in Texas dictated that the defendant cannot be sentenced to life without parole until the sentencing court considers his "individual conduct, circumstances, and character."[94] In *State v. Ragland*, the Iowa Supreme Court affirmed a re-sentencing hearing already conducted by a district court.[95] In the hearing, the defendant presented evidence that he had a strong support network and a likely chance for successful rehabilitation, and the district court mitigated his sentence to life with the possibility of parole after twenty-five years.[96]

Minnesota, Louisiana, Michigan, and Pennsylvania held that *Miller* is not retroactive.[97] All four courts agreed that *Miller* handed down a "new rule,"[98] but held that the rule is procedural and not substantive.[99] The courts reasoned that since *Miller* did not categorically ban life without parole sentences for juveniles, it is a procedural rule.[100] As further evidence that the rule is procedural rather than substantive, Louisiana and Minnesota pointed out that *Miller* did not create a new element for juvenile homicide conviction.[101]

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and community environment, ability to appreciate risks and consequences of the conduct, intellectual capacity, and mental health evaluation as mitigating factors the court can consider).

94. *Ex parte* Maxwell, 424 S.W.3d 66, 76 (Tex. Crim. App. 2014).

95. *Ragland*, 836 N.W.2d at 122.

96. *Id.* at 112–13. The defendant had already served for twenty-five years, so he was eligible for parole immediately. *Id.* at 113.

97. *See* State v. Tate, 130 So. 3d 829, 831 (La. 2013); People v. Carp, 852 N.W.2d 801, 827–28 (Mich. 2014); Chambers v. State, 831 N.W.2d 311, 331 (Minn. 2013); Commonwealth v. Cunningham, 81 A.3d 1, 11 (Pa. 2013). The Louisiana Supreme Court determined *Miller* is not retroactive despite previously applying *Miller* retroactively to two cases that came before it on collateral review. *See* State v. Simmons, 99 So. 3d 28, 28 (La. 2012) (per curiam); State v. Graham, 99 So. 3d 28, 29 (La. 2012).

98. *See Tate*, 130 So. 3d at 831; *Carp*, 852 N.W.2d at 820; *Chambers*, 831 N.W.2d at 326; *Cunningham*, 81 A.3d at 10.

99. *Tate*, 130 So. 3d at 831; *Carp*, 852 N.W.2d at 825; *Chambers*, 831 N.W.2d at 328; *Cunningham*, 81 A.3d at 10.

100. *See Tate*, 130 So. 3d at 837 ("[*Miller*] simply altered the range of *permissible methods* for determining whether a juvenile could be sentenced to life imprisonment without parole . . . ."); *Carp*, 852 N.W.2d at 825; *Chambers*, 831 N.W.2d at 328; *Cunningham*, 81 A.3d at 10 ("Since, by its own terms, the *Miller* holding 'does not categorically bar a penalty for a class of offenders,' it is procedural and not substantive for purposes of *Teague*.").

101. *See Tate*, 130 So. 3d at 837 ("[*Miller*] did not alter the elements necessary for a homicide conviction."); *Chambers*, 831 N.W.2d at 329.

All four courts also held that *Miller* is not a watershed procedural rule.[102] The courts reasoned that requiring presentation of youthfulness characteristics before handing out severe sentences to juveniles is a well-established principle, and *Miller* is simply an outgrowth of previous juvenile justice cases.[103] The courts also determined that *Miller* does not rise to the level of *Gideon*,[104] the case that announced the procedural rule change the Supreme Court has dubbed "watershed."[105] Pennsylvania additionally pointed out that a majority of Supreme Court justices would not agree that *Miller* is a watershed procedural rule.[106]

2. Federal Courts

Four federal circuit courts have addressed *Miller*'s retroactivity in some capacity.[107] Similar to the state courts, there is no consensus among the federal courts about this issue.[108]

The Third, Fifth, and Eighth Circuits all allowed defendants to file successive motions based on *Miller* because the defendants made prima facie showings that *Miller* is retroactive.[109] Although none of the courts fully analyzed *Miller*'s retroactivity, and left it to district courts to determine, they seem to agree that *Miller* should be retroactive.[110]

102. *See Tate*, 130 So. 3d at 839–41; *Carp*, 852 N.W.2d at 826; *Chambers*, 831 N.W.2d at 330–31; *Cunningham*, 81 A.3d at 10.

103. *See, e.g.*, *Tate*, 130 So. 3d at 835–36; *Chambers*, 831 N.W.2d at 331.

104. *See, e.g.*, *Tate*, 130 So. 3d at 841 ("[W]e find [*Miller*] cannot be construed to qualify as being 'in the same category with *Gideon*' in having 'effected a profound and "sweeping" change.'"); *Chambers*, 831 N.W.2d at 331; *Cunningham*, A.3d at 10.

105. Whorton v. Bockting, 549 U.S. 406, 419 (2007).

106. *See Cunningham*, 81 A.3d at 10 ("We doubt, however, that a majority of the Justices would broaden the [procedural rule] exception beyond the exceedingly narrow (or, essentially, class-of-one) parameters reflected in the line of decisions referenced by the Commonwealth.").

107. *See In re* Simpson, 555 F. App'x. 369, 371 (5th Cir. 2014) (per curiam); *In re* Pendleton, 732 F.3d 280, 282 (3d Cir. 2013) (per curiam); Johnson v. United States, 720 F.3d 720, 720–21 (8th Cir. 2013) (per curiam); *In re* Morgan, 713 F.3d 1365, 1368 (11th Cir. 2013); Craig v. Cain, No. 12-30035, 2013 WL 69128, at *2 (5th Cir. Jan. 4, 2013).

108. *Compare In re Simpson*, 555 F. App'x. at 371 (stating that the defendant has made a prima facie case of retroactivity), *and In re Pendleton*, 732 F.3d at 282 (same), *and Johnson*, 720 F.3d at 721 (same), *with In re Morgan*, 713 F.3d at 1368 (denying retroactivity of *Miller*), *and Craig*, 2013 WL 69128, at *2 (same).

109. *See In re Simpson*, 555 F. App'x. at 371–72; *In re Pendleton*, 732 F.3d at 282; *Johnson*, 720 F.3d at 721.

110. *See In re Simpson*, 555 F. App'x. at 371; *In re Pendleton*, 732 F.3d at

Both the Fifth[111] and Eleventh Circuits held that *Miller* is not retroactive.[112] The Eleventh Circuit denied a defendant permission to file a successive motion based on *Miller* because it reasoned that *Miller* is not a new substantive rule.[113] The Fifth Circuit, giving the most in-depth analysis of *Miller*'s retroactivity of all the federal courts, held, in an unpublished opinion, that *Miller* is not substantive because it is not a categorical bar on life without parole.[114] The Fifth Circuit also held that *Miller* is not a watershed procedural rule because it is an outgrowth of prior opinions pertaining to individual sentencing for juveniles.[115]

3. United States Supreme Court

Although the Supreme Court has not explicitly addressed *Miller*'s retroactivity, it has made decisions some courts and commentators believe signal the Court's favorable position on *Miller*'s retroactivity. In issuing *Miller* the court also remanded Kuntrell Jackson's case, which was on collateral review.[116] Some courts and commentators have used this as evidence that *Miller* is retroactive.[117] Also, shortly after the *Miller* decision, in *Mauricio v. California* (Mauricio received a discretionary life without parole sentence and argued that the trial court failed to properly balance all relevant factors during sentencing)[118] the Court issued an order granting certiorari, vacating the lower decision, and remanding the case to a lower court (GVR)[119] for

282; *Johnson*, 720 F.3d at 721.

111. The Fifth Circuit has issued split opinions on this issue.

112. *See In re Morgan*, 713 F.3d at 1368; *Craig*, 2013 WL 69128, at *2.

113. *In re Morgan*, 713 F.3d at 1368.

114. *Craig*, 2013 WL at 69128, *1–2.

115. *Id.* at *2.

116. Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012) (reversing both Jackson's and Miller's cases).

117. *See, e.g.*, State v. Ragland, 836 N.W.2d 107, 116 (Iowa 2013); Marsha L. Levick & Robert G. Schwartz, *Practical Implications of* Miller v. Jackson*: Obtaining Relief in Court and Before the Parole Board*, 31 LAW & INEQ. 369, 380 (2013) ("The Court's application of its holding in *Miller* to Jackson's case necessarily dictates retroactivity of the new rule."). *But see* People v. Carp, 828 N.W.2d 685, 713 (Mich. Ct. App. 2012) (arguing that the new hearing granted to Jackson does not matter because retroactivity was not an issue before the Court), *aff'd*, 852 N.W.2d 801 (Mich. 2014).

118. Lyle Denniston, *A Puzzle on Juvenile Sentencing*, SCOTUSBLOG (Nov. 16, 2012, 5:20 PM), http://www.scotusblog.com/2012/11/a-puzzle-on-juvenile-sentencing.

119. A GVR order is an order issued by the Supreme Court that *grants* a petition for certiorari, *vacates* the decision of the court bellow, and *remands*

"further consideration in light of *Miller v. Alabama*."[120] One commentator argues that even though *Mauricio* is not a mandatory life without parole case the GVR suggests the Court is "inviting lower courts to tinker with the notion that *Miller* has a substantive bite."[121]

Despite certain Supreme Court moves pointing to a possible pro-retroactivity ruling in the future, *Miller*'s retroactivity remains undetermined.[122] There is widespread disagreement among courts concerning *Miller*'s retroactivity, many holding that *Miller* creates a new substantive rule and is therefore retroactive,[123] and many others holding that *Miller* creates a procedural rule that fails the retroactivity test.[124] Additionally, those courts applying *Miller* retroactively have not definitively determined how to implement *Miller*'s youthfulness characteristics during new sentencing hearings.[125] Juvenile lifers' post-*Miller* statuses are inconsistent and will likely be settled by the Supreme Court at a future date.[126]

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the case for further proceedings—usually in light of an intervening new law or fact. Sena Ku, *The Supreme Court's GVR Power: Drawing a Line Between Deference and Control*, 102 NW. U. L. REV. 383, 383 (2008).

120. Mauricio v. California, 133 S. Ct. 524, 524 (2012).

121. Alexander Satanovsky, *Habeas Corpus - Alex's First Post*, HABEAS CORPUS BLOG (Oct. 31, 2012), http://habeascorpusblog.typepad.com/habeas_corpus_blog/2012/10/habeas-corpus-alexs-first-post.html ("The GVR strongly suggests that *Miller* may in fact be more than a procedural rule . . . but rather a substantive restriction . . . .").

122. The Supreme Court has not granted certiorari for any *Miller* retroactivity cases at the time of this writing.

123. *See* State v. Ragland, 836 N.W.2d 107, 115 (Iowa 2013); Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 279, 281 (Mass. 2013); Jones v. State, 122 So. 3d 698, 702 (Miss. 2013) (en banc); People v. Morfin, 981 N.E.2d 1010, 1022 (Ill. App. Ct. 2012).

124. *See In re* Morgan, 713 F.3d 1365, 1368 (11th Cir. 2013); Craig v. Cain, No. 12-30035, 2013 WL 69128, at *1–2 (5th Cir. Jan. 4, 2013); State v. Tate, 130 So. 3d 829, 831 (La. 2013); Chambers v. State, 831 N.W.2d 311, 331 (Minn. 2013); Commonwealth v. Cunningham, 81 A.3d 1, 11 (Pa. 2013); Geter v. State, 115 So. 3d 375, 385 (Fla. Dist. Ct. App. 2012); People v. Carp, 828 N.W.2d 685, 713 (Mich. Ct. App. 2012), *aff'd*, 852 N.W.2d 801 (Mich. 2014).

125. *See* Jackson v. Norris, 426 S.W.3d 906, 910–11 (Ark. 2013); *Ragland*, 836 N.W.2d at 115; *Diatchenko*, 1 N.E.3d at 281; *Jones*, 122 So. 3d at 702; *Morfin*, 981 N.E.2d at 1022.

126. *See* Douglas A. Berman & Robert J. Watkins, *Third Circuit Concludes Juves Serving LWOP Made "Prima Facie Showing that* Miller *Is Retroactive,"* SENT'G L. & POL'Y (Oct. 4, 2013), http://sentencing.typepad.com/sentencing_law_and_policy/2013/week40/index.html ("Because of the circuit split noted by the Third Circuit . . . the Supreme Court is surely likely to take up this issue in some form at some point in the not too distant future.").

II. GIVING JUVENILE LIFERS THE BENEFIT OF *MILLER V. ALABAMA*

Granting juvenile lifers post-*Miller* justice requires a finding that *Miller* is retroactive, and developing a practical method to re-sentence these offenders. Section A of this Part critiques some state courts' conclusions that *Miller* is not retroactive, and determines that *Miller* should be considered retroactive. Section B explains that retroactively applying *Miller* creates a paradox of treating adults like children, because transitory personality is a foundational principle in *Miller* that is irrelevant to adult juvenile lifers. Section B also analyzes courts' and legislatures' current efforts to apply *Miller* retroactively, and concludes that none of these efforts solve the paradox. Section C addresses potential problems juvenile lifers will face in parole hearings, whether they arrive at the hearing via re-sentencing or an automatic lesser sentence.

A. RETROACTIVITY ANALYSIS

Before examining how to retroactively apply *Miller* to juvenile lifers, it is necessary to determine if *Miller* is retroactive for cases on collateral review. Based on *Teague,* if *Miller* creates a substantive rule, then it is retroactive.[127] Additionally, if *Miller* creates a "watershed" procedural rule that implicates the fundamental fairness and accuracy of juvenile lifers' convictions (with more emphasis on accuracy),[128] then it is retroactive.[129] If *Miller* does not fall into either category, then it is not retroactive for cases on collateral review.[130]

1. *Miller* Creates a New Substantive Rule

If *Miller* is retroactive it will likely be because it creates a new substantive rule, because the Supreme Court has not held any new procedural rules pass the test.[131] It is likely that the Supreme Court would find *Miller* creates a new substantive rule, despite the fact that it does not place a categorical ban on life without parole sentences for juvenile homicide offenders. First, *Miller* "alters the . . . class of persons that the law pun-

127. *See* Teague v. Lane, 489 U.S. 288, 311 (1988).
128. *See* Schriro v. Summerlin, 542 U.S. 348, 355–56 (2004).
129. *See Teague*, 489 U.S. at 311–12, 315.
130. *See id.* at 311.
131. *See* Dooley, *supra* note 72.

ishes," which is one way a new rule qualifies as substantive.[132] *Miller* precludes the law from imposing mandatory life without parole sentences on juvenile offenders.[133] The law can still impose mandatory life without parole on adult offenders,[134] therefore *Miller* simply limits the class of persons subject to mandatory life without parole.[135]

Second, even though several courts have ruled that *Miller* does not create a new substantive rule,[136] it is because they failed to separate a mandatory life without parole sentence from a sentencing range where life without parole is the maximum after considering youthfulness characteristics. Even though one could argue (and courts have) that the only difference between these two sentencing ranges is that one requires a different procedure (considering youthfulness characteristics) before imposing life without parole on a juvenile,[137] the difference is not procedural. The second range forces the sentencing judge to consider other possible sentences as well—life without parole is not the juvenile's only option. This is a substantive difference. *Miller* creates a substantive rule that requires more sentencing options than life without parole for juvenile homicide offenders.

2. *Miller* Could Be a Watershed Procedural Rule

If the Supreme Court ever rules on *Miller*'s retroactivity, and decides *Miller* does not create a substantive rule, it is possible the Court would find *Miller* is the first modern example of a "watershed" procedural" rule. In *Schriro v. Summerlin*, the Court ruled that having a jury, not a judge, find the presence of an aggravating circumstance necessary for the death penalty is not a watershed procedural rule because it does not cut to the *accuracy* of a death sentence.[138] The rule declared in *Miller* is

132. *Schriro*, 542 U.S. at 353. The Supreme Court applies this reasoning to both convictions and punishments. *See* Penry v. Lynaugh, 492 U.S. 302, 329–30 (1989) ("Therefore, the first exception set forth in *Teague* should be understood to cover not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.").

133. Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012).

134. *Id.*

135. *Id.*; *see also* Levick & Schwartz, *supra* 117, at 386 (arguing that *Miller* creates a substantive rule).

136. *See, e.g.*, *In re* Morgan, 713 F.3d 1365, 1368 (11th Cir. 2013); Craig v. Cain, No. 12-30035, 2013 WL 69128, at *2 (5th Cir. Jan. 4, 2013).

137. *See* Chambers v. State, 831 N.W.2d 311, 328–30 (Minn. 2013).

138. Schriro v. Summerlin, 542 U.S. 348, 357 (2004).

distinguishable because it almost certainly could affect the accuracy of a particular sentence.[139] *Miller* requires consideration of many differences between juveniles and adults that could affect a judge's determination of a juvenile offender's culpability.[140] In addition, when comparing the requirement from *Gideon v. Wainwright* that criminal offenders receive counsel[141] (the only accepted watershed procedural rule),[142] with the requirement of considering youthfulness when sentencing juvenile homicide offenders, both rules carry significant importance, especially when compared with the rule considered in *Schriro*.[143] The rule at issue in *Schriro* simply shifts the fact-finding responsibility from judge to jury, whereas *Gideon* and *Miller* add a completely new element into the process—in one case an attorney and in the other, consideration of youthfulness.[144]

3. *Miller* Is Retroactive

Whether the Supreme Court eventually finds that *Miller* is a new substantive rule or a watershed procedural rule, it is likely that the Court will find a way to make *Miller* retroactive. The Court remanded Kuntrell Jackson's case, which was on collateral review, for re-consideration in light of *Miller*.[145] This move strongly suggests that the Court feels juvenile lifers previously sentenced to mandatory life without parole should have new sentencing hearings where their youthfulness is taken into account.[146] Additionally, the Court's issuance of a GVR for a case on collateral review (although not a mandatory life without parole case), requiring the lower court to consider the case

139. The Supreme Court's reasoning in *Miller* strongly supports this inference. *See Miller*, 132 S. Ct. at 2469 (stating that sentences of life without parole for juvenile offenders will be rare once judges take youthfulness into account).

140. *Id.*

141. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

142. Whorton v. Bockting, 549 U.S. 406, 419 (2007).

143. *See Schriro,* 542 U.S. at 357.

144. *Compare Miller*, 132 S. Ct. at 2475, *and Gideon*, 372 U.S. at 344, *with Schriro*, 542 U.S. at 357. The Nebraska Supreme Court also agrees that the *Miller* rule is more significant than the rule considered in *Schriro*. *See* State v. Mantich, 842 N.W.2d 716, 730 & n.94 (2014) (stating that "*Miller* did not simply change what entity considered the same facts," in reference to *Ring*, the rule considered in *Schriro*).

145. *Miller*, 132 S. Ct. at 2475 (reversing both Jackson's and Miller's cases).

146. *See* Levick & Schwartz, *supra* note 117, at 392.

in light of *Miller*, suggests that the Court believes the principles from *Miller* are retroactive on collateral review.[147]

Alternatively, the Supreme Court may never rule on *Miller*'s retroactivity, and leave it to lower courts to determine retroactivity for themselves. In that case, *Miller* will certainly be retroactive in at least some jurisdictions, and those courts will have to figure out how to apply *Miller* retroactively.[148] Even if the Supreme Court rules that *Miller* is not retroactive, states currently applying *Miller* retroactively can and will continue to do so.[149] One way or another, *Miller* will be retroactive in at least some jurisdictions.[150]

B. RE-SENTENCING JUVENILE LIFERS: THE PARADOX OF TREATING ADULTS LIKE CHILDREN[151]

Since *Miller* is retroactive in at least some jurisdictions, and, as previously argued, should be retroactive nationwide, courts must determine how to resentence juvenile lifers. This is a new problem courts face in juvenile criminal cases because although previous Supreme Court juvenile justice cases categorically banned certain sentences,[152] *Miller* requires courts to *broaden* the scope of possible sentences.[153] After previous juvenile justice rulings courts could simply commute the affected juvenile offenders' sentences to the next lowest offense. For example, after *Roper* courts could commute juvenile death sentences to life without parole.[154] Similarly, after *Graham* courts could commute non-homicide juvenile offender life without pa-

147. *See* Mauricio v. California, 133 S. Ct. 524, 524 (2012); *see also* Satanovsky, *supra* note 121.

148. *See, e.g.*, State v. Ragland, 836 N.W.2d 107, 115–17 (Iowa 2013); Jones v. State, 122 So. 3d 698, 701–02 (Miss. 2013) (en banc).

149. *See* Danforth v. Minnesota, 551 U.S. 264, 291 (2008) ("A decision by this Court that a new rule does not apply retroactively under *Teague* does not imply that there was no right and thus no violation of that right at the time of trial–only that no remedy will be provided in federal habeas courts.").

150. *See, e.g.*, *Ragland*, 836 N.W.2d at 115–17; *Jones*, 102 So. 3d at 701–02.

151. "Treating adults like children" is an inversion of a phrase Marsha Levick uses when describing the many paradoxes of treating juvenile lifers like adults. Levick & Schwartz, *supra* note 117, at 394.

152. *See, e.g.*, Graham v. Florida, 130 S. Ct. 2011, 2034 (2011) (issuing a categorical ban on life without parole sentences for juvenile non-homicide offenders); Roper v. Simmons, 543 U.S. 551, 578–79 (2005) (issuing a categorical ban on death sentences for juveniles).

153. *See* Miller v. Alabama, 132 S. Ct. 2455, 2471 (2012).

154. *See* Tamar Birckhead, *Should* Miller v. Alabama *Be Applied Retroactively?*, JUV. JUST. BLOG (Aug. 15, 2012), http://juvenilejusticeblog.web.unc.edu/2012/08/15/should-miller-v-alabama-be-applied-retroactively.

role sentences to life with the possibility of parole.[155] *Miller*, on the other hand, does not preclude courts from sentencing juveniles to life without parole; it requires courts to consider "youthfulness" characteristics before sentencing juveniles to life without parole.[156] This makes re-sentencing juvenile lifers much more complicated than simply commuting their sentences.

Other than just requiring more work for lower courts,[157] considering "youthfulness" characteristics when re-sentencing juvenile lifers could be moot, because many of these individuals are no longer juveniles. In *Miller*, the Court lists several factors courts should consider when sentencing juveniles: family and home environment; extent of participation in the offense, and the way familial and peer pressures may have affected the juvenile; the offender's possible inability to deal with police officers or prosecutors; and the possibility of rehabilitation.[158] The *Miller* court especially stresses the final factor, possibility of rehabilitation, throughout its entire opinion.[159] The fact that juveniles' unique characteristics are not permanent is a main justification for treating juveniles differently.[160] The Court stresses that because juveniles can change, courts should not mandatorily subject juveniles to punishments that foreclose a chance to change.[161] The Court's main justification for concluding that after *Miller* life without parole sentences will be "rare," is that a juvenile offender's crime does not reflect "irreparable corruption," but rather "transient immaturity."[162] The Court suggests that if sentencers could tell which juveniles are actually just "bad seeds," harsh punishments such as life without parole would be justified for those juveniles.[163]

155. *Id.*

156. *See Miller*, 132 S. Ct. at 2471.

157. *Cf.* Feld, *supra* note 24, at 316, 319–20 (describing how *Miller* did not leave judges and parole boards with practical guidance of how to consider youthfulness in trials and arguing that a categorical rule of reduced punishments for juveniles is more workable).

158. *Miller*, 132 S. Ct. at 2468.

159. *See id.* at 2464, 2468–69.

160. *See id.* at 2464 (listing transitory personality as one of "three significant gaps" that *Graham, Roper*, and ultimately *Miller* rely on to establish that juveniles are less deserving of overly severe punishments, such as death or life without parole); Graham v. Florida, 560 U.S. 48, 67–68, 73 (2010); Roper v. Simmons, 543 U.S. 551, 570 (2005).

161. *See Miller*, 132 S. Ct. at 2468–69.

162. *Id.* at 2469.

163. *See id.*

Many juvenile homicide offenders sentenced to mandatory life without parole are no longer juveniles.[164] For example, Kuntrell Jackson, sentenced at fourteen, is now twenty-nine.[165] Adult juvenile-lifers' personalities are now for the most part fixed.[166] Although some psychologists disagree that personalities become fixed at any point in life,[167] the general consensus throughout the twentieth century was that people's personalities become fixed somewhere around turning thirty.[168] The Court also seems to accept the theory that people's personalities become fixed at some point, since transitory personality is one of its three main justifications for subjecting juvenile offenders to less harsh punishments than adults.[169] With this knowledge, it is unclear how a court could re-sentence a juvenile lifer using youthfulness characteristics that are primarily justified based on transitory personalities in juveniles when the juvenile lifer no longer has a transitory personality. The court will, theoretically, now know whether the juvenile lifer is plagued with "irreparable corruption."[170]

This paradox of re-sentencing adult juvenile lifers with youthfulness characteristics creates a problem. Juvenile lifers are still entitled to the justice *Miller* affords them, but complete re-sentencing hearings examining the offenders' crime in a vacuum may lead to absurd results. For example, one could envision a situation in which a juvenile lifer's crime was extremely depraved and, despite youthfulness characteristics, worthy of life without parole, but his current, adult behavior demon-

164. *See, e.g.*, Maggie Clark, *After Supreme Court Ruling, States Act on Juvenile Sentences*, PEW (Aug. 26, 2013), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/08/26/after-supreme-court-ruling-states-act-on-juvenile-sentences (discussing juvenile lifer Henry Hill, who is now forty); Jones, *supra* note 15 (discussing juvenile lifer Jeffrey Ragland, who is now forty-five).

165. *Inmate Details of Kuntrell Jackson*, *supra* note 1.

166. *See* Antonio Terracciano et al., *Personality Plasticity After Age 30*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 999, 999, 1007 (2006) (finding that the study strengthens claims of predominant personality stability after age 30).

167. *See, e.g.*, Sanjay Srivastava et al., *Development of Personality in Early and Middle Adulthood: Set Like Plaster or Persistent Change?*, 84 J. PERSONALITY & SOC. PSYCHOL. 1041, 1051 (2003) ("Mean levels of personality traits changed gradually but systematically throughout the life span, sometimes more after age 30 than before.").

168. *See generally id.* at 1042 (providing an overview of the widely accepted "plaster theory," which postulates that personality traits reach maturity by age thirty).

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

170. *Id.* at 2469.

strates maturity and reform. It would be absurd to re-sentence this offender to life without parole based on a transitory personality theory (in this case concluding that the offender in fact has a depraved personality) when we know he has grown into an upright, respectable individual.[171]

1. New Sentencing Trial

Lower courts are granting juvenile lifers retroactive application of *Miller*, and many juvenile lifers will receive new sentencing hearings as a result.[172] No court has addressed the problem of implementing *Miller*'s holding to adult juvenile-lifers.[173]

In *State v. Simmons*, the Louisiana Supreme Court instructed the district court to reconsider a juvenile's life without parole sentence "after conducting a sentencing hearing in accord with the principles enunciated in *Miller*."[174] Because a juvenile's transitory personality is a bedrock principle in *Miller*,[175] it would follow that the Louisiana Supreme Court expects lower courts to address this characteristic in sentencing hearings. The court provided no guidance, however, about how this principle applies to an offender who is now thirty-six years old.[176]

In *Jones v. State*, the Mississippi Supreme Court set forth similar instructions, requiring the lower court to conduct a new

171. Another example of an absurd result: A juvenile lifer was heavily influenced by his peers to participate in a robbery that ended up in the murder of a bystander. The juvenile lifer was subject to mandatory life without parole. The juvenile lifer, now an adult, is constantly involved in extremely violent acts in prison which suggest that he should not have the opportunity for release. Based on *Miller*, the juvenile lifer is likely eligible to receive a lower sentence for his crime, but his current actions do not support a lower sentence.

172. *See, e.g.*, Jackson v. Norris, 426 S.W.3d 906, 910 (Ark. 2013); State v. Ragland, 836 N.W.2d 107, 122 (Iowa 2013); State v. Simmons, 99 So. 3d 28, 28 (La. 2012) (per curiam); Jones v. State, 122 So. 3d 698, 701–02 (Miss. 2013) (en banc); State v. Mantich, 842 N.W.2d 716, 731 (Neb. 2014); People v. Williams, 982 N.E.2d 181, 199 (Ill. App. Ct. 2012); People v. Morfin, 981 N.E.2d 1010, 1022–23 (Ill. App. Ct. 2012).

173. *See, e.g.*, *Norris*, 426 S.W.3d at 910; *Ragland*, 836 N.W.2d at 122; *Simmons*, 99 So. 3d at 28; *Jones*, 122 So. 3d at 701–02; *Mantich*, 842 N.W.2d at 732; *Williams*, 982 N.E.2d at 199; *Morfin*, 981 N.E.2d at 1022.

174. *Simmons*, 99 So. 3d at 28.

175. *See* Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) (listing transitory personality as one of "three significant gaps" that *Graham*, *Roper*, and ultimately *Miller* rely on to establish that juveniles are less deserving of overly severe punishments, such as death or life without parole).

176. *Simmons*, 99 So. 3d at 28 (stating that Simmons was seventeen when he committed his crime in 1995).

sentencing hearing in which it considers "all circumstances set forth in *Miller*."[177] Like Louisiana, it would follow that the Mississippi Supreme Court expects transitory personality to be considered in this sentencing hearing, but there is no explanation about how to apply this characteristic to a twenty-five-year-old.[178] In this case, the Mississippi Supreme Court actually declined a request from the juvenile lifer's attorneys that the court clarify what it "intends to happen when [the offender's] case goes back to [the lower court] for re-sentencing."[179]

In *State v. Mantich*, the Nebraska Supreme Court ordered re-sentencing comporting with a revised Nebraska sentencing statute.[180] Although the Nebraska court provided more structured instructions by virtue of pointing to a statute,[181] the court did not explain how this statute should apply to current juvenile lifers versus new juvenile offenders.[182] Since the court made no distinction between offenders being re-sentenced, and offenders being sentenced for the first time, it is fair to assume that Nebraska expects re-sentencing hearings to consider all *Miller* youthfulness factors, including transitory personality, the same way it would for new offenders.[183] It is unclear how this analysis would work when re-sentencing a thirty-six-year-old who has spent twenty years in prison.[184]

177. *Jones*, 122 So. 3d at 701 n.4. The Arkansas Supreme Court has also issued an opinion setting forth instructions similar to those in *Simmons* and *Jones*. *See Norris*, 426 S.W.3d at 907 (requiring a sentencing hearing in which the defendant "may present . . . evidence that would include that of his 'age, age-related characteristics, and the nature of' his crime").

178. *See Jones*, 122 So. 3d. at 701 n.4, 702; Patsy R. Brumfield, *Court Denies Rehearing for Brett Jones*, NE. MISS. DAILY J. (Sep. 27, 2013), http://djournal.com/news/update-court-denies-brett-jones-hearing-sentenc-questions (stating that Jones was twenty-four in September, 2013).

179. The Sun Herald, *Court Denies Rehearing for Brett Jones*, MISS. ST. NEWS (Sept. 28, 2013), http://www.mississippi.statenews.net/index.php/sid/217384530/scat/a97a4109a449ff84; *see also* Brumfield, *supra* note 178.

180. State v. Mantich, 842 N.W.2d 716, 731–32 (Neb. 2014).

181. *See* NEB. REV. STAT. § 28-105.02(2) (2013) (providing examples of factors courts can look at in sentencing).

182. *Mantich*, 842 N.W.2d at 732.

183. Even though the statute governing Mantich's re-sentencing hearing does not list transitory personality as a factor, the statute is not limited to the factors listed. NEB. REV. STAT. § 28-105.02(2). Since, as explained, transitory personality is a bedrock principle in *Miller v. Alabama*, Nebraska would expect this factor to be considered when retroactively applying *Miller*. *See supra* note 175 and accompanying text.

184. *Mantich*, 842 N.W.2d at 718–19 (stating that Mantich was sixteen in 1994 when the murder took place).

The Iowa Supreme Court is the only court that has articulated a clear set of expectations for re-sentencing hearings based on *Miller*. In *State v. Ragland*, the court affirmed a district court's re-sentencing hearing of a juvenile lifer, stating that the court "properly resentenced Ragland in light of *Miller*."[185] The district court re-sentencing hearing included testimony from Ragland's friends and family.[186] A business owner testified that he would give Ragland a job upon release, and Ragland's brother testified that he would give Ragland a place to live and had developed a relationship with the victim's brother.[187] Additionally, one of Ragland's accomplices testified, claiming that Ragland was minimally involved in the murder.[188] After hearing this evidence, the district court re-sentenced Ragland to life with the possibility of parole after serving twenty-five years—which incidentally made Ragland immediately eligible for parole.[189]

This district court reasoning, which the Iowa Supreme Court accepted, provides the most guidance thus far on how to adequately re-sentence juvenile lifers. Although the district court's method is workable, it does not follow *Miller* exactly, because the court did not consider all *Miller* evidence.[190] For example, the court excluded discussion of Ragland's transitory personality, and only minimally included other youthfulness characteristics such as impulsivity, immaturity, and environmental factors.[191] The court focused more on Ragland's character at the moment of re-sentencing, and less on his youthfulness characteristics at the time the crime was committed.[192] There was little discussion of whether Ragland, at the time he committed the crime and because of the nature of the crime,

185. State v. Ragland, 836 N.W.2d 107, 122 (Iowa 2013).

186. *Id.* at 112.

187. *Id.*

188. *Id.*

189. *Id.* at 112–13.

190. *Compare* Miller v. Alabama, 132 S. Ct. 2455, 2468 (2012) (listing relevant factors in sentencing a juvenile: family and home environment; extent of participation in the offense and the way peer pressure may have affected him; the offender's possible inability to deal with police officers or prosecutors; and the possibility of rehabilitation), *with Ragland*, 836 N.W.2d at 112–13 (looking at family and home environment, maturity, and relationship with the victim in the present, not at the time of the crime).

191. Ragland's accomplice briefly discusses the group of boys' poor home lives and immaturity. *Ragland*, 836 N.W.2d at 112.

192. *Id.* at 112–13.

deserved life without parole.[193] The court stated that the governor's previous commutation of Ragland's sentence to life with the possibility of parole after serving sixty years was not adequate under *Miller* because it "deprived Ragland of a meaningful opportunity to demonstrate his maturity and rehabilitation."[194] This declaration further establishes that the court was focused on Ragland's current personality, rather than youthfulness characteristics at the time of the crime. Even though the district court's re-sentencing hearing was practical and brought justice for Ragland, it did not properly implement *Miller* and looks more like a parole hearing than a sentencing hearing.[195]

2. Automatic Lesser Sentence

The paradox of treating adults like children when implementing *Miller* during re-sentencing hearings is avoidable if states completely preclude life without parole for juveniles. In that situation, if *Miller* is retroactive courts could automatically commute juvenile lifers' sentences to the next lowest sentence.[196] Several states are taking this route.[197]

Wyoming, a state that imposed mandatory life without parole for some juvenile homicide offenders before *Miller*, has changed its sentencing laws to preclude discretionary life without parole sentences for juvenile offenders.[198] Wyoming now sentences juveniles convicted of first-degree murder to life im-

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193. *Id.*

194. *Id.*

195. Parole hearings typically consider factors almost identical to those considered in Ragland's hearing. *See* 28 C.F.R. § 2.18–19 (2013) (stating that parole hearings should consider offender's chances of recidivism upon release, and should encourage persons interested in prisoner to testify); *Lifer Parole Process*, CAL. DEP'T OF CORR. & REHAB., http://www.cdcr.ca.gov/BOPH/lifer_parole_process.html (last visited Dec. 3, 2014) (listing factors to consider in parole, including "plans for the future").

196. *See* Birckhead, *supra* note 154; Levick & Schwartz, *supra* note 117, at 389 ("If state law already provides for an alternative term of years or life sentence with the possibility of parole, the sentencer can likely impose one of those options . . . .").

197. *See, e.g.*, H.R. 0023, 62nd Leg., 2013 Gen. Sess. (Wyo. 2013); Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 283–85 (Mass. 2013); Associated Press, *Juveniles Convicted of Murder Must Get Parole Chance in Mich.*, THE BLADE (Aug. 12, 2013), http://www.toledoblade.com/Courts/2013/08/13/Juveniles-convicted-of-murder-must-get-parole-chance-in-Mich.html; *Hawaii Becomes Latest State To Abolish Juvenile Life Without Parole Sentences*, EQUAL JUSTICE INITIATIVE (July 7, 2014), http://www.eji.org/node/924.

198. Wyo. H.R. 0023.

prisonment with the possibility of parole after serving twenty-five years.[199] If Wyoming applies *Miller* retroactively, or the Supreme Court eventually rules that *Miller* is retroactive, Wyoming could simply commute all current juvenile lifers' sentences to life with the possibility of parole after serving twenty-five years.[200]

The Massachusetts Supreme Court held that any life without parole sentences for juveniles—discretionary or mandatory—violate state constitutional law.[201] The Massachusetts ruling is retroactive,[202] so all juvenile lifers will automatically have their sentences commuted to the next lowest sentence.[203] Currently, life with the possibility of parole after fifteen years is the next lowest sentence,[204] but the Massachusetts legislature is considering legislation requiring juvenile murderers to serve at least thirty-five years.[205]

In Michigan, a U.S. District Court judge issued an order requiring Michigan to grant parole consideration to any juveniles convicted of murder.[206] The judge's ruling essentially precludes life without parole sentences for any juvenile offenders in Michigan.[207] Even though the Michigan Supreme Court has held that *Miller* does not apply retroactively,[208] if the United States Supreme Court holds that *Miller* is retroactive, Michi-

199. *Id.*

200. *See* Levick & Schwartz, *supra* note 117, at 389.

201. *Diatchenko*, 1 N.E.3d at 283–85.

202. *See* Commonwealth v. Brown, 1 N.E.3d 259, 262–63 (Mass. 2013).

203. *Id*. In *Diatchenko*, the juvenile lifer was automatically granted parole consideration since he had been serving for thirty-one years. 1 N.E.3d at 286.

204. Sarah Schweitzer & Michael Levenson, *Mass. SJC Bars No-Parole Life Terms for Youths*, BOS. GLOBE (Dec. 24, 2013), http://www.bostonglobe.com/metro/2013/12/24/mass-high-court-strikes-down-life-without-parole-sentences-for-juveniles/eyjKrVSE2EXD0KF7wQXX5M/story.html.

205. Milton J. Valencia, *Bill Seeks at Least 35 Years for Young Killers*, BOS. GLOBE (Jan. 24, 2014), http://www.bostonglobe.com/metro/2014/01/24/legislators-propose-parole-hearings-for-juvenile-murderers-only-after-they-have-served-years-prison/Dis1vi9GEqBgt9BovNmQ4I/story.html.

206. *See* Associated Press, *supra* note 197; Kate Abbey-Lambertz & Ashley Woods, *Michigan Juvenile Life Without Parole Mandatory Sentencing Ban Upheld by Judge*, HUFFINGTON POST (Aug. 14, 2013), http://www.huffingtonpost.com/2013/08/14/michigan-juvenile-life-without-parole-sentencing_n_3756853.html; Jonathan Oosting, *Federal Judge Says All Michigan 'Juvenile Lifers' Eligible for Parole; Bill Schuette Disagrees*, MLIVE (Aug. 13, 2013), http://www.mlive.com/politics/index.ssf/2013/08/federal_judge_every_juvenile_l.html.

207. If all juvenile lifers receive parole consideration, then they technically are not sentenced to life without the possibility of parole.

208. People v. Carp, 852 N.W.2d 801, 827–28 (Mich. 2014).

gan could commute all juvenile lifers' sentences to allow parole consideration.[209]

Although Wyoming, Massachusetts, and Michigan have easy solutions for retroactively applying *Miller* because they all preclude life without parole for juveniles, this is not the case for most states that imposed mandatory life without parole on juvenile homicide offenders pre-*Miller*.[210] Many states changed their laws to comply with *Miller* but still allow discretionary life without parole sentences for some juvenile homicide offenders after considering *Miller*'s youthfulness characteristics.[211] In these cases, juvenile lifers need complete re-sentencing hearings to determine if life without parole is still justified in light of the *Miller* factors, and courts must solve the paradox of treating adults like children.[212]

C. THE PROBLEM OF PAROLE

Whether through a new sentencing hearing or an automatic lesser sentence, at least some adult juvenile-lifers will soon face parole boards.[213] Some scholars suggest that juvenile lifers

209. *See* Levick & Schwartz, *supra* note 117, at 389. It should be noted that Michigan is considering legislation that would retain a life without parole sentence, and the district court case requiring parole consideration for all juvenile lifers is on appeal. Associated Press, *Mich. House OKs Sentencing Rules for Young Killers*, CBS DETROIT (Feb. 5, 2014), http://detroit.cbslocal.com/2014/02/05/mich-house-oks-sentencing-rules-for-young-killers. If the legislation passes and/or the case is reversed, Michigan would face the same re-sentencing problems as other states. *See supra* Part II.B.1.

210. *See* Maggie Clark, *After Supreme Court Ruling, States Act on Juvenile Sentences*, PEW (Aug. 26, 2013), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2013/08/26/after-supreme-court-ruling-states-act-on-juvenile-sentences ("[T]here are at least 15 states that have not yet eliminated mandatory life without parole sentences for juveniles."); *How Many People Are Serving in My State?*, CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, http://fairsentencingofyouth.org/reports-and-research/how-many-people-are-serving-in-my-state (last visited Dec. 3, 2014) (breaking down which states still allow life without parole); James Swift, Miller v. Alabama*: One Year Later*, JUV. JUST. INFO. EXCHANGE (June 25, 2013), http://jjie.org/miller-v-alabama-one-year-later (stating that at least seven states have kept life without parole as a possible sentence for juvenile homicide offenders).

211. *See, e.g.*, S.B. 9, 147th Gen. Ass. (Del. 2013) (removing mandatory life without parole, but retaining life without parole as a maximum sentence for juveniles convicted of first-degree murder); S.B. 228, 2013 Gen. Sess. (Utah 2013) (making aggravated murder committed by a juvenile a noncapital first degree felony punishable under section 76-3-207.7 of the Utah Criminal Code); *see also* UTAH CODE ANN. § 76-3-207.7 (2012) (naming life without parole as a possible punishment for juveniles convicted of noncapital first degree felonies).

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

213. *See, e.g.*, State v. Ragland, 836 N.W.2d 107, 112–13, 122 (Iowa 2013).

facing parole boards could be problematic, because juvenile offenders serving long sentences are more likely to have adverse prison experiences.[214]

Juvenile offenders serving long sentences are often immediately sent to prison with adult offenders.[215] These juvenile prisoners face the same prison challenges that adult offenders face, but because they are juveniles, they lack the mental or physical ability to adjust to prison life.[216] Since juveniles are less emotionally well adjusted, juvenile lifers often "use violence to express anger or to protect themselves."[217] Additionally, juvenile lifers typically receive fewer rehabilitative services than prisoners with shorter sentences, and once they turn eighteen "[they] face[] an uphill battle to obtain additional educational opportunities in prison."[218] Prison violence and a lack of marketable skills are important factors during parole hearings, and juvenile lifers who have not made efforts towards rehabilitation may be passed over for parole.[219]

Juvenile lifers also have trouble remaining hopeful, and often lose touch with friends and family throughout their prison sentences.[220] Most prisoners serving long sentences, adults and juveniles alike, "lose social support and family connections."[221] For juvenile prisoners, who likely rely on their friends and fam-

214. *See* Gerard Glynn & Ilona Vila, *What States Should Do To Provide a Meaningful Opportunity for Review and Release: Recognize Human Worth and Potential*, 24 ST. THOMAS L. REV. 310, 337 (2012); Levick & Schwartz, *supra* note 117, at 394.

215. *See, e.g.*, Glynn & Vila, *supra* note 214, at 338 (discussing juveniles serving time in a Florida prison).

216. *Id.* at 337.

217. *Id.*

218. HUMAN RIGHTS WATCH & AMNESTY INT'L, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 68 (2005), *available at* http://www.amnestyusa.org/sites/default/files/pdfs/therestoftheirlives.pdf; *see also id.* at 5 ("[Juvenile lifers] are denied educational, vocational, and other programs to develop their minds and skills because access to those programs is typically restricted to prisoners who will someday be released, and for whom rehabilitation therefore remains a goal."); Glynn & Vila, *supra* note 214, at 340 ("Confronted with limited resources, prisons often give enrollment preference for education, vocational, and other services to inmates with shorter sentences."); Levick & Schwartz, *supra* note 117, at 398 (explaining how juvenile lifers are systematically excluded from educational and vocational programs).

219. *See* 28 C.F.R. § 2.18–19 (2013); Levick & Schwartz, *supra* note 117, at 394, 409; *Lifer Parole Process*, *supra* note 195.

220. HUMAN RIGHTS WATCH & AMNESTY INT'L, *supra* note 218, at 61; Glynn & Vila, *supra* note 214, at 338.

221. HUMAN RIGHTS WATCH & AMNESTY INT'L, *supra* note 218, at 61.

ily more than adult prisoners, these relationship losses could be especially detrimental.[222] Additionally, not only will losing relationships with loved ones hurt juvenile lifers emotionally, it could hurt their chances for parole. In parole hearings judges look at a prisoner's likelihood for rehabilitation,[223] and having someone to provide living arrangements or a job is useful when convincing a judge that a prisoner will have no problem re-entering society.[224] As juvenile lifers begin to face parole boards (based on either a re-sentencing hearing or an automatic lesser sentence) it is unclear if these offenders will even qualify for parole because of the detrimental effects of prison.[225] It is possible that adult juvenile lifers granted lower sentences post-*Miller* will not realize tangible justice in the form of freedom.[226]

Miller is retroactive, at least in some states, and many juvenile lifers will have their mandatory life without parole sentences re-considered.[227] States keeping discretionary life without parole sentences for juveniles must re-sentence juvenile lifers, taking into account *Miller*'s youthfulness factors—including transitory personality—before making sentencing decisions.[228] Taking transitory personality into account creates a paradox of treating adults like children, because juvenile lifers' have grown up and no longer have transitory personalities.[229] So far, courts conducting re-sentencing hearings have not solved this paradox, and focus more on the juvenile lifer's rehabilitation efforts rather than the actual crime.[230] Some states are avoiding the paradox of treating adults like children altogether, by precluding any life without parole sentences for ju-

222. *Id.* ("The difference for youth offenders serving life without parole is that they are likely to be much more dependent on family relationships than older inmates and may suffer these losses at an earlier age, causing them to endure their loss longer than other inmates.").

223. *See* 28 C.F.R. § 2.18–19; Levick & Schwartz, *supra* note 117, at 394; *Lifer Parole Process*, *supra* note 195.

224. For example, in juvenile lifer Ragland's re-sentencing hearing described in *State v. Ragland*, testimony about Ragland's ability to get a job from a friend and live with his brother upon release were key. 836 N.W.2d 107, 112–13 (Iowa 2013).

225. *See* Levick & Schwartz, *supra* note 117, at 394–95.

226. *See id.*

227. *See, e.g.*, People v. Morfin, 981 N.E.2d 1010, 1022 (Ill. App. Ct. 2012); *Ragland*, 836 N.W.2d at 122; Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 281–82 (Mass. 2013); Jones v. State, 122 So. 3d 698, 702–03 (Miss. 2013) (en banc).

228. *See* Miller v. Alabama, 132 S. Ct. 2455, 2471 (2012).

229. *See supra* notes 152–171 and accompanying text.

230. *See, e.g.*, *Ragland*, 836 N.W.2d at 112–13.

veniles and automatically commuting juvenile lifers' sentences,[231] but most states are electing to keep discretionary life without parole sentences for juveniles and must solve the paradox.[232] Finally, even if courts manage to re-sentence juvenile lifers, or states commute juvenile lifers' sentences, many offenders may never receive parole because of the inherent difficulties involved in serving prison sentences as a juvenile lifer.[233]

III. SENTENCING/PAROLE HYBRID HEARINGS: A FUNCTIONAL APPROACH

Because new sentencing hearings face the paradox of treating adults like children and may lead to absurd results,[234] and because not all states preclude life without parole for juveniles,[235] many adult juvenile lifers will face difficulties when pursuing post-*Miller* justice. Section A of this Part argues that complete re-sentencing hearings are untenable because completely adhering to *Miller*'s requirements is unpractical for many juvenile lifers seeking new sentences, and courts should instead conduct "hybrid hearings." Hybrid hearings will examine the relevant youthfulness characteristics from *Miller*, but will avoid the paradox of treating adults like children by also focusing on the juvenile lifers' current characteristics and their chances for rehabilitation. Section B of this Part addresses some problems with hybrid hearings, but argues that these hearings are still the most practical way for adult juvenile lifers to attain *Miller* justice.

A. AVOIDING THE PARADOX: "HYBRID HEARINGS"

In theory, new sentencing hearings for juvenile lifers should focus on the sentence warranted for the crime, not on the events that transpired between imposition of mandatory life without parole and the present.[236] If courts completely adhere to *Miller*'s requirements when conducting new sentencing

231. *See* H.R. 0023, 62nd Leg., 2013 Gen. Sess. (Wyo. 2013); *Diatchenko*, 1 N.E.3d at 283–85; Associated Press, *supra* note 197.

232. *See* sources cited *supra* note 211.

233. *See* Levick & Schwartz, *supra* note 117, at 393–94.

234. *See supra* notes 152–70 and accompanying text.

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

236. Courts applying retroactivity have remanded for new sentencing trials in accord with *Miller*, and have not given any instructions to address the offender's current likelihood for rehabilitation. *See, e.g.*, Jackson v. Norris, 426 S.W.3d 906, 911 (Ark. 2013) (instructing the court "to hold a sentencing hearing where Jackson may present *Miller* evidence").

hearings for adult juvenile lifers, they must look at the offender at the time of the crime, and address youthfulness characteristics.[237] Courts must ask the question: Does the offender's behavior and life circumstances suggest that this crime was a simple youthful indiscretion, or is it evidence of a depraved personality?[238] As explained above, this question's answer could sometimes lead to absurd results.[239] Even in situations that do not lead to absurd results,[240] addressing transitory personality may be moot, and courts (federal courts at least) should not waste judicial resources addressing moot issues.[241]

This Note proposes a solution that avoids mootness and absurd results: "hybrid hearings." Hybrid hearings combine sentencing and parole hearings. These hearings will allow courts to focus on a juvenile lifer's youthfulness characteristics at the time of the crime, but also the offender's current personality. The district court hearing approved in *State v. Ragland*, discussed above, offers a good example for how these hearings could be conducted.[242] A juvenile lifer could present evidence that his or her youthfulness constitutes diminished culpability for the crime committed.[243] Some examples include demonstrating peer pressure by a group of friends,[244] simply being in the

237. Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) ("[W]e require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.").

238. *See id.*

239. *See supra* note 171 and accompanying text.

240. It is possible that a juvenile lifer's personality has not drastically changed and that a court would end up with a result that makes sense. For example, a juvenile who was minimally involved in his or her crime and was heavily influenced by peers might now demonstrate maturity and a strong possibility for rehabilitation.

241. *See* DeFunis v. Odegaard, 416 U.S. 312, 316–20 (1974) (per curiam) (explaining that federal courts cannot decide moot issues). Even if state courts are not precluded from considering moot issues, one could imagine that it would be uncomfortable for a court and/or offender to discuss issues that are no longer relevant.

242. *See* State v. Ragland, 836 N.W.2d 107, 112–13 (Iowa 2013).

243. *See* Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012) (stating that juveniles have "diminished culpability").

244. *See, e.g.*, *id.* at 2468 ("To be sure, Jackson learned on the way to the video store that his friend Shields was carrying a gun, but his age could well have affected his calculation of the risk that posed, as well as his willingness to walk away at that point."); Jackson v. State, 194 S.W.3d 757, 758 (Ark. 2004) (stating that Jackson only found out that his friend had a gun on the way to the robbery).

wrong place at the wrong time,[245] living in a violent environment,[246] proving that the offender was not the primary actor in the crime,[247] or showing that the offender acted on impulse.[248]

In addition to presenting youthfulness evidence to prove diminished culpability for the crime, the juvenile lifer could also demonstrate rehabilitation. This would allow the important transitory personality characteristic from *Miller* to come in *ex post*. By demonstrating rehabilitation, the offender can prove his or her actions were evidence of a transitory personality, rather than a permanently depraved personality. Evidence that could prove transitory personality/rehabilitation would be similar to evidence typically presented in parole hearings.[249] Some examples are: guaranteed job upon release,[250] having a place to live upon release,[251] marketable skills acquired in prison,[252] demonstrating remorse for the crime,[253] or clean prison records.[254]

Examining youthfulness characteristics at the time of the crime alongside current personality characteristics avoids ab-

245. *See, e.g.*, *Miller*, 132 S. Ct. at 2468 (emphasizing that Jackson did not even shoot the victim); *Ragland*, 326 N.W.2d at 112 (quoting Ragland's accomplice's statement that Ragland "was unlucky to be with [him] that night, not the other way around").

246. *See, e.g.*, *Miller*, 132 S. Ct. at 2468 (commenting that both Jackson's mother and his grandmother had previously shot people); *id.* at 2462, 2469 (explaining that Miller attempted suicide as a child, his stepfather physically abused him, and his mother neglected him); *Ragland,* 836 N.W.2d at 112 (quoting Ragland's accomplice's statement that the "time and place" in which the boys grew up influenced their actions).

247. *See, e.g.*, *Miller*, 132 S. Ct. at 2468 (emphasizing that Jackson did not even shoot the victim).

248. *See, e.g.*, *id.* at 2462, 2469 (stating that Miller committed his crime while under the influence of drugs and alcohol, and that Miller grabbed a baseball bat after the victim grabbed him by the throat).

249. *See* 28 C.F.R. § 2.18–19 (2013); *Lifer Parole Process*, *supra* note 195.

250. *See, e.g.*, *Ragland,* 836 N.W.2d at 112 (stating that a businessman "testified he would gladly hire Ragland upon release from prison").

251. *See, e.g.*, *id.* (stating that Ragland's brother testified that "living arrangements" would be "in place" upon Ragland's release).

252. *See* Levick & Schwartz, *supra* note 117, at 403 ("Many state codes explicitly require parole boards to use rehabilitation as the central benchmark for parole decisions.").

253. *See, e.g.*, *Ragland*, 836 N.W. 2d at 112 (quoting Ragland's brother's statement that Ragland had built a relationship with the victim's brother); *Lifer Parole Process*, *supra* note 195 (listing "signs of remorse" as a factor tending to indicate an inmate's suitability for parole in California).

254. *See* 28 C.F.R. § 2.18 ("[T]he Commission must determine that the prisoner has substantially observed the rules of the institution or institutions in which he has been confined . . . .").

surd results and potential mootness problems. The court would no longer look at the crime in a vacuum, examining characteristics that may no longer be relevant to the offender.[255] If the juvenile's crime was so extreme that a court might find it evidence of a depraved personality, but the offender currently demonstrates maturity, a court would not come to the absurd result of keeping the life without parole sentence when it is no longer warranted.[256] Hybrid hearings are a practical solution that can bring juvenile lifers the justice they deserve post-*Miller*.

B. POTENTIAL PROBLEMS WITH HYBRID HEARINGS

Even though hybrid hearings solve the paradox of treating adults like children, there are several problems with these hearings that should be addressed. One problem with hybrid hearings is that, as explained above, juveniles serving life without parole sentences are often disadvantaged in prison.[257] These offenders may not receive the benefit of educational and vocational programs, which incidentally may make it less likely that the offender will have a job upon release.[258] Additionally, these offenders entered prison at a tumultuous time in their lives without any hope of release, and may have acted violently as a result.[259] Some offenders may have violent prison records, not because they have depraved personalities, but because they had no incentive to act otherwise.[260] Also, many juvenile lifers may not have friends and family willing to provide living arrangements upon release, because juvenile offenders serving life sentences are less likely to maintain relationships.[261] All of these unfortunate consequences of serving long prison sentences could severely disadvantage juvenile lifers in hybrid hearings. Courts conducting hybrid hearings should keep these facts in mind, and understand that even if a prisoner has diffi-

255. *See supra* notes 152–171 and accompanying text.

256. *See supra* note 171 and accompanying text.

257. *See supra* Part II.C.

258. Glynn & Vila, *supra* note 214, at 340 ("Confronted with limited resources, prisons often give enrollment preference for education, vocational, and other services to inmates with shorter sentences."); Levick & Schwartz, *supra* note 117, at 398 (explaining how juvenile lifers are systematically excluded from educational and vocational programs).

259. Glynn & Vila, *supra* note 214, at 337.

260. *Id.*

261. HUMAN RIGHTS WATCH & AMNESTY INT'L, *supra* note 218, at 61.

culty proving rehabilitation it may not mean that there is no hope for the offender.

Another problem with hybrid hearings is that they likely will favor juvenile lifers with more resources. Juvenile lifers coming from well-off families or backgrounds likely will have more job and living options upon release.[262] These offenders may have had resources entering prison that allowed them to enter educational programs other juvenile lifers were not offered.[263] Favoring juvenile lifers with more resources is problematic because it could perpetuate the cycle of violence in low-income populations.[264] Courts should weigh these factors when conducting hybrid hearings, and should keep class status in mind when making decisions.

A third problem with hybrid hearings is that they are not a concrete solution, and are subject to the court's discretion. Judges' solutions could vary vastly from case to case, and some juvenile lifers may end up with better results than others. Unfortunately, this is a problem with any functional solution, and it is not easily resolved.[265] Still, hybrid hearings allow flexibility to address each juvenile lifer's individual circumstances.[266] Also, since many states keep life without parole as a possible sentence for juvenile lifers,[267] a functional solution ensures that these offenders actually receive *Miller* justice.

262. *Cf.* Paul Street, *Race, Prison, and Poverty*, HIST. IS A WEAPON, http://www.historyisaweapon.com/defcon1/streeracpripov.html (last visited Dec. 3, 2014) ("For those [parolees] with earnings, average annual wages were exceedingly low and differed significantly by race: white former inmates averaged $7,880 per year and Blacks made just $4,762.").

263. *See* HUMAN RIGHTS WATCH & AMNESTY INT'L, *supra* note 218, at 69 ("Post-secondary education is only available to youth offenders serving life without parole if someone can pay the course fees, which tend to be beyond the means of most offenders' families.").

264. *See generally* Victor Eugene Flango & Edgar L. Sherbenou, *Poverty, Urbanization, and Crime*, 14 CRIMINOLOGY 331, 340 (1977) (finding that urbanization and poverty correlate with crime).

265. Professor Barry Feld's "youth discount" could be one alternative. *See* Feld, *supra* note 24, at 316. The "youth discount" would categorically mitigate juvenile sentences rather than require individualized sentencing. *Id.* While this is a practical solution, it would not work for states that still want to sentence some juveniles to life without parole. *See, e.g.*, S.B. 9, 147th Gen. Ass. (Del. 2013).

266. *Miller* requires individualized sentencing hearings before sentencing juveniles to harsh penalties. *See* Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012).

267. *See, e.g.*, Del. S.B. 9 (removing mandatory life without parole, but retaining life without parole as a maximum sentence for juveniles convicted of first-degree murder).

CONCLUSION

Miller v. Alabama provides juvenile lifers an opportunity for justice, and a chance to receive new sentences that take juveniles' diminished culpability into account. Unfortunately, adult juvenile lifers may face difficulties when seeking the benefit of *Miller*. New sentencing hearings for juvenile lifers that have grown up must address the paradox of treating adults like children, and cannot implement the transitory personality characteristic—an important principle in *Miller*—without risking addressing a moot issue or ending up with an absurd result. Courts applying *Miller* retroactively have not addressed this problem, or have conducted sentencing hearings that do not consider transitory personality and other youthfulness characteristics. Additionally, many states still keep life without parole as a possible sentence for some juvenile offenders, so most adult juvenile lifers' cannot simply have their sentences commuted.

Complete sentencing hearings are not the correct route for courts when re-sentencing adult juvenile lifers. Courts should use "hybrid hearings" that mix elements of sentencing and parole hearings. Hybrid hearings will allow courts to address youthfulness characteristics as related to the crime committed, as well as the offender's current personality and likelihood for rehabilitation. Addressing the adult juvenile lifer's current personality allows courts to consider transitory personality *ex post*. Offenders can present evidence demonstrating that the crime committed only indicated a transitory personality, not a permanently depraved character. Hybrid hearings would solve the paradox of treating adults like children while staying true to the central principles in *Miller*. Most importantly, hybrid hearings will allow juvenile lifers to receive tangible post-*Miller* justice.