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Jury Sentencing and Juveniles: Eighth Amendment Limits and Sixth Amendment Rights

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JURY SENTENCING AND JUVENILES: EIGHTH AMENDMENT LIMITS AND SIXTH AMENDMENT RIGHTS

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Abstract: Across the country, states are grappling with how to comply with the U.S. Supreme Court's recent decision in *Miller v. Alabama*, which held that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment. Following *Miller*, it appears a sentencer may impose life without parole on a juvenile homicide offender only in those rare instances in which the sentencer determines, after considering the mitigating qualities of youth, that the juvenile's crime reflects "irreparable corruption." Courts are preparing to conduct resentencing hearings in states nationwide, and new cases where juveniles face the possibility of life in prison are entering the courts. Yet courts and scholars have not addressed a fundamental question: Who is the sentencer? Can a judge decide that a particular juvenile should die in prison or does the Constitution give juveniles the right to require that a jury make that determination? Courts and state legislatures responding to *Miller* have assumed that a judge can impose life without parole on a juvenile, as long as the judge has discretion to impose a less severe sentence. But viewing *Miller* in light of the Supreme Court's recent Sixth Amendment jury right jurisprudence raises questions about the role of the jury in these post-*Miller* sentencing hearings. In particular, does an Eighth Amendment limit on a sentence operate in the same way as a statutory maximum sentence and set a ceiling that cannot be raised absent a jury finding? If so, a jury must find the facts beyond a reasonable doubt that expose a juvenile to life without parole. Understanding how the Court's recent Sixth and Eighth Amendment cases interact has broad implications for how sentencing authority is allocated not only in serious juvenile cases but also in our justice system more widely.

INTRODUCTION

In three recent decisions, the U.S. Supreme Court has held that the Eighth Amendment places categorical limits on the severity of sentences

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that may be imposed on individuals whose crimes occurred when they were under the age of eighteen.[1] First, the U.S. Supreme Court's 2005 decision *Roper v. Simmons* created an absolute ceiling on punishment for juveniles by holding that the Eighth Amendment prohibits the death penalty for such offenders.[2] In 2010, the Court in *Graham v. Florida* lowered the maximum available penalty for a particular category of juvenile offenders: Those who commit nonhomicide offenses may not receive life-without-parole sentences and must have a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[3] Most recently, in its 2012 decision *Miller v. Alabama*, the Court held that even juvenile homicide offenders cannot automatically receive life-without-parole sentences under the Eighth Amendment but must have "individualized" sentencing hearings that take into account the "mitigating qualities of youth" and the ways in which these qualities "counsel against" life-without-parole sentences.[4] *Miller* stressed that life without parole should be "uncommon" in juvenile homicide cases and may be imposed only in those "rare" instances in which the sentencer determines that the juvenile's crime reflects "irreparable corruption."[5] Thus, although *Roper* places an absolute ceiling on punishment for juveniles (i.e., no death penalty for any juvenile), *Graham* and *Miller* lower the punishment ceiling further for some categories of juveniles.[6]

States are now grappling with how to comply with *Graham* and *Miller*. Sixteen states have enacted legislation responding to these decisions, and legislation is being considered in other states.[7] State Supreme Courts in Illinois, Iowa, Massachusetts, Mississippi, Nebraska, New Hampshire, South Carolina, Texas, and Wyoming have recently held that *Miller* applies retroactively, and inmates are preparing for resentencing hearings.[8] With old cases being remanded for resentencing hearings and new cases entering the system, courts must conduct sentencing proceedings that comply with constitutional requirements. Although much has been written about *Graham*

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[1] *See* Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012); Graham v. Florida, 560 U.S. 48, 75 (2010); Roper v. Simmons, 543 U.S. 551, 572 (2005).

[2] 543 U.S. at 572.

[3] 560 U.S. at 75.

[4] 132 S. Ct. at 2467–69.

[5] *Id.* at 2469.

[6] *See id.*; *Graham*, 560 U.S. at 75; *Roper*, 543 U.S. at 572.

[7] *See infra* notes 193–249 and accompanying text (discussing state statutes responding to *Miller and Graham*).

[8] People v. Davis, 6 N.E.3d 709, 720 (Ill. 2014); State v. Ragland, 836 N.W.2d 107, 117 (Iowa 2013); Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 278 (Mass. 2013); Jones v. State, 122 So.3d 698, 703 (Miss. 2013); State v. Mantich, 842 N.W.2d 716, 731 (Neb. 2014); Petition of State, 103 A.3d 227, 233–34 (N.H. 2014); Aiken v. Byars, 765 S.E.2d 572, 575 (S.C. 2014); *Ex parte* Maxwell, 424 S.W.3d 66, 68 (Tex. Crim. App. 2014); State v. Mares, 335 P.3d 487, 508 (Wyo. 2014).

and *Miller*,[9] scholars have not addressed a critical question raised by these cases: In states that have retained life without parole as a possible penalty for juveniles, who is the sentencer? Can a judge decide that a particular juvenile deserves a life-without-parole sentence or does the Constitution give juveniles the right to have a jury make that determination?

Graham and *Miller* bring to the forefront important questions about the allocation of sentencing authority in the justice system. In particular, how do Eighth Amendment categorical limits on sentences interact with Sixth Amendment jury trial rights?[10] Does an Eighth Amendment limit operate in the same manner as a statutory maximum for an offense and thus set a ceiling on a sentence that cannot be raised absent a jury finding?

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[9] *See, e.g.*, William W. Berry III, *More Different Than Life, Less Different Than Death: The Argument for According Life Without Parole Its Own Category of Heightened Review Under the Eighth Amendment After* Graham v. Florida, 71 OHIO ST. L.J. 1109, 1109 (2010); Cara H. Drinan, Graham *on the Ground*, 87 WASH. L. REV. 51, 51 (2012); Nancy Gertner, Miller v. Alabama: *What It Is, What It May Be, and What It Is Not*, 78 MO. L. REV. 1041, 1041–44 (2013); Kristin Henning, *Juvenile Justice After* Graham v. Florida*: Keeping Due Process, Autonomy, and Paternalism in Balance*, 38 WASH. U. J.L. & POL'Y 17, 17–19 (2012); Craig S. Lerner, *Sentenced to Confusion:* Miller v. Alabama *and the Coming Wave of Eighth Amendment Cases*, 20 GEO. MASON L. REV. 25, 25–27 (2012); Marsha L. Levick & Robert G. Schwartz, *Practical Implications of* Miller *and* Jackson*: Obtaining Relief in Court and Before the Parole Board*, 31 LAW & INEQ. 369, 369–70 (2013); Terry A. Maroney, *Adolescent Brain Science After* Graham v. Florida, 86 NOTRE DAME L. REV. 765, 765–67 (2011); Alice Ristroph, *Hope, Imprisonment, and the Constitution*, 23 FED. SENT'G REP. 75, 75 (2010); Krisztina Schlessel, Graham*'s Applicability to Term-of-Years Sentences and Mandate to Provide a "Meaningful Opportunity for Release*,*"* 40 FLA. ST. U. L. REV. 1027, 1028–29 (2013).

[10] Only a few scholars have considered how the Court's Eighth Amendment juvenile sentencing cases might relate to Sixth Amendment jurisprudence. Beth A. Colgan argues that following *Miller*, if an offense carries a mandatory life-without-parole sentence, age is an element of the offense. *See* Beth A. Colgan, Alleyne v. United States*, Age as an Element, and the Retroactivity of* Miller v. Alabama, 61 UCLA L. REV. DISC. 262, 265 (2013), http://www.uclalawreview.org/pdf/discourse/61-17.pdf, *archived at* http://perma.cc/82EC-4485. In other words, to convict a defendant of such an offense, the jury must find that the defendant is above the age of eighteen. For this reason, Colgan asserts that *Miller* is a substantive rule that must apply retroactively. *See id.*

Richard A. Bierschbach and Stephanos Bibas argue that "commentators have overlooked important parallels between the *Graham* and *Apprendi* lines." Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 399 (2013). They argue that both lines of cases "marked a departure from the Court's usual deference to legislative judgment with respect to noncapital sentencing decisions," "limited judges' powers in some ways while enhancing them in others," and "read constitutional provisions in unexpected ways to reallocate sentencing power among various actors rather than to limit sentences or sentence enhancements directly and substantively." *Id.* Bierschbach and Bibas "see deep connections between these seemingly unrelated doctrines." *Id.* In their view, "[t]he Court is awkwardly squeezing fundamental notions about the structural features of a system of just punishment into disparate individual rights provisions. What is emerging is a larger structural and procedural framework for constitutionally tailoring punishment." *Id.* Unlike Bierschbach and Bibas, I focus on whether Eighth Amendment limits trigger Sixth Amendment rights. In particular, I examine whether the Court's recent lines of Sixth and Eighth Amendment cases combine to create a jury sentencing right for juveniles facing the possibility of life-without-parole sentences.

Under the Court's recent Sixth Amendment cases, a judge may not make factual findings that expose a defendant to a sentence above the maximum sentence authorized by the jury's verdict. "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority."[11] In other words, if an enhanced sentence is authorized only if certain facts are established, then a defendant may be exposed to the enhanced sentence only if a jury finds those facts.[12] Moreover, the jury must find those facts beyond a reasonable doubt.[13] These principles apply not only where a maximum sentence is set by statute, but also where a presumptive maximum sentence is set by sentencing guidelines promulgated by a sentencing commission.[14] They also extend to capital cases: The Sixth Amendment requires that a jury find beyond a reasonable doubt the facts that make a defendant eligible for the death penalty under applicable state statutory provisions.[15]

Graham and *Miller* plainly set limits on the sentences that may be imposed in some categories of juvenile cases.[16] But do these categorical Eighth Amendment holdings trigger Sixth Amendment rights? Can the Constitution set punishment ceilings that cannot be raised absent factual findings made by a jury beyond a reasonable doubt? If so, then life without parole may not be imposed on a juvenile unless a jury finds, beyond a reasonable doubt, that the juvenile's conduct involved all the factual components necessary to make the conduct a "homicide" crime within the meaning of *Graham*.[17] Moreover, even in a "homicide" case, a jury would need to find

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[11] Blakely v. Washington, 542 U.S. 296, 304 (2004) (citation omitted).

[12] *See id.*

[13] *See* United States v. Booker, 543 U.S. 220, 244 (2005).

[14] *Id.*; *see also id.* at 232–33.

[15] Ring v. Arizona, 536 U.S. 584, 609 (2002) (overruling prior precedent "to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty" and holding that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury") (internal citation omitted). The Court has not required that a jury make the ultimate decision to impose death, although several Justices have asserted that the Eighth Amendment requires as much. *See id.*. at 619 (Breyer, J., concurring) (noting his agreement with Justice Stevens that "the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death").

[16] *See Miller*, 132 S. Ct. at 2469; *Graham*, 560 U.S. at 75.

[17] *Graham* does not define "homicide." *See infra* notes 79–85 and accompanying text. Justices Breyer and Sotomayor have asserted that only juveniles who kill or intend to kill may be sentenced to life without parole under *Graham*. *Miller*, 132 S. Ct. at 2476 (Breyer, J., concurring) ("*Graham* dictates a clear rule: The only juveniles who may constitutionally be sentenced to life without parole are those convicted of homicide offenses who 'kill or intend to kill.'" (citing *Graham*, 560 U.S. at 69)).

that a juvenile was irreparably corrupt before life without parole would be authorized under *Miller*.[18]

Despite the large volume of litigation involving *Miller* and *Graham*,[19] lower courts have not yet addressed the intersection of *Miller* and *Graham* with the U.S. Supreme Court's Sixth Amendment jury right cases. Indeed, appellate courts remanding cases for resentencing following *Miller* have assumed that judges will be the sentencers.[20] Most state legislatures enacting statutes responding to *Miller* have assumed the same. Although several new state statutes do not specify where the sentencing authority lies, most states that have retained life without parole for juveniles have placed the sentencing authority explicitly in the hands of judges.[21] Even without con-

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[18] *Miller*, 132 S. Ct. at 2469. In my view, no child is irreparably corrupt and a finding of irreparable corruption at the time of sentencing is not supportable. Yet to the extent *Miller* appears to authorize life without parole for a juvenile if such a finding is made, then a juvenile has a right to have a jury finding on the issue.

[19] In the two years since *Miller* was decided, the decision has been cited in more than 1000 cases.

[20] *See infra* notes 190–192 and accompanying text (discussing court decisions applying *Miller* and *Graham*).

[21] States enacting legislation post-*Miller* that retains the possibility of life-without-parole sentences for juveniles include Arkansas, Florida, Louisiana, Michigan, Nebraska, North Carolina, Pennsylvania, South Dakota, Utah, and Washington. ARK. CODE ANN. § 5-4-104 (2014); FLA. STAT. § 775.082(1)(b)(1) (2014); LA. CODE CRIM. PROC. ANN. art. 878.1(A) (2014); MICH. COMP. LAWS § 769.25 (2014); NEB. REV. STAT. § 28-105.02(1) (2014); N.C. GEN. STAT. § 15A-1340.19B (2014); 18 PA. CONS. STAT. § 1102.1 (2014); S.D. CODIFIED LAWS § 22-6-1 (2014); UTAH CODE ANN. § 76-5-202 (West 2014) (stating those convicted of aggravated murder committed under 18 shall be sentenced according to Utah Code Ann. § 76-3-207.7, which provides for sentencing by the court); WASH. REV. CODE § 10.95.030(3)(a)(ii). The statutes enacted in Florida, Michigan, Nebraska, North Carolina, Pennsylvania, South Dakota, Utah, and Washington place the sentencing decision in the hands of judges. FLA. STAT. § 775.082(1)(b)(1); MICH. COMP. LAWS § 769.25; NEB. REV. STAT. § 28-105.02(2); N.C. GEN. STAT. § 15A-1340.19B; 18 PA. CONS. STAT. § 1102.1(d); S.D. CODIFIED LAWS § 22-6-1; UTAH CODE ANN. §§ 76-5-202(3)(e), 76-3-207.7; WASH. REV. CODE § 10.95.030(3)(b). The new statutes enacted in Arkansas and Louisiana are not explicit about whether a jury or judge is empowered to make the sentencing determination. *See* ARK. CODE ANN. § 5-4-104(b); LA. CODE CRIM. PROC. art. 878.1.

Several states have eliminated life without parole entirely for juveniles. Colorado, Hawaii, and Texas have recently eliminated life without parole for juveniles through legislation that applies prospectively. COLO. REV. STAT. § 18-1.3-401(4)(b)(I) (2014); HAW. REV. STAT. § 706-656 (West); TEX. GOV'T CODE ANN. § 508.145(b) (West 2014) (eliminating life without parole for juveniles 16 and under); TEX. PENAL CODE § 12.31 (West 2014). West Virginia and Wyoming have eliminated life without parole for juveniles retroactively. W. VA. CODE ANN. § 61-11-23 (West); WYO. STAT. ANN. § 6-2-101(b) (2014); State v. Mares, 2014 WY 126 (2014) (holding that Wyoming statute applies retroactively). In Massachusetts, the Supreme Judicial Court held that life without parole for juveniles is prohibited by the state constitution. *See* Commonwealth v. Brown, 1 N.E.3d 259, 264 (Mass. 2013) (life without parole prohibited for juveniles); *Diatchenko*, 1 N.E.3d at 278, 285–86 (Mass. 2013) (juveniles currently serving life-without-parole sentences entitled to parole). The Massachusetts legislature subsequently enacted legislation that applies prospectively. *See infra* note 258 and accompanying text. Delaware and California have created mechanisms for juveniles sentenced to life without parole to seek resentencing after serving a period of time. Those bills apply retroactively. *See* CAL. PENAL CODE § 1170(d)(2)(A)(i) (West

sidering the impact of Eighth Amendment limits on the sentences, some of the new statutes impermissibly expose juveniles to enhanced sentences based on judicial fact-finding. Moreover, if punishment ceilings created by the Eighth Amendment operate in the same manner as maximum sentences under statutory or guideline provisions, then many of the statutes enacted in response to *Miller* unconstitutionally permit judges to determine unilaterally that life without parole is appropriate for a juvenile.

Whether an Eighth Amendment punishment ceiling is equivalent to a statutory or guideline ceiling for Sixth Amendment purposes impacts not only sentencing proceedings in serious juvenile cases, but also a broader range of criminal cases. Although the U.S. Supreme Court's Sixth Amendment decision in *Apprendi v. New Jersey* and its progeny appear at first glance to reinvigorate the jury's role at sentencing, it is questionable whether the decisions have, in fact, led to more jury involvement in sentencing decisions.[22] Legislatures can easily avoid a role for juries in sentencing by setting high maximum sentences for offenses and giving judges the discretion to select sentences within statutory ranges.[23] Indeed, many of the post-*Miller* statutes attempt to do exactly that. The statutes require judges to consider a list of factors, but ultimately give judges full discretion to impose life without parole on juveniles convicted of certain offenses—without a requirement that any particular factor be found before such a sentence may be imposed.[24]

Although an Eighth Amendment punishment ceiling is set by the Constitution rather than by a legislature or commission, it nonetheless defines the lawful sentencing range to which a defendant may be exposed. Thus, under the Court's recent Sixth Amendment cases, it follows that an Eighth Amendment ceiling may not be raised under the Sixth Amendment absent jury findings beyond a reasonable doubt. With categorical Eighth Amendment limits triggering Sixth Amendment rights, a role for the jury in sentencing decisions in serious cases is preserved—even if legislatures draft

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Supp. 2015) (providing mechanism for most juveniles serving life without parole to petition court for resentencing); DEL. CODE ANN. tit. 11, § 4204A(d)(1) (2014) (providing mechanism for juveniles serving life without opportunity for parole and other lengthy sentences to seek resentencing); *see also* S.B. 260, 2013 Legis., Reg. Sess. (Cal. 2013) (providing new parole eligibility rules for juveniles serving lengthy sentences other than life without parole). The California statute excludes some juveniles serving life without parole from petitioning for resentencing.

[22] *See* Sam Kamin & Justin Marceau, *The Facts About* Ring v. Arizona *and the Jury's Role in Capital Sentencing*, 13 U. PA. J. CONST. L. 529, 529–30 (2011). For more information, see generally Alleyne v. United States, 133 S. Ct. 2151 (2013); Cunningham v. California, 549 U.S. 270 (2006); *Booker*, 543 U.S. at 244; *Blakely*, 542 U.S. at 304; *Ring*, 536 U.S. at 609; Apprendi v. New Jersey, 530 U.S. 466 (2000).

[23] *See* Stephanos Bibas, *How* Apprendi *Affects Institutional Allocations of Power*, 87 IOWA L. REV. 465, 468 (2002).

[24] *See infra* notes 193–249 and accompanying text.

statutes in an effort to avoid jury sentencing. Moreover, with Eighth Amendment jurisprudence creating ceilings on punishment, the facts necessary to raise the ceiling would need to be found by the sentencer beyond a reasonable doubt.[25]

This Article proceeds in four Parts. Part I examines the Supreme Court's decisions placing Eighth Amendment categorical limits on the sentences that may be imposed on juveniles.[26] Part II explores the interaction between the Court's recent Eighth Amendment and Sixth Amendment cases and considers whether juveniles have a right to jury findings before life without parole may be imposed.[27] Part III reveals how state courts and legislatures have assumed that judges rather than juries will sentence juveniles

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[25] Of course, Sixth Amendment jury rights are waivable. *See infra* notes 284–285 and accompanying text. There may be good reasons for juveniles in serious cases to waive the right to jury involvement in sentencing and ask judges to determine the sentence. Some commentators have stressed that jury sentencing serves as an important check on legislative, prosecutorial, and judicial power. *See, e.g.*, *Apprendi*, 530 U.S. at 477 (discussing the common law practices that support the principle that a criminal defendant has the right to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt") (citation and internal quotation marks omitted); *Blakely*, 542 U.S. at 305–06 ("Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 72, 83–84 (2011) (noting that at the time of the country's founding, trial by jury prevented the government from ordering its judges to convict its critics); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 106–10 (2003) (discussing the jury's role in providing a "check against executive and legislative overreaching"); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 313 (2003) (arguing that "[i]n the absence of wide consensus on sentencing goals, it is best to leave the sentencing decision with a deliberative democratic institution—the jury"). Others have warned of dangers of jury involvement in sentencing. Juries may be prone to racial bias and arbitrary decision making. Patrick E. Higginbotham, *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047, 1048 (1991); Radha Iyengar, *Who's the Fairest in the Land? Analysis of Judge and Jury Death Penalty Decisions*, 54 J.L. & ECON. 693, 694 (2011); Mona Lynch & Craig Haney, *Looking Across the Empathic Divide: Racialized Decision Making on the Capital Jury*, 2011 MICH. ST. L. REV. 573, 575–86. Some studies have found juries to be harsher sentencers than judges. *See* Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 898–900, 927–28 (2004). *See generally* Mona Lynch & Craig Haney, *Emotion, Authority, and Death: (Raced) Negotiations and Mock Capital Jury Deliberations*, LAW & SOC. INQUIRY (2014). Although studies suggest that juries will tend to find youth mitigating, it is difficult to predict whether juries are more inclined than judges to give mitigating effect to youth as *Miller* requires. *See infra* notes 304–333 and accompanying text.

What does seem clear is that the right to jury sentencing would make sentencing in serious juvenile cases longer and more complex. Selecting a jury takes time, and the presence of a jury may lead to more thorough, capital-style presentations of mitigating evidence by defense lawyers. The right to jury involvement thus would give juveniles an important bargaining chip in plea negotiations: prosecutors may be deterred from seeking life-without-parole sentences because of the prospect of lengthy proceedings. All and all, the right to jury sentencing for juveniles in serious cases is likely to reduce the prevalence of life-without-parole sentences.

[26] *See infra* notes 30–113 and accompanying text.

[27] *See infra* notes 114–183 and accompanying text.

facing life without parole, and considers whether new state statutes responding to *Miller* are constitutional.[28] Part IV concludes by discussing the consequences that may flow from concluding that Eighth Amendment limits trigger Sixth Amendment rights and give juveniles the right to jury sentencing in serious juvenile cases.[29]

I. Eighth Amendment Ceilings on Punishment for Juveniles

The U.S. Supreme Court's recent Eighth Amendment decisions in *Roper v. Simmons*, *Graham v. Florida*, and *Miller v. Alabama* place categorical limits on the sentences that may be imposed on individuals whose crimes occurred before they were eighteen.[30] *Roper* sets an absolute ceiling on punishment by prohibiting the death penalty for juvenile offenders.[31] *Graham* and *Miller* lower the punishment ceiling further for some categories of juvenile cases by prohibiting life-without-parole sentences under certain circumstances.[32] These constitutional ceilings on punishment for juveniles are discussed below.[33] Section A introduces the Supreme Court's Eighth Amendment jurisprudence regarding juvenile sentencing.[34] Section B then discusses how these cases prohibit life-without-parole sentences for juveniles absent certain factual findings.[35]

A. Eighth Amendment Limits on Sentencing Juveniles

In the past ten years, the U.S. Supreme Court has held three times that the Eighth Amendment requires individuals under eighteen years of age to be sentenced differently from adults.[36] In 2005, in *Roper v. Simmons*, the U.S. Supreme Court held that it was cruel and unusual punishment under the Eighth Amendment to impose the death penalty on an individual who was under eighteen at the time of the crime.[37] The Court observed that the death penalty is reserved for offenders who commit the most serious crimes "and whose extreme culpability makes them 'the most deserving of execution.'"[38] The Court reasoned that certain differences between juveniles and adults "demonstrate that juvenile offenders cannot with reliability be classi-

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[28] *See infra* notes 184–259 and accompanying text.
[29] *See infra* notes 260–348 and accompanying text.
[30] *See Miller*, 132 S. Ct. at 2469; *Graham*, 560 U.S. at 75; *Roper*, 543 U.S. at 572.
[31] 543 U.S. at 572.
[32] *See Miller*, 132 S. Ct. at 2469; *Graham*, 560 U.S. at 75.
[33] *See infra* notes 36–113 and accompanying text.
[34] *See infra* notes 36–72 and accompanying text.
[35] *See infra* notes 73–113 and accompanying text.
[36] *See Miller*, 132 S. Ct. at 2469; *Graham*, 560 U.S. at 75; *Roper*, 543 U.S. at 572.
[37] 543 U.S. at 572.
[38] *Id.* at 568 (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002)).

fied among the worst offenders."[39] In particular, youth have a "lack of maturity and an underdeveloped sense of responsibility," they are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and their character "is not as well formed as that of an adult."[40] These differences diminish a juvenile's culpability and "render suspect any conclusion that a juvenile falls among the worst offenders."[41]

The Court in *Roper* emphasized that "[t]he reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character."[42] Indeed, "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[43] The Court stressed that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption."[44] Accordingly, the Court categorically barred the death penalty for juveniles, concluding that "neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders."[45] Following *Roper*, life without parole thus became the harshest available penalty for a juvenile offender.[46]

In 2010, in *Graham v. Florida*, the U.S. Supreme Court held that the Eighth Amendment categorically prohibits life-without-parole sentences for juveniles who commit "nonhomicide" crimes.[47] In such cases, states must provide juveniles with a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[48] In concluding that juveniles who commit nonhomicide crimes may not receive life without parole, the Court reasoned that "[t]he age of the offender and the nature of the crime each bear on the analysis."[49] As it had in *Roper*, the Court in *Graham* emphasized that juveniles are less culpable than adults due to their underdeveloped brains and characters.[50] Regarding the nature of the crime, the Court noted that it had previously recognized that "defendants who do not

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[39] *Id.* at 569.
[40] *Id.* at 569–70 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).
[41] *Id.* at 570.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 573.
[45] *Id.* at 572–74.
[46] *See id.*
[47] *See* 560 U.S. at 75.
[48] *See id.*
[49] *See id.* at 69.
[50] *See id.* at 68; *Roper*, 543 U.S. at 569–70.

kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers."[51] Relying on these two lines of precedent, the Court concluded that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."[52] In light of this diminished capacity and the greater prospects that juveniles have for reform, the Court concluded that life-without-parole sentences may not be imposed on juveniles in nonhomicide cases.[53]

Most recently, in 2012, the U.S. Supreme Court held in *Miller v. Alabama* that mandatory life-without-parole sentences violate the Eighth Amendment when imposed on juvenile offenders.[54] Under *Miller*, even in the most serious homicide cases, juvenile offenders are entitled to "individualized sentencing," and the sentencer must have discretion to impose a sentence that allows a meaningful opportunity for release at a later time.[55] *Miller* reasoned that "children are constitutionally different from adults for purposes of sentencing,"[56] and therefore "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children."[57] As in *Roper* and *Graham*, the Court in *Miller* emphasized the capacity of children to rehabilitate.[58] The Court stated that children have "greater prospects for reform"[59] than adults, and a mandatory life-without-parole sentence "disregards the possibility of rehabilitation even when the circumstances most suggest it."[60] *Miller* does not on its face ban life-without-parole sentences. Rather, the Court explained:

> We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment. Because that holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger. But given all we

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[51] *Graham*, 560 U.S. at 69.
[52] *Id.* at 68–69.
[53] *See id.* at 75.
[54] 132 S. Ct. at 2469.
[55] *Id.* at 2468–69.
[56] *Id.* at 2464.
[57] *Id.* at 2466.
[58] *See Miller*, 132 S. Ct. at 2464; *Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 570.
[59] *Miller*, 132 S. Ct. at 2464.
[60] *Id.* at 2468.

> 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. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.[61]

Miller therefore leaves open the possibility of life-without-parole sentences for juveniles in "rare" instances.[62] In particular, *Miller* does not "foreclose a sentencer's ability" to make the judgment in a homicide case that a juvenile offender's crime "reflects irreparable corruption."[63] *Miller*, however, does require the sentencer to "take into account" the mitigating qualities of youth and how these differences between children and adults "counsel against" imposing a life-without-parole sentence on a juvenile.[64]

Miller flatly prohibits sentencing schemes that mandate life-without-parole sentences for juveniles upon conviction of the offense.[65] Life without parole may not be mandatory for juveniles even for the most serious type of murder offense in the state—i.e., first-degree murder.[66] Instead, the sentencer must have the ability to impose a less severe sentence.[67] Moreover, merely providing the sentencer with discretion to impose a less severe sentence does not suffice.[68] Instead, the sentencer must actually give the qualities of youth mitigating effect and consider how these qualities counsel against a life-without-parole sentence for a juvenile.[69] The sentencer may ultimately make a judgment that a juvenile's crime reflects irreparable corruption, but, in the Court's view, the circumstances where such a judgment is appropriate will be uncommon.[70] Before making such a determination,

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[61] *Id.* at 2469 (internal citations omitted).
[62] *See id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *See id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*

the sentencer must take into account all the mitigating factors of youth and how these factors counsel against such a finding.[71]

Accordingly, following *Graham* and *Miller*, a life-without-parole sentence can never be imposed on a juvenile who commits a nonhomicide crime, and it can be imposed on a juvenile who commits a homicide crime only in certain "rare" circumstances where the sentencer concludes that the youth is irreparably corrupt.[72]

B. The Eighth Amendment and Ceilings on Punishment

Roper, *Graham*, and *Miller* employ categorical Eighth Amendment analysis. Rather than considering whether a particular sentence is "grossly disproportionate" based on the individual circumstances of the offense and the offender,[73] these three cases establish Eighth Amendment limits on the severity of sentence that may be imposed on particular categories of offenders. Before *Graham* and *Miller*, the Supreme Court had not applied categorical bans on sentences of imprisonment under the Eighth Amendment but had used categorical limits exclusively with respect to imposition of the death penalty.[74] In essence, the Court's categorical Eighth Amendment holdings create constitutional ceilings on punishment. *Roper* imposes an absolute ceiling on punishment for juveniles—the case bans the death penalty altogether for all individuals who were under the age of eighteen at the time of the crime.[75] *Graham* and *Miller* create ceilings on punishment for some categories of juveniles.[76]

1. Ceiling for Juvenile "Nonhomicide" Offenders

Graham flatly prohibits life-without-parole sentences for juveniles who commit "nonhomicide" crimes, and thus creates a ceiling for some juveniles based on the nature of the crime.[77] Under *Graham*, juveniles who

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[71] *Id.*

[72] *See id.*; *Graham*, 560 U.S. at 75.

[73] *See* Harmelin v. Michigan, 501 U.S. 957, 997, 1001 (1991) (Kennedy, J., concurring in part and concurring in judgment) (stating that the Eighth Amendment contains a "narrow proportionality principle," that "does not require strict proportionality between crime and sentence" but rather "forbids only extreme sentences that are 'grossly disproportionate' to the crime" (quoting Solem v. Helm, 463 U.S. 277, 288, 303 (1983))).

[74] *Graham*, 560 U.S. at 60 (noting that categorical restrictions were applied previously only in death penalty cases); Alison Siegler & Barry Sullivan, *"'Death Is Different' No Longer":* Graham v. Florida *and the Future of Eighth Amendment Challenges to Noncapital Sentences*, 2010 SUP. CT. REV. 327, 336–53 (discussing the evolution of the Court's Eighth Amendment categorical analysis).

[75] *See Roper*, 543 U.S. at 572.

[76] *See Miller*, 132 S. Ct. at 2469; *Graham*, 560 U.S. at 75.

[77] *See Graham*, 560 U.S. at 75.

commit nonhomicide crimes may not receive life without parole and instead must be given a less severe sentence—i.e., one with a meaningful opportunity for release.[78]

Graham never explicitly defines "nonhomicide" or "homicide." Justice Breyer, joined by Justice Sotomayor, addressed that issue in a concurring opinion in *Miller*.[79] The two Justices read *Graham* to mean that a felony murder—where the juvenile did not kill or intend to kill—would not qualify as a "homicide."[80] Justice Breyer explained that "if the State continues to seek a sentence of life without the possibility of parole for Kuntrell Jackson," who had been convicted only of felony murder, "there will have to be a determination whether Jackson 'kill[ed] or intend[ed] to kill' the robbery victim."[81] In Justice Beyer's view, "without such a finding, the Eighth Amendment as interpreted in *Graham* forbids sentencing Jackson to such a sentence, regardless of whether its application is mandatory or discretionary under state law."[82] Justice Breyer noted that "[i]n *Graham* we said that 'when compared to an adult murderer, a juvenile offender *who did not kill or intend to kill* has a twice diminished moral culpability.'"[83] According to Justice Breyer, "[g]iven *Graham*'s reasoning, the kinds of homicide that can subject a juvenile offender to life without parole must exclude instances where the juvenile himself neither kills nor intends to kill the victim."[84] Justice Breyer concluded that "[t]he upshot is that Jackson, who did not kill the clerk, might not have intended to do so either." In that case, "the Eighth Amendment simply forbids imposition of a life term without the possibility of parole."[85] If on remand, however, "there is a finding that Jackson did intend to cause the clerk's death, the question remains open whether the Eighth Amendment prohibits the imposition of life without parole upon a juvenile in those circumstances as well."[86]

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[78] *See id.*
[79] *See Miller*, 132 S. Ct. at 2475 (Breyer, J., concurring).
[80] *See id.*
[81] *Id.* (citing *Graham*, 560 U.S. at 69).
[82] *Id.*
[83] *Id.* (quoting *Graham*, 560 U.S. at 69).
[84] *Id.* at 2475–76.
[85] *Id.* at 2477.
[86] *See id.* On remand from the U.S. Supreme Court, the Arkansas Supreme Court remanded the case for resentencing to the trial court, stating: "We thus instruct the Mississippi County Circuit Court to hold a sentencing hearing where Jackson may present *Miller* evidence for consideration." Jackson v. Norris, 426 S.W.3d 906, 911 (Ark. 2013). The Arkansas Supreme Court concluded that the discretionary sentencing range for a Class Y felony would apply at the resentencing (rather than the mandatory life-without- parole sentence provided by statute). *See id.* at 910. For a Class Y felony, the sentence is a discretionary sentencing range of not less than ten years and not more than forty years, or life. *See id.* at 911.

As Justice Breyer noted in *Miller*, the U.S. Supreme Court in *Graham* cited its 1982 death penalty decision in *Enmund v. Florida*[87] and its 1987 death penalty decision in *Tison v. Arizona*.[88] In *Enmund*, the Court considered whether "the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed."[89] The Court concluded that the death penalty had been improperly imposed on Enmund, who had been the driver for a robbery in which his codefendants had killed the robbery victims.[90] Five years later, in *Tison*, the Court reaffirmed the holding in *Enmund*, explaining that something more than simple felony murder was required to make a defendant eligible for the death penalty.[91] *Tison* qualified *Enmund*, however, and concluded that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement."[92]

In his concurring opinion in *Miller*, Justice Breyer rejected the view that a juvenile's "reckless indifference to human life" would suffice to expose a juvenile to life without parole.[93] He reasoned: "Indeed, even juveniles who meet the *Tison* standard of 'reckless disregard' may not be eligible for life without parole. Rather, *Graham* dictates a clear rule: The only juveniles who may constitutionally be sentenced to life without parole are those convicted of homicide offenses who 'kill or intend to kill.'"[94] Given the diminished capacity of juveniles to foresee consequences of their actions, it is logical that a finding of a youth's "reckless indifference" should not trigger life without parole.[95]

Regardless, the *Graham* Court's reliance on *Enmund* and *Tison* reveals that the category of homicide crimes for which life without parole for juve-

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[87] 458 U.S. 782 (1982).

[88] *See Miller*, 132 S. Ct. at 2475 (Breyer, J., concurring); Tison v. Arizona, 481 U.S. 137, 138 (1987) (citing *Edmund*, 458 U.S. at 782).

[89] *Enmund*, 458 U.S. at 782.

[90] *Id.*

[91] *See Tison*, 481 U.S. at 158.

[92] *See id.* The Model Penal Code does not adopt the felony murder doctrine. Instead, the Code requires for a murder conviction a showing of (at least) extreme indifference to human life. The Code, however, permits juries to treat participation in an enumerated felony as prima facie evidence of extreme indifference. MODEL PENAL CODE § 210.2(1)(b) (Proposed Official Draft 1962).

[93] *See Miller*, 132 S. Ct. at 2476 (Breyer, J., concurring).

[94] *Id.* (quoting *Graham*, 560 U.S. at 69).

[95] *See id.* Justice Breyer's formulation appears to permit a juvenile who accidentally kills someone during the course of committing a felony to receive life without parole (e.g., if a gun misfires during a burglary). A strong case can be made that a juvenile should not be exposed to life without parole in a felony murder case (or in any case where death results) absent a finding that he had actual intent to kill.

niles would be proportional to the offense is at least as narrow—if not more so—as the category for which the death penalty would be proportional to the offense for adults.

2. Ceiling for Juvenile Homicide Offenders

Miller appears to create a further limitation on which juveniles may be subject to life-without-parole sentences. Even within the category of juvenile "homicide" offenders, the "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."[96] Under *Miller*, a life-without-parole sentence may not be imposed on a juvenile offender simply because the individual has been convicted of a homicide offense. Rather, it appears that life without parole may be imposed only if the sentencer makes the judgment, after taking into account the mitigating circumstances of youth, that the juvenile's crime reflects irreparable corruption.[97]

Some courts have read *Miller* as nothing more than a prohibition of mandatory life-without-parole sentences for juveniles. Yet in striking down the two mandatory state schemes at issue in the case, *Miller* imposed requirements on the sentencer when a juvenile is *exposed* to a life-without-parole sentence.[98] In particular, *Miller* stated: "we require [the sentencer] to take into account how children are different, and how those differences counsel against irrevocably sentencing [juveniles] to a lifetime in prison."[99]

One might argue that *Miller* does not create a ceiling on punishment at all, and simply requires the consideration of mitigating factors. Or, one could view *Miller* as operating like many capital sentencing schemes—the sentencer must weigh mitigating and aggravating factors before determining if a life-without-parole sentence is justified. *Miller*, however, does not articulate a weighing approach. Instead, the Court sets a presumption that life-

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[96] *Id.* at 2469.

[97] *See* State v. Riley, No. 19109, 2015 WL 854827, at *8 (Conn. Mar. 10, 2015) (holding that *Miller* applies in discretionary sentencing regimes, noting: "in *Miller*, the court expressed its confidence that, once the sentencing authority considers the mitigating factors of the offender's youth and its attendant circumstances, 'appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.' This language suggests that the mitigating factors of youth establish, in effect, a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances.") (internal citation omitted); People v. Gutierrez, 324 P.3d 245, 262–63, 270 (Cal. 2014) (rejecting a statutory presumption of life without parole for juvenile homicide offenders and noting that the question for the sentencer on remand is "whether each [defendant] can be deemed, at the time of sentencing, to be irreparably corrupt, beyond redemption, and thus unfit ever to reenter society, notwithstanding the 'diminished culpability and greater prospects for reform' that ordinarily distinguish juveniles from adults") (internal citation omitted).

[98] *See Miller*, 132 S. Ct. at 2469 (majority opinion).

[99] *Id.*

without-parole is not appropriate for a juvenile.[100] The Court states that it believes "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon" because of "the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'"[101] The Court concludes: "Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison."[102] The "judgment" appears to be the determination that a juvenile is "irreparably corrupt," and this determination may be made only after taking into account the mitigating qualities of youth.[103] Thus, only after giving youth mitigating effect, and nonetheless finding irreparable corruption, can a sentencer impose a life-without-parole sentence. Of course, a finding of irreparable corruption would not mandate life without parole, but merely authorize it.[104]

Language from several recent state supreme courts supports this reading of *Miller*. The Connecticut Supreme Court stated that *Miller* "suggests that the mitigating factors of youth establish, in effect, a presumption against imposing a life sentence without parole on a juvenile offender that must be overcome by evidence of unusual circumstances."[105] As the California Supreme Court explained, the sentencer "has discretion under *Miller* to decide on an individualized basis" whether the defendant is "a 'rare juvenile offender whose crime reflects irreparable corruption.'"[106] In remanding for resentencing, the California Supreme Court said: "The question is whether each [defendant] can be deemed, at the time of sentencing, to be irreparably corrupt, beyond redemption, and thus unfit ever to reenter society, notwithstanding the 'diminished culpability and greater prospects for reform' that ordinarily distinguish juveniles from adults."[107] The Nebraska Supreme Court explained that *Miller* "sets forth the general rule that life imprisonment without parole should not be imposed upon a juvenile except

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[100] *See id.*

[101] *Id.* (citing *Roper*, 543 U.S. at 573).

[102] *Id.*

[103] *See id.*

[104] *See id.*

[105] State v. Riley, No. 19109, 2015 WL 854827, at *8 (Conn. Mar. 10, 2015). The Court in *Riley* remanded for resentencing a 100-year sentence, noting that "the record does not clearly reflect that the court considered and gave mitigating weight to the defendant's youth and its hallmark features when considering whether to impose the functional equivalent to life imprisonment without parole." *Id.* at *10.

[106] *Gutierrez*, 324 P.3d at 263 (quoting *Miller*, 132 S. Ct. at 2469).

[107] *Id.* at 270 (quoting *Miller*, 132 S. Ct. at 2464).

in the rarest of cases where that juvenile cannot be distinguished from an adult based on diminished capacity or culpability."[108] Thus *Miller*, like *Graham*, appears to create a ceiling. The default rule is that a juvenile homicide offender must have a meaningful opportunity for release. Only those judged incapable of rehabilitation may be given a sentence above this ceiling.

Graham and *Miller*, however, do not address *who* can make the sentencing determinations that expose a juvenile to life without parole. If *Graham* requires a finding that a juvenile "killed or intended to kill" before life without parole may be imposed in a felony murder case, can either a judge or a jury make this finding?[109] In his *Miller* concurrence, Justice Breyer stated that "[i]f on remand, however, there is a finding that Jackson did intend to cause the clerk's death," then Jackson may be subject to life without parole.[110] Justice Breyer, however, did not address whether Jackson had a right to have a jury find that fact. If a jury is not required to consider a defendant's intent to kill in rendering a guilty verdict, can a judge later find this fact—which may well be disputed—at sentencing? Where a jury has not found intent to kill, can an appellate court nonetheless review the trial and sentencing record, make this finding, and affirm a life-without-parole sentence previously imposed on a juvenile?

The Court's decision in *Miller* does not discuss who is empowered to make the sentencing decision that the case involves a "rare" instance where the juvenile is "irreparably corrupt" and may be sentenced to life without parole. *Miller* generally avoids the issue by referencing the "sentencer" throughout the opinion, rather than specifying a judge or a jury.[111] The final paragraph of *Miller* suggests that the "sentencer" could be either a judge or a jury: "*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles."[112] As discussed below, however, it follows from the Court's recent Sixth Amendment jurisprudence in the adult sentencing context that jury findings are required before a juvenile may be sentenced to life without parole. Because Sixth Amendment jury rights can be waived,[113] *Miller*'s reference to the judge as a possible sentencer is hardly dispositive.

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[108] State v. Mantich, 842 N.W.2d 716, 730 (Neb. 2014).
[109] *See Graham*, 560 U.S. at 69.
[110] *Miller*, 132 S. Ct. at 2477 (Breyer, J., concurring).
[111] *See id.* at 2466–69, 2471 (majority opinion) (referring to the "sentencer").
[112] *Id.* at 2475.
[113] *See infra* notes 284–286 and accompanying text.

II. The Sixth Amendment, Jury Sentencing, and Juveniles

The discussion below examines the interaction between the Court's recent Sixth and Eighth Amendment lines of cases and considers whether a jury finding is now required before a juvenile can be sentenced to life in prison without the chance of release. Section A examines current Supreme Court jurisprudence regarding Sixth Amendment restrictions on criminal sentencing.[114] Section B then considers the categorical limits that the Eighth Amendment places on criminal sentencing and how these limits intersect with the Sixth Amendment.[115] Finally, Section C discusses whether juveniles are entitled to jury findings on certain facts before being sentenced to life without parole.[116]

A. Sixth Amendment Jury Rights and Sentencing

In a series of cases beginning with the 2000 decision in *Apprendi v. New Jersey*[117] the U.S. Supreme Court expanded the Sixth Amendment jury trial right for criminal defendants in the sentencing context.[118] These cases implicate the jury's role in sentencing juveniles in serious cases post-*Graham* and *Miller*, as well as the standard of proof governing certain factual findings.

In *Apprendi*, the defendant was sentenced under a New Jersey statute that increased the maximum term of imprisonment for possession of a firearm for an unlawful purpose from ten years to twenty years if the defendant committed the crime with racial bias.[119] Following the defendant's guilty plea to the firearm offense, the sentencing judge found racial bias by a preponderance of the evidence and imposed a sentence of twelve years.[120] The Supreme Court held that the sentence was unconstitutionally enhanced.[121] The Court reasoned that the due process clause and the Sixth Amendment's jury right, taken together, "indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'"[122] The Court concluded:

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[114] *See infra* notes 117–151 and accompanying text.

[115] *See infra* notes 152–166 and accompanying text.

[116] *See infra* notes 167–183 and accompanying text.

[117] 530 U.S. 466, 470–71 (2000).

[118] *Id.* at 490. For more information regarding this expansion, see generally Alleyne v. United States, 133 S. Ct. 2151 (2013); Cunningham v. California, 549 U.S. 270 (2006); Booker v. United States, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004); Ring v. Arizona, 536 U.S. 584 (2002).

[119] 530 U.S. at 470–71.

[120] *Id.* at 471.

[121] *Id.* at 490–92.

[122] *Id.* at 477 (quoting United States v. Gaudin, 515 U.S. 506, 510 (1995)) (alteration in original). The Court relied on *In re Winship*, which held that a juvenile delinquency finding must be

"Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[123] Prior to *Apprendi*, judges had routinely imposed sentences above otherwise applicable statutory maximums based on judicial fact-finding using a preponderance of the evidence standard.[124]

After *Apprendi*, in the 2002 decision *Ring v. Arizona*,[125] the U.S. Supreme Court held that it was impermissible under the Sixth Amendment for "the trial judge, sitting alone" to determine the presence or absence of aggravating factors that an Arizona statute required to be found before the death penalty was authorized.[126] *Ring* did not hold that the Constitution requires juries to make the ultimate determination to impose the death penalty. Rather, the Court held that a defendant cannot be *exposed* to the possibility of the death penalty absent a jury finding beyond a reasonable doubt that the factors making him eligible for death are present.[127] Following *Ring*, lower courts have generally upheld sentencing schemes that require juries to find the aggravating factors that make the defendant eligible for the death

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supported by proof beyond a reasonable doubt. *See id.*; *In re* Winship, 397 U.S. 358, 368 (1970). As David Ball observes, the civil character of *In re Winship* has been largely forgotten by scholars, and was even incorrectly described as a criminal case by the Supreme Court in a later case citing it. W. David Ball, *The Civil Case at the Heart of Criminal Procedure:* In re Winship*, Stigma, and the Civil-Criminal Distinction*, 38 AM. J. CRIM. L. 117, 140 (2011). Professor Ball, however, reminds us that *Winship* was civil and that *Apprendi* itself was about the due process clause and standards of proof—not just about juries. *See id.* at 121–22. Sentencing scholars and courts tend to highlight *Apprendi*'s Sixth Amendment jury trial holding and neglect its important due process implications. *See id.* at 121.

[123] *Apprendi*, 530 U.S. at 490.

[124] *See id.* at 555–60 (Breyer, J., dissenting) (discussing the history of judges finding facts during sentencing).

[125] 536 U.S. at 588, 609.

[126] *Id.* ("Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." (quoting *Apprendi*, 530 U.S. at 494 n.19)). The Court noted it was overruling *Walton v. Arizona* to the extent that the case "allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Id.* at 609; *see also* Walton v. Arizona, 497 U.S. 639, 655–56 (1990) (noting that the "Constitution does not require that every finding of fact underlying a sentencing decision be made by a jury rather than by a judge"), *overruled by Ring*, 536 U.S. at 609.

[127] *Ring*, 536 U.S. at 609. Justice Breyer, concurring in *Ring*, expressed his view that the Eighth Amendment requires the jury to make the ultimate decision to impose the death penalty. He explained that "the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death." *Id.* at 619 (Breyer, J., concurring). Justice Breyer relied on Justice Stevens' views described in prior dissenting and concurring opinions. *Id.* at 614 (citing Harris v. Alabama, 513 U.S. 504, 515–26 (1995) (Stevens, J., dissenting)); Spaziano v. Florida, 468 U.S. 447, 467–90 (1984) (Stevens, J., concurring in part and dissenting in part).

penalty, and then permit judges to make the ultimate decision to impose death.[128]

Following *Ring*, in the 2004 decision *Blakely v. Washington*, the U.S. Supreme Court invalidated on Sixth Amendment grounds the State of Washington's sentencing scheme, which permitted judges to impose sentences above otherwise standard sentencing guideline ranges based on judicial fact finding.[129] The defendant's standard sentencing range under guidelines was forty-nine to fifty-three months.[130] The Washington scheme, however, allowed for the following:

> A judge may impose a sentence above the standard range if he finds "substantial and compelling reasons justifying an exceptional sentence." The Act lists aggravating factors that justify such a departure, which it recites to be illustrative rather than exhaustive. Nevertheless, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense." When a judge imposes an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it. A reviewing court will reverse the sentence if it finds that "under a clearly erroneous standard there is insuffi-

[128] Kamin & Marceau, *supra* note 22, at 529–30. Indeed, several states including Alabama permit a judge to impose death—even after the jury weighs aggravating and mitigating factors and recommends life. Justice Sotomayor, joined by Justice Breyer, recently stressed that she "harbor[ed] deep concerns about whether this practice offends the Sixth and Eighth Amendments." *See* Woodward v. Alabama, 134 S. Ct. 405, 405 (2013) (Sotomayor, J., dissenting) (dissenting from denial of certiorari). In *Woodward*, an Alabama jury voted eight to four against imposing the death penalty. *Id.* "But the trial judge overrode the jury's decision and sentenced Woodward to death after hearing new evidence and finding, contrary to the jury's prior determination of the same question, that the aggravating circumstances outweighed the mitigating circumstances." *Id.*

A number of lower courts have concluded that the balancing of aggravating and mitigating factors under particular state statutory schemes is not a factual finding subject to *Ring*. *See* United States v. Barrett, 496 F.3d 1079, 1107 (10th Cir. 2007) ("[T]he *Apprendi/Ring* rule should not apply here because the jury's decision that the aggravating factors outweigh the mitigating factors is not a finding of fact. Instead, it is a 'highly subjective,' 'largely moral judgment' 'regarding the punishment that a particular person deserves . . . .'" (quoting Caldwell v. Mississippi, 472 U.S. 320, 240 n.7 (1985))); State v. McLaughlin, 265 S.W.3d 257, 264 (Mo. 2008) (en banc) (upholding a judge's imposition of the death sentence after the jury was deadlocked regarding whether the mitigating evidence outweighed aggravating evidence). The Nevada Supreme Court has taken another view. *See* Johnson v. State, 59 P.3d 450, 460 (Nev. 2002) (concluding that the weighing of aggravating and mitigating factors is "in part a factual determination" that must be made by a jury).

[129] 542 U.S. at 304–05.

[130] *See id.* at 299.

> cient evidence in the record to support the reasons for imposing an exceptional sentence."[131]

In *Blakely*, the sentencing judge had imposed a ninety-month sentence based on its factual finding that the defendant acted with "deliberate cruelty."[132] The Supreme Court rejected the State's argument that there was no *Apprendi* violation because the relevant "statutory maximum" was the ten-year maximum provided by statute for class B felonies.[133] The Court explained: "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant* . . . . In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings."[134] The Court explained further: "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority."[135]

Shortly thereafter, in the 2005 decision *Booker v. United States*, the U.S. Supreme Court used similar reasoning to hold that the federal sentencing guidelines were unconstitutional to the extent that they required enhanced sentences based on judicial fact finding using a preponderance of the evidence standard.[136] *Booker* reiterated *Blakely*'s holding that a defendant's Sixth Amendment right "is implicated whenever a judge seeks to impose a sentence that is not solely based on 'facts reflected in the jury verdict or admitted by the defendant.'"[137] The Court stated that it was reaffirming its holding in *Apprendi*: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[138] As a remedy, the Court held that the federal guidelines would be merely advisory, and thus the applicable statute would set the maximum sentence.[139]

In *Cunningham v. California*, the U.S. Supreme Court held that California's determinate sentencing law violated the Sixth Amendment "by placing

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[131] *Id.* at 299–300 (citations omitted).
[132] *Id.* at 300.
[133] *Id.* at 303.
[134] *Id.* at 303–04.
[135] *Id.* at 304 (citation omitted).
[136] 543 U.S. at 243–44.
[137] *Id.* at 232 (quoting *Blakely*, 542 U.S. at 303).
[138] *Id.* at 244.
[139] *Id.* at 245. This remedy eliminated the Sixth Amendment problem, as judges were no longer required to increase sentences above otherwise applicable maximum sentences based on their factual findings.

sentence-elevating factfinding within the judge's province."[140] Under the statute, three possible sentences were possible in Cunningham's case—six, twelve, and sixteen years.[141] The sentencing judge could impose an upper term only when she found an aggravating factor that was not an element of the charged offense.[142] Under the determinate sentencing law, an aggravating factor, in addition to a few enumerated examples, could be any "additional criteria reasonably related to the decision being made."[143] At the sentencing hearing, the judge found six aggravating circumstances by a preponderance of the evidence and only then increased the sentence to sixteen years.[144] The Court invalidated the scheme, concluding that "[f]actfinding to elevate a sentence from 12 to 16 years, our decisions make plain, falls within the province of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies."[145]

Most recently, in the 2013 decision *Alleyne v. United States*, the U.S. Supreme Court held that any fact (other than the fact of a prior conviction), which triggers a mandatory minimum sentence, must also be found by a jury and established beyond a reasonable doubt.[146] The Court stressed: "When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury."[147] Accordingly, under the Sixth Amendment, a judge may not impose a sentence above the otherwise authorized maximum sentence based on a finding about a disputed factual matter (other than the fact of a prior conviction). *Booker*, *Blakely*, and *Cunningham* require that a fact that raises the punishment ceiling—and exposes a defendant to the possibility of a higher sentence—must be found by a jury beyond a reasonable doubt.[148] *Alleyne*, in contrast, focused on the sentencing floor. A jury must find beyond a reasonable doubt any fact that raises the sentencing floor (other than the fact of a prior conviction).[149]

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[140] 549 U.S. at 274.
[141] *See id.* at 275.
[142] *See id.*
[143] *See id.* at 280.
[144] *See id.* at 275–76.
[145] *Id.* at 292.
[146] 133 S. Ct. at 2155. With this holding, the Court overruled *Harris v. United States*, which had held that the Sixth Amendment did not require juries to find facts that trigger mandatory minimum sentences. *See Alleyne*, 133 S. Ct. at 2155. *See generally* Harris v. United States, 536 U.S. 545 (2002) (allowing a judge to find a fact that triggers a mandatory minimum sentence), *overruled by Alleyne*, 133 S. Ct. at 2155.
[147] *Alleyne*, 133 S. Ct. at 2162.
[148] *See Cunningham*, 549 U.S. at 292; *Booker*, 543 U.S. at 244; *Blakely*, 542 U.S. at 304.
[149] *See Alleyne*, 133 S. Ct. at 2155.

The "maximum" for Sixth Amendment purposes is the maximum sentence that the law permits based on the facts found by the jury's verdict or admitted by the defendant. *Blakely* and *Booker* establish that the maximum is not necessarily the maximum provided by statute for the offense, but may be lower than the statutory maximum as a result of limits set by sentencing guidelines. Indeed, the Court in *Booker* rejected the Attorney General's argument that *Apprendi* did not apply to the federal sentencing guidelines because they were promulgated by the United States Sentencing Commission rather than by Congress.[150] The Court found that this argument "lacks constitutional significance" and concluded that "[r]egardless of whether the legal basis of the accusation is in a statute or in guidelines promulgated by an independent commission, the principles behind the jury trial right are equally applicable."[151]

B. Juries and Eighth Amendment Limits

Blakely and *Booker* establish that sentencing ranges set by mandatory sentencing guidelines implicate Sixth Amendment jury rights.[152] But what about categorical limits on sentences that are imposed not by statute or by a commission, but by courts through Eighth Amendment holdings? Can the Eighth Amendment set a maximum sentencing ceiling that implicates the Sixth Amendment?

The U.S. Supreme Court confronted this very question in 1986 in *Cabana v. Bullock* and determined that Eighth Amendment limits differ from statutory provisions for Sixth Amendment purposes.[153] *Cabana*, decided four years after the U.S. Supreme Court's 1982 decision in *Enmund v. Florida*, held that an *Enmund* culpability finding need not be found by a jury but could instead be found by a judge.[154] In rejecting the view that a jury must make the *Enmund* finding before a defendant could be sentenced to death, the Court explained that its "ruling in *Enmund* does not concern the guilt or innocence of the defendant—it establishes no new elements of the crime of murder that must be found by the jury."[155] Instead, "*Enmund* holds only that the principles of proportionality embodied in the Eighth Amendment bar imposition of the death penalty upon a class of persons who may nonethe-

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[150] *See Booker*, 543 U.S. at 237.

[151] *Id.* at 237–39; *see In re* Coley, 283 P.3d 1252, 1282 (Cal. 2012) ("*Booker* also suggests that the applicability of *Apprendi*'s principle is not limited to legislatively prescribed facts that are essential to punishment.").

[152] *See Booker*, 543 U.S. at 243–44; *Blakely*, 542 U.S. at 305.

[153] 474 U.S. 376, 384–86 (1986), *abrogated on other grounds*, Pope v. Illinois, 481 U.S. 497, 503 n.7 (1987).

[154] *Id.* at 386; Enmund v. Florida, 458 U.S. 782, 801 (1982).

[155] *Cabana*, 474 U.S. at 385.

less be guilty of the crime of capital murder as defined by state law: that is, the class of murderers who did not themselves kill, attempt to kill, or intend to kill."[156] According to the Court, the *Enmund* rule "remains a substantive limitation on sentencing, and like other such limits it need not be enforced by the jury."[157]

But *Cabana* was decided before the Court's expansion of Sixth Amendment rights with the *Apprendi*, *Ring*, and *Blakely* line of cases.[158] At least one commentator has asserted that *Cabana* should not survive the Court's recent Sixth Amendment jurisprudence.[159] Since *Cabana*, the Court has stressed that whether a factor is labeled a sentencing factor rather than an element of the offense is irrelevant for Sixth Amendment purposes. Rather, the relevant inquiry is whether the law makes a fact essential to punishment.[160] It is no longer accurate to say, as the Court did in *Cabana*, that "a substantive limitation on sentencing" need not be enforced by a jury.[161] Instead, the Court has found that juries must find substantive limits on sentencing set by statutes and guidelines.

Although several lower courts have held that *Cabana* survived *Apprendi* and *Ring*,[162] a few judges have raised questions about the continued viability of *Cabana*.[163] Categorical Eighth Amendment limits on sentences,

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[156] *Id.*

[157] *Id.* at 386.

[158] *See infra* notes 117–135 and accompanying text. Without extended discussion, the Supreme Court reaffirmed *Cabana* several years before *Apprendi* in *Hopkins v. Reeves*. *See* 524 U.S. 88, 100 (1998) ("*Tison* and *Enmund* do not affect the showing that a State must make at a defendant's trial for felony murder, so long as their requirement is satisfied at some point thereafter.").

[159] *See* Michael Antonio Brockland, Note, *See No Evil, Hear No Evil, Speak No Evil: An Argument for a Jury Determination of the* Enmund/Tison *Culpability Factors in Capital Felony Murder Cases*, 27 ST. LOUIS U. PUB. L. REV. 235, 259–63 (2007).

[160] *See Ring*, 536 U.S. at 605 ("[T]he characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative of the question 'who decides,' judge or jury.").

[161] *See Cabana*, 474 U.S. at 386.

[162] *See* State v. Galindo, 774 N.W.2d 190, 235 (Neb. 2009); Brown v. State, 67 P.3d 917, 920 (Okla. Crim. App. 2003). *Ring* itself involved an *Enmund/Tison* issue. The judge had found facts supporting the *Enmund/Tison* culpability factors in addition to the statutory aggravating factors that exposed the defendant to death. *See Ring*, 536 U.S. at 594. The Supreme Court concluded that the Sixth Amendment required that a jury find the statutory aggravating factors, and thus remand was required. *See id.* at 609. The Court did not address whether *Enmund/Tison* factors must also be found by a jury. On remand, the Arizona Supreme Court held that the *Enmund/Tison* factors could be found by a judge. State v. Ring, 65 P.3d 915, 944 (Ariz. 2003). Following *Atkins v. Virginia*, lower courts have rejected the argument that the state must prove to a jury beyond a reasonable doubt that a defendant is not mentally retarded. *See* 536 U.S. 304, 320–21 (2002); *see, e.g.*, *In re* Johnson, 334 F.3d 403, 405 (5th Cir. 2003); State v. Grell, 135 P.3d 696, 702 (Ariz. 2006) (en banc).

[163] Following *Ring*, a federal district court found that the Sixth Amendment required a jury finding on the *Enmund/Tison* factors. Palmer v. Clarke, 293 F. Supp. 2d 1011, 1055 (D. Neb. 2003). The Eighth Circuit reversed, noting that the jury had in fact found the culpability factors. Palmer v. Clarke, 408 F.3d 423, 441 (8th Cir. 2005). Thus, the Eighth Circuit did not reach the

such as those set by *Enmund*, *Tison*, and *Graham*, operate no differently from statutory maximum sentences from the perspective of the defendant. That is, they create definite limits on sentences that may not be exceeded absent specific factual findings. *Blakely* states that if the "judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority."[164] The "law" (i.e., the Eighth Amendment) makes certain factual findings "essential" to imposition of certain penalties (e.g., the death penalty, life without parole).[165]

A difference, of course, is that Eighth Amendment limits are set by the Constitution rather than by a legislature. Legislatures define offenses; constitutions do not. *Blakely* and *Booker*, however, stress that the maximum sentence for Sixth Amendment purposes is what the jury's verdict alone authorizes, without additional findings. As the Court in *Booker* noted:

> In order to impose the defendants' sentences under the Guidelines, the judges in these cases were required to find an additional fact, such as drug quantity, just as the judge found the additional fact of serious bodily injury to the victim in [*Jones v. United States*, 526 U.S. 227 (1999)]. As far as the defendants are concerned, they face significantly higher sentences—in Booker's case almost 10 years higher—because a judge found true by a preponderance of the evidence a fact that was never submitted to the jury. Regardless of whether Congress or a Sentencing Commission concluded that a particular fact must be proved in order to sentence a defendant within a particular range, "[t]he Framers would not have thought it too much to demand that, before depriving a man of [ten] more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to

Sixth Amendment question. *See id.* Several concurring and dissenting decisions have recently discussed the issue. *Coley*, 283 P.3d at 1282 (Liu, J., concurring) (discussing whether the Eighth Amendment can set maximum sentences for *Apprendi* purposes and noting that "*Booker* further suggests the absence of any bright line limiting *Apprendi*'s applicability to essential facts established by a legislative enactment"); Gongora v. Thaler, 710 F.3d 267, 296 (5th Cir. 2013) (Owen, J., dissenting) (stating that "[n]either *Ring* nor *Apprendi*—nor any other decision of the Supreme Court—has explicitly overruled *Cabana*'s holding that a trial judge or appellate court may make the Eighth Amendment findings mandated by *Enmund* and *Tison*" but noting that "[w]hether the Supreme Court will continue to adhere to the reasoning and holdings of *Enmund*, *Tison*, and *Cabana* is highly questionable").

[164] *Blakely*, 542 U.S. at 301 (citation omitted).

[165] *See id.*

> 'the unanimous suffrage of twelve of his equals and neighbours,' rather than a lone employee of the State."[166]

In sum, the Eighth Amendment categorically requires that certain facts be found before a sentence of death may be imposed on adults or before life without parole may be imposed on children. Regardless of whether a statute or the Constitution (as interpreted by the Supreme Court) requires that such a fact be found, the result is the same for the defendant: he or she faces a significantly more severe sentence based on the factual finding. Thus, it follows from the Court's recent Sixth Amendment decisions that categorical Eighth Amendment limits trigger Sixth Amendment rights.

C. Juveniles and Jury Findings

If categorical Eighth Amendment limits indeed operate in the same manner as statutory maximums and trigger Sixth Amendment rights, then juveniles have the right to have juries find certain facts beyond a reasonable doubt before they can be exposed to life without parole.

Unquestionably, life without parole is a more severe sentence than a life-with-parole sentence for Sixth Amendment purposes. If a statute increased a defendant's maximum exposure from life with parole to life without parole based on the presence of a particular fact (other than the fact of a prior conviction), then that fact would plainly need to be found by a jury beyond a reasonable doubt.[167]

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[166] *Booker*, 543 U.S. at 237–38 (citation omitted). At least three Justices recently endorsed the view that holdings by courts can set ceilings on punishment that may not be raised absent a jury finding. In dissenting from the U.S. Supreme Court's denial of certiorari in Jones v. United States, No. 13-10026 (Oct. 14, 2014) Justice Scalia (joined by Justices Thomas and Ginsburg) stated: "We have held that a substantively unreasonable penalty is illegal and must be set aside. It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It may not be found by the judge." In *Jones*, the defendants were convicted in federal court of distributing small qualities of drugs but acquitted of conspiring to distribute drugs. Yet the sentencing judge found that the defendants had in fact engaged in the charged conspiracy and (relying heavily on that finding), imposed sentences that were many times longer than what the federal sentencing guidelines would have otherwise recommended.

[167] *See* State v. Provost, 896 A.2d 55, 65 (Vt. 2005) ("We are persuaded instead by the reasoning of courts in other jurisdictions, interpreting similar statutes, that life without parole and life with a minimum term of imprisonment are different sentences for *Apprendi* purposes."); State v. Thomas, 83 P.3d 970, 984 (Wash. 2004) (en banc) (holding that the Sixth Amendment was implicated when aggravating factor raised sentence from life with parole to life without parole because "it is clear that the legislature intended a life sentence with the possibility of parole and a sentence of life without parole to be wholly different").

Of course, in a state where parole is virtually certain to be denied regardless of a juvenile offender's rehabilitation, there is no meaningful difference between a sentence of life with parole and life without parole. Sharon Dolovich observes that "[w]hat in the middle decades of the 20th

As discussed, the U.S. Supreme Court's 2010 decision in *Graham v. Florida* categorically prohibits life-without-parole sentences for juveniles who commit nonhomicide offenses, and thus creates an Eighth Amendment ceiling on punishment for juveniles based on the nature of the offense.[168] Although the Court does not define "nonhomicide," it is apparent that not all cases resulting in the death of a victim can constitutionally expose a juvenile to a life-without-parole sentence. Under Justice Breyer's formulation in his concurrence in the U.S. Supreme Court's 2012 decision in *Miller v. Alabama*, a juvenile may not be sentenced to life without parole absent a finding that he "killed or intended to kill."[169] Or, if the standard from the U.S. Supreme Court's 1987 decision in *Tison v. Arizona* is used, a juvenile may not be sentenced to life without parole in a felony murder case unless he had "major participation in the felony committed, combined with reckless indifference to human life."[170]

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century was a meaningful process in which parole boards seriously considered individual claims of rehabilitation has become in most cases a meaningless ritual in which the form is preserved but parole is rarely granted." Sharon Dolovich, *Creating the Permanent Prisoner*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 96, 110–11 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012). In such states, if the only sentencing options are life with parole or life without parole, then the sentencing scheme violates *Miller*, as, even in a homicide case, the sentencer must have the option of imposing a sentence that provides a meaningful opportunity for release. *See* Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 377 (2014).

A related question is whether a jury must determine facts that require a parole board to deny parole to a juvenile offender because the facts in essence render the sentence parole-ineligible. W. David Ball observed that in California, "the parole board can transform parole eligible offenses into parole ineligible offenses based on its own findings of fact about the crime, even when these findings contradict the jury's." W. David Ball, *Heinous, Atrocious, and Cruel:* Apprendi*, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 893 (2009). Although Ball views *Apprendi* as extending to parole release decisions, he rejects "a mechanical application of *Apprendi*," which would require a jury to find all facts. *Id.* at 905. In his view, "an Apprendized parole board would have no jurisdiction to find any facts." *Id.* at 935. Instead, Ball argues for "an alternate understanding of *Apprendi*, one where the jury must find only those facts relating to retribution." *Id.*

[168] 560 U.S. 48, 74 (2010).

[169] *See* Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012) (Breyer, J., concurring). Lower courts have generally held that felony murder is a "homicide offense" within the meaning of *Graham*. *See* Arrington v. State, 113 So.3d 20, 22 (Fla. Dist. Ct. App. 2012). Commentators have asserted that felony murders should fall within *Graham*'s definition of nonhomicide. *See* Emily C. Keller, *Constitutional Sentences for Juveniles Convicted of Felony Murder in the Wake of* Roper*,* Graham *&* J.D.B., 11 CONN. PUB. INT. L.J. 297 (2012) (noting that "if a juvenile convicted of felony murder did not himself kill or intend to kill, he has the same liability as a juvenile in a nonhomicide felony who did not kill or intend to kill," and concluding that "[p]ursuant to *Graham*, he is less culpable than a murderer, and life without parole is unconstitutionally disproportionate"). Courts have generally held that attempted murder is not a homicide offense under *Graham*. *See* People v. Caballero, 282 P.3d 291, 293 (Cal. 2012); Akins v. State, 104 So.3d 1173, 1174 (Fla. Dist. Ct. App. 2012).

[170] *See* 481 U.S. 137, 158 (1987).

Whatever the precise definition of "homicide," in some cases, the elements of the charged offense will require the jury to make the required culpability findings to convict, and the jury's verdict alone will establish that the juvenile was convicted of a "homicide." In other instances, however, *Graham* will require an additional factual finding regarding culpability (using a beyond-a-reasonable-doubt standard of proof) before a juvenile can be exposed to life without parole.

Moreover, following *Miller*, a life-without-parole sentence is not automatically authorized under the Eighth Amendment even in intentional murder cases. Rather, it appears such a sentence is authorized only when the sentencer makes an additional determination—after taking into account the mitigating qualities of youth—that the juvenile offender is irreparably corrupt and incapable of rehabilitation. Thus, under *Miller*, a jury's verdict in a homicide case will not alone authorize life without parole. Rather, an additional factual finding is required before life without parole is authorized.

Accordingly, it appears the combined effect of *Graham* and *Miller* is that a juvenile is eligible for life without parole under the Eighth Amendment only if there are factual findings that (1) he committed a homicide within the meaning of *Graham* (i.e., he had the requisite culpability level) and (2) he is irreparably corrupt.[171] Of course, these findings would not *mandate* life without parole. These factual findings, however, appear to be prerequisites to exposing a juvenile to a life-without-parole sentence.

Put another way, if a state adopted a statute that allowed life without parole only if the sentencer found that the juvenile intended to kill and was irreparably corrupt, then such findings would need to be made by a jury beyond a reasonable doubt. In the absence of a state statute, these findings are still required by the Eighth Amendment. Jury involvement—and the beyond-a-reasonable-doubt standard—cannot be avoided simply because the state legislature has not codified the Eighth Amendment holding.

Under the Sixth Amendment, if the "judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' and the judge exceeds his proper authority."[172] The "law" (i.e., the Eighth Amendment) makes certain factual findings "essential" to the life-without-parole punishment for juveniles. Because the law prohibits life-without-parole sentences for juveniles absent these factual findings, the Sixth Amendment requires a jury to make these findings beyond a reasonable doubt. Accordingly, if a judge im-

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[171] *See supra* note 94–95 and accompanying text (asserting that, under *Graham*, only those juveniles who intended to kill may be sentenced to life without parole); *supra* note 101 and accompanying text (discussing that under *Miller* a person may be sentenced to life without parole only if the juvenile's crime reflects irreparable corruption).

[172] *Blakely*, 542 U.S. at 304 (internal citation omitted).

poses life without parole on a juvenile "sitting alone,"[173] then the judge has exceeded his authority.

Thus, juvenile offenders being resentenced following *Graham* and *Miller*—or being sentenced for the first time—can assert that jury findings are constitutionally required before life without parole is imposed. If a jury was not instructed to find the *Graham* culpability factors at trial beyond a reasonable doubt (and the juvenile did not make such an admission in a plea), then the judge may not later find these facts at a sentencing hearing. Moreover, an appellate court reviewing a life-without-parole sentence may not determine the presence of the culpability factors based on review of the trial and sentencing record.[174] Similarly, assuming *Miller* means a juvenile may not be exposed to life without parole absent a determination that he is irreparably corrupt, then the juvenile defendant has a right to require a jury to make this determination beyond a reasonable doubt.

It bears noting that lower courts have generally held that a jury need not perform the weighing of aggravation and mitigation under state capital schemes. As described above, it could be argued that *Miller* involves a similar weighing of mitigating and aggravating circumstances. Certainly, *Miller* does require an *assessment* of aggravating and mitigating factors. In particular, the court must take into account the mitigating qualities of youth in assessing the appropriate sentence in cases where the juvenile inflicted serious harm. Unlike the weighing approach set forth by some state capital schemes, however, the consideration of mitigation and aggravation under *Miller* is part of making a particular factual determination: is the juvenile irreparably corrupt and incapable of rehabilitation?[175] The framework for the sentencer set forth by *Miller* is not unlike the guideline scheme in *Blakely*. In *Blakely*, the guidelines permitted a sentence above the "standard range" only if there were "substantial and compelling reasons justifying an exceptional sentence" and supported by factual findings.[176] The Supreme Court held that facts taking the case outside this standard range must be found by a jury. The Court reached a similar result in *Cunningham*, where the statute set a default sentence and permitted a higher sentence only if the

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[173] *See Ring*, 536 U.S. at 588.

[174] Cases decided prior to *Apprendi* permitted *Enmund/Tison* culpability factors to be found by appellate courts based on review of trial records. *See Hopkins*, 524 U.S. at 100 ("*Tison* and *Enmund* do not affect the showing that a State must make at a defendant's trial for felony murder, so long as their requirement is satisfied at some point thereafter."). As discussed, these cases do not survive *Apprendi* and its progeny. In light of the Supreme Court's Sixth Amendment cases, juries must now find *Enmund/Tison* factors before an adult defendant may be sentenced to death.

[175] *See Miller*, 132 S. Ct. at 2469. Generally, the purpose of the weighing under the capital schemes is to determine whether death is appropriate.

[176] *See Blakely*, 542 U.S. at 299.

judge found facts that justified such a sentence.[177] Indeed, *Cunningham* required jury fact finding of aggravating circumstances even where the statute did not specifically enumerate those factors. Under *Miller*, in the ordinary or standard juvenile homicide case, life without parole is not appropriate.[178] The default is *not* life without parole. It is only in the rare or unusual case—where a factual finding of irreparable corruption is made—that a juvenile may be exposed to life without parole.[179]

It might also be argued that the jury right is not implicated because *Miller* requires the sentencer to consider only mitigating facts and not aggravating facts. Indeed, courts have generally held that facts that mitigate punishment under statutory or guideline schemes do not trigger Sixth Amendment rights.[180] In the 2002 decision *Atkins v. Virginia*, for example, the Supreme Court held that a prisoner with intellectual disability may not be sentenced to death under the Eighth Amendment.[181] Although this holding possibly gives a defendant facing the death penalty a right to a jury finding of *lack* of intellectual disability, courts have generally rejected this view, reasoning that intellectual disability is a mitigating factor and that the burden may therefore be placed on defendants to prove it.[182] While arguably this conclusion is incorrect, even accepting this view of *Atkins*, *Miller* is distinguishable. *Miller* concludes that life without parole is an inappropriate sentence for most juveniles, and may be given only in rare circumstances where certain facts are established. Thus, the factual finding of "irreparable corruption" aggravates—not mitigates—the penalty.

Finally, one might assert that "irreparable corruption" is too amorphous a concept to be considered a fact that can be found, and is instead simply a moral judgment. Juries, however, are instructed to make findings

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[177] *See Cunningham*, 549 U.S. at 275.

[178] *See Miller*, 132 S. Ct. at 2469.

[179] *See id.* Post-*Blakely*, judges continue to have discretion to select a sentence within the prescribed sentencing range for the offense of conviction. Judges can make factual determinations that influence the sentences they ultimately decide to give. This form of judicial fact finding is permitted because the factual determination does not alter the legally prescribed sentencing range for the offense of conviction. In contrast, a finding of irreparable corruption does raise the punishment ceiling for a juvenile.

[180] *See, e.g.*, United States v. Payton, 405 F.3d 1168, 1173 (10th Cir. 2005) ("Nothing in *Booker*'s holding or reasoning suggests that judicial fact-finding to determine whether a lower sentence than the mandatory minimum is warranted implicates a defendant's Sixth Amendment rights."); United States v. Holguin, 436 F.3d 111, 117 (2d Cir. 2006) (holding that the Sixth Amendment was not implicated where "the only effect of the judicial fact-finding is either to reduce a defendant's sentencing range or to leave the sentencing range alone, not to increase").

[181] *See Atkins*, 536 U.S. at 321.

[182] *See* James Gerard Eftink, Note, *Mental Retardation as a Bar to the Death Penalty: Who Bears the Burden of Proof?*, 75 MO. L. REV. 537, 553–54 (2010) ("As a general trend, most states require the defendant to prove that he or she is mentally retarded in order to be exempt from the death penalty.").

of a similar nature under state statutes, such as whether a defendant presents a risk of "future dangerousness" or whether a murder was "heinous, atrocious, or cruel" or committed with a "depraved heart."[183] Defendants have a right to have such facts found by juries.

This Article does not endorse the view that any child is irreparably corrupt, or that it is possible to determine at the time of sentencing that a child will not rehabilitate as he grows older. *Miller*, however, although recognizing the difficulty of making such a judgment of irreparable corruption, nonetheless appears to leave open the possibility that a sentencer can make such a determination. Thus, to the extent that life without parole is authorized only upon a determination that a juvenile is irreparably corrupt, then a juvenile has the right to insist that a jury make this finding beyond a reasonable doubt.

In sum, it follows from the Supreme Court's recent jurisprudence that juveniles are entitled to jury findings before being sentenced to life without parole. Yet, as discussed below, state courts and legislatures responding to these cases have, for the most part, assumed that judges rather than juries will determine the sentence.

III. STATE RESPONSES TO *GRAHAM* AND *MILLER* AND THE ROLE OF THE JURY

Following the U.S. Supreme Court's 2010 decision in *Graham v. Florida* and 2012 decision in *Miller v. Alabama*, there has been extensive activity in courts and state legislatures in response to the decisions. Indeed, in the mere two years since *Miller* was decided, the decision has been cited in more than 1000 cases nationwide.[184] Numerous state supreme courts have issued decisions interpreting *Miller*, and many more cases are pending.[185] On the legislative front, sixteen state legislatures have enacted statutes in response to *Graham* and *Miller*, and many others are considering bills.[186]

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[183] *See* Ball, *supra* note 167, at 903 ("During the trial, *Apprendi* requires the jury to find the fact that the crime is so heinous, atrocious, or cruel that the offender does not deserve parole."); Eugenia T. La Fontaine, Note, *A Dangerous Preoccupation with Future Danger: Why Expert Predictions of Future Dangerousness in Capital Cases Are Unconstitutional*, 44 B.C. L. REV. 207, 208 (2002) (discussing jury determinations of "future dangerousness").

[184] *See, e.g.*, Evans-Garcia v. United States, 744 F.3d 235, 236 (1st Cir. 2014); Howell v. Hodge, 710 F.3d 381, 393 (6th Cir. 2013); State v. Mares, 335 P.3d 487, 505 (Wyo. 2014).

[185] *See, e.g.*, People v. Gutierrez, 324 P.3d 245, 249 (Cal. 2014); People v. Davis, 6 N.E.3d 709, 715–16 (Ill. 2014); State v. Null, 836 N.W.2d 41, 50 (Iowa 2013); State v. Ragland, 836 N.W.2d 107, 117 (Iowa 2013); Diatchenko v. Dist. Attn'y for Suffolk Dist., 1 N.E.3d 270, 278 (Mass. 2013); Jones v. State, 122 So.3d 698, 703 (Miss. 2013); State v. Mantich, 842 N.W.2d 716, 731 (Neb. 2014); Petition of State, 103 A.3d 227, 233–34 (N.H. 2014); Aiken v. Byars, 765 S.E.2d 572, 575 (S.C. 2014); *Ex parte* Maxwell, 424 S.W.3d 66, 68 (Tex. Crim. App. 2014); *Mares*, 335 P.3d at 508.

[186] *See supra* note 21 and accompanying text.

Surprisingly, despite all of this activity, there has been essentially no debate as to whether a judge or a jury should make the decision regarding whether a juvenile receives life without parole. Indeed, for the most part, courts and legislatures have assumed that judges will be the sentencers in these serious juvenile cases. Section A of this Part discusses how courts have responded to *Miller* and *Graham*.[187] Section B then discusses how state legislatures have responded to *Miller* and *Graham.*[188] Finally, Section C discusses the new state statutes that implicate Sixth Amendment concerns.[189]

A. Responses by Courts

Following *Graham*, lower courts have considered what *Graham* intended by a "homicide" offense.[190] The courts, however, have not addressed whether a jury must find the facts qualifying the defendant as a homicide offender. Courts have also not yet addressed whether *Miller* requires a jury finding before life without parole may be imposed on a juvenile homicide offender.

Numerous appellate court decisions have remanded cases for resentencing following *Miller*. Many of these courts have held that life without parole will remain an option at resentencing but may be imposed only after consideration of the youth-related factors described in *Miller.* Courts have uniformly assumed that a judge will conduct the sentencing proceeding.[191]

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[187] *See infra* notes 190–192 and accompanying text.

[188] *See infra* notes 193–249 and accompanying text.

[189] *See infra* notes 249–258 and accompanying text.

[190] *See supra* note 169 and accompanying text.

[191] *See, e.g.*, Alejandro v. United States, 13-CV-4364, 2013 WL 4574066, at *1 (S.D.N.Y. Aug. 22, 2013) ("Although *Miller* does not prohibit a sentence of life without the possibility of parole for a juvenile offender, it mandates that a sentencing judge must be able to at least consider mitigating factors when determining whether such a punishment is appropriate."); Foye v. State, CR-12-0308, 2013 WL 5966888, at *9 (Ala. Crim. App. Nov. 8, 2013) ("[W]e reverse Foye's sentence and remand this case to the Macon Circuit Court for that court to conduct a new sentencing hearing at which it shall consider the factors set forth by our Supreme Court in *Henderson* and resentence Foye accordingly."); *Gutierrez*, 324 P.3d at 269 ("[W]e hold that the trial court must consider all relevant evidence bearing on the 'distinctive attributes of youth' discussed in *Miller* and how those attributes 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders.'" (quoting Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012))); Washington v. State, 103 So.3d 917, 920 (Fla. Dist. Ct. App. 2012) ("[I]f the state again seeks imposition of a life sentence without the possibility of parole, the trial court must conduct an individualized examination of mitigating circumstances in considering the fairness of imposing such a sentence."); *Davis*, 6 N.E.3d at 723 (Ill. 2014) ("We remand for a new sentencing hearing, where the trial court may consider all permissible sentences."); *Null*, 836 N.W.2d at 74 (remanding for resentencing, and stating that the sentencing court must recognize that juveniles ordinarily "cannot be held to the same standard of culpability as adults in criminal sentencing" and "if a district court believes a case presents an exception to this generally applicable rule, the district court should make findings discussing why the general rule does not apply"); State v. Fletcher, 112 So.3d 1031, 1037 (La. Ct. App. 2013) ("We vacate the defendant's sentence and remand the matter to the trial

The only court to reference the jury right issue was the Michigan Supreme Court. In concluding that *Miller* is not retroactive, the court noted: "As none of the defendants before this Court asserts that his sentence is deficient because it was not the product of a jury determination, we find it unnecessary to further opine on this issue and leave it to another day to determine whether the individualized sentencing procedures required by *Miller* must be performed by a jury in light of *Alleyne*."[192]

B. Responses by State Legislatures

Sixteen states have enacted legislation responding to *Graham* and *Miller*. Although some states have eliminated life-without-parole sentences entirely for juveniles,[193] the majority of jurisdictions have retained life without parole as a possible sentence for juvenile homicide offenders.[194]

In considering legislation in response to the Supreme Court decisions, lawmakers should be cognizant of Sixth Amendment jury trial issues. Under the Sixth Amendment, if a statute requires a specific factual finding before life without parole may be imposed, then this fact must be found by a jury

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court for resentencing, after it conducts a more thorough review of the appropriate factors enunciated in *Miller*. After this review, the trial court will state the reasons for sentencing on the record."); Parker v. State, 119 So.3d 987, 998 (Miss. 2013) ("We agree and vacate Parker's sentence and remand for hearing where the trial court, as the sentencing authority, is required to consider the *Miller* factors before determining sentence."); State v. Long, 8 N.E.3d 890, 898–99 (Ohio 2014) ("Although *Miller* does not require that specific findings be made on the record, it does mandate that a trial court *consider as mitigating* the offender's youth and its attendant characteristics before imposing a sentence of life without parole."); Commonwealth v. Batts, 66 A.3d 286, 296 (Penn. 2013) ("*Miller* requires only that there be judicial consideration of the appropriate age-related factors set forth in that decision prior to the imposition of a sentence of life imprisonment without the possibility of parole on a juvenile."); Sen v. State, 301 P.3d 106 (Wyo. 2013) ("[I]n exercising its discretion with regard to a determination as to parole eligibility, the district court must set forth specific findings supporting a distinction between 'the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'"); Williams v. Virgin Islands, 59 V.I. 1024, 1042 (2013) ("[I]f the court does find this case warrants a sentence of life without parole, it 'should make findings discussing why the general rule does not apply . . . [that] go beyond a mere recitation of the nature of the crime.'" (citing *Null*, 836 N.W.2d at 74)).

The sole exception is a case from the Missouri Supreme Court, where the defendant had a statutory right under Missouri law to jury sentencing. State v. Hart, 404 S.W.3d 232, 243 (Mo. 2013) (en banc); *see* MO. ANN. STAT § 557.036 (West 2014). In remanding for resentencing, the court determined that the defendant was not bound by his prior waiver of jury sentencing. *Hart*, 404 S.W.3d at 240. The court reasoned: "[E]ven though it is reasonable to assume that Hart waived his right to jury sentencing based on which sentencer he thought would be more lenient in determining the length of his sentences, it is not reasonable to assume that Hart ever considered whether he would prefer the judge or jury to make the new—and qualitatively different—decision now required by *Miller*." *Id.*

[192] People v. Carp, 852 N.W.2d 801, 829 n.20 (Mich. 2014).

[193] *See supra* note 21 and accompanying text.

[194] *See supra* note 21 and accompanying text.

and proved beyond a reasonable doubt.[195] Moreover, as discussed above, even if a statute purports to allow a judge to impose life without parole on a juvenile without particular factual findings, *Graham* and *Miller* appear to set an Eighth Amendment ceiling that cannot be raised under the Sixth Amendment absent certain factual findings. Yet strikingly, state statutes responding to *Graham* and *Miller* have not required jury findings before life without parole may be imposed. Instead, they have either placed the sentencing decision in the hands of judges or have not been explicit about where the sentencing authority lies. This Section examines the recently-enacted state statutes and the sentencing procedures they provide for juveniles facing the possibility of life without parole.[196]

Post-*Miller* statutes enacted in states including Florida, Michigan, Nebraska, North Carolina, Pennsylvania, South Dakota, Utah, and Washington specifically place the authority to impose life without parole on juveniles entirely in the hands of judges, rather than requiring jury involvement. With the exception of Utah's statute, these new statutes all provide a list of factors for judges to consider when determining whether to impose life without parole and require judges to utilize specific sentencing procedures. California enacted a post-*Miller* statute that retains a judge's discretion to impose life without parole, but allows some juveniles sentenced to life without parole the opportunity to petition for resentencing. Statutes enacted in Arkansas and Louisiana are not explicit about whether a judge or jury has the sentencing authority. Below, Subsection 1 discusses statutes where the judge is identified as the sentencer,[197] and Subsection 2 discusses statutes where it unclear who is the sentencer.[198]

1. Statutes Requiring Sentencing by Judges

Florida enacted a statute retaining life sentences without the opportunity of release for juveniles in some circumstances.[199] In particular, a juvenile convicted of capital felony or an offense reclassified as capital felony may be sentenced to life imprisonment with no opportunity of release (or sentence review) if he "actually killed, intended to kill, or attempted to kill the victim" and was previously convicted of certain offenses, or conspiracy to commit those offenses.[200] The judge must make a written finding as to

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[195] *See supra* notes 146–149 and accompanying text.
[196] *See infra* notes 199–249 and accompanying text.
[197] *See infra* notes 199–239 and accompanying text.
[198] *See infra* notes 240–249 and accompanying text.
[199] FLA. STAT. § 775.082(1)(b)(1) (2014).
[200] *Id.* Prior qualifying convictions include murder, manslaughter, sexual battery, armed burglary, armed robbery, armed carjacking, home-invasion robbery, human trafficking for commer-

whether "the person actually killed, intended to kill, or attempted to kill the victim."[201] The judge "may find that multiple defendants killed, intended to kill, or attempted to kill the victim."[202]

Judges may decline to impose life sentences in such cases and instead impose a sentence of at least forty years.[203] In choosing the appropriate sentence, the judge shall consider "factors relevant to the offense and the defendant's youth and attendant circumstances."[204]

If the judge finds that the juvenile did not actually kill, intend to kill, or attempt to kill the victim, then the juvenile may still be sentenced to life, but will be eligible for sentence review after fifteen years.[205] Juveniles convicted of capital felony without prior convictions for the specified offense are eligible for sentence review at varying times depending on the sentence imposed and whether they killed, intended to kill, or attempted to kill.[206] Juveniles convicted of other offenses carrying possible life sentences are also eligible for sentence review. The timing of review depends on the nature of the offense and whether the court makes a finding that the juvenile actually killed, intended to kill, or attempted to kill the victim.[207]

A statute enacted in Michigan permits prosecutors to seek life-without-parole sentences for defendants convicted of certain offenses. The prosecutor must file a motion within twenty-one days of conviction that specifies

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cial sexual activity with a child under 18 years of age, false imprisonment, or kidnapping. *Id.* § 921.1402(2)(a).

[201] *Id.* § 775.082(1)(b)(3).

[202] *Id.* § 775.082(1).

[203] *Id.*

[204] *Id.* § 921.1401(2). These factors include, but are not limited to:

> (a) The nature and circumstances of the offense committed by the defendant.
> (b) The effect of the crime on the victim's family and on the community.
> (c) The defendant's age, maturity, intellectual capacity, and mental and emotional health at the time of the offense.
> (d) The defendant's background, including his or her family, home, and community environment.
> (e) The effect, if any, of immaturity, impetuosity, or failure to appreciate risks and consequences on the defendant's participation in the offense.
> (f) The extent of the defendant's participation in the offense.
> (g) The effect, if any, of familial pressure or peer pressure on the defendant's actions.
> (h) The nature and extent of the defendant's prior criminal history.
> (i) The effect, if any, of characteristics attributable to the defendant's youth on the defendant's judgment.
> (j) The possibility of rehabilitating the defendant."

Id.

[205] *Id.* §§ 775.082(1)(b), 921.1402(2).

[206] *Id.* §§ 775.082(1)(b)(1), 921.1402(2).

[207] *Id.* §§ 775.082(1)(b), 921.1402(2). The Florida statute applies prospectively only.

the grounds on which life without parole is sought.[208] If the prosecutor files such a motion, "the court shall conduct a hearing on the motion as part of the sentencing process."[209] At the hearing, "the trial court shall consider the factors listed in *Miller v. Alabama* . . . and may consider any other criteria relevant to its decision, including the individual's record while incarcerated."[210] At the hearing, "the court shall specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed."[211] In rendering a decision, "[t]he court may consider evidence presented at trial together with any evidence presented at the sentencing hearing."[212] If the prosecutor does not seek life without parole or the judge decides not to impose life without parole, then the judge shall sentence the individual to a term of years with a minimum of not less than twenty-five years or more than forty years and a maximum of not less than sixty years.[213]

Nebraska's new legislation retains life-without-parole sentences for juveniles but makes such sentences discretionary. In Class 1A felony cases, judges may now impose a minimum sentence of forty years, which allows parole eligibility after twenty years.[214] The statute provides that in determining whether to impose life without parole, "the court shall consider mitigating factors which led to the commission of the offense."[215] In addition, "[t]he convicted person may submit mitigating factors to the court."[216]

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[208] MICH. COMP. LAWS § 769.25(1)–(3) (2014).

[209] *Id.* § 769.25(6).

[210] *Id.*

[211] *Id.* § 769.25(7).

[212] *Id.*

[213] *Id.* § 769.25(9). The Michigan statute applies prospectively only, unless the U.S. Supreme Court or Michigan Supreme Court determines that *Miller* applies retroactively. *Id.* § 769.25a(2). In those instances, juvenile offenders serving life without parole will be resentenced. *Id.* The Michigan Supreme Court recently held that *Miller* is not retroactive. *Carp*, 852 N.W.2d at 841.

[214] NEB. REV. STAT. § 28-105.02(1) (2014); *id.* § 83-1,110 (2014) (providing that a prisoner is eligible for parole after serving fifty percent of the minimum term of his sentence).

[215] *Id.* § 28-105.02(2).

[216] *Id.* These factors include, but are not limited to:

> (a) The convicted person's age at the time of the offense;
> (b) The impetuosity of the convicted person;
> (c) The convicted person's family and community environment;
> (d) The convicted person's ability to appreciate the risks and consequences of the conduct;
> (e) The convicted person's intellectual capacity; and
> (f) The outcome of a comprehensive mental health evaluation of the convicted person conducted by an adolescent mental health professional licensed in this state. The evaluation shall include, but not be limited to, interviews with the convicted person's family in order to learn about the convicted person's prenatal history, developmental history, medical history, substance abuse treatment history, if any, social history, and psychological history."

North Carolina's statute provides that "if the sole basis for conviction of a count or each count of first degree murder was the felony murder rule," then a defendant shall be sentenced to life with the possibility of parole after twenty-five years and may no longer be sentenced to life without parole.[217] In other first-degree murder cases, the bill gives discretion to judges to impose either life without parole or life with the possibility of parole after twenty-five years.[218] In determining whether to impose life without parole or a lesser sentence, the statute requires that a "hearing . . . shall be conducted by the trial judge as soon as practicable after the guilty verdict is returned."[219] At the hearing, "[e]vidence, including evidence in rebuttal, may be presented as to any matter that the court deems relevant to sentencing, and any evidence which the court deems to have probative value may be received."[220] The defendant or his counsel may "submit mitigating circumstances to the court."[221]

Further, "[t]he court shall consider any mitigating factors in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole."[222] Finally, "[t]he order adjudging the sentence shall include findings on the absence or presence of any mitigating factors and such other findings as the court deems appropriate to include in the order."[223]

Pennsylvania passed a bill eliminating life without parole as a possible penalty for juveniles convicted of second-degree murder but retaining life without parole as a discretionary option for judges in first-degree murder

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Id.

[217] N.C. GEN. STAT. §§ 15A-1340.19A, 15A-1340.19B(a)(1).

[218] *Id.* § 15A-1340.19B(a)(2).

[219] *Id.* § 15A-1340.19B(b).

[220] *Id.*

[221] *Id.* § 15A-1340.19B(c). These factors include, but are not limited to, the following:

> (1) Age at the time of the offense.
> (2) Immaturity.
> (3) Ability to appreciate the risks and consequences of the conduct.
> (4) Intellectual capacity.
> (5) Prior record.
> (6) Mental health.
> (7) Familial or peer pressure exerted upon the defendant.
> (8) Likelihood that the defendant would benefit from rehabilitation in confinement.
> (9) Any other mitigating factor or circumstance."

Id.

[222] *Id.* § 15A-1340.19C.

[223] *Id.*

cases.[224] Previously, life without parole was mandatory in all first- and second-degree murder cases. The bill states that "[i]n determining whether to impose a sentence of life without parole . . . the court shall consider and make findings on the record" regarding particular factors.[225]

Legislation enacted in South Dakota retains life without parole as a sentencing option for judges in first- or second-degree murder cases.[226] Judges in these cases, however, now also have the option of imposing any term-of-years sentence. The statute provides that "[s]entences shall be imposed without unreasonable delay, but not within forty-eight hours after determination of guilt."[227] "Before imposing a sentence, a court may order a hearing in mitigation or aggravation of punishment."[228] Additionally, "[i]f the defendant is a juvenile convicted as an adult of a Class A or Class B fel-

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[224] 18 PA. CONS. STAT. § 1102.1 (2014). The Pennsylvania bill establishes a multi-tiered system for sentencing youth convicted of first- and second-degree murder. In first-degree murder convictions, life without parole remains as a sentencing option for all youth regardless of age. *Id.* § 1102.1(a). However, as an alternative sentence for first-degree murder, the judge may now impose a sentence with a minimum of thirty-five years to life for youth ages fifteen to seventeen, and a minimum of twenty-five years to life for youth under the age of fifteen. *Id.* In second-degree murder cases, where life without parole used to be mandatory, life without parole is no longer an option. *Id.* § 1102.1(c). Instead, youth ages fifteen to seventeen must receive a minimum thirty years-to-life sentence, and youth under the age of fifteen must receive a minimum twenty years-to-life sentence. *Id.*

[225] *Id.* § 1102.1(d). These factors are:

> (1) The impact of the offense on each victim, including oral and written victim impact statements made or submitted by family members of the victim detailing the physical, psychological and economic effects of the crime on the victim and the victim's family. A victim impact statement may include comment on the sentence of the defendant.
> (2) The impact of the offense on the community.
> (3) The threat to the safety of the public or any individual posed by the defendant.
> (4) The nature and circumstances of the offense committed by the defendant.
> (5) The degree of the defendant's culpability.
> (6) Guidelines for sentencing and resentencing adopted by the Pennsylvania Commission on Sentencing.
> (7) Age-related characteristics of the defendant, including:
> (i) Age.
> (ii) Mental capacity.
> (iii) Maturity.
> (iv) The degree of criminal sophistication exhibited by the defendant.
> (v) The nature and extent of any prior delinquent or criminal history, including the success or failure of any previous attempts by the court to rehabilitate the defendant.
> (vi) Probation or institutional reports.
> (vii) Other relevant factors."

Id.

[226] S.D. CODIFIED LAWS § 22-6-1 (2014).

[227] *Id.* § 23A-27-1.

[228] *Id.*

ony, prior to imposing a sentence, the court shall conduct a presentence hearing."[229] The statute states:

> At such hearing, the court shall allow the defense counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. The prosecuting attorney shall have an equivalent opportunity to speak to the court. The circumstances must be presented by the testimony of witnesses examined in open court, except that a witness' deposition may be taken by a magistrate in accordance with chapter 23A-12. In imposing a sentence, the court shall enter an order of restitution in accordance with chapter 23A-28.[230]

Utah's new statute provides simply that courts can impose in aggravated first-degree murder cases either life without parole or sentences that allow parole after at least twenty-five years.[231] The statute provides no special factors or procedures for the court to utilize.

Washington State has also retained life without parole for juveniles in certain circumstances.[232] Under the statute, juveniles ages sixteen and sventeen convicted of aggravated first-degree murder may still be sentenced to life without parole.[233] Courts in these cases may, however, as an alternative, impose life sentences with parole eligibility after twenty-five or more years.[234] In setting the minimum term for parole eligibility, courts must "take into account mitigating factors that account for the diminished culpability of youth . . . including, but not limited to, the age of the individual, the youth's childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth's chances of becoming rehabilitated."[235] Under the bill, individuals convicted of aggravated first-degree murder committed at age fifteen or younger will be sentenced to life with eligibility for parole after twenty-five years.[236]

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[229] *Id.*

[230] *Id.*

[231] UTAH CODE ANN. § 76-3-207.7 (West 2014). Utah's new statute provides that aggravated murder committed by someone under the age of eighteen is a noncapital first-degree felony punishable as provided in Utah Code Ann. § 76-3-207.7. Under that statute, judges may impose life-without-parole sentences or sentences that allow parole after at least twenty-five years. *Id.*

[232] WASH. REV. CODE § 10.95.030(3)(a)(ii) (2014).

[233] *Id.*

[234] *Id.*

[235] *Id.* § 10.95.030(3)(b).

[236] *Id.* § 10.95.030(3)(a)(i). The bill applies retroactively and provides for resentencing of those currently serving life-without-parole sentences. *Id.* § 10.95.035.

Unlike the states described above, California did not provide mandatory life-without-parole sentences for juveniles prior to *Miller*. California, however, enacted a statute post-*Miller* impacting juveniles sentenced to life without parole. Under the statute, judges continue to have discretion to impose life without parole on juveniles convicted of first-degree murder with special circumstances. As an alternative, the court may impose a sentence of life with parole after twenty-five years.[237] The new statute allows individuals sentenced to life without parole for crimes committed under the age of eighteen to petition to the court for resentencing after fifteen years if certain criteria are met.[238] In cases where the defendant is serving life without parole as a result of conviction for first-degree murder with special circumstances, the court may resentence the defendant to life with the possibility of parole after twenty-five years. The statute, however, does not permit all juveniles serving life without parole to petition for resentencing. In particular, a prisoner may not petition for resentencing if he or she "tortured" the victim or if his or her victim was a public safety official, firefighter, or other law enforcement officer.[239]

2. Statutes Not Specifying the Sentencer

In contrast to the statutes in California, Florida, Michigan, Nebraska, North Carolina, Pennsylvania, South Dakota, Utah, and Washington, the new statutes enacted in Arkansas and Louisiana are not explicit about whether a jury or judge is empowered to make the sentencing determination. The Arkansas statute simply retains life without parole as an option for juveniles in some homicide cases but now also permits sentences providing parole eligibility after twenty-eight years.[240] The bill provides no set of factors for consideration and no direction about who is empowered to impose life without parole.

Following *Miller*, Louisiana passed a bill that gives judges the option of imposing either life without parole or a sentence allowing parole eligibility after thirty-five years for first- and second-degree murder cases.[241] The statute provides that "[i]n any case where an offender is to be sentenced to

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[237] In California, youth ages sixteen and seventeen convicted of murder in the first degree with special circumstances may be sentenced to life without parole or life with the chance of parole after twenty-five years, in the discretion of the court. CAL. PENAL CODE § 190.5(b) (West 2014). Youth ages fourteen and fifteen convicted of murder in the first degree with special circumstances may not receive life without parole under California law.

[238] *Id.* § 1170(d)(2)(A)(i) (West Supp. 2015). If the court denies the first request for resentencing, the inmate has two more opportunities to seek resentencing.

[239] *Id.* § 1170(d)(2)(A)(ii).

[240] ARK. CODE ANN. § 5-4-104 (2014).

[241] LA. REV. STAT. ANN. § 15:574.4(D)(1)(a) (2014).

life imprisonment for a conviction of" first- or second-degree murder "where the offender was under the age of eighteen years at the time of the commission of the offense, a hearing shall be conducted prior to sentencing to determine whether the sentence shall be imposed with or without parole eligibility."[242] "At the hearing, the prosecution and defense shall be allowed to introduce any aggravating and mitigating evidence that is relevant to the charged offense or the character of the offender, including but not limited to the facts and circumstances of the crime, the criminal history of the offender, the offender's level of family support, social history, and such other factors as the court may deem relevant."[243] Finally, the statute states that "[s]entences imposed without parole eligibility should normally be reserved for the worst offenders and the worst cases."[244]

Interestingly, another bill proposed during the same legislative session in Louisiana would have explicitly placed the sentencing decision in the hands of the jury.[245] The bill provided that life without parole could only be imposed on a juvenile "upon unanimous determination of the jury."[246] In addition, if a jury unanimously found beyond a reasonable doubt at least one aggravating circumstance,[247] "but does not unanimously determine, after consideration of mitigating circumstances"[248] that a life-without-parole

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[242] LA. CODE CRIM. PROC. ANN. art. 878.1(A) (2014).
[243] *Id.* art. 878.1(B).
[244] *Id.*
[245] H.B. 319, 2013 Leg., Reg. Sess. (La. 2013).
[246] LA. CODE CRIM. PROC. ANN. art. 906.1(A).
[247] *Id.* art. 906.1(B)(1). Aggravating circumstances were defined as:

> (1) The defendant was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, or armed robbery.
> (2) The victim was a fireman or peace officer engaged in the performance of his lawful duties.
> (3) The defendant knowingly created a risk of death or great bodily harm to more than one person.
> (4) The defendant has previously been convicted of an unrelated murder, aggravated rape, aggravated kidnapping, or armed robbery.

Id. art. 906.4.
[248] *Id.* art. 906.1(B)(1). Mitigating circumstances are defined as:

> (1) The age of the defendant at the time of the offense.
> (2) The defendant's physical and emotional immaturity.
> (3) The defendant's diminished intellectual capacity.
> (4) The defendant's diminished mental development.
> (5) The defendant's diminished emotional development.
> (6) The defendant's mental retardation as defined in Article 905.5.1(H) of this Code.
> (7) The defendant did not directly cause or specifically intend to cause the death of the victim.
> (8) The defendant's family background.
> (9) The defendant's inability to appreciate risks and consequences.
> (10) The defendant was under the influence of another person.

sentence should be imposed, then the court shall sentence the defendant to life with parole. If the jury failed to find at least one aggravating circumstance, then the court shall sentence the defendant to imprisonment at hard labor for not more than forty years. Under the bill, life without parole could be imposed only if the jury unanimously found beyond a reasonable doubt at least one aggravating circumstance and unanimously determined, after consideration of mitigating evidence, that life without parole should be imposed.[249]

C. Jury Findings and State Statutes

As discussed, the new statutes in Nebraska, North Carolina, Pennsylvania, South Dakota, and Washington require judges to consider certain factors and evidence. None of the statutes, however, require that a particular factor be established to expose the juvenile to life without parole. Given the degree of discretion these statutes grant to the judge in determining the sentence, the statutes standing alone—putting *Graham* and *Miller* limits aside—do not appear to implicate the Sixth Amendment under the line of cases following the U.S. Supreme Court's 2000 decision in *Apprendi v. New Jersey*. The statute in Utah provides discretion to the court to impose life without parole, without even specifying factors for the court's consideration. Thus, these statutes standing alone do not appear to implicate *Apprendi*.

Life-without-parole sentences imposed by judges under these schemes are, however, subject to Sixth Amendment attack on the ground that *Miller* sets a ceiling that can be raised only if a jury finds that a juvenile is irreparably corrupt. In addition, statutes in some of these states allow a judge to impose life without parole on juveniles for felony murder offenses or other offenses that do not require a showing that the defendant killed or intended to kill.[250] Thus, the statutes permit life without parole even if a jury was not required in rendering a guilty verdict for the offense to find that the juvenile killed or intended to kill. As described above, such a finding (or some ver-

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(11) The defendant was under the influence of alcohol or drugs.
(12) The defendant would benefit from rehabilitation.
(13) The defendant's demonstrated maturity since the commission of the offense.
(14) The defendant's demonstrated rehabilitation since the commission of the offense.
(15) Any other relevant mitigating circumstance.

Id. art. 906.5.

[249] H.B. 319, 2013 Leg., Reg. Sess. (La. 2013).

[250] For example, Michigan's statute applies to felony murder offenses, where the defendant himself did not kill or intend to kill. MICH. COMP. LAWS §§ 750.316, 769.25 (2014).

sion of the *Enmund/Tison* culpability findings) is required to make the crime a "homicide" offense within the meaning of *Graham*.[251]

The Florida statute triggers the Sixth Amendment in several ways. First, the statute bases the severity of punishment on whether a judge makes a factual finding that a juvenile "actually killed, intended to kill, or attempted to kill the victim."[252] A juvenile convicted of capital felony may not be exposed to life without the possibility of sentence review absent that finding. In addition, the timing of sentence review for juveniles convicted of other offenses depends on whether the court found that the juvenile "actually killed, intended to kill, or attempted to kill the victim."[253] When a factual finding raises the severity of the punishment of an offense under a statute, the fact needs to be found by a jury rather than a judge. It would seem that the availability and timing of sentencing review—like the availability of parole—impacts the severity of the sentence and thus implicates the Sixth Amendment. Thus, the Florida statute is unconstitutional to the extent it increases the maximum sentence based on a fact found by a judge. In addition, assuming that *Miller* creates a punishment ceiling for Sixth Amendment purposes, the Florida statute impermissibly gives judges the authority to determine that a juvenile is irreparably corrupt and should receive life without parole.

The Michigan statute also implicates the Sixth Amendment. As the Michigan Supreme Court has explained, the new Michigan statute sets a "default sentencing range" for those convicted of first-degree murder: the maximum may not be less than sixty years and the minimum may not be less than twenty-five years or more than forty years.[254] Before a juvenile may be sentenced to life without parole, the prosecutor must file a motion specifying the factual basis for the heightened sentence, and the judge must make factual findings regarding aggravating factors. Since these facts "alter[] the legally prescribed punishment so as to aggravate it"[255]—they must be found by a jury.

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[251] *See* Graham v. Florida, 560 U.S. 48, 75 (2010).

[252] FLA. STAT. § 1(1)(b)(3) (2014).

[253] *Id.* § 775.082(1)(b)(2).

[254] *Carp*, 852 N.W.2d at 812. The Michigan Supreme Court explained:

> Rather than imposing fixed sentences of life without parole on all defendants convicted of violating MCL 750.316, MCL 769.25 now establishes a default sentencing range for individuals who commit first-degree murder before turning 18 years of age. Pursuant to the new law, absent a motion by the prosecutor seeking a sentence of life without parole, "the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less than 60 years and the minimum term shall be not less than 25 years or more than 40 years."

Id. (internal citation omitted).

[255] *See* Alleyne v. United States, 133 S. Ct. 2151, 2162 (2013).

The California statute raises interesting Sixth Amendment questions. The statute gives the sentencing court discretion over whether to impose life without parole or life with parole after twenty-five years if a juvenile is convicted of first-degree murder with special circumstances.[256] If a defendant did not torture and did not kill an official victim, then the life-without-parole sentence provides three opportunities to petition for resentencing under a special statutory scheme for juveniles. If the defendant did engage in torture or did kill such a victim, however, he or she will have no opportunities to petition for resentencing. To the extent that the denial of an opportunity to seek resentencing makes the sentence more severe for Sixth Amendment purposes, then the defendant has the right to have a jury decide whether he engaged in torture or killed an official victim. For a judge to make this factual determination—which raises the severity of the sentence by depriving a defendant of the right to petition for resentencing—would violate the Sixth Amendment.

The new statutes in Arkansas and Louisiana are silent on the role of the jury. Constitutional concerns can be avoided in those states by giving defendants the right to jury involvement. Indeed, Louisiana's provision that life-without-parole sentences "should normally be reserved for the worst offenders and the worst cases" triggers the right to a jury finding on whether the case and defendant meet this threshold.[257] In other words, absent a finding that the case and offender are among the "worst," life without parole is inappropriate under the statute. Thus, in Louisiana, jury sentencing appears to be required before life without parole may be imposed, even putting aside the fact that *Miller* and *Graham* set ceilings on the punishment.

One other statute warrants mention. In July 2014, Massachusetts passed legislation providing that juveniles ages fourteen to seventeen convicted of first-degree murder shall be sentenced to life with parole eligibility set by the court at not less than twenty years and not more than thirty years. If the crime is committed with "deliberately premeditated malice aforethought," however, the court shall set parole eligibility at not less than twenty-five years and not more than thirty years. If the juvenile commits first-degree murder "with extreme atrocity or cruelty," then the court shall fix the parole eligibility date at thirty years.[258]

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[256] CAL. PENAL CODE § 190.5(b) (West 2014). California's Supreme Court recently held that, following *Miller*, sentencing courts may not apply a presumption that life without parole is appropriate in first-degree murder cases involving juveniles. *Gutierrez*, 324 P.3d at 263. Previously, some courts had held that such a presumption favoring life without parole applied under the California statute. *See* People v. Guinn, 33 Cal. Rptr. 2d 791, 797 (Ct. App. 1994).

[257] LA. CODE CRIM. PROC. ANN. art. 878.1(B) (2014).

[258] MASS. GEN. LAWS. ch. 279, § 24 (2014). These parole eligibility rules apply only to crimes committed after the effective date of the act. Massachusetts initially eliminated life without parole for juveniles through a court decision. *See* Commonwealth v. Brown, 1 N.E.3d 259, 264

Thus, although the Massachusetts statute does not permit life without parole, the statute presents Sixth Amendment concerns because it raises the mandatory minimum penalty for first-degree murder based on judicial fact-finding. Under the Supreme Court's decision in *Alleyne*, facts triggering higher mandatory minimum sentences must be found by juries—not judges.[259] Thus, in Massachusetts, it appears these facts triggering delayed parole eligibility must be found by a jury.

IV. A ROLE FOR THE JURY IN SENTENCING IN SERIOUS JUVENILE CASES

As revealed above, state legislatures responding to the U.S. Supreme Court's 2012 decision in *Miller v. Alabama* have generally avoided giving juries the authority to decide if juveniles should be sentenced to life without parole. Most post-*Miller* statutes explicitly grant judges the authority to make this sentencing decision. In addition, by giving judges wide discretion over whether to impose life without parole, most of the post-*Miller* statutes—standing alone—avoid triggering a requirement of jury fact finding under the Sixth Amendment.

Given the ease with which legislatures can draft statutes that avoid triggering a role for juries in sentencing, allowing Eighth Amendment limits to trigger jury rights may be essential to ensuring some role for the jury at sentencing. Section A of this Part discusses the role that juries have played in sentencing in the post-*Apprendi* era.[260] Section B then explains how the right to a jury trial is a waivable right.[261] Section C explores the debate over the benefits of having the jury as a sentencer.[262] Section D discusses jury sentencing in cases involving juveniles.[263] Section E considers how giving juveniles the right to jury sentencing may result in fewer life-without-parole sentences for juveniles.[264] Finally, Section F argues that states may avoid

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(Mass. 2013). In December 2013, the Massachusetts Supreme Judicial Court held that life without parole for juveniles violates the state constitution. *Id.* Under the decision, juvenile offenders convicted of first-degree murder and previously sentenced to mandatory life without parole are eligible for a parole hearing after serving fifteen years. The Court addressed the issue in two decisions issued the same day. *See* Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 278, 285–86 (Mass. 2013); *Brown*, 1 N.E.3d at 264. The decisions apply retroactively to inmates currently serving sentences.

[259] 133 S. Ct. 2151, 2162–63 (2013). It might be argued that the date someone becomes eligible for parole does not implicate the Sixth Amendment—as long as one is eligible for parole at some point in time. It is hard to maintain, however, that a sentence requiring one to wait ten additional years before becoming eligible for parole is not a more severe sentence triggering Sixth Amendment rights.

[260] *See infra* notes 266–283 and accompanying text.

[261] *See infra* notes 284–286 and accompanying text.

[262] *See infra* notes 287–303 and accompanying text.

[263] *See infra* notes 304–333 and accompanying text.

[264] *See infra* notes 333–338 and accompanying text.

Sixth Amendment challenges to life-without-parole sentences by providing juveniles with the right to jury sentencing.[265]

A. Jury Sentencing After Apprendi

In colonial America, "juries were de facto sentencers."[266] As Nancy Gertner has explained, many crimes were capital offenses, and "the jury's determination of guilt had specific and well-known consequences."[267] If a jury determined that capital punishment was not appropriate for the offense, it would decline to find guilt or convict for a lesser-included offense to avoid imposition of the death penalty.[268] As Rachel Barkow has argued, the jury's "power to mitigate or nullify the law in an individual case is no accident."[269] Rather, "[i]t is part of the constitutional design—and has remained part of that design since the Nation's founding."[270] "Even if the people's representatives agreed that certain behavior should be criminalized, the Framing generation wanted the people themselves to have a final say in each case."[271] "The purpose of the jury was to inject the common-sense views of the community into a criminal proceeding to ensure that an individual would not lose her liberty if it would be contrary to the community's sense of fundamental law and equity."[272]

The Court's recent Sixth Amendment jurisprudence is informed by the jury's historical function as a check on government authority. The U.S. Supreme Court in 2000 in *Apprendi v. New Jersey* observed that the "historical foundation" for the right to have a jury determine every element of the offense "extends down centuries into the common law."[273] The right serves to "'guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties.'"[274] In 2004 in *Blakely v. Washington*, the U.S. Supreme Court asserted that the jury trial

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[265] *See infra* notes 339–348 and accompanying text.

[266] Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 692 (2010).

[267] Nancy Gertner, *Juries and Originalism: Giving "Intelligible Content" to the Right to a Jury Trial*, 71 OHIO ST. L.J. 935, 937 (2010) (suggesting that in cases involving mandatory minimum sentences or mandatory statutory enhancements, "giving 'intelligible content' to the right to a jury trial today means, at the very least, telling the jury about punishments, even if they are also told that the ultimate sentencing decision is for the judge").

[268] Gertner, *supra* note 266, at 693.

[269] Barkow, *supra* note 25, at 36.

[270] *Id.*

[271] *Id.* at 58.

[272] *Id.* at 59; *see also* Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 963 (2003); Jenia Iontcheva Turner, *Implementing* Blakely, 17 FED. SENT'G REP. 106, 111 (2004).

[273] 530 U.S. 466, 477 (2000).

[274] *Id.* (alteration in original) (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873)).

right "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."[275] The *Blakely* Court emphasized that "*Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict" and "[w]ithout that restriction, the jury would not exercise the control that the Framers intended."[276] Yet although *Apprendi* and its progeny stressed the role that juries play in checking legislative, prosecutorial, and judicial power, these Sixth Amendment cases have not led to the broad expansion of jury involvement in sentencing nationwide that some hoped would occur.[277] Moreover, legislatures can avoid triggering jury involvement in sentencing by enacting statutes that set high maximum sentences for offenses and give judges discretion to select a sentence within a range.[278]

Although juries have become more heavily involved in noncapital sentencing decisions in some states, there has hardly been a jury-sentencing revolution nationwide.[279] In addition, the Sixth Amendment cases have not had a radical impact on jury involvement in death penalty cases. For example, in 2002, the U.S. Supreme Court held in *Ring v. Arizona* that juries must find the facts making defendants eligible for the death penalty under state statutes. As Sam Kamin and Justin Marceau assert, however, "*Ring* was initially seen, both by its proponents and its detractors, as a sea change in the way states could structure their capital decision making; it overturned several states' death penalty statutes and appeared to imperil many more."[280] Yet, "eight years after the case was decided, it is not clear what, if anything, *Ring* demands of the states."[281] Indeed, Kamin and Marceau con-

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[275] 542 U.S. 296, 305–06 (2004).

[276] *Id.* at 306.

[277] *See* Hoffman, *supra* note 272, at 954.

[278] In the federal system, juries have little more involvement in sentencing today than they had prior to *Booker* and *Apprendi*. Benjamin J. Priester, Apprendi *Land Becomes Bizarro World: "Policy Nullification" and Other Surreal Doctrines in the New Constitutional Law of Sentencing*, 51 SANTA CLARA L. REV. 1, 4 (2011) ("[T]he [*Apprendi*] doctrine has completely lost touch with any basis in jury trial rights, instead focusing entirely on protecting judicial power."). The U.S. Supreme Court in 2005 in *United States v. Booker* held that the mandatory federal guideline regime triggered Sixth Amendment rights. 543 U.S. 220, 232 (2005). Rather than require juries to find facts under the guidelines, however, *Booker* rendered the guidelines advisory. *Id.* at 245. Thus, judges continue to make factual findings under the guidelines, and jury rights are triggered only if a fact alters a statutory sentencing range. These facts requiring jury findings are now simply pleaded in the indictment and either admitted with a guilty plea or proved at trial. Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775, 801 (2008).

[279] *Id.* at 799–802.

[280] Kamin & Marceau, *supra* note 22, at 529.

[281] *Id.*

cluded that "*Ring* creates perverse incentives" for states that want to avoid handing over complete control to juries in capital cases.[282] States can remove juries "from the equation simply by making capital decision making open-ended rather than fact-based, by making the decision to impose death a moral judgment rather than a legal conclusion."[283]

Thus, standing alone, the Sixth Amendment does not ensure that defendants have a right to jury involvement in sentencing decisions. Under the Court's current Sixth Amendment jurisprudence, legislatures can avoid jury involvement in sentencing decisions in noncapital cases altogether, and can give judges the power to make the ultimate decision to sentence a person to death.

If Eighth Amendment limits trigger Sixth Amendment rights, however, a role for the jury in sentencing decisions in serious cases can be preserved—even if legislatures draft statutes in an effort to avoid giving defendants the right to jury involvement in sentencing.

B. A Waivable Right to a Jury

A defendant may consent to judicial fact finding and waive the Sixth Amendment right to have a jury find facts.[284] The Court in *Blakely* noted that "nothing prevents a defendant from waiving his *Apprendi* rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding."[285] In addition, "[e]ven a defendant who stands trial may consent to judicial factfinding as to sentence enhancements."[286]

Thus, simply because a juvenile has a right to jury sentencing on the question of whether he can be exposed to a life-without-parole sentence does not mean that he needs to exercise this right—he could waive the right

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[282] *Id.* at 530.

[283] *Id.* Unlike in noncapital cases, juries must have some role in sentencing decisions in capital cases as they need to find the facts that make defendants eligible for death. As Kamin and Marceau explain, with decisions in the 1970s, the Court "essentially mandated that capital sentencing include two layers of narrowing: the class of eligible persons must be narrowed to the most severe murderers, and there must be a further narrowing such that only the most culpable of those individuals is sentenced to death." *Id.* at 535. States enacted various schemes in response to these decisions. As to the first "narrowing," *Ring* holds that juries must find the aggravating facts that make defendants eligible for death under the statutory schemes. Kamin and Marceau argue, however, that states can draft statutes that avoid triggering a Sixth Amendment right to jury involvement in the second narrowing decision. *Id.* at 530.

[284] *See Blakely*, 542 U.S. at 310.

[285] *Id.*

[286] *Id.* In response to the dissent, the *Blakely* majority reasoned: "We do not understand how *Apprendi* can possibly work to the detriment of those who are free, if they think its costs outweigh its benefits, to render it inapplicable." *Id.*

and consent to sentencing by a judge. The judge would still be required to find facts beyond a reasonable doubt. As discussed below, in many instances, there may be good reasons for a juvenile to consent to sentencing by a judge.

C. The Jury as Sentencer

Courts and scholars have debated the virtues and dangers of jury sentencing. Justices Stevens and Breyer have emphasized the superior ability of juries to express moral views of the community. For this reason, the Justices view the Eighth Amendment as requiring juries to make the ultimate decision about whether to impose the death penalty. In his concurring opinion in *Ring*, Justice Breyer explained his belief that "the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death."[287] Justice Sotomayor recently observed that "[b]ecause 'capital punishment is an expression of society's moral outrage at particularly offensive conduct,' jurors, who 'express the conscience of the community on the ultimate question of life or death,' seem best-positioned to decide whether the need for retribution in a particular case mandates imposition of the death penalty."[288]

Some scholars have highlighted the virtues of jury sentencing. Jenia Iontcheva argues that "[b]ecause of their deliberative capacity and demo-

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[287] 536 U.S. 584, 619 (2002) (Breyer, J., concurring). Justice Breyer relied on Justice Stevens' views described in prior dissenting and concurring opinions. *Id.* at 614 (citing Harris v. Alabama, 513 U.S. 504, 515–526 (1995) (Stevens, J., dissenting)); Spaziano v. Florida, 468 U.S. 447, 467–490 (1984) (Stevens, J., concurring in part and dissenting in part)). In his *Ring* concurrence, Justice Breyer said that he was convinced by Justice Stevens' reasons for insisting that juries impose death sentences, including: "(1) his belief that retribution provides the main justification for capital punishment, and (2) his assessment of the jury's comparative advantage in determining, in a particular case, whether capital punishment will serve that end." 536 U.S. at 614. In particular, juries are "more attuned to 'the community's moral sensibility'" and "'reflect more accurately the composition and experiences of the community as a whole.'" *Id.* at 615 (quoting *Spaziano*, 468 U.S. at 481 (Stevens, J., concurring in part and dissenting in part)). Justice Breyer reasoned that "[t]he importance of trying to translate a community's sense of capital punishment's appropriateness in a particular case is underscored by the continued division of opinion as to whether capital punishment is in all circumstances, as currently administered, 'cruel and unusual.'" *Id.* at 616. Indeed, Justice Breyer noted that many communities do not impose capital sentences at all, and this diversity of opinion "argues strongly for procedures that will help assure that, in a particular case, the community indeed believes application of the death penalty is appropriate, not 'cruel,' 'unusual,' or otherwise unwarranted." *Id.* at 618.

[288] Woodward v. Alabama, 134 S. Ct. 405, 407 n.2 (2013) (Sotomayor, J., dissenting) (citations omitted). In *Woodward*, an Alabama jury voted eight to four against imposing the death penalty. "But the trial judge overrode the jury's decision and sentenced Woodward to death after hearing new evidence and finding, contrary to the jury's prior determination of the same question, that the aggravating circumstances outweighed the mitigating circumstances." *Id.* at 405. Justice Sotomayor dissented from the denial of certiorari, noting that she "harbor[ed] deep concerns about whether this practice offends the Sixth and Eighth Amendments." *Id.* Justice Breyer joined. *Id.*

cratic makeup, juries are better situated than other political institutions to perform the sensitive tasks of deciding between contested sentencing goals and applying the law with due regard for the individual circumstances of each offender"[289] Richard A. Bierschbach and Stephanos Bibas note that "[m]ore than any other actor, juries reflect and embody community values at the retail level, giving them special competence to determine what punishment is appropriate in a given case."[290] In addition, "[t]heir short-term service and lay moral intuitions help them to focus on case-specific facets of individual blameworthiness."[291] Josh Bowers asserts that "[m]ore than the professional, the layperson has the capacity and inclination to cut through the thicket of legal and institutional norms (that are not the layperson's stock in trade) to the equitable question of blameworthiness that is and ought to be central to the sentencing determination."[292]

But there are also concerns about giving juries the power to sentence. Bierschbach and Bibas observe that "juries' lack of training and experience with criminal justice might make them more prone to certain biases and less able to situate sentences for particular crimes within the larger sentencing framework."[293] Moreover, juries can "be worse at considering systemic factors such as predictability, equality across cases, and resource allocation."[294]

There are questions about whether juries or judges tend to be harsher sentencers. A recent study of death penalty cases concluded that juries are more likely than judges to apply the death penalty.[295] Nancy King and Rosevelt Noble caution that it "turns out that jury sentencing in practice looks very little like jury sentencing in theory."[296] In an empirical study of non-

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[289] Iontcheva, *supra* note 25, at 350.

[290] Bierschbach & Bibas, *supra* note 10, at 425.

[291] *Id.*

[292] Josh Bowers, *Mandatory Life and the Death of Equitable Discretion*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?, *supra* note 167, at 39.

[293] Bierschbach & Bibas, *supra* note 10, at 425.

[294] *Id.*

[295] Iyengar, *supra* note 25, at 694.

[296] King & Noble, *supra* note 25, at 888. King and Noble examine jury sentencing in Arkansas, Kentucky, and Virginia and conclude that jury sentencing in those states "bears little resemblance to the lofty ideal of a mini-legislature, well-versed in all 'societal and moral considerations' and dictating 'acceptable' punishment policy for the local community." *Id.* at 962. They state: "Judging from these interviews, any jury sentencing system approaching that ideal would likely be rejected as prohibitively expensive and politically unpalatable. Instead, jury sentencing in these states, hobbled as it is, plays a vital and pragmatic role within each state's unique legal and political framework: it helps to discourage jury trials and to provide protection from, and for, an elected judiciary." *Id.*; *see also* Charles O. Betts, *Jury Sentencing*, 2 CRIME & DELINQ. 369, 372 (1956) ("Many inequalities are displayed by the system which requires or permits the jury to assess penalty in criminal cases."); Charles W. Webster, *Jury Sentencing—Grab-Bag Justice*, 14 SW. L.J. 221, 228–29 (1960); Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas*, 45 WASH. U. J. URB. & CONTEMP. L. 3, 24–29 (1994).

capital sentencing in Arkansas and Virginia, King and Noble concluded that "[f]or most of the offenses examined in these two states, the sentences selected by juries after trial were both more varied and more severe than sentences selected by judges after bench trial."[297]

Some mock studies, however, have found that lay people tend to be more lenient than judges in selecting sentences when presented with the same information about a case.[298] Factors such as whether the judge is elected and the proximity of the election to the sentencing decision may have a large effect on sentence severity comparisons between judges and juries.[299]

Of critical significance are the concerns about racial bias influencing jury decisions, particularly when juries are given wide discretion or asked to make moral judgments.[300] Racial bias undisputedly influences capital sentencing decisions.[301] In 1987 in *McCleskey v. Kemp*,[302] the U.S. Supreme Court considered a study establishing that the death penalty in Georgia was imposed more often on black defendants and killers of white victims than on white defendants and killers of black victims. Studies in the decades since McCleskey find similar evidence that race is a significant factor in who gets sentenced to death.[303] As discussed further below, racial bias is of particular concern in juvenile cases.

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[297] Nancy J. King & Rosevelt L. Noble, *Jury Sentencing in Non-Capital Cases: Comparing Severity and Variance with Judicial Sentences in Two States*, 2 J. EMPIRICAL LEGAL STUD. 331, 332 (2005); *see also* Nancy J. King, *How Different Is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 OHIO ST. J. CRIM. L. 195, 200 (2004).

[298] Shari Seidman Diamond & Loretta J. Stalans, *The Myth of Judicial Leniency in Sentencing*, 7 BEHAV. SCI. & L. 73, 74–75, 88 (1989); *see also* Jennifer K. Robbennolt, *Evaluating Juries by Comparison to Judges: A Benchmark for Judging?*, 32 FLA. ST. U. L. REV. 469, 478–79 (2005) (finding that juries applied a higher standard than judges in finding guilt beyond a reasonable doubt); *cf.* Loretta J. Stalans & Shari Seidman Diamond, *Formation and Change in Lay Evaluations of Criminal Sentencing*, 14 LAW & HUM. BEHAV. 199, 211 (1990) (finding that laypersons' sentences were more lenient than the required minimum sentence).

[299] Carlos Berdejó & Noam Yuchtman, *Crime, Punishment, and Politics: An Analysis of Political Cycles in Criminal Sentencing*, 95 REV. ECON. & STAT. 741, 741 (2013). Berdejo and Yuchtman present evidence that "Washington State judges respond to political pressure by sentencing serious crimes more severely." *Id.* In particular, "[s]entences are around 10% longer at the end of a judge's political cycle than at the beginning; judges' discretionary departures above the sentencing guidelines range increase by 50% across the electoral cycle, accounting for much of the greater severity." *Id.*

[300] Lynch & Haney, *supra* note 25, at 592–94.

[301] Iyengar, *supra* note 25, at 694; Lynch & Haney, *supra* note 25, at 575–87.

[302] 481 U.S. 279, 286–87 (1987). In a widely criticized decision, *McCleskey* held that the study failed to establish a violation of the equal protection clause. *Id.* at 297.

[303] *See* Lynch & Haney, *supra* note 25, at 575–87.

D. Jury Consideration of Youth

Whatever the general virtues and dangers of jury involvement in sentencing, there are unique considerations in juvenile cases. If juries are more attuned to "the community's moral sensibility" and "reflect more accurately the composition and experiences of the community as a whole,"[304] then how do communities feel about youth who commit terrible crimes? Will juries tasked with sentencing juveniles convicted of serious crimes be naturally inclined to give mitigating effect to youth—as they will be instructed to do pursuant to *Miller*—or will judges be better at following this instruction? What role does racial bias play?

Unfortunately, there appear to be no studies examining the factors that influence judges in deciding whether to impose life without parole on juveniles, or considering how jurors and judges may sentence differently in cases involving serious crimes committed by juveniles.[305] Significantly, prior to *Miller*, life without parole in serious cases was mandatory for juveniles in many cases, and thus neither judges nor juries were given discretion to determine sentences in these cases.[306]

There is surprisingly little data about whether the public views life without parole as an appropriate sentence for juveniles.[307] One study surveyed Michigan residents in 2005 and 2006 and concluded that support for life without parole was low when respondents were presented with different (less severe) sentencing options.[308] In particular, the researchers found that when respondents were "initially given the opportunity to agree or disagree with current state policy that requires an adolescent to be sentenced to life without any possibility of parole for certain offenses, nearly half (42.6%) stated their agreement. Yet, when asked what punishment a youth convicted

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[304] *Ring*, 536 U.S. at 615 (Breyer, J., concurring) (quoting *Spaziano*, 468 U.S. at 481, 486 (Stevens, J., concurring in part and dissenting in part)).

[305] Marty Guggenheim and Randy Hertz have considered the problematic aspects of the juvenile bench trial model and suggest how legislators and judges can "engraft onto the bench trial model some of the safeguards of jury trial." Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 556 (1998). They conclude that judges are more likely than jurors to weigh evidence in favor of the prosecution and are less likely to assess the credibility of the accused with an open mind, particularly in juvenile court. *Id.*

[306] At the time *Miller v. Alabama* was decided, twenty-nine jurisdictions (twenty-eight states and the federal government) imposed mandatory life-without-parole sentences on some juveniles convicted of murder in adult court. 132 S. Ct. 2455, 2471 (2012).

[307] Some older studies assessed whether there was public support for life without parole for juveniles as an alternative to the death penalty. *See* Brenda L. Vogel & Ronald E. Vogel, *The Age of Death: Appraising Public Opinion of Juvenile Capital Punishment*, 31 J. CRIM. JUST. 169, 173–81 (2003).

[308] Sheryl Pimlott Kubiak & Terrence Allen, *Public Opinion Regarding Juvenile Life Without Parole in Consecutive Statewide Surveys*, 57 CRIME & DELINQ. 495, 498–511 (2011).

of homicide should receive—and provided with six options—only 5% choose [life without parole] in an adult prison, the current state policy."[309] Indeed, when given more information, "only 8.5% of those who initially agreed with the current policy chose the sanction associated with that policy."[310]

Our knowledge about juries and juveniles is limited because juveniles facing charges in juvenile court have no Sixth Amendment right to a jury trial.[311] Nevertheless, some states provide jury trials to at least some catego-

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[309] *Id.* at 509.

[310] *Id.* A 2013 study considered to what extent the public views life without parole as appropriate for juvenile offenders and how a person's punishment-related ideologies were associated with support for life without parole. Edie Greene & Andrew J. Evelo, *Attitudes Regarding Life Sentences for Juvenile Offenders*, 37 L. & HUM. BEHAV. 276, 278–87 (2013). The study found that that "[w]hen respondents were asked about the minimum age at which [life without parole] was appropriate for offenders who committed murder, only a slight majority selected an age that was less than eighteen years, as did only approximately one quarter of respondents when asked about sentencing juveniles who committed nonhomicide offenses." *Id.* at 286. Among the subset who endorsed life without parole for at least some offenders (and for all crimes except murder of an abusive parent), however, the majority gave a minimum age for life-without-parole sentences in the juvenile range. *Id.* at 287. Furthermore, among those respondents who favored life without parole for juvenile offenders "a higher proportion of respondents gave a minimum age for life without parole in the 10–15-year-old range than indicated the minimum age should be in the 16–17-year-old range." *Id.* The authors concluded that their studies "show (a) that, as a consequence of the serious nature of their crimes, a subgroup of juvenile offenders is judged worthy of very harsh punishment, and (b) that a subset of the public—those who doubt that these youthful offenders can successfully reform and be reintegrated into society—deems them so." *Id.*

[311] In 1967 in *In re Gault*, the U.S. Supreme Court extended many procedural protections to juvenile adjudications, concluding that juveniles who face the possibility of incarceration if found to be delinquent are entitled to notice of the charges, assistance of counsel, rights of confrontation and cross-examination, and the protections of the privilege against self-incrimination. 387 U.S. 1, 31–57 (1967). Several years later, in *In re Winship*, the U.S. Supreme Court held that juveniles charged in delinquency proceedings with acts that would be crimes if committed by adults are entitled as a matter of due process to the reasonable doubt standard of proof. 397 U.S. 358, 368 (1970). In *McKeiver v. Pennsylvania*, however, a plurality of the Court refused to extend the jury trial to juveniles in delinquency proceedings. 403 U.S. 528, 545 (1971) (plurality opinion). The plurality reasoned that juries are not necessary to achieve accuracy—unlike the protections recognized in *Gault* and *Winship*. *Id.* at 543. The Court also observed: "If the jury trial were to be injected into the juvenile court system as a matter of right, it would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial." *Id.* at 550. With these consequences, there would be "little need for [the] separate existence" of juvenile courts. *Id.* at 551. For discussion of *McKeiver* and jury trial rights for juveniles, see generally Susan E. Brooks, *Juvenile Injustice: The Ban on Jury Trials for Juveniles in the District of Columbia*, 33 U. LOUISVILLE J. FAM. L. 875 (1995) (arguing against the rationale put forth in *McKeiver*); Joseph B. Sanborn Jr., *The Right to a Public Jury Trial: A Need for Today's Juvenile Court*, 76 JUDICATURE 230 (1993) (arguing that the Sixth Amendment right to a jury trial should be extended to juvenile courts). Recently, the Kansas Supreme Court found that the Sixth Amendment right attaches to some juvenile prosecutions in juvenile court given the punitive nature of these proceedings. *In re* L.M., 186 P.3d 164, 170 (Kan. 2008). For a discussion of Sixth Amendment rights in juvenile delinquency proceedings, see generally Martin R. Gardner, *Punitive Juvenile Justice and Public Trials by Jury: Sixth Amendment Applications in a Post-*McKeiver *World*, 91 NEB. L. REV. 1 (2012).

ries of juveniles in delinquency proceedings as a matter of state law.[312] Moreover, community involvement in adjudicating matters involving juveniles has increased in recent years with the advent of juvenile review boards and youth courts.[313] And, of course, juries try juveniles transferred to adult court.

Although the literature is not extensive, several studies are instructive as we consider how jurors are likely to behave as sentencers in serious cases involving juveniles. Perhaps most analogous to a jury considering whether to sentence a juvenile to life in prison without parole is the experience of juries in considering whether to impose the death penalty on juvenile offenders prior to the U.S. Supreme Court's 2005 decision in *Roper v. Simmons*.

In the years leading up to *Roper*, there had been a decline in the use of the death penalty for juvenile homicide offenders. An empirical study published in 2005 found that "[t]here is compelling evidence, even in the states that theoretically permit the use of the juvenile death penalty, of an emerging societal norm opposing the death penalty for juvenile offenders—which has in the last several years reduced the number of juveniles sentenced to death almost to zero."[314]

A 2004 study about jury decision making in juvenile death penalty cases considered why juries were less likely to impose the death penalty on

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[312] *See* Linda A. Szymanski, *Juvenile Delinquents' Right to a Jury Trial (2007 Update)*, NAT'L CTR. JUV. JUST. 13(2) (Feb. 2008), *available at* http://www.ncjj.org/PDF/Snapshots/2008/Vol13_no2_righttojurytrial.pdf, *archived at* http://perma.cc/LC6Q-NU85 (stating that thirty states plus the District of Columbia have statutory or case law that denies juveniles the right to a jury trial, while the remaining states either allow for it by right for delinquency adjudications or provide jury trials for juveniles under limited circumstances); Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 BUFF. L. REV. 1447, 1451 n.20 (2009) (finding that twenty states provide jury trials to juveniles by right or allow them under limited circumstances).

[313] *See* Kristin Henning, *Criminalizing Normal Adolescent Behavior in Communities of Color: The Role of Prosecutors in Juvenile Justice Reform*, 98 CORNELL L. REV. 383, 456–59 (2013) (discussing youth courts and diversionary programs for youth).

[314] Jeffrey Fagan & Valerie West, *The Decline of the Juvenile Death Penalty: Scientific Evidence of Evolving Norms*, 95 J. CRIM. L. & CRIMINOLOGY 427, 495 (2005). The study analyzed data regarding the use of the death penalty for adolescent homicide offenders in the United States since 1990. The number of juveniles peaked (at fifteen) in 1994, had a more recent peak (at fourteen) in 1999, and declined to one in 2003. *Id.* at 456. The authors concluded:

> The decline in the number of juveniles sentenced to death since *Stanford* has been greater than the parallel decline for adults ages eighteen to twenty-four and for adults twenty-five and over, suggesting an age-specific decline. The decline in juveniles sentenced to death is striking, and is greater than the analogous decline for adults, even after the sentencing rate is indexed to the declining homicide rate and to the declining homicide arrest rate.

Id. at 494.

juveniles.[315] The study, which utilized interviews conducted by the Capital Jury Project of people who served as jurors in capital cases, compared jurors who served on adult cases with those who served on cases involving juveniles.[316] The study determined that the crimes of juvenile and adult capital defendants differed "only slightly in defendant-victim relationships, in the numbers of victims and perpetrators, and in jurors' choice of descriptive terms to characterize the killings."[317] Although, "[d]espite the similarity of their crimes, defendants in juvenile and adult cases differ vastly in how they are described by jurors."[318] "The two most distinctive characterizations of the juvenile defendant are his family dysfunction and his social maladjustment."[319] Although the interviews dealt with different defendants and different crimes, juries had similar accounts for why they refused to sentence a juvenile offender to death. In particular, "nearly all of these jurors describe the juvenile defendant's overwhelmingly dysfunctional home life and im-

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[315] William J. Bowers et al., *Too Young for the Death Penalty: An Empirical Examination of Community Conscience and the Juvenile Death Penalty from the Perspective of Capital Jurors*, 84 B.U. L. REV. 609, 617–18 (2004).

[316] *Id.* at 618.

[317] *Id.* at 655.

[318] *Id.*

[319] *Id.* In particular, "[r]eflecting his adverse family background, jurors affirmed the absence of a loving family, the presence of poverty, and their belief that he got a raw deal in life. As indicators of social maladjustment, they identified his inability to know his place in society and lack of basic human instincts." *Id.* The study noted:

> In particular, jurors from these cases describe the defendant as lacking positive role models and never being taught social norms of proper behavior. Observing that the juvenile offender is in many ways himself a victim, they often describe the defendant as lacking the fundamental social capital to be a law-abiding citizen. They see the death penalty as unacceptable in such cases because juvenile defendants cannot be held fully responsible for their crimes.

Id. at 658. The study further noted:

> Jurors blame the defendant's family and the lack of parental care or supervision as reasons for refusing to impose the death sentence. Describing the defendant's parents as unloving, uncaring, absent, abusive—picturing them as drug addicts, as inappropriate themselves in court—many jurors think of the juvenile defendant's upbringing as profoundly lacking in social control and support. Others even see the parents' failure to provide counseling as "proof" of why a young defendant committed the crime, thus ascribing guilt to them as well as the defendant. Jurors also see the defendant's immaturity as a bar to the death penalty. While an adult defendant's inappropriate behavior in court and failure to show remorse may undermine jurors' receptivity to mitigation, such conduct may have the opposite effect when the defendant is a juvenile. By laughing or showing a lack of respect or seriousness, for example, a juvenile defendant may be seen by jurors as "still a kid." In effect, such inappropriate or immature behavior confirms jurors' suspicions that the juvenile defendant is not fully responsible for his crime and hence that death is not appropriate as punishment.

Id. at 667.

maturity as a reason for sparing him the death penalty."[320] Significantly, the study found that the possibility of rehabilitation was central to the differences in thinking by jurors in adult and juvenile cases.[321] This study demonstrates that jurors in capital cases considered many of the factors that *Miller* now requires the sentencer to take into account when determining whether to impose life without parole on a juvenile.

Information can also be gleaned from several empirical studies analyzing mock juror treatment of cases involving juveniles. One set of studies considered the effect of a defendant's age on trial and sentencing outcomes.[322] In the first study, individual mock jurors read a trial transcript and were told that the defendant was thirteen, seventeen, or twenty-five years old.[323] Results showed that although the defendant's age had no effect on the jurors' decision regarding the defendant's guilt, the jurors recommended shorter sentences for the younger defendants.[324] In the second study, jurors read the same trial transcript but deliberated as a group. These group verdicts did not differ significantly by age. Age was a factor, however, in the deliberations, and the researchers found that "age tended to be used as a mitigating factor in favor of youth rather than against them."[325]

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[320] *Id.* at 658.

[321] *Id.*at 653. The study found:

> More jurors in juvenile cases (55.3%) than in adult cases (36.4%) said that "the goal of rehabilitation" was very or fairly important to them in deciding what the punishment should be. Since rehabilitation and execution are incompatible, the implication is that jurors in juvenile cases are much more concerned than those in adult cases with preserving the defendant's life. Consistent with such a concern, jurors in juvenile cases also appear to have been moved more than those in adult cases by "feelings of compassion or mercy for the defendant" and by "the belief that the defendant should have a chance to pay for the crime and become a law abiding citizen" (differences of 14.3 and 11.7 percentage points, respectively).

Id.

[322] Diane Warling & Michele Peterson-Badali, *The Verdict on Jury Trials for Juveniles: The Effects of Defendant's Age on Trial Outcomes*, 21 BEHAV. SCI. & L. 63, 63–64 (2003).

[323] *Id.* at 67.

[324] *Id.* at 78.

[325] *Id.* at 64. In another study, subjects read a scenario about a juvenile who committed a crime, decided on a sentence, and rated perceptions of the juvenile's accountability and legal competence. The study manipulated the age of the defendant (eleven versus fourteen versus seventeen years), type of crime (shooting versus arson), crime outcome (victim injured versus died), and time delay between the instigating incident and the crime (immediately versus one day). The researchers concluded that "[t]he type and outcome of the crime were major motivating factors in sentencing decisions and perceptions of legal competence, and, although younger offenders were seen as less accountable and less competent than older offenders, sentence allocation and attitudes towards punishment were not significantly affected by offender age." Simona Ghetti & Allison D. Redlich, *Reactions to Youth Crime: Perceptions of Accountability and Competency*, 19 BEHAV. SCI. & L. 33, 33 (2001). The authors concluded that there is a tendency to attribute antisocial acts to a "criminal disposition" that exists regardless of the offender's age. *Id.* at 46. This attribution allows individuals to feel some control over events that are incomprehensible and makes them feel

The impact of age on decision making by jurors may, however, diminish as the seriousness of the crime increases. A study considered mock juror decision making in cases where juvenile offenders faced the death penalty and found a significant age effect for the least heinous crimes evaluated—i.e., fewer death sentences for younger offenders. As the severity of the crime increased, however, the age effect decreased and the study found no age effect for the most serious crimes.[326]

Not surprisingly, jurors' preexisting stereotypes about juvenile offenders appear to impact evaluation of cases. A study determined that mock jurors who endorsed the "superpredator" stereotype of juvenile offenders[327] were more likely to convict a juvenile murder defendant than those who endorsed

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less personally vulnerable. *Id.* Notably, however, the study did not compare juveniles to adults, but only younger juveniles to older juveniles.

[326] Finkel et al., *Killing Kids: The Juvenile Death Penalty and Community Sentiment*, 12 BEHAV. SCI. & L. 5, 12–20 (1994); *see also* R. Kalbeitzer & N. Goldstein, *Assessing the "Evolving Standards of Decency": Perceptions of Capital Punishment for Juveniles*, 24 BEHAV. SCI. & L. 157, 163 (2006).

[327] In the late 1980s and early 1990s, at the height of the tough-on-crime era, there was a spike in homicides committed by juveniles. Philip J. Cook & John H. Laub, *After the Epidemic: Recent Trends in Youth Violence in the United States*, 29 CRIME & JUST. 1, 15 (2002). The narrative of the "juvenile superpredator" emerged as an explanation for why young children were committing homicides and other violent crimes. Juvenile superpredators were simply born bad. They were remorseless, lacked a moral conscience, and were incapable of reform. A vocal advocate of the "superpredator" narrative asserted:

> On the horizon . . . are tens of thousands of severely morally impoverished juvenile super-predators. They are perfectly capable of committing the most heinous acts of physical violence for the most trivial reasons . . . . They fear neither the stigma of arrest nor the pain of imprisonment. They live by the meanest code of the meanest streets, a code that reinforces rather than restrains their violent, hair-trigger mentality.

John J. Dilulio, Jr., *The Coming of the Super-Predators*, WEEKLY STANDARD, Nov. 27, 1995, at 23. "Superpredators" were described as:

> [R]adically impulsive, brutally remorseless youngsters, including ever more preteenage boys, who murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs, and create serious communal disorders . . . . They perceive hardly any relationship between doing right (or wrong) now and being rewarded (or punished) for it later. To these mean-street youngsters, the words "right" and "wrong" have no fixed moral meaning.

WILLIAM J. BENNETT ET AL., BODY COUNT: MORAL POVERTY . . . AND HOW TO WIN AMERICA'S WAR AGAINST CRIME AND DRUGS 27 (1996); *see* Peter Annin, "*Superpredators" Arrive: Should We Cage the New Breed of Vicious Kids?*, NEWSWEEK, Jan. 22, 1996, at 57; John J. Dilulio, Jr., *Defining Criminality Up*, WALL ST. J., July 3, 1996, at A10; John J. Dilulio, Jr., *My Black Crime Problem, and Ours*, CITY J., Spring 1996, at 5, 14–28; Suzanne Fields, *The Super-Predator*, WASH. TIMES, Oct. 17, 1996, at A23; Gene Koprowski, *The Rise of the Teen Super-Predator*, WASH. TIMES, Oct. 23, 1996, at A17; *see also* Lara A. Bazelon, Note, *Exploding The Superpredator Myth: Why Infancy Is the Preadolescent's Best Defense in Juvenile Court*, 75 N.Y.U. L. REV. 159, 165 n.21 (2000).

the more innocuous stereotype of juveniles as "wayward youths."[328] Another study showed that people form negative impressions of juveniles who are tried in adult court and view them as even more dangerous and their crimes as even more serious than those of adult defendants.[329]

Racial bias is of special concern in cases involving juveniles. Robin Walker Sterling explains that "implicit biases based on racial stereotypes conflate assessments of youth culpability, maturity, sophistication, future dangerousness, and severity of punishment."[330] The "superpredator" myth of the 1990s focused particularly on the "dangers" of African American youth, and racial bias persists today in the treatment of children charged with or convicted of crimes. A recent study found that participants who were told that a juvenile was black were more likely to choose harsh sentences (including life without parole) then participants who were told that the juvenile was white.[331] Racial bias is, of course, a major concern with the sentencing of juveniles by judges as well.[332]

Another consideration with jury sentencing is that the jury selection process may disqualify individuals who express unwillingness to impose life-without-parole sentences on juveniles in any circumstances. This is a major concern in death penalty cases, where juries are "death qualified."[333] The result of the process is a jury that may not accurately reflect the sentiments of the community.

Finally, in some cases, defendants may prefer sentencing by judges if judges are required to provide statements of reasons supporting their decisions and juries are not. In other words, there may be a better record for ap-

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[328] T. Haegerich & B. Bottoms, *Effect of Jurors' Stereotypes of Juvenile Offenders on Pre- and Post-deliberation Case Judgments*, American Psychology-Law Society Annual Conference (Mar. 2004) (on file with author). Individuals completed stereotype measures several months before participating in an ostensibly unrelated mock murder trial. *Id.*

[329] C. Tang et al., *Effects of Trial Venue and Pretrial Bias on the Evaluation of Juvenile Defendants*, 34 CRIM. JUST. REV. 210, 210–25 (2009).

[330] Robin Walker Sterling, *"Children Are Different": Implicit Bias, Rehabilitation, and the "New" Juvenile Jurisprudence*, 46 LOY. L.A. L. REV. 1019, 1067 (2013).

[331] Aneeta Rattan et al., *Race and the Fragility of the Legal Distinction Between Juveniles and Adults*, PLOS ONE, 2–4 (May 23, 2012), *available at* http://web.stanford.edu/~eberhard/downloads/20120523-RaceAndTheFragility.pdf, *archived at* http://perma.cc/ZSS9-4YLB.

[332] A 2012 study conducted by The Sentencing Project of juvenile offenders serving life-without-parole sentences nationwide concluded that the races of victims and offenders still "may play a key role in determining which offenders are sentenced to juvenile life without parole." ASHLEY NELLIS, THE SENTENCING PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 3 (2012). Mandatory life-without-parole sentences would have been the result of charging decisions by prosecutors and convictions by juries. Discretionary life-without-parole sentences in most instances would have resulted from judicial decisions.

[333] *See, e.g.*, Wainwright v. Witt, 469 U.S. 412, 424 (1985) (allowing challenges for cause over a juror's views on capital punishment if those views "would prevent or substantially impair the performance of his duties"); Note, *Live Free and Nullify: Against Purging Capital Juries of Death Penalty Opponents*, 127 HARV. L. REV. 2092 (2014).

peal if a judge sentences. Of course, the presence of a jury may introduce other grounds for challenging a life-without-parole sentence on appeal (e.g., irregularities in jury selection, improper evidentiary rulings).

In sum, although existing studies suggest that juries are likely to view youth as mitigating, racial bias may prevent juries from giving youth mitigating effect in some cases. Moreover, the mitigating effect of age on sentencing decisions by juries may decrease as the severity of the crime increases. It does appear that a juror's knowledge about the alternative possible sentences for a juvenile convicted of a serious crime is likely to influence the decision about whether life without parole is appropriate.

All and all, it is difficult to predict whether juries or judges will be better at fulfilling *Miller*'s mandate to give youth mitigating effect. The answer is no doubt highly dependent on the particular judge, the makeup of the particular jury, and the characteristics of the individual defendant and offense. If a juvenile facing life without parole has a right to jury sentencing, then the juvenile (in consultation with counsel) can determine in an individual case whether to waive the right and consent to judicial sentencing. It bears noting that a prosecutor cannot insist on jury sentencing as a matter of constitutional right, as the right belongs to the accused. The prosecutor may, however, have the ability as a matter of state law or rules of court to force jury sentencing even if the defendant wishes the judge to sentence. Yet prosecutors may be unlikely to insist on jury involvement when defendants consent to waive juries—given that involving juries would increase the length and the complexity of the proceeding.

E. "Uncommon" Life-Without-Parole Sentences for Juveniles

Although it is debatable whether juries are more inclined than judges to give mitigating effect to youth, giving juveniles the right to jury sentencing in serious juvenile cases may nonetheless be the best way to make life-without-parole sentences for juveniles "uncommon."[334] In particular, giving juveniles facing life without parole the right to jury sentencing is likely to reduce the frequency of life-without-parole sentences. Placing the sentencing decision in the hands of a jury would make the proceeding more akin to the sentencing phase of a capital trial than to a traditional sentencing hearing in a noncapital case. At the sentencing phase of a capital case, defense lawyers typically present extensive mitigating evidence by calling fact witnesses, offering documentary evidence, and presenting expert testimony.[335]

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[334] *See Miller*, 132 S. Ct. at 2469.

[335] Carol S. Steiker & Jordan M. Steiker, Miller v. Alabama*: Is Death (Still) Different?*, 11 OHIO ST. J. CRIM. L. 37, 42–43 (2013). Steiker and Steiker discuss whether *Miller*'s command of

In contrast, the presentations by defense counsel at sentencing hearings in noncapital cases—even when a defendant is facing life in prison—have historically been much less comprehensive. They often do not involve the presentation of evidence but merely an argument by the lawyer and possibly statements from the defendant's family members asking for leniency.[336] In many jurisdictions, cases automatically transferred to adult court involving juveniles have been treated just like any other noncapital adult case.

A right to jury sentencing for juveniles facing life without parole would distinguish these cases from ordinary noncapital cases and give the proceedings a greater prominence. With a jury empaneled, judges are likely to allow more time for the presentation of evidence, and defense lawyers may more readily recognize the need for a higher level of development of mitigating evidence. The presentation of this mitigating evidence is crucial in serious cases to make the sentencer view the individual sentenced as human and capable of redemption.[337] With a capital-style presentation of mitigating evidence, the sentencer will be more likely to give youth mitigating effect as *Miller* requires.

Moreover, because a sentencing proceeding before a jury is likely to be more time-consuming and work-intensive for all parties, the right to jury sentencing for juveniles facing life without parole gives juveniles greater leverage in plea negotiations with prosecutors.[338] In addition, the process of selecting a jury is time-consuming and introduces the potential for reversible error. Prosecutors may decide that it is simply too time-consuming and burdensome to seek life without parole.

F. Making Miller *Meaningful in the States*

States can avoid a host of constitutional challenges to sentences by simply eliminating life without parole for all juveniles. Indeed, many states

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individualized sentencing for juveniles facing life without parole demands the same level of defense lawyer practice in these cases as in death penalty cases. *Id.* at 43–46.

[336] *Id.* at 43 ("Capital trials are nothing like their non-capital counterparts, and intensive investigation and presentation of mitigating evidence are the primary distinguishing features.").

[337] *See* AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION 167 (2001). Sarat considers the role of death penalty lawyers in presenting mitigating evidence. He explains that the death penalty lawyer's work is "increasingly the work of recording the stories of their clients' lives, of the poverty and abuse that breeds violence, and of the indifference of a state intent on doing its own kind of violence." *Id.* Sarat asserts that "the one overriding strategic goal in all narratives is to humanize the client, under the assumption that jurors and judges will only condemn those whom they see as fundamentally Other, as inhuman, as outside the reach of the community of compassionate beings." *Id.* at 173.

[338] *Cf.* Steiker & Steiker, *supra* note 335, at 46 ("The costs associated with capital trials—the lion's share of which is directly attributable to the new mitigation practice—have contributed to the dramatic decline in death sentences over the past fifteen years. Prosecutors are increasingly willing to forego the possibility of a death sentence to avoid the extensive cost of a capital trial.").

have already taken this approach.[339] Short of abolishing life without parole for juveniles, states can avoid Sixth Amendment challenges to life-without-parole sentences for juveniles by giving juveniles the right to jury sentencing.

Several states already give defendants—juveniles and adults—the right to jury findings before they may be sentenced to life without parole. For example, in Vermont, a court may sentence a defendant to life without parole for first- or second-degree murder only if a jury first finds that aggravating factors outweigh any mitigating factors.[340] Vermont's current statutory scheme requiring jury involvement followed a decision by the Vermont Supreme Court holding the prior scheme unconstitutional on Sixth Amendment grounds.[341] Under the prior version of the statute, life-without-parole sentences were authorized only if a court found that the aggravating factors outweighed the mitigation factors. Rhode Island also requires a jury finding of aggravating factors before life without parole may be imposed.[342] Once the jury has found an aggravating factor beyond a reasonable doubt, the judge has discretion to impose either life without parole or life with parole.[343]

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[339] *See supra* note 21 and accompanying text.

[340] The Vermont statute provides in relevant part:

> (b) The punishment for murder in the first degree shall be imprisonment for life and for a minimum term of 35 years unless a jury finds that there are aggravating or mitigating factors which justify a different minimum term. If the jury finds that the aggravating factors outweigh any mitigating factors, the court may set a minimum term longer than 35 years, up to and including life without parole. If the jury finds that the mitigating factors outweigh any aggravating factors, the court may set a minimum term at less than 35 years but not less than 15 years.
>
> (c) The punishment for murder in the second degree shall be imprisonment for life and for a minimum term of 20 years unless a jury finds that there are aggravating or mitigating factors which justify a different minimum term. If the jury finds that the aggravating factors outweigh any mitigating factors, the court may set a minimum term longer than 20 years, up to and including life without parole. If the jury finds that the mitigating factors outweigh any aggravating factors, the court may set a minimum term at less than 20 years but not less than 10 years.

VT. STAT. ANN. tit. 13, § 2303 (2014).

[341] State v. Provost, 896 A.2d 55, 64 (Vt. 2005).

[342] R.I. GEN. LAWS § 12-19.2-1 (2014).

[343] The Rhode Island statute provides:

> In all cases tried by a jury in which the penalty of life imprisonment without parole may be imposed pursuant to § 11-23-2 or 11-23-2.1, and in which the attorney general has recommended to the court in writing within twenty (20) days of the date of the arraignment that such a sentence be imposed, the court shall, upon return of a verdict of guilty of murder in the first degree by the jury, instruct the jury to determine whether it has been proven beyond a reasonable doubt that the murder committed by the defendant involved one of the circumstances enumerated in § 11-23-2 or 11-23-2.1 as the basis for imposition of a sentence of life imprisonment without pa-

Both the Vermont and Rhode Island schemes leave the ultimate decision regarding whether to impose life without parole in the hands of judges, rather than the juries that found the defendant eligible for life without parole. It appears such a scheme would satisfy Sixth Amendment concerns. In particular, a state could require a jury to find that the juvenile committed a "homicide" crime and was "irreparably corrupt," but leave the ultimate decision about whether to impose life without parole in the hands of a judge.

Such a structure may have its advantages in some cases. Yet a concern with this bifurcated structure is that it may allow the jury to avoid feeling ultimate responsibility for the sentence imposed. In most states, juries are empowered to make the ultimate decision about whether to impose the death penalty.[344] Some states, however, leave the ultimate decision in the hands of judges and even allow judges to override sentencing recommendations of juries.[345] A study of capital jury decision making in such "hybrid" states found: "[T]he punishment decisions of jurors in hybrid states were fraught with less seriousness and conscientiousness owing to jurors' recognition that their punishment decision was not final. Where their sentence determination was merely a recommendation, they more often denied responsibility for the defendant's punishment, they more often failed to understand jury instructions, and they devoted less time and effort to deciding the sentence."[346] Josh Bowers argues that "an equitable sentencing jury not only provides a democratic check on the prosecutor; it forces the jury to

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> role. If after deliberation the jury finds that one or more of the enumerated circumstances was present, it shall state in writing, signed by the foreperson of the jury, which circumstance or circumstances it found beyond a reasonable doubt. Upon return of an affirmative verdict, the court shall conduct a presentence hearing. At the hearing, the court shall permit the attorney general and the defense to present additional evidence relevant to a determination of the sentence to be imposed as provided for in § 12-19.2-4. After hearing evidence and argument relating to the presence or absence of aggravating and mitigating factors, the court shall, in its discretion, sentence the defendant to either life imprisonment without parole or life imprisonment. If the trial court is reversed on appeal because of error only in the presentence hearing, the new proceedings before the trial court which may be ordered shall pertain only to the issue of sentencing.

Id.

[344] *Woodward*, 134 S. Ct. at 407 (Sotomayor, J., dissenting) (noting that of the thirty-two states that currently authorize capital punishment, thirty-one require jury participation in the sentencing decision; in all but four of those states, the jury's decision to spare the defendant from death is final and cannot be overridden by a judge).

[345] *See id.*

[346] William J. Bowers et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931, 1010 (2006).

take *responsibility* for its punishment decision."[347] Thus, there may be a benefit, at least in some cases, to requiring jurors to make, and take responsibility for, the decision to sentence a juvenile to die in prison.[348]

CONCLUSION

There has been a great deal of activity in state courts and legislatures in response to the U.S. Supreme Court's decisions in *Graham v. Florida* and *Miller v. Alabama*. Yet despite the extensive debate in the states, no one has asked a crucial question: Can a judge sentence a juvenile to die in prison or does a juvenile have a right to have a jury make this determination? Courts and state legislatures responding to *Miller* have assumed that a judge can impose life without parole on a juvenile, as long as the judge has discretion to impose a less severe sentence.

Graham and *Miller* place Eighth Amendment ceilings on punishment for juveniles. Under the decisions, it appears that a juvenile may be exposed to life without parole only if there are factual findings that he (1) committed a "homicide" offense, and (2) is irreparably corrupt. If an Eighth Amendment limit on a sentence operates in the same way as a statutory maximum sentence, then the Sixth Amendment requires a jury to find the facts beyond a reasonable doubt that expose a juvenile to life without parole.

Although the Constitution, rather than a legislature or commission, sets an Eighth Amendment punishment ceiling, it nonetheless defines the lawful sentencing range to which a defendant may be exposed. Thus an Eighth Amendment ceiling may not be raised under the Sixth Amendment absent jury findings beyond a reasonable doubt. With Eighth Amendment limits triggering Sixth Amendment rights, a role for the jury in sentencing will be preserved—even if legislatures draft statutes in an effort to avoid jury involvement.

States would do best to simply eliminate life-without-parole sentences for juveniles—it is the right thing to do and avoids a host of constitutional challenges to these sentences. Barring that solution, juveniles in states that retain life without parole as a possible sentence can assert their right to jury sentencing. A right to jury sentencing may help make life-without-parole sentences for juveniles "uncommon."

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[347] Bowers, *supra* note 292, at 45–46. Bowers urges legislatures to adopt capital-style jury sentencing for all cases (adult and juvenile) in which the potential exists for a life-without-parole sentence. *Id.* at 46.

[348] Justice Breyer's view is that "the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death." *Ring*, 536 U.S. at 619 (Breyer, J., concurring).