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Random If Not Rare: The Eighth Amendment Weaknesses of Post-Miller Legislation

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RANDOM IF NOT "RARE"? THE EIGHTH AMENDMENT WEAKNESSES OF POST-*MILLER* LEGISLATION

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I. INTRODUCTION

In the wake of *Miller v. Alabama*,[1] 28 states had homicide sentencing laws that were, overnight, unconstitutional as applied to juvenile

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1. Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012) (holding that the Eighth Amendment was violated by the mandatory imposition of a life without parole sentence on a

defendants.[2] *Miller* found that the Eighth Amendment banned the mandatory imposition of a life without parole sentence on a juvenile, and, in considering the individualized sentencing procedure that is constitutionally required, admonished that the sentence of life without parole for juveniles should be "uncommon"[3] or "rare."[4] In the years since *Miller*, many of these states have passed new sentencing provisions aimed at addressing the constitutional violation in *Miller*. *Montgomery v. Louisiana*, which found that *Miller* created a substantive right and applied *Miller* retroactively,[5] increased the need for state responses. This Article takes a hard look at state legislation after *Miller*. States have made a range of choices, but a common approach is to establish a new sentencing process by which sentencing courts examine the individual juvenile before the court and have a choice between life without parole and a different, lesser sentence, often a long term of years or life with the possibility of parole. In particular, this Article examines these new laws in light of other Eighth Amendment doctrine—particularly the case law surrounding the statutory framework for the death penalty—and finds that many of these laws are deficient. While state legislative responses to *Miller* have eliminated the automatic imposition of life without parole on juveniles, they have largely failed to provide for any guidance or limitations on the sentencer. In other words, it remains to be seen whether or not states will make life without parole "rare," as the sentencing laws established in its wake set up systems in which the sentence of life without parole could certainly be imposed arbitrarily and inconsistently.

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juvenile and that juveniles must have individualized sentencing determinations that consider the unique qualities of youth if they are facing a life without parole sentence).

2. Joshua Rovner, *Juvenile Life Without Parole: An Overview* 3, SENTENCING PROJECT (July 1, 2016), http://www.sentencingproject.org/wp-content/uploads/2015/12/Juvenile-Life-Without-Parole.pdf (citing Montgomery v. Louisiana, 136 S. Ct. 718 (2016)); Gary Gately, *Supreme Court Agrees to Hear Miller Retroactivity Issue*, JUVENILE JUSTICE INFO. EXCHANGE (Mar. 23, 2015), http://jjie.org/supreme-court-agrees-to-hear-miller-retroactivity-issue/108497/ (noting that the ruling in *Miller* affected mandatory sentencing laws in twenty-eight states and the federal government and suggesting that those states remedy the unconstitutionality of mandatory juvenile life without parole sentences after *Miller* by simply permitting parole hearings for the thousands of juveniles who were sentenced mandatorily prior to *Miller*); *see also* Joshua Rovner, *Slow to Act: State Responses to 2012 Supreme Court Mandate on Life Without Parole* 1, SENTENCING PROJECT (June 25, 2014), http://sentencingproject.org/wp-content/uploads/2015/11/Slow-to-Act-State-Responses-to-Miller.pdf (stating that 28 states had laws that were struck down by *Miller* which provided for mandatory juvenile life without parole).

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

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

5. Montgomery v. Louisiana, 136 S. Ct. 718, 732–34 (2016).

First, this Article surveys the U.S. Supreme Court's decision to analogize life without parole for juveniles to the death penalty for adults, and discusses the Eighth Amendment law regarding the parameters around death penalty statutory schemes. Second, this Article examines the state legislative response to *Miller*, and scrutinizes it with the Court's Eighth Amendment death penalty law—and the states' responses to this case law—in mind. This Article highlights the failure of juvenile homicide sentencing provisions to: 1) narrow offenses that are eligible for life without parole sentences; 2) further limit, once a guilty finding is made, the categories of offenders to the most likely to have demonstrated "irreparable corruption,"; and 3) provide for meaningful appellate review, among other deficiencies.

II. *MILLER*, *MONTGOMERY*, AND A BRIEF LOOK AT SOME EIGHTH AMENDMENT LAW AROUND DEATH PENALTY LEGISLATION

In *Graham* and *Miller*, the Court analogized the sentence of life without parole for juveniles to the sentence of the death penalty for adults.[6] Life without parole is the most severe sentence that a juvenile can constitutionally receive.[7] For juveniles, a life without parole sentence

> guarantees [the juvenile] will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes.[8]

Notably, the Court found that the same concerns that motivated its invalidation of juvenile death penalty sentences in *Roper* apply in the life without parole context:

> The juvenile should not be deprived of the opportunity to achieve maturity of judgment and self-recognition of human worth and

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6. *See* Graham v. Florida, 560 U.S. 48, 69 (2011) (recognizing that *life without parole* sentences "share some characteristics with death sentences that are shared by no other sentences"). *See also Miller*, 132 S. Ct. at 2466 (citing *Graham*, 560 U.S. at 69) (stating that because the Court "viewed [life without the possibility of parole sentence] for juveniles as akin to the death penalty, we treated it similarly to that most severe punishment").

7. *See* Roper v Simmons, 543 U.S. 551, 578 (2005) (holding that executing juveniles violates the Eighth Amendment).

8. *Graham*, 560 U.S. at 79.

> potential. In *Roper*, that deprivation resulted from an execution that brought life to its end. Here, though by a different dynamic, the same concerns apply. Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope.[9]

In *Miller*, the Court, in part relying on this analysis, found that the mandatory imposition of a life without parole sentence on a youth violated the Eighth Amendment.[10] The *Miller* Court also opined that, under the discretionary system that could remain, the sentence of life without parole for a juvenile should be "rare" or "uncommon."[11] In applying *Miller* retroactively, the Court in *Montgomery* stated that most youth convicted of homicide have a substantive Eighth Amendment right *not* to be sentenced to life without parole, and that only youth who are "irreparably corrupt" can be eligible for a discretionary life without parole sentence.[12]

In addition to making the comparison between life without parole for juveniles and the death penalty, in developing these juvenile cases, the Court has drawn extensively on its death penalty jurisprudence. In its decisions, the Court has repeatedly cited to the landmark Eighth Amendment death penalty cases, which suggests that the Court's death penalty cases are relevant for the discussion of juvenile life without parole under the Eighth Amendment. Specifically, the Court has cited *Lockett*,[13] *Enmund* and *Tison*,[14] *Atkins*,[15] *Kennedy*,[16] and *Coker*.[17]

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9. *Id.*

10. *Miller*, 132 S. Ct. at 2464.

11. *Id.*

12. Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) (citing *Miller*, 132 S. Ct. at 2469).

13. Lockett v. Ohio, 438 U.S. 586, 608–09 (1978) (reversing the death sentence imposed on the petitioner, who was convicted of aggravated murder, after finding that the Ohio death penalty statute under which the petitioner was sentenced violated the Eighth and Fourteenth Amendments because the statute did not allow for a sentencer to consider any aspect of a defendant's character, record, or circumstances of the offense that a defendant proffers as a mitigating factor for a sentence less than death). *See also Miller*, 132 S. Ct. at 2463–64 (citing *Lockett*, 438 U.S. at 608) (providing that the sentencing authority must "consider the characteristics of a defendant and the details of his offense before sentencing him to death"); *Graham*, 560 U.S. at 102 (Thomas, J., dissenting) (citing *Lockett*, 438 U.S. at 605) (providing that the Constitution "gives special protection to capital defendants because the death penalty is a uniquely severe punishment that must be reserved for only those who are 'most deserving of execution'").

14. Tison v. Arizona, 481 U.S. 137, 158 (1987) (remanding for new penalty phase hearing when there was no finding that petitioners had a major role in the offense and that they had an intent to kill or a reckless indifference to human life); Enmund v. Florida, 458 U.S. 782, 798–801 (1982) (reversing death penalty where petitioner participated in a robbery in the

Therefore, while prior to *Graham* it was often said that, in the context of the Eighth Amendment analysis, "death is different," many have opined that is no longer true. In his *Graham* dissent, Justice Thomas warned explicitly that the Court's decision implied the elimination of the distinction between death and other sentences: "'Death is different' no longer."[18] Scholars after *Graham* have also suggested that death may no longer be different.[19]

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course of which a murder was committed, but did not himself commit the murder or intend or attempt to take life or use lethal force). *See also Graham*, 560 U.S. at 69 (citing *Enmund*, 458 U.S. at 799; and *Tison*, 481 U.S. at 170–71) (providing that defendants who do not kill, intend to kill, or anticipate that homicide will occur while they are engaged in criminal behavior are "categorically less deserving of the most serious form of punishment than are murderers"); *Roper v. Simmons*, 543 U.S. 551, 589 (2005) (O'Connor, J., dissenting) (citing *Enmund*, 458 U.S. at 801; and *Tison*, 481 U.S. at 149) (providing that the Constitution requires that punishment be tailored to both the nature of the crime and the defendant's moral culpability and responsibility); Thompson v. Oklahoma, 487 U.S. 815, 853 (1988) (O'Connor, J., concurring) (citing *Enmund*, 458 U.S. at 825 (O'Connor, J., dissenting); and *Tison*, 481 U.S. at 149) (providing that a proportional punishment requires a nexus between the defendant's culpability and the punishment imposed).

15. Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that executions of developmentally disabled defendants violate the Eighth Amendment). *See also Miller*, 132 S. Ct. at 2463 (citing *Atkins*, 536 U.S. at 318) (demonstrating the Court's practice of placing categorical bans on sentencing practices that foster incongruences between the culpability of certain classes of offenders as a whole (e.g., mentally handicapped) and the severity of the penalty (e.g., death)); *Graham*, 560 U.S. at 48 (citing *Atkins*, 536 U.S. at 318; Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) and *Roper*, 543 U.S. at 568–89) (concluding that the use of a categorical approach to regulating sentencing length and severity, as demonstrated in *Atkins* and prior cases, was appropriate in the case of juvenile nonhomicide offenders as well).

16. *Kennedy*, 554 U.S. at 446 (holding that the rape of a child did not warrant the petitioner's death sentence). *See Miller*, 132 S. Ct. at 2467 (citing *Kennedy*, 554 U.S. at 447) (providing that it is appropriate to categorically ban the imposition of the death penalty on non-homicide offenders); *Graham*, 560 U.S. at 60–61 (citing *Kennedy*, 554 U.S. at 446) (providing *Kennedy* as an illustration from a class of cases that used categorical rules to define Eighth Amendment standards).

17. Coker v. Georgia, 433 U.S. 584, 599–600 (1977) (reversing the death sentence of the petitioner, who was convicted of rape of an adult woman while in the course of an armed robbery, because the sentence of death for rape does not warrant the taking of the offender's life who did not take any life himself). *See also Miller*, 132 S. Ct. at 2467 (citing *Coker*, 433 U.S. at 599; *Kennedy*, 544 U.S. at 446) (noting the Court's rejection of the death penalty for non-homicide offenders); *Graham*, 560 U.S. at 69 (citing *Coker*, 433 U.S. at 600) (providing that the Court has recognized that certain classes of defendants are categorically less deserving of the most serious forms of punishment, such as non-homicide offenders).

18. *Graham*, 560 U.S. at 102–03 (Thomas, J., dissenting) (quoting *Atkins*, 536 U.S. at 319) ("Until today, the Court has based its categorical proportionality rulings on the notion that the Constitution gives special protection to capital defendants because the death penalty is a uniquely severe punishment that must be reserved for only those who are 'most deserving of execution' . . . [t]oday's decision eviscerates that distinction. 'Death is different' no longer.").

19. *See, e.g.*, Carol S. Steiker & Jordan M. Steiker, *Miller v. Alabama: Is Death (Still) Different?*, 11 OHIO ST. J. CRIM. L. 37, 38 (2013) (citing *Graham*, 560 U.S. at 58–61)

Regardless of whether the Court broadens Eighth Amendment doctrine to apply to sentences other than life without parole for juveniles, it certainly now extends this far. As Justice Breyer noted in his concurring opinion in *Miller*, the categorical ban on the imposition of the death penalty for lesser-involved aiders and abetters translates to the examination of life without parole for juveniles,[20] as does the categorical ban on the death penalty for adults with intellectual disabilities.[21] There are many unanswered questions, however.[22] This Article focuses on one of these: How will statutes that allow juveniles to be sentenced to life without parole hold up against the Eighth Amendment death penalty law regarding the form, content, and review available under statutory provisions for the most extreme sentence?

A short overview of some particularly relevant pieces of the Supreme Court's death penalty history is needed before we take a hard look at the new juvenile sentencing legislation.

In 1972, when the Court found the death penalty unconstitutional in *Furman*,[23] the Justices were concerned with a range of problems in the

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("*Graham* breached the capital versus non-capital divide . . . *Graham* essentially imported the proscription against disproportionate punishment from the Court's capital jurisprudence into its non-capital jurisprudence and transformed a 'death-is-different' doctrine into a more general limitation on excessive sentences.").

20. *Miller*, 132 S.Ct. at 2475-76 (Breyer, J., concurring) (stating that because of their "twice diminished culpability," he viewed the sentence of life without parole, whether discretionary or mandatory, as violating the Eighth Amendment for a juvenile who did not kill or intend to kill) (citing, among other cases, *Graham*, 560 U.S. at 69; Enmund v. Florida, 458 U.S. 782 (1982) and Tison v. Arizona, 481 U.S. 137 (1987)). Some states have codified these exclusions for individuals facing the death penalty, see for example, WASH. REV. CODE § 10.95.030 (2) (barring the death penalty for individual with an intellectual disability), but have not done so for juveniles facing life without parole.

21. *See Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (barring death penalty for adults with intellectual disabilities). *See also Hall v. Florida*, 134 S.Ct. 1986, 1990 (2014) (reaffirming *Atkins* and further defining intellectual disability).

22. For examples of commentaries after *Graham* and *Miller* that examine other Eighth Amendment implications, see generally Douglas A. Berman, Graham *and* Miller *and The Eighth Amendment's Uncertain Future*, 27 CRIM. JUST. 19 (2013), for a discussion of the uncertainty in Eighth Amendment jurisprudence with the fall of the bright-line "death is different" rule. *See also* William W. Berry III, *Bombshell or Babystep? The Ramifications of* Miller *v.* Alabama *for Sentencing Law and Juvenile Crime Policy*, 78 MO. L. REV. 1053, 1075–76 (2013) ("As explained above, if juveniles are different in the sense that they are a unique class of offender, two potential consequences logically follow. First, the limitation on death sentences as the only relevant punishment for Eighth Amendment purposes dissipates. Second, if juveniles are different as a class, other classes of offenders may also be different. If the restriction on punishment scrutiny under the Eighth Amendment no longer applies, then the doctrinal expansion of the cruel and unusual punishment clause with respect to juveniles could go much further than juvenile LWOP cases.").

23. Furman v. Georgia, 408 U.S. 238, 239 (1972).

application of the death penalty, including the possibility that it was "so wantonly and so freakishly imposed"[24] instead of imposed for only the worst offenders[25] and that the lack of procedures permitted discriminatory application of the death penalty.[26] States responded by enacting a variety of new death penalty statutes. Some states passed legislation providing for a mandatory death penalty; these were struck down by the Court because they failed to give particularized consideration to an individual defendant and failed to "fulfill *Furman*'s basic requirement [to] replac[e] arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death."[27]

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24. *Id.* at 309–10 (Stewart, J., concurring).

25. *Id.* (comparing the application of the death penalty to an individual's chance of being struck by lightning). *See also* Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for* Furman*?*, 72 N.Y.U. L. REV. 1283, 1283 (1997) ("[*Furman*] was based in part on the Justices' belief that relatively few (15–20%) of the number of death-eligible murderers were being sentenced to death and that there was no meaningful basis for distinguishing the cases in which the death penalty was imposed. In subsequent cases, the Court interpreted *Furman* to require that the states, by statute, genuinely narrow the death-eligible class."); Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941, 951–52 (1986) ("[T]he death penalty can be imposed only if the sentencer's discretion is adequately limited and guided . . . [because] there is a greater need for reliability in capital sentencing procedures than in noncapital sentencing procedures, both to minimize the risk of error and to avoid arbitrariness, caprice, and discrimination; the choice to sentence someone to die must be based on reason, not caprice or emotion; and the state in its sentencing scheme must provide a rational and meaningful basis for the sentencer to use in singling out the few who are to die from among the many who are allowed to live.").

26. *See* Gregg v. Georgia, 428 U.S. 153, 189 (1976) ("*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."); *Furman*, 408 U.S. at 255 (Douglas, J., concurring) ("Those who wrote the Eighth Amendment knew what price their forebears had paid for a system based, not on equal justice, but on discrimination. In those days the target was not the blacks or the poor, but the dissenters . . . One cannot read this history without realizing that the desire for equality was reflected in the ban against 'cruel and unusual punishments' contained in the Eighth Amendment."). *See also* Betty B. Fletcher, *The Death Penalty in America: Can Justice Be Done?*, 70 N.Y.U. L. REV. 811, 813–18 (1995) (discussing the evolution of the death penalty in America, and citing reasons for the drop in executions prior to *Furman* as including the rise in habeas corpus petitions for state prisoners and Civil Rights Movement leaders' growing concerns that the death penalty could be easily applied in a racially discriminatory fashion by juries); Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 369–72 (1999) (noting that although federal executions in the pre-*Furman* twentieth century were "relatively infrequent," a growing concern mounted that the "absolute and unguided discretion granted to federal juries" in capital punishment cases would follow discriminatory patterns).

27. Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

Other states, like Georgia, responded by passing legislation that provided a series of aggravating circumstances, at least one of which had to be found beyond a reasonable doubt before the defendant could be considered for the death penalty by the jury.[28] In approving this legislation, the Court determined that the sentencer's "discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application."[29] The Court also approved other state legislation that, in other ways, "narrow[ed] the categories of murders for which a death sentence may ever be imposed"[30] and provided "capital sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death."[31] Another key element of these approved capital punishment schemes was the provision for automatic review by an appellate court,[32] often the highest state court, which would not otherwise review the case.[33] The Court noted that state supreme court review for proportionality "is intended to prevent caprice in the decision to inflict the penalty."[34]

Subsequent to *Gregg*, the Court has, as the Court reiterated in *Graham*, determined that certain categories of offenders and certain categories of offenses are not eligible to receive the death penalty under the Eighth Amendment.[35] As summarized by one scholar, "death penalty

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28. *See Gregg*, 428 U.S. at 164–65 (citing GA. CODE ANN § 27-2534.1 (Supp. 1975) (current version at GA. CODE ANN § 17-10-30 (2012)) ("Before a convicted defendant may be sentenced to death, however, except in cases of treason or aircraft hijacking, the jury, or the trial judge in cases tried without a jury, must find beyond a reasonable doubt one of the 10 aggravating circumstances specified in the statute.").

29. *Id.* at 198 (quoting Coley v. State, 204 S.E.2d 612, 615 (Ga. 1974)).

30. Jurek v. Texas, 428 U.S. 262, 270 (1976).

31. *Jurek*, 428 U.S. at 274. *Cf.* Janet C. Hoeffel, *Risking the Eighth Amendment: Arbitrariness, Juries, and Discretion in Capital Cases*, 46 B.C. L. REV. 771, 777 (2005) (quoting *Gregg*, 428 U.S. at 189) ("*Gregg*, through its reincarnation of *Furman*, then, could claim, '*Furman* mandates . . . that discretion [in a capital case] must be suitably directed and limited so as to *minimize the risk of wholly* arbitrary and capricious action.' With these words, a system of risk-management was born. Yet, neither 'sentencing procedures' nor 'risks' had been a part of *Furman*'s mandate.").

32. *Jurek*, 428 U.S. at 276 ("By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law.").

33. *Gregg*, 428 U.S. at 166–67 (noting "special expedited direct review by the Supreme Court of Georgia of the appropriateness of imposing the sentence of death," including relative proportionality).

34. *Id.* at 203.

35. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 413, 439 (2008) (barring capital punishment for rape of a child or other offense that does not result in death of the victim); Roper v. Simmons, 543 U.S. 551, 578 (2005) (barring the death penalty for defendants under the age of 18); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (barring capital punishment for

proportionality jurisprudence teaches that in order for the penalty of death to be reserved for 'the worst of the worst,' its application should be narrowly and categorically drawn in terms of both offenders and offenses."[36]

III. FAILURE OF POST-*MILLER* LEGISLATION TO NARROW THE YOUTH SUBJECT TO LWOP AND PROVIDE MEANINGFUL APPELLATE REVIEW

If we take the comparison to the death penalty seriously, the post-*Miller* statutes do not fare well. This Article first surveys the legislative responses that the states have made to *Miller*. Then, it looks at these statutes in an Eighth Amendment framework that has been used in death penalty cases. This framework reveals that, first, the statutes largely ignore the post-*Furman* work that the Court has done to categorically eliminate the most severe punishment for groups of offenders or offenses. Second, the statutes do not give contour to the types of offenses or offenders that the state considers more likely to demonstrate "irreparable corruption"[37] or be the "worst of the worst."[38] Finally, I did not find any state statute that explicitly privileged appellate review for youth who receive a life without parole statute, despite the widespread practice of additional appellate review for proportionality across cases and sufficiency of aggravation in death penalty jurisdictions.

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intellectually disabled); Ford v. Wainwright, 477 U.S. 399, 410 (1986) (barring the death penalty from being inflicted upon a prisoner who is insane); Coker v. Georgia, 433 U.S. 584, 592 (1977) (barring capital punishment for rape of adult).

36. Janet C. Hoeffel, *The Jurisprudence of Death and Youth: Now the Twain Should Meet*, 46 TEXAS TECH L. REV. 29, 46 (2013) (looking generally to the proportionality analysis in death penalty cases and drawing lessons for juvenile transfer laws).

37. Miller v. Alabama, 132 S. Ct. 2455, 2469 (quoting *Roper*, 546 U.S. at 573); Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) ("*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility . . . *Miller* drew a line between children whose crimes reflect transient immaturity and those rare children whose crimes reflect irreparable corruption. The fact that life without parole could be a proportionate sentence for the latter kind of juvenile offender does not mean that all other children imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right.").

38. *See, e.g.*, *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'").

A. Summary of Statutory Changes

In the years since *Miller*, some, but not all, of the states that had mandatory juvenile life without parole sentencing laws have passed legislative revisions.[39] In fact, some have been critical of the relatively slow pace of passage of new legislation.[40]

While this Article focuses on post-*Miller* legislation, it is worth noting that in most states where the legislature has not acted, the state courts have crafted a temporary (or perhaps not so temporary) remedy for the unconstitutional statute.[41]

Also removed from consideration are the states that, either before or after *Miller*, have eliminated the sentence of life without parole entirely for juvenile defendants. Before *Miller*, at least five states had eliminated the sentence of life without parole for children.[42] After *Miller*, a number of other states have followed suit, at least for new cases, including Colorado (2016);[43] South Dakota (2016);[44] Utah (2016);[45] Iowa (2016);[46] Connecticut (2015);[47] Nevada (2015);[48] Vermont (2015);[49] Hawaii (2014);[50] West

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39. *See* Rovner, *supra* note 2, at 1 (stating that although Miller struck down laws in twenty-eight states, only thirteen states had enacted revised statutes).

40. *Id.*

41. For an example of this approach, see Minnesota's *State v. Ali*, in which the court vacated the mandatory LWOP sentence for the juvenile and remanded to the sentencing court for a *Miller* hearing at which the choice was between life without parole and life with consideration for release after 30 years, under MINN. STAT. § 609.185a. *See* State v. Ali, 855 N.W.2d 235, 256 (Minn. 2014) (also noting that there is no legislation resolving the *Miller* problem with its existing statute mandating life without parole for first-degree premeditated murder, MINN. STAT. § 609.106). Another example is Jackson v. State, 883 N.W.2d 272, 274–75 (Minn. 2016) (finding a mandatory life without parole sentence unconstitutional under *Montgomery* and remanding with instructions to sentence to life with parole review after 30 years).

42. These states include Alaska (ALASKA STAT. ANN. § 12.55.125 (West 2016)); Colorado (COLO. REV. STAT. ANN. § 17-22.5-104(IV) (2016)); Kansas (KAN. STAT. ANN. § 21-6618) (2012)); Kentucky (KY. REV. STAT. ANN. § 640.040(1) (2016)); and Montana (MONT. CODE ANN. §§ 46-18-222(1) (2015); 45-5-102(2) (2015)).

43. S.B. 16-180, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016); S.B. 16-181, 70th Gen. Assemb., 2d Reg. Sess. (Colo. 2016). *See also* CAMPAIGN FOR FAIR SENTENCING OF YOUTH, *Colorado Eliminates Life Without Parole* (June 16, 2016), http://fairsentencingofyouth.org/2016/06/16/colorado-eliminates-life-without-parole/ (describing the Colorado bills which eliminated the practice of sentencing children to life in prison without the possibility of parole).

44. S.B. 140, 91st Leg. Assemb. (S.D. 2016).

45. H.B. 405, 61st Leg., Gen. Sess. (Utah 2016).

46. State v. Sweet, 879 N.W.2d 811, 839 (Iowa 2016).

47. S.B. 796, 2015 Gen. Assemb., Reg. Sess. (Conn. 2015).

48. A.B. 267, 78th Reg. Sess. § 2 (Nev. 2015).

Virginia (2014);[51] Massachusetts (2013);[52] Texas (2013);[53] Wyoming (2013).[54] As of the fall of 2016, seventeen states have banned life without parole and four have banned it in nearly all cases.[55]

A few scholars after *Miller* have suggested the direction that legislation should take[56] and have noted the difficulty of legislative compliance with *Miller*, but there is little guidance for states. Of the states that have passed legislation that still permits life without parole, by far the most common approach has been to change the sentencing hearing itself, instead of, for example, the parole board process.

B. Issue 1: Broader Category of Offenses Eligible for JLWOP

Under the post-*Miller* statutes, youth are eligible for life without parole in greater numbers than adults are eligible for the death penalty in two categorical ways.

First, if one takes the comparison seriously, the offenses for which juveniles are eligible to receive the sentence of life without parole should not be broader than the offenses for which adults can receive the most serious penalty in that jurisdiction. In other words, given the history of death penalty law and the Court's comparison, it would stand to reason that states would unify the offenses for which adults could receive the death penalty and offenses for which juveniles could receive life without parole. For example, in a death penalty jurisdiction that limits the death penalty to first-degree murder (however defined) but excludes death as a possible punishment for second-degree murder (however defined), life without parole should not be an eligible sentence for second-degree murder.

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49. H.B. 62, 2015–16 Leg. Sess. § 7045 (Vt. 2015).
50. H.B. 2116, 27th Leg. Sess. (Haw. 2014).
51. H.B. 4210, 81st Leg., 2d Sess. (W.Va. 2014).
52. Diatchenko v. Dist. Att'y, 1 N.E.3d 270, 282 (Mass. 2013).
53. S.B. 2, 83rd Leg., Spec. Sess. (Tex. 2013).
54. H.B. 23, 62nd Leg., Gen. Sess. (Wyo. 2013).
55. CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, RIGHTING WRONGS 4, 6 (Sept. 2016), http://fairsentencingofyouth.org/righting-wrongs-the-five-year-groundswell-of-state-bans-on-life-without-parole-for-children/.
56. *See, e.g.*, Lauren Kinell, *Answering the Unanswered Questions: How States Can Comport with* Miller v. Alabama, 13 CONN. PUB. INT. L. J. 143, 149–58 (2013) (examining early approaches to *Miller* legislative compliance); Sonia Mardarewich, Note, *Certainty in a World of Uncertainty: Proposing Statutory Guidance to Sentencing Juveniles to Life Without Parole*, 16 THE SCHOLAR: ST. MARY'S L. REV. ON RACE & SOC. JUSTICE 123, 124 (2013) (suggesting a "framework to consult in drafting legislation that eliminates mandatory life without parole for juvenile offenders convicted on a transferred intent theory").

That logic, however, has not taken hold across the board. An example of a state that has not followed this prescription is Louisiana. In Louisiana, only first-degree murder is eligible for the death penalty,[57] while juveniles serving both first and second-degree murder both receive new sentencing hearings at which LWOP is a possible sentence.[58] First-degree murder requires "specific intent to kill or to inflict great bodily harm," and an additional aggravating circumstance, such as the victim was a law enforcement officer, the killing was done to prevent testimony, the victim was under 12 years old or over 65 years old, etc.[59] By contrast, second-degree murder includes offenses in which there is a "specific intent to kill or to inflict great bodily harm" but without an additional aggravating factor, as well as felony murder and other killings that do not require a specific intent to kill or inflict great bodily harm.[60] South Dakota, which passed its *Miller* legislation in 2013, then subsequently banned life without parole, was another example.[61]

One state that has limited the category of offenses for which youth could receive life without parole is North Carolina. North Carolina's juvenile murder sentencing statute does this by limiting the category of otherwise eligible convictions that may proceed to a life without parole hearing. In North Carolina, even if a youth is duly convicted of first-degree murder, the post-Miller sentencing statute excludes youth convicted under a felony murder theory from eligibility for life without parole.[62]

Arkansas is an example of a state that unifies the statutory offense eligibility for the most extreme penalty available for the death penalty (for adults) and for life without parole (for children).[63] Arkansas amended its

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57. *See* LA. REV. STAT. ANN. § 14:30(C)(1) (2016) (noting the ability of a prosecutor to seek a capital verdict).

58. LA. CODE CRIM. PROC. ANN. art. 878.1(A) (2016); LA. REV. STAT. ANN. § 15:574.4(E) (2012).

59. LA. REV. STAT. ANN. § 14:30(A) (defining first-degree murder).

60. *Id.* § 14:30.1 (2016) (defining second-degree murder).

61. The legislation made both Class A and Class B felonies eligible for life without parole sentences for juveniles. S.D. CODIFIED LAWS § 22-6-1 (2016). In contrast, only individuals convicted of Class A felonies, and who were not juveniles at the time of commission of the offense, are eligible for the death penalty. *Id.* The legislature banned life without parole in 2016. S.B. 140, 91st Leg. Assemb. (S.D. 2016).

62. N.C. GEN. STAT. ANN. § 15A-1340.19B(a)(1) (2015) ("If the sole basis for conviction of a count or each count of first degree murder was the felony murder rule, then the court shall sentence the defendant to life imprisonment with parole.").

63. ARK. CODE ANN. § 5-4-104(b) (2008) provides:

(b) A defendant convicted of capital murder, § 5-10-101, or treason, § 5-51-201, shall be sentenced to death or life imprisonment without parole in accordance with §§ 5-4-60–5-4-605, 5-4-607, and 5-4-608, except if the defendant was younger than eighteen (18) years of age at the time he or she committed the capital murder he or she shall be sentenced to:

(1) Life imprisonment without parole under § 5-4-606; or

mandatory life without parole statute to allow for the choice between life without parole and life with parole after a minimum of 28 years if the defendant was under 18 at the time of the capital murder.[64]

C. *Issue 2: No Narrowing of the Categories of Individuals or Qualities of the Statutory Offenses that are Subject to the Possibility of Life Without Parole*

In death penalty law, the statutory framework which requires finding at least one aggravating factor, and to weigh any mitigating evidence against the aggravating circumstance(s), is well-established.[65] As mentioned earlier, the Court looked to these statutory frameworks as a means to focus the sentence on "clear and objective standards so as to produce non-discriminatory application"[66] and to limit the possible imposition of the death penalty on the "worst of the worst."[67] Although there has been a robust critique of how well aggravating circumstances—or other death penalty schemes for that matter—constrain eligibility and provide clear guidance,[68] aggravating circumstances must, at a minimum, be defined well enough "to furnish principled guidance for the choice between death and a lesser penalty."[69]

Aggravating circumstances or other ways to narrow the category of death-eligible individuals may constrain or focus in at least two relevant

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(2) Life imprisonment with the possibility of parole after serving a minimum of twenty-eight (28) years' imprisonment.

See also ARK. CODE ANN. § 5-10-101(a)(1)(A) (2008) (defining capital murder to include felony murder, premeditated murder, murder for hire, and other circumstances); ARK. CODE ANN. § 5-4-104(c) (providing the same sentencing for Class Y felonies and second-degree murder, without respect to age).

64. ARK. CODE ANN. § 5-4-104(b).

65. Michael Vitiello, *The Expanding Use of Genetic and Psychological Evidence: Finding Coherence in the Criminal Law?*, 14 NEV. L.J. 897, 903 (2014) (noting that "this balancing of mitigating and aggravating factors is so well established in the law").

66. Gregg v. Georgia, 428 U.S. 153, 198 (1976) (quoting Coley v. State, 204 S.E.2d 612, 615 (1974)).

67. *See* Roper v. Simmons, 543 U.S. 551, 568–70 (2005) (stating capital punishment must be limited to a narrow category of offenders and the definition aggravating circumstances must be narrow and precise); Vitiello, *supra* note 65, at 902 (noting aggravating and mitigating circumstances are balanced in determining whether the defendant should be sentenced to the death penalty).

68. *See, e.g.*, Rosen, *supra* note 25, at 945 (critiquing how courts have refused to impose any meaningful restrictions on the scope of the "especially heinous" aggravating circumstance despite the constitutional problems within it).

69. Richmond v. Lewis, 506 U.S. 40, 46 (1992) (citing Maynard v. Cartwright, 486 U.S. 356, 361–64 (1988); Godfrey v. Georgia, 446 U.S. 420, 427–33 (1980)).

ways.[70] First, prosecutors, in charging, know that they will have to allege and prove the required factor(s).[71] From a pool of all death-eligible statutory offenses, this is likely to further limit those in which the government actually seeks the death penalty. Second, as the Court recognizes in *Gregg* and *Jurek*, the additional requirements serve to focus the sentencer's attention on additional features of the case or offender that must be considered—in addition to the facts needed for a conviction—and, effectively, narrow the number of individuals who are considered for the death penalty.[72]

This system could be a fit for starting to narrow the number of possible JLWOP cases, in which the Court has now told us that, of the youth who have committed homicides that can statutorily be punished with LWOP, only the smaller subset of youth who are "irreparab[ly] corrupt" can be eligible for a LWOP sentence.[73]

While the Court looked to the establishment of required proof of additional aggravating circumstances as a way to comply with the Eighth Amendment in capital punishment cases, states have largely not followed suit or adopted other narrowing provisions in their JLWOP statutes. For example, in Arkansas, like many other death penalty states, once an adult defendant is found guilty of capital murder, state law lays out a separate sentencing procedure.[74] As part of this sentencing, the prosecution must

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70. *See generally Gregg*, 428 U.S. at 196–97 (recognizing that Georgia "narrowed the class of murderers subject to capital punishment by specifying 10 statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed"); *Jurek v. Texas*, 428 U.S. 262, 262–63 (1976) ("Texas' action in narrowing capital offenses to five categories in essence requires the jury to find the existence of a statutory aggravating circumstance before the death penalty may be imposed, thus requiring the sentencing authority to focus on the particularized nature of the crime.").

71. *See generally Gregg*, 428 U.S. at 199 (noting that at each of the discretionary stages from charging to post-sentencing, including the state prosecutor's "unfettered authority" to select whom he wishes to prosecute for capital offenses, "an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty").

72. *See supra* text accompanying note 68; *see also* Robert F. Schopp, *Reconciling "Irreconcilable" Capital Punishment Doctrine as Comparative and Noncomparative Justice*, 53 FLA. L. REV. 475, 482 (2001) (stating that laws "that narrow the set of death-eligible offenders . . . serve to reduce the number of death-eligible offenders in a manner that justifies the more severe punishment of those selected").

73. Montgomery v. Louisiana, 136 S. Ct. 718, 726 (2016) (quoting Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012)).

74. *See, e.g.*, ARK. CODE ANN. § 5-4-602 (2016) (laying out additional trial procedural requirements for defendants found guilty of capital murder); *cf.* ARK. CODE ANN. § 5-4-104(b) (2016) (permitting life with and life without parole for juveniles, but not providing for, nor making any references to, other statutes that provide for a sentencing process in which this is to occur).

prove at least one aggravating circumstance.[75] Arkansas' statutory amendments addressing *Miller* only changed the available sentences after conviction.[76] Under its now-defunct post-*Miller* statute, South Dakota provided for a "presentence hearing," as in death penalty cases, but there were no required aggravated findings and no other constraints or guidance for the sentence,[77] unlike under its death penalty provisions.[78] Although there are other grounds on which it could be critiqued, one state that did model its JLWOP statute after a death penalty statute is Missouri.[79] Missouri's law, passed in July 2016, has a list of aggravating factors, one or more of which must be found beyond a reasonable doubt.[80]

Aggravating circumstances or other objective-narrowing provisions can also serve to assist in reviewing the imposition of the most severe penalty. Finally, after the imposition of the death penalty, legislatures provided that the sufficiency of these narrowing circumstances are a specific subject of appellate review. In Pennsylvania, for example, the state supreme court is specifically told that one reason that it should not affirm a death sentence is if "the evidence fails to support the finding of at least one aggravating

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75. ARK. CODE ANN. § 5-4-604 (2016) (listing 10 categories of aggravating circumstances, including that the murder was committed for pecuniary gain and that the murder was committed to escape from custody); ARK. CODE ANN. § 5-4-603 (2016) (describing circumstances in which the jury shall impose a death sentence and circumstances in which the jury shall impose a sentence of life without parole).

76. *See* H.B. 1993, 89th Gen. Assemb., Reg. Sess. (Ark. 2013) (amending provisions of capital murder sentencing in response to *Miller*).

77. S.D. CODIFIED LAWS § 23A-27-1 (2015).

78. S.D. CODIFIED LAWS § 23A-27A-1 (2015) (listing 10 aggravating circumstances, such as commission for money or commission during an escape, among other circumstances); S.D. CODIFIED LAWS § 23A-27A-3 (2015) (providing that a jury is to determine the existence of aggravating circumstances); S.D. CODIFIED LAWS § 23A-27A-4 (2015) (requiring a jury finding of at least one aggravating circumstance and jury recommendation for death in order for death to be imposed); S.D. CODIFIED LAWS § 23A-27A-5 (2015) (requiring a jury to write down aggravating circumstance(s) that it found beyond a reasonable doubt); S.D. CODIFIED LAWS § 23A-27A-6 (2015) (requiring finding by judge of at least one aggravating circumstance in bench cases before death penalty may be imposed).

79. *See, e.g.*, S.B. 590, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016) (repealing the mandatory life sentence without parole for juveniles found to be unconstitutional in *Miller* and making it discretionary); MO. REV. STAT. § 565.033 (2016) (listing available sentences and factors to consider in first-degree murder cases against defendants who were under the age of eighteen at the time of the offense); MO. REV. STAT. § 565.034 (2016) (requiring notice of intent to file for life without parole for a defendant under the age of eighteen at the time of the offense).

80. S.B. 590, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016); MO. ANN. STAT. § 565.034 (2016).

circumstance."[81] If the court finds the aggravating evidence insufficient, it is directed to remand for imposition of a life without parole sentence.[82]

D. Issue 3: Special Rules for Appellate Review

As mentioned above, after *Furman* a number of states established different appellate rules for death penalty cases.[83] As one scholar noted, modern death penalty doctrine "has emphasized the importance of appellate review. While the Court has not imposed a generally applicable standard of review in capital cases, it has suggested that some form of meaningful review is required."[84] While the Court has not required rigorous proportionality provisions in capital cases[85] and scholars have criticized the effectiveness of these provisions,[86] a variety of appellate review provisions

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81. 42 PA. CONS. STAT. ANN. § 9711(h)(3)(ii) (West 2016).

82. 42 PA. CONS. STAT. ANN. § 9711(h)(4) (West 2016).

83. Penny J. White, *Can Lightning Strike Twice? Obligations of State Courts After* Pulley v. Harris, 70 U. COLO. L. REV. 813, 825–26 (1999) ("The three statutes at issue in *Gregg v. Georgia*, *Proffitt v. Florida*, and *Jurek v. Texas* were illustrative of the states' methods of appellate review adopted after *Furman*. All states allowed appellate review of death sentences, and the majority of the states followed Georgia in statutorily requiring their appellate courts to conduct comparative proportionality reviews."); Note, *A Matter of Life and Death: Due Process Protection in Capital Clemency Proceedings*, 90 YALE L.J. 889, 891 (1981) (analyzing the alternative of offering executive clemency to prisoners on death row who have exhausted appellate review).

84. Steven Semeraro, *Responsibility in Capital Sentencing*, 39 SAN DIEGO L. REV. 79, 120 (2002).

85. *See, e.g.*, Pulley v. Harris, 465 U.S. 37, 43–44, 50–51 (1984) (rejecting the contention that the Eighth Amendment invariably requires comparative proportionality review—whether the punishment is excessive compared to other similar cases—on appeal before affirming a death sentence). Even though comparative proportionality review is not constitutionally required in the death penalty context, given the Court's admonition that JLWOP sentences should be "rare," "uncommon," and reserved for only the few who demonstrate "irreparable corruption," comparative proportionality review seems particularly apt. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) (quoting Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012)).

86. For an assessment of comparative proportionality review, see, for example, Donald H. Wallace & Jonathon R. Sorensen, *Missouri Proportionality Review: An Assessment of a State Supreme Court's Procedures in Capital Cases*, 8 NOTRE DAME J. L. ETHICS & PUB. POL'Y 281, 313 (1994), reviewing Missouri's proportionality review process and concluding that its "enfeebled" process renders a review that "does little more than allow the reviewing court to justify a death sentence." *See also* Timothy V. Kaufman-Osborn, *Proportionality Review and the Death Penalty*, 29 JUST. SYS. J. 257, 257 (2008) (evaluating the comparative proportionality review of death sentences with a focus on Washington state); White, *supra* note 83, at 868–69 (quoting MODEL CODE OF JUD. CONDUCT Preamble (AM. BAR ASS'N 1998)) (discussing the benefits of comparative proportionality review); Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After* Gregg*: Only "The*

have attempted to allow greater access to state courts and also required state courts reviewing death penalty to give particular consideration to these cases.[87]

As an initial matter, statutes should require the sentencer to provide reasons for the imposition of sentence. *Gregg*, in the death penalty context, noted the importance of when "the sentencing authority is required to specify the factors it relied upon in reaching its decision" for "meaningful appellate review."[88] Not all JLWOP statutes explicitly provide for a statement of reasons by the sentencer; and of those that do,[89] there will inevitably be debate about whether the requirement is sufficiently robust to provide for appellate review.

Another way that legislatures sought to ensure that the imposition of the death penalty was given sufficient scrutiny was by giving automatic review in the state's highest court to these cases, instead of requiring these cases to go through a certiorari or request for leave process. For example, Pennsylvania provides that "[a] sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules."[90]

Appearance of Justice", 87 J. CRIM. L. & CRIMINOLOGY 130, 141–46 (1996) (comparing two different approaches to proportionality review: the analysis of a capital case system and the review of a single death sentence); Rhonda G. Hartman, *Critiquing Pennsylvania's Comparative Proportionality Review in Capital Cases*, 52 U. PITT L. REV. 871, 872 (1991) (critiquing Pennsylvania's appellate review process in capital cases and proposing methodologies for establishing an effective comparative proportionality review procedure that is consistent with the principles of fairness and uniformity). In another study, Wallace and Sorensen looked at fifty-five cases from twelve jurisdictions from 1975 through April 1996 in which comparative proportionality review had been done. Donald H. Wallace & Jonathon R. Sorensen, *Comparative Proportionality Review: A Nationwide Examination of Reversed Death Sentences*, 22 AM. J. CRIM. JUST. 13, 20–21 (1997). They found that Florida led these jurisdictions in comparative review reversals (26), followed by North Carolina (7), Illinois (4), Idaho and Nevada (3), Arkansas, Louisiana, and Georgia (2), and Arizona, Mississippi, Missouri, and Oklahoma (1). *Id.* at 27–34.

87. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 917(h)(1) (West 2016) (providing for automatic review of death sentences by the Supreme Court of Pennsylvania); Semeraro, *supra* note 84, at 120 ("The Court has rejected simplistic devices that might enable an appellate court to affirm death sentences without taking sufficient responsibility for the result.").

88. Gregg v. Georgia, 428 U.S. 153, 195 (1976).

89. *See, e.g.*, MICH. COMP. LAWS § 769.25 (2014); *see also* MICH. COMP. LAWS § 769.25a (2014).

90. *See* 42 PA. CONS. STAT. ANN. § 9711(h)(1) (2014); *see also* TENN. CODE ANN. § 39-13-206(a)(1) (2016) (providing for automatic review by the state court of criminal appeals and, if the sentence is affirmed, by the state supreme court); *cf.* Joseph E. Wilhelm & Kelly L. Culshaw, *Ohio's Death Penalty Statute: The Good, the Bad, and the Ugly*, 63 OHIO ST. L.J. 549, 584 (2002) (noting that although Ohio's penal code calls for mandatory appellate review of death sentences (section 2929.05(A) of the Ohio Revised Code), "[t]he [U.S.

In addition to providing increased access to state appellate courts, a number of death penalty statutes also seek to give increased substantive review to cases in which the death penalty is imposed, especially along dimensions that might give rise to constitutional error. For example, in Pennsylvania, the state supreme court is told to affirm death sentences "unless it determines that: (i) the sentence of death was the product of passion, prejudice or any other arbitrary factor."[91] As another example, in South Dakota, the state supreme court must examine each death sentence to determine whether it was imposed "under the influence of passion or prejudice or any other arbitrary factor," whether there is sufficient evidence for the aggravating circumstance(s), and whether the sentence is disproportionate to the penalty imposed in other cases.[92] As a third example, Arkansas' Supreme Court examines the evidence supporting the aggravating circumstances and conducts a harmless error analysis in some cases.[93] Although it was never adopted, the federal Fairness in Death Sentencing Act,[94] which provided that a defendant could challenge that his death sentence was the result of racial bias, gives one possible example for how substantive review specifically for racial discrimination in sentencing might occur.[95]

At the time of this writing, I could not find one post-*Miller* statute that provided additional access to appellate courts for individuals sentenced to life without parole or enhanced substantive review for proportionality, discriminatory implementation, or other aspects.

Supreme] Court has not mandated, however, that state appellate courts independently weigh selection factors as part of appellate review of a death sentence. Indeed, the Court does not even require reweighing by state appellate courts to correct constitutional weighing errors made by the original sentencer").

91. 42 PA. CONS. STAT. ANN. § 9711(h)(3)(i) (2014).

92. S.D. CODIFIED LAWS § 23A-27A-12 (2016) ("Factors reviewed by Supreme Court regarding sentence. With regard to the sentence, the Supreme Court shall determine: (1) [w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and (2) [w]hether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 23A-27A-1; and (3) [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.").

93. ARK. CODE ANN. § 5-4-603(d) & (e) (2016).

94. H.R. 2851, 102d Cong., 1st Sess. (1991).

95. *See also* KY. REV. STAT. ANN. § 532.300 (2016) (known as the Racial Justice Act, which allows for a pretrial claim that race was a "significant factor" in the decision to seek death); Olatunde C.A. Johnson, *Legislating Racial Fairness in Criminal Justice*, 39 COLUM. HUM. RTS. L. REV. 233, 241–45 (2007) (describing the Kentucky Racial Justice Act and its potential influence on prosecutorial behavior); *see also* Seth Kotch & Robert P. Mosteller, *The Racial Justice Act and the Long Struggle with Race and the Death Penalty in North Carolina*, 88 N.C. L. REV. 2031 (2010) (discussing North Carolina Racial Justice Act).

E. Issue 4: No Limit on the Scope or Subject Area of Aggravating Evidence or Rules Regarding What Evidence Can Be Presented at the Miller *Hearing, and How the Hearing Should Be Conducted*

While it may not be an Eighth Amendment violation, it is worth noting that the JLWOP statutes, for the most part, lack any codification of the type or reliability of evidence that will be presented and used as aggravation at sentencings in which the government is seeking to impose a life without parole sentence. The *Gregg* Court noted that the Eighth Amendment was not violated by the Georgia statute's allowance of "wide scope of evidence" and argument at death penalty hearings.[96] There are, to be sure, specific instances or categories of evidence that have been deemed constitutionally impermissible.[97]

Nevertheless, a number of capital punishment statutes cabin the evidence that may be presented by the state. For example, the Pennsylvania death penalty sentencing statute states that "[e]vidence of aggravating circumstances shall be limited to those circumstances specified in subsection (d)."[98]

One state that illustrates the contrast is Arkansas. The Arkansas death penalty procedure statute gives guidance as to what evidence may be placed before the sentencer, that evidence regarding aggravating circumstances must conform to the rules of evidence at trial and the format for argumentation.[99] By contrast, in Arkansas, the statutory amendments addressing sentencing post-*Miller* do not provide any guidance about how the hearing should be conducted or what is relevant, or irrelevant, evidence.[100]

In terms of other evidence, a number of states have, in their legislation, codified the "*Miller* factors" or a series of factors similar to those listed in *Miller*.[101] Some of the state legislation explicitly characterizes these factors

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96. Gregg v. Georgia, 428 U.S. 153, 203 (1976).

97. *See, e.g.*, Dawson v. Delaware, 503 U.S. 159, 159 (1992) (finding, where there was no relevance to the offense, a violation of the First and Fourteenth Amendment to introduce evidence of Aryan Brotherhood membership in the sentencing phase).

98. 42 PA. CONS. STAT. ANN. § 9711(a)(2) (2014).

99. ARK. CODE ANN. § 5-4-602(4) (2016) (providing, among other things, that admission of "evidence relevant to an aggravating circumstance" is governed by the rules of evidence). *See also* ARK. CODE ANN. § 5-4-602(5) (2016) (addressing the order of argumentation of the parties).

100. *See* H.B. 1993, 2013 Reg. Sess. (Ark. 2013) (amending provisions of capital murder sentencing in response to *Miller*).

101. *See, e.g.*, MICH. COMP. LAWS ANN. § 769.25 (West 2014) (listing factors, largely taken directly from *Miller*, to be considered at the sentencing hearing). These states have not

as mitigating evidence, which signals their intended use to the sentence.[102] For example, North Carolina's legislation characterizes the "mitigating circumstances" that the defense may submit, lists eight factors that resemble the *Miller* factors, then lists "(9) [a]ny other mitigating factor or circumstance."[103] Some other states codify the *Miller* factors as a list of relevant considerations for the sentencer, but do not explicitly state that the sentencer is constrained from using one or more of these factors in aggravation of the sentence.[104]

IV. CONCLUSION

The *Miller/Montgomery* Court directed that the sentence of life without parole should be "rare", and only those youth who have demonstrated "irreparable corruption" are eligible under the Eighth Amendment for an individualized sentence of LWOP. It remains to be seen how states will implement this dictate. A look at the state legislation passed post-*Miller* suggests, when viewed against a backdrop of Eighth Amendment capital punishment law, that many of these statutes make a broader group of offenses eligible for LWOP for youth than for the death penalty for adults. Further, the legislation does not narrow the categories of youth eligible for LWOP or provide clear or objective limitations to reduce the potential for arbitrary or discriminatory imposition of LWOP, and does not provide for heightened appellate review or privileged access to appellate courts for youth sentenced to life without parole. These questions are not just academic—they are beginning to percolate in state courts. For example, in Pennsylvania, the state supreme court agreed to allow an appeal where the Petitioner challenged the lack of procedural mechanism which would ensure

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explicitly referred to the Eighth Amendment requirement that the sentencer in death penalty cases be permitted to consider wide-ranging mitigating evidence. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 602 (1978).

102. *See, e.g.*, ILL. COMP. STAT. 5/5-4.5-105 (2015) (the court "shall consider the following additional factors *in mitigation*") (emphasis added); WASH. REV. CODE §10.95.030(3)(b) (providing that, in "setting the minimum term, the court must take into account mitigating factors . . . ").

103. N.C. GEN. STAT. ANN. § 15A-1340.19B(c) (West 2015) (the other eight factors are: "(1) [a]ge at the time of the offense; (2) [i]mmaturity; (3) [a]bility to appreciate the risks and consequences of the conduct; (4) [i]ntellectual capacity; (5) [p]rior record; (6) [m]ental health; (7) [f]amilial or peer pressure exerted upon the defendant; (8) [l]ikelihood that the defendant would benefit from rehabilitation in confinement").

104. *See* MICH. COMP. LAWS ANN. § 769.25.7 (West 2014) ("[T]he court shall specify on the record the aggravating and mitigation circumstances considered by the court and the court's reasons supporting the sentence imposed. The court may consider evidence presented at trial together with any evidence presented at the evidence hearing.").

that life without parole will be "uncommon."[105] The failure to learn lessons from the Eighth Amendment law on capital punishments poses a risk that the imposition of the sentence of LWOP on youth could be both random and not rare.

105. See Commonwealth v. Batts, Order Granting Allowance of Appeal, No. 941 MAL 2015 (Pa., Apr. 19, 2016).

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