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CERTAINTY IN A WORLD OF UNCERTAINTY: PROPOSING STATUTORY GUIDANCE IN SENTENCING JUVENILES TO LIFE WITHOUT PAROLE

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Behold, I send you forth as sheep in the midst of wolves: be ye therefore wise as serpents, and harmless as doves. But beware of men: for they will deliver you up to the councils, and they will scourge you in their synagogues; And ye shall be brought before governors and kings for my sake, for a testimony against them and the Gentiles.

Matthew 10:16–18[1]

Pursuant to the Eighth Amendment of the Constitution to the United States, the Supreme Court recently held that it is cruel and unusual punishment for states to mandatorily sentence juvenile offenders to life in prison without the possibility of parole.[2] Life in prison without parole is a sentence that tells a convicted juvenile, despite good behavior and demonstrating real change, he or she will remain in prison for the rest of his or her life.[3] The Court acknowledged such a sentence is the most draconian punishment available and should be reserved for minors who commit the most truly horrific crimes.[4]

Based on the Court's ruling and its ramifications, the purpose of this Article is to create and test the theoretical framework for legislation that state and federal legislators may look to for guidance as they implement new rules that comply with the Supreme Court's decision in *Miller v. Alabama*.[5] This Article will not argue that states should guarantee eventual freedom to juvenile offenders convicted of all homicide crimes—rather, it will provide legislators with a theoretical framework to consult in drafting legislation that eliminates mandatory life without parole for juvenile offenders convicted on a transferred intent theory.

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1. *Matthew 10:16* (King James).

2. 47 AM. JUR. 2D *Juvenile Courts & Delinquent & Dependent Children* § 65 (2006).

3. Graham v. Florida, 560 U.S. __, 130 S. Ct. 2011, 2027 (2010).

4. *Id.* at 2030. *Compare* State v. Ninham, 2011 WI 33, ¶ 2, 4, 797 N.W.2d 451, 456–58 (stating the sentencing of life without parole for a 14-year-old who intentionally abused and murdered a 13-year-old is not cruel and unusual punishment under the Eighth Amendment), *with* People v. Caballero, 282 P.3d 291, 295 (Cal. 2012) ("[S]entencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment.").

5. Miller v. Alabama, 567 U.S. __, 132 S. Ct. 2455 (2012).

I. INTRODUCTION

Before the Supreme Court's ruling in *Miller*, states were divided between mandatory and discretionary life without the possibility of parole sentencing approaches.[6] Moreover, states that allowed courts to exercise discretion in sentencing juveniles reportedly had significantly decreased rates of juveniles sentenced to life without parole compared to states that mandated the sentence of life imprisonment without the possibility of parole for certain crimes.[7] Thus, given the choice, many courts would rather choose to permit juveniles the opportunity to be paroled.

Now, states can no longer force courts to make that choice. Based on the recent Supreme Court decision in *Miller*, "mandatory life [imprisonment] without parole for those under the age of [eighteen] at the time of their crimes *violates* the Eighth Amendment's prohibition on 'cruel and unusual punishments.'"[8] The *Miller* decision "did not prohibit life imprisonment without parole for juveniles, but instead required that a sentencing court consider an offender's youth and attendant characteristics as mitigating circumstances before deciding whether to impose [life without the possibility of parole] for juveniles who have committed a homicide offense."[9] Thus, the Supreme Court's decision was largely "procedural, [ultimately] requiring new sentencing guidelines."[10] However, the Supreme Court failed to specify what sentencing guidelines should dictate, leaving states and courts without guidance when determining the appropriate sentence for juveniles convicted of violent

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6. *See* State v. Andrews, 329 S.W.3d 369, 383 (Mo. 2010) (en banc) ("Sixteen states have a mandatory juvenile sentencing statute . . . and [twenty-five] states have discretionary life without parole sentences."). *Cf. State Distribution of Youth Offenders Serving Juvenile Life Without Parole (JLWOP)*, HUM. RTS. WATCH (Oct. 2, 2009), *available at* http://www.hrw.org/news/ 2009/10/02/state-distribution-juvenile-offenders-serving-juvenile-life-without-parole (detailing data collected between 2004 and 2009 indicating that twenty-seven states had mandatory JLWOP sentences, sixteen states allowed discretionary JLWOP, and five states, plus the District of Columbia, had "no JLWOP").

7. *Andrews*, 329 S.W.3d at 383. In determining that the evolving standards of decency may have changed, the court noted, "The average number of juveniles sentenced to life without parole in states having mandatory such sentences is 82.36. This is significantly higher than the average number of juveniles sentenced to life without parole in states in which sentencing courts have discretion—13.19." *Id.*

8. *Miller*, 567 U.S. at __, 132 S. Ct. at 2460 (emphasis added).

9. Louisiana v. Simmons, 2011-1810, p. 2 (La. 10/12/12), 99 So.3d 28, 28 (La. 2012) (per curiam).

10. Jonathan Oosting, *Resentence Juvenile Lifers? Michigan Appeals Court Considers Implications of Supreme Court Ruling*, MLIVE (Oct. 17, 2012, 8:03 AM), http://www.mlive.com/news/index.ssf/2012/10/michigan_court_of_appeals_cons.html.

crimes[11] and without guidance when considering whether this ruling should be applied retroactively.[12]

This Article will attempt to fill in the gaps left by the Supreme Court in its decision. In order to do so, Part I will address the cases that paved the way to the Supreme Court's decision eliminating mandatory sentencing of juveniles to life without the possibility of parole, including *Roper v. Simmons*[13] and *Graham v. Florida*.[14] Part II will address *Miller v. Alabama* and the way in which the Court reached its historic decision to eliminate mandatory juvenile life without parole sentencing. Part III will address various legislative actions states have taken since the Court's decision in *Miller* with a focus on California's legislation. Part IV will explain how legislatures can expand the *Miller* decision further – to ultimately eliminate juvenile life without parole sentences based on a finding of transferred intent. Part V will survey the anatomy of a model sentencing statute. This section will highlight the Federal Sentencing Factors under 18 U.S.C. § 3553(a), the United States Sentencing Commission's Guidelines, and the Juvenile Justice Accountability and Improvement Act of 2011 as blueprints to create this model sentencing statute. This Article concludes by proposing a model sentencing statute that clarifies three specific requirements for courts to follow when determining sentences, should state or federal legislators choose to adopt this unprecedented sentencing statute.

II. LANDMARK CASES THAT HELPED WIN THE BATTLE

The Supreme Court in *Roper* held, "The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of [eighteen] when their crimes were committed."[15] Further, the Court in *Graham* likened life without parole for juveniles to the death penalty.[16] Thus, these cases lay the precedential foundation for

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11. *See id.*; *A Chance for Hope: U.S. Supreme Court Ends Mandatory Juvenile Life Without Parole Sentences*, JUV. L. CENTER (June 26, 2012), http://www.jlc.org/blog/chance-hope-us-supreme-court-ends-mandatory-juvenile-life-without-parole-sentences ("The *Miller* majority did not reach the question of whether life sentences could be imposed for felony murder—meaning the juveniles were not convicted of actually committing the murder.").

12. Suevon Lee, *Despite Supreme Court Ruling, Many Minors May Stay in Prison for Life*, PROPUBLICA (Aug. 2, 2012, 8:43 AM), http://www.propublica.org/article/despite-supreme-court-ruling-many-minors-may-stay-in-prison-for-life; Oosting, *supra* note 10.

13. Roper v. Simmons, 543 U.S. 551 (2005) (involving sentencing a seventeen-year-old convicted of murder in the first degree).

14. Graham v. Florida, 560 U.S. __, 130 S. Ct. 2011 (2010) (involving sentencing of a sixteen-year-old convicted of both armed burglary and armed robbery).

15. *Roper*, 543 U.S. at 578.

16. *Graham*, 560 U.S. at __, 130 S. Ct. at 2027.

the Supreme Court's seminal decision in *Miller* – that a mandatory life without parole sentence imposed upon a juvenile individual constitutes cruel and unusual punishment and is, therefore, unconstitutional under the Eighth Amendment.[17]

A. *Roper v. Simmons: Eliminating the Juvenile Death Penalty*

In *Roper*, seventeen-year-old Christopher Simmons planned and committed first-degree murder, when he assured his friends that they would surely "get away with it" because they were minors.[18] Simmons, along with two accomplices, broke into the victim's home, duct-taped her arms and legs, kidnapped her, took the victim to a railroad bridge, and threw her into the river where she drowned.[19] Police arrested Simmons and he was subsequently charged with burglary, kidnapping, stealing, and first-degree murder.[20] Simmons was tried as an adult and the State of Missouri sought the death penalty.[21] Following the jury's recommendation, the trial judge sentenced Simmons to the death penalty.[22]

Following the Supreme Court's Decision in *Atkins v. Virginia*,[23] Simmons filed a new petition for post-conviction relief, "arguing that the reasoning of *Atkins* established that the Constitution prohibits the execution of a juvenile who was under [eighteen] when the crime was committed."[24] The Missouri Supreme Court agreed and set aside Simmons's death sentence in favor of a sentence for life in prison without parole.[25]

The U.S. Supreme Court agreed, and held that the execution of an individual who was under 18 years of age at the time of the crime(s) was prohibited by the Eighth and Fourteenth Amendments.[26] Through *Roper*, the Supreme Court overruled *Stanford v. Kentucky*,[27] in which the

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17. Miller v. Alabama, 567 U.S. __, 132 S. Ct. 2455, 2475 (2012).

18. *Roper*, 543 U.S. at 556–57.

19. *Id.*

20. *Id.* at 558. Simmons reportedly bragged about the murder to friends. *Id.* at 557.

21. *Id.* The three aggravating factors the State submitted to the jury to justify the request for the death penalty were, "that the murder was committed for the purpose of receiving money . . . for the purpose of avoiding, interfering with, or preventing lawful arrest . . . and involved depravity of mind and was outrageously and wantonly vile, horrible, and inhuman." *Id.*

22. *Id.* at 558.

23. Atkins v. Virginia, 536 U.S. 304, 321 (2002) (finding death penalty improper for a mentally retarded criminal).

24. *Roper*, 543 U.S. at 559.

25. *Id.* at 559–60.

26. *Id.* at 578.

27. Stanford v. Kentucky, 492 U.S. 361 (1989), *abrogated by Roper*, 543 U.S. at 551.

Court had previously upheld a juvenile death penalty sentence in a capital murder case.[28]

Rather than clearing up a troublesome area of the law regarding juvenile sentencing, *Roper* created additional confusion regarding the degree of protection due to juveniles under the Eighth Amendment's cruel and unusual punishment clause. In order to resolve this ambiguity, the Supreme Court responded by granting certiorari on the issue in *Graham v. Florida*.[29]

B. *Graham's Twist of Fate: Granting Parole to Juvenile Non-Homicide Offenders*

At the age of 16, Terrence Graham, had his first encounter with law enforcement after attempting robbery of a local restaurant with two accomplices.[30] Graham pled guilty and served his proscribed time.[31] However, just six months after his release, Graham was arrested again, this time for a successful home invasion and another attempted robbery.[32]

The trial court sentenced Graham to the maximum sentence, life imprisonment plus an additional fifteen years.[33] Graham filed a motion

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28. *Roper*, 543 U.S. at 574; Stanford, 492 U.S. at 380 ("We discern neither a historical nor a modern societal consensus forbidding the imposition of capital punishment on any person who murders at 16 or 17 years of age . . . such punishment does not offend the Eighth Amendment's prohibition against cruel and unusual punishment.").

29. Graham v. Florida, 560 U.S. __, 130 S. Ct. 2011, 2018 (2010). Graham was charged as an adult for "armed burglary with assault or battery, a first-degree felony carrying a maximum penalty of life imprisonment without the possibility of parole . . . and attempted armed-robbery, a second-degree felony carrying a maximum penalty of [fifteen]years imprisonment." *Id.* "Under Florida law it [was] within the prosecutor's discretion whether to charge [sixteen] and [seventeen]-year-olds as adults or juveniles for most felony crimes." *Id.*

30. *Id.* Graham was charged as an adult for "armed burglary with assault or battery, a first-degree felony carrying a maximum penalty of life imprisonment without the possibility of parole . . . and attempted armed-robbery, a second-degree felony carrying a maximum penalty of [fifteen] years imprisonment." *Id.* "Under Florida law it [was] within the prosecutor's discretion whether to charge [sixteen]-and [seventeen]-year-olds as adults or juveniles for most felony crimes." *Id.*

31. *Id.*

32. *Id.* Graham maintained at trial that he was not involved in the home invasion robbery, but did concede to "violating probation conditions by fleeing." *Id.* at __, 130 S. Ct. at 2019.

33. *Id.* at __, 130 S. Ct. at 2020. The trial court held a sentencing hearing, and pursuant to Florida law, the minimum sentence Graham could receive was a five-year imprisonment and the maximum was life in prison. "The State recommended that Graham receive [thirty] years on the armed burglary count and [fifteen] years on the attempted armed robbery count," while "the Florida Department of Corrections recommended that Graham receive an even lower sentence—at most [four] years[ ] imprisonment." *Id.* at __, 130 S. Ct. at 2019.

contesting the trial court's ruling, arguing that his sentence was a violation of the Eighth Amendment's cruel and unusual punishment clause.[34] The Florida Supreme Court denied review; however, based on Graham's advancement of an evolving standard of decency theory, the United States Supreme Court granted certiorari.[35]

The Supreme Court used the following three-prong analysis to assess the evolving standards of decency test: (1) "consider[ation] of 'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue;"[36] (2) "consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question;"[37] and (3) consideration of the achievement of "penological justifications" specifically, "retribution, deterrence, incapacitation, and rehabilitation."[38]

In evaluating culpability considerations, the Court likened life without parole for juvenile offenders to the death penalty and recognized that life without parole sentences "share some characteristics with death sentences that are shared by no other sentences."[39] The Court stated that life imprisonment "alters the offender's life by a forfeiture that is irrevocable."[40] Based on the longevity of the sentence, the Court recognized that "[l]ife without parole is an especially harsh punishment for a juvenile," because "[u]nder this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender."[41]

After making these and other considerations, the Supreme Court held "that for a juvenile offender *who did not commit homicide* the Eight Amendment forbids the sentence of life without parole."[42] Further, the Court admonished that states must afford juvenile offenders a "meaningful opportunity to obtain release."[43] Yet, following this decision, lower

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34. *Id.* at __, 130 S. Ct. at 2020–21.

35. *Id.* at __, 130 S. Ct. at 2020.

36. *Id.* at __, 130 S. Ct. at 2022.

37. *Id.*

38. *Id.* at __, 130 S. Ct. at 2028. Lower courts have also applied this same analysis when sentencing juveniles who have been convicted of homicide. *See* State v. Andrews, 329 S.W.3d 369, 380–81 (Mo. 2010) (en banc) (Wolff, J., dissenting) (citing and applying the three prong framework used in *Graham* to find that Missouri's "[s]entencing a juvenile offender to spend his life in prison without the possibility of parole is cruel and unusual punishment and violates the Eighth Amendment").

39. *Graham*, 560 U.S. at __, 130 S. Ct. at 2027.

40. *Id.*

41. *Id.* at __, 130 S. Ct. at 2028.

42. *Id.* at __, 130 S. Ct. at 2030 (emphasis added).

43. *Id.*

courts have interpreted the Court's ruling in *Graham* to conclude that the sentence of life without parole for a *homicide* is constitutional.[44] This conclusion is incorrect, however, because the Supreme Court in *Graham* clearly distinguished juvenile life without parole for homicide and non-homicide cases throughout its analysis.[45] Thus, under the *Graham* analysis, life without parole remained a sentence available only for juveniles convicted of a *capital* offense, not merely a simple homicide offense, until the Supreme Court's subsequent ruling in *Miller v. Alabama.*

III. *MILLER V. ALABAMA*: A HISTORIC CHANGE IN MANDATORY SENTENCING FOR JUVENILE OFFENDERS

The Supreme Court's decision in *Miller v. Alabama* advanced the fight to reform juvenile justice by eliminating mandatory life without parole for juveniles convicted of any homicide offense.[46] The decision in *Miller* prohibits the mandatory application of juvenile life without parole; however, it does not provide precise guidelines to courts as to when juvenile life without parole would be a constitutional sentence.[47] In addition, the decision paves the way for a potential case in which the Court may decide that the Eighth Amendment absolutely prohibits sentencing a juvenile convicted of felony murder based on a finding of transferred intent to life without the possibility of parole.

A. *The Cases Before the Court: Evan Miller and Kuntrell Jackson*

The Court's decision in *Miller v. Alabama* involved two defendants, Evan Miller and Kuntrell Jackson, who were both convicted of murder, and sentenced to a mandatory term of life imprisonment without the possibility of parole.[48] Fourteen-year-old Evan Miller and accomplice Colby Smith orchestrated a plan to travel to the victim's trailer with the intent to rob him.[49] After the victim passed out from drinking and smoking marijuana, the boys took all the money from his wallet. While attempting to put the wallet back in the victim's pocket, he awoke and attacked

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44. *See* State v. Andrews, 329 S.W. 369, 376–77 (2010) (en banc) ("*Graham* implicitly recognize[s] that life without parole is not cruel and unusual punishment for a minor who is convicted of a homicide.").

45. *See generally Graham*, 560 U.S. __, 130 S. Ct. 2011 (pointing out many of the differences between homicide and non-homicide offenses).

46. Miller v. Alabama, 567 U.S. __, 132 S. Ct. 2455, 2469 (2012).

47. *See* Oosting, *supra* note 10 (noting the search for guidance on new sentencing guidelines); JUV. L. CENTER, *supra* note 11 (recognizing possible issues with finding new sentencing schemes in the wake of *Miller*).

48. *Miller*, 567 U.S. at __, 132 S. Ct. at 2460–62.

49. Miller v. State, 63 So.3d 676, 683 (Ala. Crim. App. 2010), *rev'd and remanded by Miller*, 567 U.S. __, 132 S. Ct. 2457.

Miller, grabbing Miller by the throat.[50] Miller proceeded to strike the victim repeatedly with a baseball bat, knocking him unconscious.[51] Afterward, in an attempt to cover up their crime, the boys set several fires throughout the trailer.[52] The victim was later pronounced dead, and the victim's cause of death was determined to be inhalation of products of combustion, along with multiple blunt force injuries, and ethanol intoxication.[53] Eventually, Miller was charged and convicted of capital murder and was sentenced to life imprisonment without the possibility of parole.[54]

In this case, it was evident that Miller had the requisite intent to commit the homicidal offense. Since *Graham*, "[t]he only juveniles who may constitutionally be sentenced to life without parole are those convicted of homicide offenses that 'kill or intended to kill.'"[55] Therefore, based on the precedent set following *Graham*, Miller appeared to be a juvenile offender who could constitutionally be sentenced to life without parole, because his homicide crime demonstrated an element of intent.[56] Based on this finding, the Alabama Criminal Court of Appeals affirmed the judgment of the lower court and the Alabama Supreme Court denied review.[57] However, the United States Supreme Court granted certiorari[58] in tandem with *Miller's* companion case, *Jackson v. Hobbs*.[59]

Kuntrell Jackson and two accomplices, Derrick Shields and Travis Booker, orchestrated a plan to rob a Movie Magic video store.[60] Upon arrival at Movie Magic, Jackson noticed that Shields was carrying a .410 gauge shotgun.[61] Shields and Booker proceeded to rob Movie Magic, while Jackson chose to remain outside the store.[62] Upon the video clerk's failure to produce any money, Shields shot the clerk point-blank in the face.[63] Immediately after the shooting, all three boys fled

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50. *Miller*, 63 So.3d at 683.
51. *Id.*
52. *Id.*
53. *Id.* at 685.
54. *Id.* at 682.
55. Miller v. Alabama, 567 U.S. __, 132 S. Ct. 2476 (2012) (Breyer, J., concurring).
56. *See* Graham v. Florida, 560 U.S. __, 130 S. Ct. 2011, 2027 (2010) (emphasizing the difference between intentional and unintentional homicide). "Miller was convicted of capital murder, a crime that is not included in any category of offenses that are less culpable and thus undeserving of the ultimate penalty." Miller v. State, 63 So.3d 676, 689 (Ala. Crim. App. 2010), *rev'd and remanded by Miller*, 567 U.S. at __, 132 S. Ct. 2457.
57. *Miller*, 567 U.S. at __, 132 S. Ct. at 2463.
58. *Id.*
59. Jackson v. Hobbs, 132 S. Ct. 548 (2011) (mem.).
60. Jackson v. State, 194 S.W.3d 757, 758 (Ark. 2004).
61. *Id.*
62. *Id.*
63. *Id.* at 758–59.

the crime scene.[64] Police arrested Jackson and charged him in connection to the murder of the video clerk.[65] In the subsequent trial and appeal, Jackson was convicted of capital murder and aggravated robbery and was sentenced to life in prison.[66] The Supreme Court granted certiorari to hear the appeal with *Miller v. Alabama*.[67]

B. *The Court's Decision and its Limitations*

Faced with a huge decision, the Supreme Court had to determine whether mandatorily sentencing juveniles to life without parole violated the Eighth Amendment's prohibition on cruel and unusual punishment; ultimately, in a controversial 5-4 decision, the Court concluded that it did.[68] In arriving at this decision, the Court combined two sets of precedent.[69] First, expanding upon its prior holdings in *Roper* and *Graham*, the Court established that juveniles are fundamentally different from adults.[70] Second, the Court reaffirmed its previous decisions holding that individualized sentences were required when imposing the death penalty in criminal matters.[71]

The *Miller* Court postulated that "because *Graham* compared juvenile life-without-parole sentences for juveniles to the death penalty, the 'distinctive set of legal rules' that this Court has imposed in the capital punishment context, including the requirement of individualized sentencing is 'relevant.'"[72] The Court reached its ultimate conclusion, finding it cruel and unusual punishment for adults and children to receive the same

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64. *Id.* at 759.

65. *Id.*

66. *Id.* at 758.

67. Jackson v. Hobbs, 132 S. Ct. 548 (2011) (mem.).

68. Miller v. Alabama, 567 U.S. __, 132 S. Ct. 2455, 2460 (2012).

69. *See* Sara L. Ochs, *Miller v. Alabama: The Supreme Court's Lenient Approach to Our Nation's Juvenile Murderers*, 58 LOY. L. REV. 1073, 1082 (2012) (analyzing the Court's decision).

70. *Miller*, 567 U.S. at __, 132 S. Ct. at 2464-66 (citing Graham v. Florida, 560 U.S. __, 130 S. Ct. 2011, 2026–28 (2010)); Roper v. Simmons, 543 U.S. 551, 568–72 (2005); *see generally* Michael Barbee, Comment, *Juveniles are Different: Juvenile Life Without Parole After Graham v. Florida*, 81 MISS. L.J. 299 (2011) (discussing the Court's application of the "evolving standards of decency" and the implications of the precedent set by *Roper* and *Graham*).

71. *Miller*, 567 U.S. at __, 132 S. Ct. at 2467 (citing *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976)); *see generally* 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 (2010) (analyzing the Court's analogy that sentencing a juvenile to life without parole was, according to the Eighth Amendment, the functional equivalent of imposing a death sentence).

72. *Miller*, 567 U.S. at __, 132 S. Ct. at 2484 (Thomas, J., dissenting).

mandatory minimum sentences and that the death sentence must be imposed on an individual, rather than mandatory, basis.[73]

Based on this finding, Miller and Jackson's cases were remanded for further proceedings consistent with the Court's ruling.[74] Despite the Court's seemingly clear ruling mandating individualized hearings rather than mandatory sentencing,[75] juvenile defendants convicted of felony murder based on a finding of transferred intent, like Jackson, are still subject to a possible sentence of life without parole.[76] Jackson's case is still on remand with the Jefferson County Circuit Court.[77] This proposed model sentencing statute provides adequate procedural guidelines in determining whether a juvenile defendant convicted of felony murder, like Jackson, deserves a sentence of life without parole based on a finding of transferred intent.

Justice Breyer wrote a concurring opinion specifically to address the issue of juvenile conviction and sentencing based on transferred intent.[78] In accordance with this concurring opinion, Jackson should not be a candidate for life without parole, because he was convicted on the basis of transferred intent, which is an insufficient to meet the intent requirements in the Eighth Amendment.[79] On the other hand, based on this individualized approach, Miller *would* be eligible to be sentenced to life without parole because his crime included the requisite intent to kill.[80] According to Justice Breyer in his concurring opinion, only in those cases in which the juvenile has killed or intended to kill the victim will the punishment of life without parole be available; "transferred intent" and "reckless disregard" crimes would not make the cut.[81]

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73. *Id.* at __, 132 S. Ct. at 2464-67.

74. *Id.* at __, 132 S. Ct. at 2475.

75. *See id.* at __, 132 S. Ct. at 2469 ("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.") (emphasis added).

76. *See* James Donald Moorehead, *What Rough Beast Awaits?* Graham, Miller, *and the Supreme Court's Seemingly Inevitable Slouch Towards Complete Abolition of Juvenile Life Without Parole*, 46 IND. L. REV. 671, 693 (2013) ("[T]he Court's straightforward rule is this: if the victim dies, JLWOP is constitutional; if the victim lives, JLWOP is unconstitutional.").

77. Jackson v. Norris, 2013 Ark. 175, at 175, 2013 WL 1773087, at *9.

78. *Miller*, 567 U.S. at __, 132 S. Ct. at 2475–77 (Breyer, J., concurring).

79. *Id.* at __, 132 S. Ct. at 2476 (Breyer, J., concurring).

80. *See id.* ("*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.'").

81. *Id.*

Since the Supreme Court's decision in *Miller,* states have already taken legislative action[82] and petitioned for resentencing hearings.[83] Lobbyists have placed a particular focus on juvenile inmates currently serving life without parole who were convicted of first-degree murder on the basis of their roles as "accomplices who aided and abetted killers."[84]

IV. REDEMPTION: ALLOWING JUVENILES A SECOND CHANCE AT PAROLE

Despite the Supreme Court's ruling in *Miller* eliminating mandatory life without parole sentences for juveniles, whether or not to apply the decision retroactively remains unclear.[85] Currently, there are approximately 2,500 juvenile offenders already sentenced to life in prison without parole,[86] although the precise number is hard to determine with complete accuracy.[87] Despite the unprecedented ruling by the Supreme Court in *Miller*, states are still unsure as to how to apply the ruling, and, meanwhile, juvenile offenders are still serving out their life sentence in prison.[88] Therefore, this proposed model sentencing statute suggests that

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82. *See* James Swift, *Miller v. Alabama: One Year Later*, JUV. JUST. INFO. EXCHANGE (June 25, 2013), http://jjie.org/miller-v-alabama-one-year-later/ (accounting all the legislative changes that have occurred since the *Miller* decision).

83. *See* Mariko K. Shitama, Note, *Bringing Our Children Back from the Land of Nod: Why the Eighth Amendment Forbids Condemning Juveniles to Die in Prison for Accessorial Felony Murder*, 65 FLA. L. REV. 813, 848 (2013) (arguing "*Miller* provides a chance at resentencing for the roughly 2,000 individuals who were mandatorily sentenced to life without parole as juveniles").

84. Marisa Lagos, *Bill Offers Juvenile Lifers 2nd Chance*, SFGATE (Aug. 16, 2012, 11:06 PM), http://www.sfgate.com/crime/article/Bill-offers-juvenile-lifers-2nd-chance-3793528.php.

85. Lee, *supra* note 12.

86. *See* HUM. RTS. WATCH, *supra* note 6 (detailing data collected between 2004 and 2009 indicating that 2,589 youth offenders were sentenced to life in prison without parole); *see also* Shitama, *supra* note 83, at 816 (identifying the impact of the decision on the 2,589 juvenile offenders sentenced to life without parole in the United States); Lee, *supra* note 12 (reporting roughly 2,500 juvenile offenders could be affected by the ruling).

87. *See id.* (illustrating the piecemeal manner in which data must be collected). "[W]e updated data between mid-2004 and 2009 using the following methods: post-2004 press reports were checked against inmate records with state departments of corrections; and correspondence received by Human Rights Watch from youth offenders sentenced to life without parole was checked against press reports and state inmate records."). *Id.*

88. *See* Maggie Clark, *How Will States Handle Juveniles Sentenced to Life Without Parole?*, USA TODAY (Aug. 26, 2013, 11:27 AM) ("In Michigan, Iowa, Illinois, Louisiana and Mississippi, judges have ruled that the Supreme Court decision applies retroactively to all prisoners serving such sentences. But in Minnesota and Florida, judges have ruled that the Supreme Court decision only applies to future cases."); Lee, *supra* note 12 (recognizing that twenty-six states have mandatory juvenile life without parole sentences and surveying the responses of states that have taken action).

legislatures resolve the issue on whether the ruling in *Miller* should apply retroactively to all juvenile defendants currently serving life without parole sentences. Some states have already taken action to change the fate of an inmate's current sentence.

A. *States That Have Already Taken Legislative Action to Change the Fate of an Inmate*

North Carolina was one of the first states to legislatively respond to the *Miller* decision.[89] It immediately passed a bill granting juvenile offenders an opportunity for parole after serving twenty-five years in prison[90] and incorporating the Court's majority ruling in *Miller* as follows:

> The 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. The 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.[91]

This law provides a non-exclusive list of mitigating factors that defendants may submit and that judges may consider when sentencing a juvenile, including: age, immaturity, intellectual capacity, mental health, and familial or peer pressure influences.[92]

Michigan, the state with the second-highest number of juveniles currently serving life without parole, experienced mobilization of criminal defense attorneys to assist these juveniles following *Miller*.[93] As a result, a U.S. District Court Judge recently ruled "that the state has an obligation to stop enforcing an unconstitutional law" and that Michigan should provide all juveniles serving life without parole an opportunity for pa-

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89. NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, REPORT ON SENTENCING OF MINORS CONVICTED OF FIRST DEGREE MURDER PURSUANT TO SESSION LAW 2012-148, SECTION 2, at 4 (2013), *available at* http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/SB-635-Commission-Report-to-GA.pdf; *see* 2012 N.C. Sess. Laws 2012-148 (signed by the governor on July 12, 2012).

90. 2012 N.C. Sess. Laws 2012-148.

91. *Id.*

92. *Id.*; *cf.* Miller v. Alabama, 567 U.S. __, 132 S. Ct. 2455, 2465 (2012) (listing characteristics, including "immaturity, impetuosity, and failure to appreciate risks and consequences[,] "among those to be considered by courts when sentencing youthful offenders").

93. Lee, *supra* note 12.

role.[94] However, Michigan's Attorney General strongly disagrees with the ruling and plans to appeal the issue.[95]

Pennsylvania currently has the most juvenile offenders serving life without parole at a staggering 444 juvenile inmates.[96] The Pennsylvania legislature, in an effort to bring the state in compliance with the Supreme Court's decision in *Miller*, created a new bill, signed into law by Governor Tom Corbett,[97] reducing the sentences for those under the age of fifteen to at least twenty-five years for first-degree murder and twenty years for second-degree murder and those ages fifteen to seventeen to at least thirty-five years for first-degree murder and at least thirty years for second-degree murder.[98] However, this law only applies to those convicted after June 24, 2012[99] and the Pennsylvania Supreme Court has yet to decide whether or not to retroactively apply *Miller*.[100]

Many other state courts and legislatures are also struggling with decision as to whether or not to apply the *Miller* ruling retroactively.[101] Since the Court did not appropriately address retroactivity of its ruling, legislation must step in to silence this debate in many states.

B. *Retroactive Application for Juvenile Life Without Parole Offenders*

Legislation in California is particularly relevant in addressing retroactive relief for juveniles currently serving life without the possibility of parole. The legislature proposed the Fair Sentencing for Youth Act,[102]

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94. Jonathan Oosting, *Federal Judge Says All Michigan 'Juvenile Lifers' Eligible for Parole; Bill Schuette Disagrees*, MLIVE (Aug. 13, 2013, 10:43 AM).

95. *Id.*

96. Lee, *supra* note 12.

97. Greg Gross, *Bill Provides Alternatives to Life Sentences for Juveniles Convicted of Murder*, YORK DISPATCH (Oct. 26, 2012 10:45 AM), http://www.yorkdispatch.com/ci_21861540/bill-provides-alternatives-life-sentences.

98. 18 PA. CONS. STAT. § 1102.1(a), (c) (Supp. 2013).

99. *Id.* § 1102.1(a), (c).

100. *See* Commonwealth v. Cunningham, 51 A.3d 178, 178 (Pa. 2012).

101. *See* Maggie Clark, *How Will States Handle Juveniles Sentenced to Life Without Parole?*, USA TODAY (Aug. 26, 2013, 11:27 AM) ("In Michigan, Iowa, Illinois, Louisiana and Mississippi, judges have ruled that the Supreme Court decision applies retroactively to all prisoners serving such sentences. But in Minnesota and Florida, judges have ruled that the Supreme Court decision only applies to future cases."). *Compare* In re Morgan, 713 F.3d 1365, 1367 (11th Cir. 2013) ("[T]he decision in *Miller* has not been made retroactive on collateral review."), *with* Johnson v. U.S., No. 12–3744, 2013 WL 3481221, at *1 (8th Cir. July 12, 2013) (looking to *Miller* and concluding that the defendant "made a *prima facie* showing . . . that his motion contains 'a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable'").

102. 2012 Cal. Legis. Serv. Ch. 828 (S.B. 9) (West) (codified as amended at CAL. PENAL CODE § 1170 (Deering Supp. 2013)).

which became effective in 2013.[103] This law authorizes defendants who were under the age of eighteen at the time they committed their crime and who have served at least fifteen years of their sentence of life without the possibility of parole to "submit to the sentencing court a petition for recall and resentencing."[104] Although the law does not allow a defendant who had "tortured . . . his or her victim or [whose] victim was a public safety official" from filing a petition for a resentencing hearing, it would give other defendants an opportunity to produce a petition with a statement declaring their "remorse and work towards rehabilitation."[105]

Importantly, the legislation defines criteria to be considered by the attorneys and courts when considering whether a hearing should be held for resentencing and defines additional criteria to be considered when determining whether or not to grant such a petition.[106] "The bill would require the court to hold a hearing if the court finds that the statement in the petition is true, as specified. The bill would apply retroactively, as specified."[107] California State Senator Leland Yee, who proposed the bill, defined the bill as "an 'incredibly modest proposal that respects victims, international law, and the fact the children have a greater capacity for rehabilitation than adults.'"[108]

Lobbyists for this bill focused their fight towards "the roughly 135 juvenile life-without-parole inmates who were convicted of first-degree murder as accomplices who aided and abetted a killer."[109] Based upon the perceived significance of the element of intent in sentencing, the impact of Justice Breyer's concurrence in *Miller* is evident in this bill. Indeed, Justice Breyer urged in his concurrence that "[t]ransferred intent is not sufficient to satisfy the intent to murder that could subject a juvenile to a sentence of life without parole."[110] In that way, California certainly targeted a particularly appropriate group of juvenile offenders for whom to grant resentencing hearings and petitions.

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103. CAL. PENAL CODE § 1170 (Deering Supp. 2013).

104. *Id.* § 1170(d)(2)(A)(i).

105. *Id.* § 1170(d)(2)(B).

106. 2012 Cal. Legis. Serv. Ch. 828 (S.B. 9) (West) (codified as amended at CAL. PENAL CODE § 1170 (Deering Supp. 2013)); *accord* CAL. PENAL CODE §§ 1170(d)(2)(B)–(F) (Deering Supp. 2013).

107. *Id.*

108. Lagos, *supra* note 84.

109. *Id.* Thus, the first factor to be considered in granting both the hearing and petition for resentencing is proof that "[t]he defendant was convicted pursuant to felony murder or aiding and abetting murder provisions of law." CAL. PENAL CODE §§ 1170(d)(2)(B)(i), (F)(i) (Deering Supp. 2013).

110. Miller v. Alabama, 567 U.S. __, 132 S. Ct. 2455, 2476 (2012) (Breyer, J., concurring).

However, juvenile defendants who committed homicide with an element of intent should also be granted the ability to petition for a resentencing hearing, if the sentencing court failed to "examine all [mitigating] circumstances before concluding that life without the possibility of parole was the appropriate penalty."[111] This proposed model sentencing statute would require retroactive application to all juvenile defendants currently serving life without parole sentences who submit "a petition for recall and resentencing."[112]

V. A Categorical Ban for Transferred Intent

In order for the United States to collectively move towards the complete elimination of sentencing juveniles to life without parole, the onus is upon state legislatures to propose sentencing statutes. These statutes should provide guidance to courts, by emphasizing the importance of analyzing mitigating factors and ultimately limiting a judge's broad discretion in sentencing a juvenile to life without parole based on a finding of transferred intent. The Supreme Court has long appreciated that, "defendants who do not 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."[113] Therefore, proposed model sentencing statutes must address whether juveniles should be sentenced to life without parole when convicted of felony murder and did not intend to kill.[114]

Legislatures should further expand the *Miller* decision to eliminate juvenile life without parole sentences based on a finding of transferred intent. Such model sentencing statutes would require judges to analyze mitigating factors within a totality-of-circumstances, case-by-case analysis when sentencing a juvenile defendant to life without the possibility of

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111. *Id.* at __, 132 S. Ct. at 2469.

112. Cal. Penal Code § 1170(d)(2)(A)(i) (Deering Supp. 2013).

113. Graham v. Florida, 560 U.S. __, 130 S. Ct. 2011, 2027 (2010); *see also, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 438 (2008) ("Consistent with evolving standards of decency and the teachings of our precedents we conclude that, in determining whether the death penalty is excessive, there is a distinction between intentional first-degree murder on the one hand and nonhomicide [sic] crimes against individual persons, even including child rape, on the other."); Enmund v. Florida, 458 U.S. 782, 794 (1982) ("Society's rejection of the death penalty for accomplice liability in felony murders is also indicated by the sentencing decisions that juries have made."); Tison v. Arizona, 481 U.S. 137, 157–58 (1987) ("[R]eckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state . . . that may be taken into account in making a capital sentencing judgment when that conduct causes . . . lethal result.").

114. *See Miller*, 567 U.S. at __, 132 S. Ct. at 2476 (Breyer, J., concurring) (arguing *Graham* prohibits the death penalty for a juvenile who "neither kills nor intends to kill").

parole.[115] Ultimately, a categorical rule prohibiting juveniles from being sentenced to life without parole based on a finding of transferred intent must be established to ensure a juvenile is not held at the mercy of a judge's discretion on that issue. An essential part of the model sentencing statute would require the examination of mitigating factors to ensure that a sentence of life without parole is fair and proportionate based on the facts and circumstances of an individual's case. This balance should never tip the scale in favor of sentences of life without parole for offenders whose convictions were based on a finding of transferred intent.

A. *The Reasoning Behind Juvenile Transferred Intent is Flawed*

In light of these mitigating factors and the Supreme Court's decision in *Miller*, a properly considered model sentencing statute will eliminate sentencing a juvenile to life without parole based on a finding of transferred intent. The rule of transferred intent is grounded on the premise that a "defendant's intent to commit the felony satisfies the intent to kill required for murder."[116] Juvenile offenders who deliberately murder innocent victims belong in a category distinct from juveniles whose crimes lack the element of intent when creating a sentencing statute eliminating mandatory life without parole for juvenile offenders. In order to sentence a juvenile to life without parole, the court should determine whether the juvenile's behavior showed reckless disregard for human life with an element of intent.[117] *Graham* recognized that if a juvenile defendant's crime does not have an element of intent, his or her moral culpability diminishes, "making those that do not intend to kill 'categorically less deserving of the most serious form of punishment than are murders.'"[118]

Moreover, "The felony murder doctrine traditionally attributes death caused in the course of a felony to all participants who intended to commit the felony regardless of whether they killed or intended to

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115. *See generally id.* at __, 132 S. Ct. at 2469 (highlighting that all circumstances must considered before determining whether life without parole is suitable punishment).

116. *Id.* at __, 132 S. Ct. at 2476; *see generally* SANFORD H. KADISH ET. AL., CRIMINAL LAW AND ITS PROCESSES 490–523 (9th ed. 2012) (explaining the felony murder rule); *see also* 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 147 (15th ed. 1994) (outlining the felony murder doctrine).

117. *See Miller*, 567 U.S. at __, 132 S. Ct. at 2476 (Breyer, J., concurring) ("[E]ven juveniles who meet the *Tison* standard of 'reckless disregard' may not be eligible for life without parole because they did not have requisite intent to kill."); *Tison*, 481 U.S. at 157–58 ("[T]he reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment.").

118. *Miller*, 567 U.S. at __, 132 S. Ct. at 2475 (Breyer, J., concurring) (quoting Graham v. Florida, 560 U.S. __, 130 S.Ct. 2011, 2027 (2010)).

kill."[119]However, studies demonstrate that "the ability to consider the full consequences of a course of action and to adjust one's conduct accordingly is precisely what we know juveniles lack capacity to do effectively."[120] A juvenile's enhanced vulnerability and underdeveloped sense of responsibility are *uncontrollable* traits due to his or her brain development during this stage of adolescence.[121] Therefore, the Court's reasoning behind sentencing a juvenile to life without parole based on a finding of transferred intent is flawed and must be eliminated, as it has been eliminated in the context of capital punishment sentencing.

Again, imprisoning a juvenile to life without parole is analogous to a death sentence.[122] Like the death penalty, "[i]mprisoning an offender until he dies alters the remainder of his life 'by a forfeiture that is irrevocable.'"[123] However, "[justices] *do not rely* on transferred intent in determining if an adult may receive the death penalty"[124] because the Constitution prohibits imposing a death sentence upon aider and abettors where the individual neither killed nor intended to kill.[125] Therefore, to follow the Supreme Court precedent controlling juvenile sentencing and capital punishment sentencing, legislatures must create a model statute that eliminates sentencing a juvenile to life without parole based in a finding of transferred intent.

B. *Reasons a Categorical Ban is Necessary*

A categorical rule provides a procedural protection against a judge or jury inaccurately ruling that a juvenile convicted of felony murder based on a finding of transferred intent is deserving of life without parole.[126] Considering the inadequacy of two alternative approaches to juvenile sentencing, a categorical rule is necessary

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119. *Id.* at __, 132 S. Ct. at 2476; *see generally* 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW §§ 14.5(a), (c) (2nd ed. 2003) (reviewing felony murder principles).

120. *Miller*, 567 U.S. at __, 132 S. Ct. at 2476.

121. *Id.* at __, 132 S. Ct. at 2464–65; *see* State v. Andrews, 329 S.W.3d 369, 384–85 (Mo. 2010) (en banc) (describing different biological reasons for lack of maturity in juveniles).

122. *Id.* at __, 132 S. Ct. at 2466–67 (citing Graham v. Florida, 560 U.S. __, 130 S. Ct. 2011, 2027 (2010)).

123. *Id.* at __, 132 S. Ct. at 2466 (quoting Graham v. Florida, 560 U.S. __, 130 S. Ct. 2011, 2027 (2010)).

124. *Id.* at __, 132 S. Ct. at 2476 (Breyer, J., concurring).

125. Enmund v. Florida, 458 U.S. 782, 788 (1982).

126. *See* Graham v. Florida, 560 U.S. __, 130 S.Ct. 2011, 2032 ("A categorical rule avoids the risk that, as a result of these difficulties, a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole for a nonhomicide.").

On one hand, giving judges and juries the power of discretion when sentencing a juvenile offender initiates a risk that subjective judgment of a juvenile offender, being a irredeemably depraved individual unable to demonstrate reform, will result in harsh punishment without respect to the fact that culpability is lower in juveniles compared to adults.[127] On the other hand, a case-by-case approach despite the court's efforts in weighing a minor's age against the seriousness of the crime "could with sufficient accuracy distinguish the few incorrigible juvenile offenders [with sufficient psychological maturity and sufficient depravity] from the many that have the capacity for change."[128]

Additionally, attorneys face difficulties in the course of representing juvenile offenders due to juveniles' "[d]ifficulty in weighing long-term consequences; a corresponding impulsiveness; and reluctance to trust defense counsel seen as part of the adult world a rebellious youth rejects."[129] Because of these difficulties, a juvenile runs the risk that a "court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole."[130] A categorical rule eliminates this risk and provides a juvenile a chance to show the court he or she is capable of maturity and reform.[131] Juveniles are more capable of change compared to adults and their actions demonstrate a lesser quantum of "'irretrievably depraved character' than . . . adults."[132]

Therefore, a categorical rule will assist in proportional sentencing and eliminate the use of harsh sentencing practices such as imposing life without the possibility of parole based on a finding of transferred intent. Studies have demonstrated that juveniles are in a class distinct from adults, and trying them as adults could cause severe and permanent damage to their future.[133] This research further magnifies the injustice of subjecting juveniles to life without parole. Juveniles should not be held to the same level of culpability as adults due to their "social, physiological, and psychological underdevelopment."[134] Moreover, as juveniles are in a

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127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at __, 132 S. Ct. at 2017.

131. *Id.* at __, 132 S. Ct. at 2032.

132. *Id.* at __, 132 S. Ct. at, 2026 (quoting Roper v. Simmons, 543 U.S. 551, 570 (2005)).

133. *See Does Treating Kids Like Adults Make a Difference?*, *Frontline*, PBS, http://www.pbs.org/wgbh/pages/frontline/shows/juvenile/stats/kidslikeadults.html (last visited Sept. 29, 2013) (incorporating two studies where treating juveniles as adults in the criminal justice system does not cause lower juvenile crime rates, but conversely causes those juveniles treated as adults to repeat offend sooner than other juvenile offenders).

134. Enrico Pagnanelli, Note, *Children as Adults: The Transferring of Juvenile to Adult Courts and the Potential Impact of* Roper v. Simmons, 44 AM. CRIM. L. REV. 175, 187

class distinct from adults, they should not be tried nor sentenced with the same harsh punitive sanctions as adults, including life without the possibility of parole.

The juvenile justice system is the most appropriate forum for juvenile adjudication due to the proven negative effects of transferring a juvenile to adult court.[135] Juvenile court has a lower rate of post-transfer recidivism and focuses more on nurturing and re-socialization, which are two areas of rehabilitation not found in adult court.[136] Therefore, to improve the juvenile justice system and give youths a chance to lead reformed productive lives, a categorical ban must be created that eliminates life without parole for juveniles convicted of felony murder based on a finding of transferred intent. A fundamental change would begin with the adoption of a model sentencing statute.

VI. The Anatomy of a Model Sentencing Statute

In the wake of the Supreme Court's decision in *Miller*, state statutes must conform to the decision and provide juvenile defendants convicted of a homicide a mandatory sentencing hearing. Such model sentencing statutes utilize existing guidelines courts already employ and incorporates the decision in *Miller* to ensure the guidelines "limit and structure the sentencing discretion" of lower court judges.[137] In developing sentencing statutes that are consistent with *Miller*, legislatures should consider the adoption of mitigating factors and look towards Federal Sentencing Factors under 18 U.S.C. § 3553(a),[138] the United States Sentencing Commis-

(2007). The Supreme Court's decision in *Roper* "demands a reexamination of current transfer policies and underscores an ideological shift toward a rehabilitative focus in juvenile jurisprudence . . . ." *Id.* at 176.

135. *See id.* at 187–88 (2007) (arguing for a bright line rule that would keep juveniles out of the adult criminal justice system); *see* also Terrie Morgan-Besecker, *Juvenile Law Change Forbids Minors From Being Held in Adult Prison*, Times Tribune (July 8, 2013), http://thetimes-tribune.com/news/juvenile-law-change-forbids-minors-from-being-held-in-adult-prison-1.1517198 (quoting Robert Schwartz of the Juvenile Law Center in Philadelphia, "A great deal of harm can happen to kids in an adult jail in very quick time.").

136. Pagnanelli, *supra* note 134, at 187–88 ("Youths tried as adults and housed in adult prisons commit more crimes, often more violent ones, than minors who remain in the juvenile justice system, a panel of experts appointed by the Centers for Disease Control and Prevention said in a new report.").

137. Barry L. Johnson, *The Sentencing Reform Act of 1984*, *in* 3 Major Acts of Congress 184 (Brian K. Landsberg ed., 2004), *available at* http://www.enotes.com/sentencing-reform-act-1984-reference/sentencing-reform-act-1984.

138. 18 U.S.C. § 3553(a) (2006).

sion's Guidelines,[139] and the Juvenile Justice Accountability and Improvement Act of 2011[140] for guidance.

A. *Importance of Mitigating Factors: Scars of Abuse Must be Revealed*

The first and most important component of any model sentencing statute is the adoption of mitigating factors for courts to consider when sentencing juveniles convicted of homicidal offenses. When considering mitigating factors that should be included in proposed guidelines, two main factors that must be considered are: (1) the juvenile's background and (2) the juvenile's mental and emotional development.[141]

In evaluating an individual's background, a court must look to find if there has been any history of drug use, physical or sexual abuse, and emotional disturbance.[142] For instance, in *Miller*, Justice Kagan noted as to Miller's background:

> [I]f ever a pathological background might have contributed to a [fourteen]-year-old's commission of a crime, it is [within Miller's case] . . . his stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he has tried to kill himself four times, the first was when he should have been in kindergarten.[143]

While Miller committed a serious crime and deserved to be sentenced to a serious punishment, it is imperative that judges "examine all of these circumstances before concluding that life without the possibility of parole is the appropriate penalty."[144]

Scholars have proposed certain important mitigating factors for courts to consider in capital sentencing cases.[145] These factors can be placed into four categories:

> (1) Mitigating circumstances unrelated to the crime that show that the defendant has some good qualities ("Good Character Factors");

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139. *See generally* U.S. SENTENCING COMM'N, GUIDELINES MANUAL (2012), *available at* http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/2012_Guidelines_Manual_Full.pdf (detailing the sentencing scheme established by the United States Sentencing Commission).

140. Juvenile Justice Accountability and Improvement Act of 2011, H.R. 3305, 112th Cong. (2011).

141. Miller v. Alabama, 567 U.S. __, 132 S. Ct. 2455, 2467 (2012) (quoting Eddings v. Oklahoma, 455 U.S. 104, 116 (1982)).

142. *Id.*

143. *Id.* at __, 132 S. Ct. at 2469.

144. *Id.*

145. Jeffrey L. Kirchmeier, *A Tear in the Eye of the Law: Mitigating Factors and the Progression Toward a Disease Theory of Criminal Justice*, 83 OR. L. REV. 631, 658 (2004).

(2) mitigating circumstances that show the defendant had a lesser involvement with the murder ("Crime Involvement Factors"); (3) mitigating circumstances related to the legal proceedings ("Legal Proceeding Factors"); and (4) mitigating circumstances that show less culpability I and/or that help explain why a defendant committed the crime ("Disease Theory Factors").[146]

Mitigating factors are crucial in determining whether sentencing a juvenile to life without parole is justified. A sentencing statute must include analysis of mitigating factors, with the goal of promoting infrequency regarding when juvenile life without parole sentences are imposed.

B. *A Blueprint for Change: The Sentencing Reform Act of 1984*

The Sentencing Reform Act of 1984 (hereinafter SRA) fundamentally altered federal sentencing policy and practice.[147] Prior to the SRA, federal judges were afforded broad discretion in sentencing. This latitude allowed judges to impose sentences without permitting convicted individuals an opportunity for meaningful appeal.[148] Thus, the SRA changed prior criminal sentencing practices and "establish[ed] sentencing guidelines to limit and structure the sentencing discretion of federal judges."[149]

Notably, the SRA abolished parole and raised the sentencing severity for several crimes in order to ensure the success of the guidelines in achieving certainty of punishment and truth-in-sentencing.[150] After the SRA, there is no parole eligibility for federal offenders who committed offenses on or after November 1, 1987.[151] Policymakers argue that the

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146. *Id.*

147. Johnson, *supra* note 137.

148. *Id.* Thus:

> [s]entencing decisions . . . reflected each judge's individual notions of justice and views of the purposes of sentencing, and sentences for similar offenses varied dramatically depending on the identity of the sentencing judge. Moreover, discretion in the system was not limited to sentencing judges. The introduction of parole into the federal system in 1910 left each prisoner's release date to the discretion of parole officials, although most prisoners were ineligible for parole until one-third of their sentence was served.

Id.

149. *Id.*

150. U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 11, 38 (2004), *available at* http://www.ussc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/15_Year_Study/15_year_study_full.pdf.

151. *See* U.S. DEPARTMENT OF JUSTICE: UNITED STATES PAROLE COMMISSION, FY 2013 PERFORMANCE BUDGET: CONGRESSIONAL SUBMISSION 3–4 (2012), *available at* http://www.justice.gov/jmd/2013justification/pdf/fy13-uspc-justification.pdf (discussing its jurisdiction over federal inmates who committed a crime before November 1, 1987).

elimination of parole boards "increase the length of time inmates spend in prison . . . [which] may incapacitate dangerous criminals and deter future crimes . . . ."[152]

However, scholars have demonstrated that parole boards are vital to increasing the efficiency of correctional facilities by providing greater accuracy in predicting an inmate's future risk for recidivism and promoting "prisoners' incentive to invest in their own rehabilitation."[153] Therefore, this model sentencing statute, should states choose to adopt it, will provide juvenile offenders a chance at parole at specified intervals during incarceration.

Regardless, SRA's creation of the Federal Sentencing Factors under 18 U.S.C.§ 3553(a) and the United States Sentencing Commission's Guidelines remain quite instrumental in helping legislatures create a sentencing statute for lower courts to follow.

C. *The Federal Sentencing Factors under 18 U.S.C. § 3553(a)*

"The U.S. Supreme Court has determined that a penalty must be proportional to the crime; otherwise, the punishment violates the Eighth Amendment's prohibition against cruel and unusual punishments."[154]

According to the Federal Sentencing Factors under 18 U.S.C. § 3553(a):

> "The court, in determining the particular sentence to be imposed, shall consider: (1) The nature and circumstances of the offense and history and characteristics of the defendant; (2) The need for the sentence imposed (a) to reflect the seriousness of the offense, to promote respect the law, and to provide just punishment for the offense; (b) to afford adequate deterrence to criminal conduct; (c) to protect the public from further crimes of the defendant; and (d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established . . . (5) any pertinent policy statement . . . (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty

152. Ilyana Kuziemko, *Going Off Parole: How the Elimination of Discretionary Prison Release Affects the Social Cost of Crime* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 13380, 2007), *available at* http://www.nber.org/papers/w13380.

153. *Id.* at 2–3.

154. *Death Penalty, Legal Information Institute, Wex*, CORNELL U. L. SCH. (Aug. 19, 2010, 5:14 PM), http://www.law.cornell.edu/wex/death_penalty.

of similar conduct; and (7) the need to provide restitution to any victims of the offense.[155]

These are just a few factors legislatures can take into account when creating a model sentencing statute to control juvenile sentencing, with a focus on proportionate sentencing.

One of the most important elements a court must analyze in an individual sentencing hearing is mitigating factors based on a defendant's circumstances. Just as courts must do in capital sentencing hearings, judges in juvenile life without parole hearings must now take special notice of mitigating factors.[156] Therefore, a model sentencing statute that incorporates factors to be considered in sentencing decisions that review mitigating circumstances, among other factors, clearly satisfies the Supreme Court's decision in *Miller*.

D. *The United States Sentencing Commission's Guidelines*

The original United States Sentencing Commission based its guidelines and deliberations on "detailed data drawn from more than 10,000 reports of offenders sentenced in 1985 and additional data from approximately 100,000 more federal convictions."[157] Using this information, the Commission was able to issue sentencing guidelines to ensure proportionality between the punishment and the crime's gravity.[158]

In creating its Guidelines, the Commission "established [base] offense levels for each crime, which [are] directly linked to a recommended imprisonment range."[159] Each base offense level sentence increases or decreases in direct correlation with the magnitude of any aggravating and mitigating factors.[160] These factors form "the bases for 'specific offense characteristics' for each type of crime, which adjust[s] the base offense level upward and downward."[161] Further affecting the offense level are adjustment categories, including, "victim-related adjustment, the offender's role in the offense, and obstruction of justice."[162]

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155. 18 U.S.C. § 3553(a) (2006).

156. *See* Miller v. Alabama, 567 U.S. __, 132 S. Ct. 2455, 2467 (2012) ("*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.").

157. U.S. SENTENCING COMM'N, *supra* note 150, at 14.

158. *Id.* at 12.

159. *Id.* at 14.

160. *Id.*

161. *Id.*

162. *Id.* at 16.

Next, the Commission's Guidelines will consider the criminal history of each offender.[163] Here, the Commission recognizes the importance of predicting recidivism rates when sentencing a criminal defendant.[164] The Guidelines use a "'criminal history score[s]' . . . based on the frequency, seriousness, and [temporal proximity] of prior criminal convictions, and whether the offender was under criminal justice supervision at the time of the present offense."[165] Applying the criminal history score, each defendant's likelihood to become a repeat offender is evaluated and those "with prior convictions [are] shown to be more likely to recidivate, and also [are] viewed as more culpable and therefore more deserving of punishment."[166]

After the offense level and criminal history are established, judges apply this information to the sentencing table.[167] Since a sentencing system that "attempts to account for every conceivable offense and offender characteristic" would be ineffective, the Commission devised "a sentencing table with [forty-three] offense levels and [six] criminal history categories with overlapping ranges of imprisonment."[168] This table followed the "[twenty-five] percent rule which requires that the maximum of each recommended sentencing range exceed the minimum of the range by no more than six months or [twenty-five] percent of minimum range, whichever is greater."[169] These Guidelines are designed with sufficient detail "to assign offenders to relatively narrow ranges of recommended prison terms."[170]

Finally, if a judge uses the Commission's Guidelines to impose a sentence on a criminal defendant, the judge "must impose a sentence within the guidelines range unless a reason for departure can be identified and stated on the record."[171] Departure from the prescribed range is permissible if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[172]

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163. *Id.* at 15.

164. *Id.*

165. *Id.* For example, score level one "is for offenders with the least serious criminal record and includes many first-time offenders" and score level six "is for offenders with the most extensive criminal records." *Id.* at 17.

166. *Id.* at 15.

167. *See Id.* at 17–18 (outlining the sentencing table and its application).

168. *Id.* at 15.

169. *Id.*; *accord* 18 U.S.C. § 994(b)(2) (enunciating the twenty-five percent rule).

170. U.S. SENTENCING COMM'N, *supra* note 150, at 15.

171. *Id.* at 17; *accord* 28 U.S.C. §§ 994(w)(2)(B), 3553(c)(2) (requiring a written report of every sentencing decision to include the judgment and the reason for it).

172. 18 U.S.C. § 3553(b)(1); *see* U.S. SENTENCING COMM'N, *supra* note 150, at 32.

However, if a judge departs from this range and does not have an acceptable justification to do so, the defendant will have the right to appeal his or her sentence.[173] Additionally, a defendant may appeal a sentence "as a result of an incorrect application of the sentencing guidelines."[174] The Commission outlined departures that may be taken while remaining within the contours of the SRA in its Guidelines Manual.[175]

Therefore, the Commission's Guidelines help form components of a well-revised model sentencing statute for state legislatures to implement and for courts to subsequently follow when sentencing juveniles. A similar proposed framework would limit judicial discretion and ensure a fair sentence to juveniles convicted of homicide offenses. Therefore, despite state movement toward abolishing parole, this model sentencing statute reintroduces the possibility of parole for juvenile offenders at specified intervals during incarceration and utilizes the Commission's Guidelines to determine when to issue juvenile life without parole based upon specific and uniform criteria.

E. *The Juvenile Justice Accountability and Improvement Act of 2011: A Financial Incentive to Providing Juveniles a Chance at Parole*

The Juvenile Justice Accountability and Improvement Act of 2011 (hereinafter JJAIA) is proposed federal legislation that "provides juveniles a meaningful opportunity for parole or similar release for child offenders sentence to life in prison" after serving fifteen years of their sentence.[176] Additionally, the JJAIA would provide a financial incentive

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173. *See* 18 U.S.C. § 3742(a)(3) (providing the right to appeal if the sentence "is greater than the sentence specified in the applicable guideline range . . . or includes a more limiting condition of probation or supervised release . . . than the maximum established in the guideline range"); U.S. SENTENCING COMM'N, *supra* note 150, at 34 (noting the SRA provided defendants with an automatic right to appeal if the judge sentenced them outside the mandated guideline range by departing upward). However, the government was also given an automatic right to appeal if the judge departed from the guidelines by sentencing downward. § 3742(b)(3); U.S. SENTENCING COMM'N, *supra* note 150, at 34.

174. § 3742(a)(2); U.S. SENTENCING COMM'N, *supra* note 150, at 34.

175. U.S. SENTENCING COMM'N, *supra* note 139, at 450–67 (explaining specific instances in which a judge may depart from the sentencing guidelines); *see* U.S. SENTENCING COMM'N, *supra* note 150, at 32–34 (discussing departure from the Guidelines). "The Supreme Court reaffirmed the importance of the Commission's role in regulating departures in *United States v. Koon*, 518 U.S. 81 (1996). In the PROTECT Act of 2003, Congress directed the Commission to review [the Guidelines] and amend them 'to ensure that the incidence of downward departures are substantially reduced.'" *Id.*
U.S. SENTENCING COMM'N, *supra* note 150, at 32.

176. Juvenile Justice Accountability and Improvement Act of 2011, H.R. 3305, 112th Cong. (2011) (outlining the purpose for the law and the proposed scheme to be enacted by the states and a parallel scheme for juvenile offenders sentenced at the federal level).

for states to afford juveniles the possibility of parole by linking federal funding to state statutory reform.

Despite collective movement toward abolishing parole, this bill would require states to "have in effect laws and policies under which each child offender who is serving a life sentence receives, not less than once during the first [fifteen] years of incarceration, and not less than once every [three] years of incarceration thereafter, a meaningful opportunity for parole or other form of supervised release."[177] Thus, the bill would reestablish parole review for juveniles at the federal level and for many states.

The JJAIA establishes sentencing guidelines for states to adopt in order to continue to receive full federal funding.[178] Specifically, the bill states:

For any fiscal year after the expiration of the period specified in paragraph (1) [three to five years depending on the circumstances], a State that fails to be in compliance with this section shall not receive [ten] percent of the funds that would otherwise be allocated for that fiscal year to that State under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. [§] 3750 et seq.) . . . .[179]

Therefore, the JJAIA would provide the federal government with the means to incentivize states to collectively adopt uniform sentencing statutes. To prevent states from circumventing this proposed model sentencing statute by continuing to sentence juveniles to life without parole based on a finding of transferred intent, the federal government could withhold a certain percent of federal funding. By incorporating the JJAIA's framework, this proposed model sentencing statute establishes rules consistent with *Miller* in requiring parole review for juveniles and provides incentive to states to follow suit.

VII. A Proposed Model Sentencing Statute for Juveniles

The following proposed sentencing statute provides a scheme for state and federal legislators, who currently lack adequate procedural guidelines, in determining whether juveniles should be sentenced to life with-

177. H.R. 3305 at § 3(a)(1). This requirement was based on the following findings:

> The estimated rate at which the sentence of life without parole is imposed on children nationwide remains at least [three] times higher today [in 2011] than it was [fifteen] years ago. The majority of youth sentenced to life without parole are first-time offenders. Sixteen percent of these individuals were age [fifteen] or younger when they committed their crimes. According to the Bureau of Prisons, the annual cost of incarcerating an inmate is $28,284. In light of this figure, the total cost of incarcerating a juvenile for life will be millions of dollars.

Id. § 1.

178. *Id.* §§ 3(d)(1)–(2).

179. *Id.* § 3(d)(2).

out parole. Ultimately, in accordance with *Miller*, this model statute provides an individualized sentencing hearing to *all* juveniles convicted of a homicide offense; however, *only* juveniles convicted of homicide based on a finding of *intent* will be eligible for life without the possibility of parole. This proposed model statute has three specific requirements for courts to follow, should state or federal legislators decide to adopt this unprecedented sentencing statute.

The first main element of this proposed model sentencing statute provides mandatory individualized sentencing hearings and parole review after fifteen years of imprisonment and every three years thereafter if not released. Judges must examine mitigating factors within certain procedural guidelines modeled after the SRA, to ensure all juvenile defendants are granted a fair sentence.

The mitigating factors courts should consider can be divided into four main categories:

> (1) mitigating circumstances unrelated to the crime that show that the defendant has some good qualities . . . ; (2) mitigating circumstances that show the defendant had a lesser involvement with the murder . . . ; (3) mitigating circumstances related to the legal proceedings . . . ; and (4) mitigating circumstances that show less culpability and/or that help explain why a defendant committed the crime . . . .[180]

The Federal Sentencing Factors under 18 U.S.C. § 3553(a) also provide helpful guidance in what circumstances to consider in determining sentences. Additionally, based on the ruling in *Miller*, courts must consider both the "offender's youth and [any] attendant characteristics" during a sentencing hearing before imposing life without parole.[181]

The procedural steps courts should follow in sentencing a juvenile mirror the United States Sentencing Commission's Guidelines. First, there should be a full examination of the details of the crime to determine the "'base offense level'" for the crime which is "directly linked to a recommended imprisonment range" established by the SRA.[182] Next, courts should apply the "'criminal history score,' designed to predict recidivism . . . based on the frequency, seriousness, and recency of prior criminal convictions, and whether the offender was under criminal justice supervision at the time of the present offense."[183] Lastly, courts should apply these two factors to the Commission's sentencing table to "assign offend-

180. Kirchmeier, *supra* note 145.

181. Miller v. Alabama, 567 U.S. __, 132 S. Ct. 2455, 2471 (2012).

182. U.S. SENTENCING COMM'N, *supra* note 150, at v.

183. *Id.* at 15.

ers to [a] relatively narrow range of recommended prison terms."[184] If a judge were to depart from the sentencing table range, and gave no permissible justification for doing so, the defendant would be given an automatic right to appeal a sentence.

The second main element of this proposed model sentencing statute will provide a categorical rule eliminating sentencing juveniles to life without parole based on a finding of transferred intent. A case-by-case analysis for juvenile defendants will still be required for juveniles whose intent is to deliberately murder an innocent victim and juveniles whose crime lacks the element of intent. However, if a juvenile is found guilty of felony murder based on a finding of transferred intent, the judge will no longer have authority to sentence him or her to life without the possibility of parole.

Lastly, this proposed model sentencing statute would require retroactive application to juvenile defendants currently serving life without parole sentences. This section is modeled directly after the Fair Sentencing for Youth Act[185] and "would authorize a prisoner, who was under [eighteen]-years-of-age at the time of committing an offense for which the prisoner was sentenced to life without parole [based on both a finding of transferred intent and intent], to submit a petition for recall and resentencing to the sentencing court, and to the prosecuting agency."[186]

Distinguishable from the Fair Sentencing for Youth Act, this element of the proposed model sentencing statute will apply retroactively to *all* juvenile defendants currently serving life without parole sentences and grant them ability to request a petition for resentencing. Thus, even juveniles who tortured their victims or killed public safety officer would have the opportunity to gain parole or similar supervised release. Juvenile defendants who were convicted of felony murder based on a finding of intent should also have the ability to petition for a resentencing hearing to ensure all the mitigating circumstances "will be thoroughly examined before concluding that life without the possibility of parole is the appropriate penalty."[187]

This last element will provide a meaningful opportunity for review and possible parole within a maximum fifteen-year incarceration for juvenile offenders convicted based on a finding of intent or transferred intent. Specifically, this proposed model sentencing statute would require states to "establish a meaningful opportunity for parole" for every juvenile at

184. *Id.*

185. 2012 Cal. Legis. Serv. Ch. 828 (S.B. 9) (West) (codified as amended at CAL. PENAL CODE § 1170 (Deering Supp. 2013)).

186. *Id.*

187. Miller v. Alabama, 567 U.S. __, 132 S. Ct. 2455, 2469 (2012).

least once during the first fifteen years of their incarceration and again every three years thereafter, if not released.[188] Moreover, any state not in compliance with this new statute would receive reduced federal funding as a result.[189]

Ultimately, this proposed model sentencing statute has the ability to create an unprecedented and fundamental change in sentencing reform for juveniles convicted of homicidal crimes.

VIII. Conclusion

Life in prison is a fate worse than death, and the Supreme Court has made notable progress handing down a decision that respects the future of juvenile defendants allowing them the chance to obtain parole. Now, legislatures must implement a proposed model sentencing statute that provides lower courts with mitigating factors and a sentencing framework and wholly eliminates sentencing juveniles to life without parole based on a finding of transferred intent.

188. Juvenile Justice Accountability and Improvement Act of 2011, H.R. 3305, 112th Cong. (2011).

189. *See* H.R. 3305 at § 3(d)(2) (providing a ten percent decrease in funding through "the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. [§] 3750 et seq)").