

# MILLER’S PROMISE: RE-EVALUATING EXTREME CRIMINAL SENTENCES FOR CHILDREN

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*Abstract:* Scientific, legal, and societal notions about youth have come together to reaffirm an age-old concept—children are different and they change as they grow older. In recent decisions, the United States Supreme Court has required courts and legislatures to take a new look at extreme criminal sentences imposed upon children. Life without parole sentences and decades-long, determinate sentences are constitutionally suspect when applied to children because they fail to adequately account for the dynamism of youth. *Miller v. Alabama* and *Graham v. Florida* announced two important principles: (1) that an extreme sentence can only be imposed upon a child following an individualized hearing at which a court considers myriad mitigating factors; and (2) that in the vast majority of cases, the child should have a realistic opportunity for parole at some point in the future. During the recently completed 2014 session, the Washington legislature took steps to address some of the Supreme Court’s concerns, but work remains before Washington law fully incorporates the principles laid out in *Miller* and *Graham*. Legal principles announced in the Court’s recent cases require individualized sentencing hearings any time a child may be sentenced to decades behind bars. Moreover, in no case should a child be sentenced to spend the rest of his life in prison without some possibility of release in the future.

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## INTRODUCTION

Recent psychosocial studies and neurological research have proven that the structures and processes of the adolescent brain render young people more reckless and more susceptible to negative familial and societal pressures.<sup>1</sup> In a series of recent cases, culminating in *Miller v.*

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1. See, e.g., ELIZABETH S. SCOTT & LAURENCE D. STEINBERG, RETHINKING JUVENILE JUSTICE (2008) (discussing impact of neurological and psychosocial research on manner in which criminal law addresses criminal behavior by young people); Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May Be Less Culpable Than Adults*, 18 BEHAV. SCI. & L. 741 (2000) (presenting research showing that adolescents scored significantly worse than adults in tests of responsibility, perspective, and temperance); Sarah Durston et al., *Anatomical MRI of the Developing Human Brain: What Have We Learned?*, 40 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1012 (2001) (discussing various neuroimaging studies of juvenile brain development); Neir Eshel et al., *Neural Substrates of Choice Selection in Adults and Adolescents: Development of the Ventrolateral Prefrontal and Anterior Cingulate Cortices*, 45 NEUROPSYCHOLOGIA 1270 (2007) (presenting neurological research showing that adolescents do

*Alabama*,<sup>2</sup> the United States Supreme Court relied on this science and recognized that, for young people, a confluence of immature judgment, vulnerability, social pressure, and decreased ability to appreciate long-term consequences can create a toxic environment with tragic results.<sup>3</sup> The chances for unthinking violence are exponentially increased when homelessness, familial abuse or neglect, mental illness, and chemical dependency are added to the mix.<sup>4</sup>

However, because of their developing characters, children are also uniquely able to transform themselves; they can change from foolhardy, risk-seeking teenagers into mature, rehabilitated adults.<sup>5</sup> It is these “characteristics of youth”<sup>6</sup> and the developing science that explains them that animate the Supreme Court’s recent juvenile sentencing decisions.<sup>7</sup> As discussed in those cases, physiological differences between teenagers and adults carry constitutional significance and require that children be sentenced differently—a principle firmly rooted in recent science and longstanding legal distinctions between children and adults.<sup>8</sup>

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not utilize regulatory areas of brain during decision-making to same extent as adults); Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed in Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEVELOPMENTAL PSYCHOL. 1764 (2008) (study demonstrating heightened vulnerability to risk taking among adolescents). The author relied heavily upon amici curiae briefs filed in the *Miller* case for assistance with research and understanding the scientific evidence. See Brief for the Am. Med. Ass’n & the Am. Academy of Child and Adolescent Psychiatry as Amici Curiae in Support of Neither Party, *Miller v. Alabama*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647) [hereinafter *Miller* AMA Brief]; Brief for the Am. Psychological Ass’n et al., as Amici Curiae in Support of Petitioners, *Miller v. Alabama*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2455 (2012) (Nos. 10-9646, 10-9647) [hereinafter *Miller* APA Brief].

2. \_\_\_ U.S. \_\_\_, 132 S. Ct. 2455 (2012).

3. *Cf. id.* at 2468–69 (discussing before the Court details of the boys and their crimes).

4. Alan Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths*, in YOUTH ON TRIAL: A DEVELOPMENTAL PERSPECTIVE ON JUVENILE JUSTICE 33, 47 (Thomas Grisso & Robert G. Schwartz eds., 2000); see generally Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOL. REV. 674 (1993) (examining antisocial behavior among adolescents and interaction of neuro-psychological development and criminogenic environments).

5. The author uses the terms “youth,” “juvenile,” and “child” interchangeably throughout this Article to refer to people under the age of eighteen. As discussed below, in the vast majority of circumstances, the law and society treat all such people as “children.” *Cf. Miller*, 132 S. Ct. at 2464 (“[C]hildren are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, ‘they are less deserving of the most severe punishments’” (quoting *Graham v. Florida*, 560 U.S. 48, 68 (2010)).

6. *Miller*, 132 S. Ct. at 2465.

7. *Id.* at 2469; *Graham*, 560 U.S. at 68.

8. See *Graham*, 560 U.S. at 68 (“[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.”); *id.* at 71 (“A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense. With respect

In Part I, this Article analyzes *Miller v. Alabama*,<sup>9</sup> *Graham v. Florida*,<sup>10</sup> and *Roper v. Simmons*.<sup>11</sup> Part II explains the science underpinning those decisions. Part III shows how that science helps explain why the men currently serving life without parole in Washington for crimes committed as juveniles came to reside in prison. Part IV argues that the principles announced in *Graham* and *Miller* apply with equal force to long determinate sentences imposed upon children. Part V discusses how *Miller* and *Graham* track a growing societal disfavor for extreme punishments for youth. Part VI examines how the Washington legislature responded to this changing legal and social landscape during the 2014 legislative session when it fundamentally altered the sentencing structure applicable to children who commit serious crimes. Finally, Part VII discusses what else courts and the legislature should do to fully realize *Miller*'s promise.

## I. THE U.S. SUPREME COURT HAS RECOGNIZED THAT CHILDREN MUST BE SENTENCED DIFFERENTLY THAN ADULTS

In a trilogy of recent cases, the Supreme Court has recognized that juveniles differ from adults in their psychosocial and neurological makeups and therefore must be sentenced differently—even when those children have committed heinous crimes.<sup>12</sup> In 2005 in *Roper v. Simmons*,<sup>13</sup> the Court extended the categorical rule it set out in *Thompson v. Oklahoma*<sup>14</sup> barring the death penalty for children under the age of sixteen, to any person who was under the age of eighteen at the time of the crime.<sup>15</sup> While *Roper* announced a number of important principles, the true impact of those newly articulated constitutional rules

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to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation—provides an adequate justification.” (citation omitted).

9. 132 S. Ct. at 2455.

10. 560 U.S. 48 (2010).

11. 543 U.S. 551 (2005).

12. See *Miller*, 132 S. Ct. at 2464 (holding it is unconstitutional to impose mandatory life-without-parole sentences on juvenile offenders); *Graham*, 560 U.S. at 74–75 (holding it is unconstitutional to sentence youth to life without parole for non-homicide crimes); *Roper*, 543 U.S. at 559–60 (holding it is unconstitutional to sentence youth to death).

13. 543 U.S. 551 (2005).

14. 487 U.S. 815 (1987).

15. *Roper*, 543 U.S. at 568 (2005).

awaited further development in *Graham* and *Miller*.<sup>16</sup>

The Court heard arguments in *Graham v. Florida*, a case that presented the question whether children can be sentenced to life without parole for non-homicides, in the fall of 2009.<sup>17</sup> In an opinion authored by Justice Kennedy, the Court ruled that imposition of such sentences in cases in which no one was killed violated the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>18</sup>

The *Graham* Court expanded upon the discussion begun in *Roper* that the unique attributes of children require that they be sentenced differently than adults. As in *Roper*, the *Graham* Court accepted recent scientific breakthroughs that explain why young people are inclined to engage in risky, anti-social behaviors; how peer pressure and poor familial circumstances more dramatically affect them; and how—given expected neurological development—many of them will outgrow the irresponsible, unthinking acts which lead them to prison.<sup>19</sup> The *Graham* Court noted, “‘juvenile offenders cannot with reliability be classified among the worst offenders.’ A juvenile is not absolved of responsibility for his actions, but his transgression ‘is not as morally reprehensible as that of an adult.’”<sup>20</sup> Because children change as they age, a constitutional sentencing structure requires that a “juvenile offender [be given] a chance to demonstrate growth and maturity.”<sup>21</sup> Life without parole sentences violate this tenet by removing any chance that a child will one day again walk the world as a free person, no matter how well he may have done while behind bars.<sup>22</sup> *Graham* therefore required that any child convicted of a non-homicide crime be provided a “realistic opportunity to obtain release” at some point in the future.<sup>23</sup>

*Miller v. Alabama* presented the Court with the next question in the

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16. The Court in *Roper* extended the categorical rule it set out in *Thompson v. Oklahoma*, 487 U.S. 815 (1987), barring the death penalty for children under the age of sixteen, to all children. *Roper*, 543 U.S. at 568.

17. *Graham*, 560 U.S. at 74–75.

18. *Id.* at 75.

19. *Id.* at 68–69.

20. *Id.* (quoting *Roper*, 543 U.S. at 569; *Thompson*, 487 U.S. at 835).

21. *Graham*, 560 U.S. at 73 (“Even if the State’s judgment that Graham was incorrigible were later corroborated by prison misbehavior or failure to mature, the sentence was still disproportionate because that judgment was made at the outset.”); *id.* at 75 (“A State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime. What the State must do, however, is give defendants like Graham some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”).

22. *Id.* at 69–71.

23. *Id.* at 75.

sequence: whether children who commit murder can be sentenced to mandatory life without parole.<sup>24</sup> In a few paragraphs, the *Miller* Court referred to the lengthy discussions in *Roper* and *Graham* of the science and its relevance to the constitutional analysis the Court must undertake.<sup>25</sup> As the *Miller* Court explained, these cognitive and physiological differences are constitutionally relevant in three ways: (1) juveniles are less able than adults to control and understand the consequences of their actions; (2) juveniles are more likely than adults to be affected by negative influences in their lives; and (3) juveniles are uniquely capable of rehabilitation and reform.<sup>26</sup> These differences render children less culpable than adults and more likely to change for the better.<sup>27</sup>

The *Graham* and *Miller* Courts also recognized that life without parole sentences are uniquely severe when applied to children.<sup>28</sup> By virtue of their younger ages, children sentenced to life without parole will, on the whole, serve more years behind bars than adults condemned to the same fate.<sup>29</sup> Moreover, they will be subject to greater levels of abuse and hardship while incarcerated because of their particular vulnerabilities. A recent report from the National Institute of Corrections indicates that in 2005 and 2006 between ten and twenty percent of the victims of inmate-on-inmate sexual violence in U.S. jails were under the age of eighteen, even though they represented only one percent of all jail inmates.<sup>30</sup>

A life without parole sentence imposed upon a child constitutes an irrevocable decision, one taken without sufficient information about the person that child will become. As Justice Kennedy noted in *Graham*:

[L]ife without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration . . . . [T]his sentence "means

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24. \_\_ U.S. \_\_, 132 S. Ct. 2455, 2460 (2012).

25. *Id.* at 2464.

26. *Id.*

27. *Id.*

28. *Id.* at 2466; *Graham*, 560 U.S. at 70–71.

29. *Graham*, 560 U.S. at 70.

30. JASON ZIEDENBERG, U.S. DEP'T OF JUSTICE, NAT'L INST. OF CORR., YOU'RE AN ADULT NOW: YOUTH IN ADULT CRIMINAL JUSTICE SYSTEMS 11 (2011), available at <http://static.nicic.gov/Library/025555.pdf>.

denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days.<sup>31</sup>

Given their more limited culpability, their greater rehabilitative capacity, and the uniquely severe consequences of life sentences upon children, the Court found life without parole sentences for children to be tantamount to death sentences.<sup>32</sup> As in *Graham*, the *Miller* Court recognized that because of their developing minds, and because of the harshness of life without parole sentences, children cannot be sentenced in the same manner as adults and should rarely face the same punishment.<sup>33</sup>

These two factors—the severity of life without parole and the particular qualities of youth—prohibit the sentencing of a child to life in prison without the possibility of parole if the mitigating factors of youth and the child's upbringing require a lesser sentence.<sup>34</sup> The Court explicitly adopted the rationale from its extensive death penalty jurisprudence in its decisions regarding extreme sentences for children.<sup>35</sup> And like the death sentence, the Court commanded that a life without parole sentence be imposed rarely and only after an exacting analysis.<sup>36</sup> Unwilling at that time to categorically ban life without parole sentences for children who commit murder, the *Miller* Court prohibited the imposition of such a sentence absent an individualized sentencing hearing.<sup>37</sup> At this hearing, a court must consider evidence that mitigates against condemning the child to die behind bars.<sup>38</sup>

The Court in *Roper*, *Graham*, and *Miller* relied upon a wealth of relatively recent neurological and psychosocial research in finding that children must be sentenced differently than adults.<sup>39</sup> An understanding

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31. *Graham*, 560 U.S. at 69–70 (third alteration in original) (quoting *Naovarath v. State*, 779 P.2d 944, 944 (Nev. 1989)); see also *id.* at 70–71 (“Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only. This reality cannot be ignored.” (citation omitted)).

32. *Id.* at 69–70; see also *Miller*, 132 S. Ct. at 2463–64.

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

34. *Id.*

35. *Id.* at 2466–67.

36. *Id.* at 2468–69.

37. *Id.*

38. *Id.*

39. *Miller*, 132 S. Ct. at 2464–65; *Graham v. Florida*, 560 U.S. 48, 68 (2010); *Roper v. Simmons*,

of the science is therefore crucial to grasping the fundamental shifts in juvenile sentencing the United States Supreme Court has been recently exploring.

## II. NEUROLOGICAL AND PSYCHOSOCIAL RESEARCH PROVES THAT CHILDREN ARE LESS CULPABLE AND MORE LIKELY TO CHANGE THAN ADULTS

Adolescents' behavioral immaturity mirrors the anatomical immaturity of their brains. To a degree never before understood, scientists can now demonstrate that adolescents are immature, not only to the observer's naked eye, but in the very fibers of their brains.<sup>40</sup> Psychosocial and neurological advances prove that juveniles act impulsively, react rashly, and engage in risky behaviors without appreciation for the potential consequences due to psychological and anatomical immaturity.<sup>41</sup> The same impulses that compel youth to explore, experiment, and learn through experience also compel them to engage in risky, sensation-seeking behaviors.<sup>42</sup>

The physiology of the teenage brain is fundamentally different than it will be later in adulthood. The dynamic nature of this development accounts for a great deal of the behavioral changes children exhibit as they age.<sup>43</sup> Perfectly normal neurological development renders teenagers more likely to engage in socially destructive and risky behaviors.<sup>44</sup>

The prefrontal cortex—the region of the brain that controls the “executive functions,” including emotional regulation, impulse control, working memory, risk assessment, and the ability to evaluate future consequences—is one of the last neurological structures to fully develop.<sup>45</sup> Once mature, the prefrontal cortex modulates impulsive

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543 U.S. 551, 617–18 (2005).

40. Brief for the Am. Med. Ass'n et al., as Amici Curiae in Support of Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633) [hereinafter *Roper* AMA Brief].

41. *Miller*, 132 S. Ct. at 2464–65; *Graham*, 560 U.S. at 68.

42. *Miller* APA Brief, *supra* note 1, at 5; *see also* Cauffman & Steinberg, *supra* note 1, at 741, 747–49, 754 & tbl.4; Steinberg et al., *supra* note 1, at 1774–76.

43. *See* Eshel et al., *supra* note 1, at 1270–71; Kathryn L. Modecki, *Addressing Gaps in the Maturity of Judgment Literature: Age Differences and Delinquency*, 32 LAW & HUM. BEHAV. 78, 79–80 (2008); Steinberg et al., *supra* note 1, at 1765.

44. Moffitt, *supra* note 4, at 685–86; *see also* *Miller* APA Brief, *supra* note 1, at 7 (reckless behavior “is ‘virtually a normative characteristic of adolescent development’” (quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEVELOPMENTAL REV. 339, 344 (1992))).

45. *See Miller* AMA Brief, *supra* note 1, at 17–19; Elizabeth R. Sowell et al., *In Vivo Evidence for Post-Adolescent Brain Maturation in Frontal and Striatal Regions*, 2 NATURE NEUROSCIENCE



behavioral urges emanating from other earlier developing regions of the brain, like the amygdala.<sup>46</sup> However, the prefrontal cortex remains structurally immature until early adulthood, around the mid-twenties.<sup>47</sup> Until that time, adolescents' decision-making and responses to stimuli are largely directed by the amygdala and other more primitive neurological regions.<sup>48</sup> As the brain develops through adolescence and into early adulthood, the communication between regions of the brain improves, allowing complicated information to flow more freely and for areas of the brain associated with higher-level reasoning to begin to assert more control.<sup>49</sup> While developing structurally, teenage brains also produce an imbalance of dopamine and serotonin, the neurotransmitters that regulate pleasure and the desire for rewards.<sup>50</sup> The interplay between these various neurological structures and processes causes correspondingly stronger desires for immediate pleasure and

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859, 860 (1999).

46. See Miller AMA Brief, *supra* note 1, at 27; Ralph Adolphs, *The Human Amygdala and Emotion*, 5 NEUROSCIENTIST 125, 125–26 (1999). The amygdala evolved early on to detect danger and produce rapid protective reactions, the “fight or flight” reflex. Abigail A. Baird et al., *Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents*, 38 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 195, 195 (1999).

47. See Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PROC. OF THE NAT'L ACAD. OF SCI. 8174, 8177 (2004). See generally Miller AMA Brief, *supra* note 1, at 17–27 (discussing current scientific understanding regarding how the brain develops as children age into adulthood). Two separate processes are involved in the development of the prefrontal cortex. First, the brain undergoes what is colloquially known as “pruning.” Unused and redundant synaptic pathways begin to close down. Though fewer in number, the remaining neural networks become stronger and more efficient. Durston et al., *supra* note 1. Second, the brain begins to produce a greater abundance of myelin, a neural network insulator that allows electrical messages to move more effectively throughout the brain. See ELKHONON GOLDBERG, *THE EXECUTIVE BRAIN: FRONTAL LOBES AND THE CIVILIZED MIND* 144 (2001).

48. See Miller AMA Brief, *supra* note 1, at 29–32; Eshel et al., *supra* note 1, at 1271.

49. Miller AMA Brief, *supra* note 1, at 27 (discussing evidence that “development of top-down effective connectivity from cognitive control regions is critical in supporting active inhibitory control” (quoting Kai Hwang et al., *Strengthening of Top-Down Frontal Cognitive Control Networks Underlying the Development of Inhibitory Control: A Functional Magnetic Resonance Imaging Effective Connectivity Study*, 30 J. NEUROSCIENCE 15535, 15543 (2010))).

50. B. Luna, *The Maturation of Cognitive Control and the Adolescent Brain*, in FROM ATTENTION TO GOAL-DIRECTED BEHAVIOR: NEURODYNAMICAL, METHODOLOGICAL AND CLINICAL TRENDS 249, 258 (Francisco Aboitiz & Diego Cosmelli eds., 2009); R. Andrew Chambers et al., *Developmental Neurocircuitry of Motivation in Adolescence: A Critical Period of Addiction Vulnerability*, 160 AM. J. PSYCHIATRY 1041, 1046 (2003); Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANN. REV. CLINICAL PSYCHOL. 459, 466 (2009). Researchers theorize that this neurochemical imbalance plays an important role in reinforcing learning in adolescents. Dustin Wahlstrom et al., *Neurobehavioral Evidence for Changes in Dopamine System Activity During Adolescence*, 34 NEUROSCIENCE & BIOBEHAVIORAL REV. 631, 643 (2010).

gratification in adolescents, while also rendering them less able to resist those heightened urges.<sup>51</sup>

This observable neurological immaturity plays out in psychological studies and controlled observations of teenage behavior. Teenagers score significantly lower than adults on assessments measuring “impulse control” and “suppression of aggression.”<sup>52</sup> Even youth who have developed cognitive abilities similar to adults do not have the same ability to self-regulate their behaviors, modulate their emotions, or weigh the consequences of their actions.<sup>53</sup>

The combination of a developing brain and the psychosocial tendency toward risk, impulsivity, and limited judgment often results in criminal conduct. Studies have shown that it is statistically typical to engage in some form of criminal behavior during adolescence.<sup>54</sup> These behavioral patterns are particularly acute for teenagers in groups. Adolescents commit crimes in groups at a much greater rate than adults.<sup>55</sup> The presence of peers increases the likelihood and seriousness of risky behaviors beyond what a teenager acting alone would undertake.<sup>56</sup> By contrast, adult behavior is not significantly impacted by the presence of peers.<sup>57</sup>

As the *Miller* Court recognized, these scientific truths have a direct

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51. *Miller* AMA Brief, *supra* note 1, at 29–30 (the differing timing of development in various areas of the juvenile brain means that “adolescents experience increasing motivation for risky and reward-seeking behavior without a corresponding increase in the ability to self-regulate behavior”).

52. Cauffman & Steinberg, *supra* note 1, at 749, 754 tbl.4; *see also Miller* APA Brief, *supra* note 1, at 9–10.

53. *Miller* APA Brief, *supra* note 1, at 6; Steinberg, *supra* note 50, at 467. The areas of the brain that regulate cognition and logic develop relatively early in adolescence; gains in cognitive capability plateau at about age sixteen. *See* Thomas Grisso et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333, 333–34 (2003); Daniel Keating, *Cognitive and Brain Development*, in HANDBOOK OF ADOLESCENT PSYCHOLOGY 45, 64 (Richard Lerner & Laurence Steinberg eds., 2d ed. 2004). However, social and emotional maturity continues to develop well into early adulthood. *See* Cauffman & Steinberg, *supra* note 1, at 756. In other words, teenagers have the neurological foundation to support logical, rational thinking, but lack self-restraint and the ability to fully comprehend consequences, especially in emotionally charged settings. *Id.* at 743–45; *see also* Bonnie L. Halpern-Felsher & Elizabeth Cauffman, *Costs and Benefits of a Decision: Decision-Making Competence in Adolescents and Adults*, 22 J. APPLIED DEVELOPMENTAL PSYCHOL. 257, 264–71 (2001).

54. Moffit, *supra* note 4, at 685–86; *see also* L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 NEUROSCIENCE & BIOBEHAVIORAL REVS. 417, 421 (2000).

55. SCOTT & STEINBERG, *supra* note 1, at 39.

56. Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHOL. 625, 632 (2005).

57. Jason Chein et al., 14 DEVELOPMENTAL SCI. F1, F2 (2011).

impact on the applicability of criminal sanctions to children:

“[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds”—for example, in “parts of the brain involved in behavior control.” . . . [T]hose findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child’s “moral culpability” and enhanced the prospect that, as the years go by and neurological development occurs, his “deficiencies will be reformed.”<sup>58</sup>

Juveniles are uniquely susceptible to negative influences in their lives because of their psychosocial and neurological immaturity. Troubled family lives, limited educational achievement, and poor neighborhood conditions are highly correlated with youth who commit homicides,<sup>59</sup> as is early experimentation with drugs and alcohol.<sup>60</sup> Neurologically based impulses towards risk and reward-seeking behaviors—and the accompanying lack of forethought—combine with abuse, chemical dependency, mental illness, and other negative environmental factors to cause some youth to act violently.<sup>61</sup>

Because of their emotional immaturity and tendencies towards risk, teenagers have been granted very little legal autonomy over their own lives.<sup>62</sup> These realities render youth “more vulnerable . . . to negative

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58. *Miller v. Alabama*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2455, 2464–65 (2012) (quoting *Graham v. Florida*, 560 U.S. 48, 68–69 (2010); *Roper v. Simmons*, 543 U.S. 551, 570 (2005)); see also *Graham*, 560 U.S. at 68–74 (developments in brain science and psychology reveal fundamental differences between adult and juvenile minds that require that children be subject to different sentences than adults). While the *Miller* and *Graham* rulings involve life without parole sentences imposed upon children, the Court’s rationale would seem to apply to any criminal sentence that is imposed equally upon children and adults. If a child who commits murder is less culpable than an adult convicted of the same crime, then similarly, a child who steals should be treated less harshly than an adult. The *Miller* Court’s rationale requires a significant reevaluation of not only the most serious criminal sentences, but of sentencing of any child in the adult system. See *infra* Parts V and VI.

59. See ROLF LOEBER & DAVID P. FARRINGTON, *YOUNG HOMICIDE OFFENDERS AND VICTIMS: RISK FACTORS, PREDICTION, AND PREVENTION FROM CHILDHOOD* 61 (2011).

60. Lawrence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003).

61. Kazdin, *supra* note 4, at 47. See generally Thomas Grisso, *Adolescent Offenders with Mental Disorders*, 18 FUTURE CHILD. 143, 143 (2008) (showing linkage between mental disorders in juveniles and increased risk of impulsive and aggressive behaviors that lead to criminal justice system involvement).

62. *Roper*, 543 U.S. at 569 (“It has been noted that ‘adolescents are overrepresented statistically in virtually every category of reckless behavior.’ In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including

influences and outside pressures,' including from their family and peers; they have limited 'contro[l] over their own environment' and lack the ability to extricate themselves from horrific, crime-producing settings."<sup>63</sup>

The *Miller* Court recognized that the natural attendant characteristics that all juveniles share, and the particular family and social circumstances of individual youth, can lead to awful violence.<sup>64</sup> It illustrated this point by discussing the particulars of the crimes and circumstances before it.<sup>65</sup> The *Miller* Court noted that the two petitioners, Evan Miller and Kuntrell Jackson, were both fourteen years old at the times of their crimes.<sup>66</sup> Jackson and two other boys attempted to rob a video store.<sup>67</sup> One of the other boys shot and killed the clerk.<sup>68</sup> Jackson was sentenced to life without parole for his role in the crime.<sup>69</sup> In reviewing the facts of his crime, the Court found that Jackson's young age "could well have affected his calculation of the risk" of following his armed friend to a video store "as well as his willingness to walk away at that point."<sup>70</sup> Moreover, the Court highlighted Jackson's difficult family life and "immersion in violence" as relevant psychosocial factors that contributed to his actions.<sup>71</sup>

Turning to Evan Miller, the Court pointed out that the fourteen-year-old's stepfather abused him, his drug-addicted mother neglected him, and that he grew up in foster care.<sup>72</sup> The abuse and dysfunction led him

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peer pressure. '[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.' This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment." (quoting Arnett, *supra* note 44, at 339; Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).

63. *Miller*, 132 S. Ct. at 2458 (alteration in original) (quoting *Roper*, 543 U.S. at 569). The law also imposes particular restrictions upon the freedoms of children that often place them at the mercy of abusive family members without the power or autonomy to adequately protect themselves. Government agencies tasked with protecting children are often unable to provide appropriate and timely assistance because of limited resources and large caseloads. The lack of available state support is particularly acute for teenagers involved with abusive families. For many teenagers, homelessness is the only realistic alternative to remaining in households dominated by physical or sexual abuse. NAT'L COAL. FOR THE HOMELESS, HOMELESS YOUTH 1 (2008).

64. *Miller*, 132 S. Ct. at 2458.

65. *Id.* at 2461–62.

66. *Id.*

67. *Id.* at 2461.

68. *Id.*

69. *Id.*

70. *Id.* at 2468.

71. *Id.* at 2468–69.

72. *Id.* at 2469.

to attempt suicide on at least four occasions, his earliest attempt in kindergarten.<sup>73</sup> And while his crime was terrible, his reduced culpability and limited prior criminal record required a court to reevaluate his life without parole sentence to ensure imposition of an “appropriate penalty.”<sup>74</sup> These negative influences and mitigating factors are qualities of youth that courts must take into account when deciding whether to impose long criminal sentences upon children.<sup>75</sup>

The psychosocial and neurological evidence also proves another important truth: children change. As explained by the *Miller* Court, because “a child’s character is not as ‘well formed’ as an adult’s; his traits are ‘less fixed’ and his actions less likely to be evidence of irretrievabl[e] deprav[ity].”<sup>76</sup>

The incidence of violent criminal behavior generally peaks during adolescence and falls off in young adulthood.<sup>77</sup> In fact, the vast majority of youth outgrow criminal behaviors, and it is impossible to determine during childhood which child is truly incorrigible.<sup>78</sup> Put simply, no accurate means exist to predict whether any particular youth will continue to commit violent acts as an adult.<sup>79</sup> “Assessing adolescents . . . presents the formidable challenge of trying to capture a rapidly changing process with few trustworthy markers.”<sup>80</sup> This scientific fact requires that the prospects for rehabilitation be considered before children are sentenced to life terms<sup>81</sup> and explains why children, irrespective of conviction, should be provided some real opportunity for

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73. *Id.*

74. *Id.*

75. *Id.* at 2469.

76. *Id.* at 2464 (alterations in original) (quoting *Roper v. Simmons*, 543 U.S. 551, 570 (2010)).

77. Arnett, *supra* note 44, at 343; Moffitt, *supra* note 4, at 675 fig.1; Terrie Moffitt, *Natural Histories of Delinquency*, in *CROSS-NATIONAL LONGITUDINAL RESEARCH ON HUMAN DEVELOPMENT AND CRIMINAL BEHAVIOR* 3, 29 (Elmar Weitekamp & Hans-Jurgen Kerner eds., 1994).

78. SCOTT & STEINBERG, *supra* note 1, at 1014–15; see also Kathryn C. Monahan et al., *Trajectories of Antisocial Behavior and Psychosocial Maturity from Adolescence to Young Adulthood*, 45 *DEVELOPMENTAL PSYCHOL.* 1654, 1654–55 (2009); Moffitt, *supra* note 4, at 685–86.

79. *State v. Null*, 836 N.W.2d 41, 55–56 (Iowa 2013) (quoting SCOTT & STEINBERG, *supra* note 1, at 54) (“[I]t is very difficult to identify which juveniles are ‘adolescence-limited offenders,’ whose antisocial behavior begins and ends during adolescence and early adulthood, and those who are ‘life-course-persistent offenders’ whose antisocial behavior continues into adulthood.”); Edward P. Mulvey et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 *DEV. & PSYCHOPATHOLOGY* 453, 468–70 (2010).

80. Edward P. Mulvey & Elizabeth Cauffman, *The Inherent Limits of Predicting School Violence*, 56 *AM. PSYCHOLOGIST* 797, 799 (2001).

81. *Miller*, 132 S. Ct. at 2468–69.

release from prison at some point during their lifetimes.<sup>82</sup>

Given this science, traditional rationales supporting criminal sanctions—retribution, deterrence, incapacitation, and rehabilitation—apply with less force to children than to adults.<sup>83</sup> Retribution is less compelling with children because their more limited ability to control criminal behavior and understand emotional impulses renders them less culpable than adults.<sup>84</sup> Similarly, children are less likely to be deterred by criminal sanctions because “their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment.”<sup>85</sup> Furthermore, incapacitation does not justify life without parole sentences for youth because “[d]eciding that a ‘juvenile offender forever will be a danger to society’ would require ‘mak[ing] a judgment that [he] is incorrigible’—but ‘incorrigibility is inconsistent with youth.’”<sup>86</sup> And finally, barring a child from ever living outside a prison’s walls “forfeits altogether the rehabilitative ideal.” It reflects “an irrevocable judgment about [an offender’s] value and place in society, at odds with a child’s capacity for change.”<sup>87</sup> Rationale that may support life sentences for adults do not similarly support long sentences for children.

### III. THE MEN SERVING LIFE WITHOUT PAROLE DEMONSTRATE HOW THE SCIENCE PLAYS OUT IN THE REAL WORLD

As demonstrated by the circumstances of their crimes, many of the men serving life without parole for crimes committed as children exhibited the hallmark features of youth: immaturity, impetuosity, and failure to appreciate the risks and the consequences of their actions.<sup>88</sup> More than half of the men serving this sentence in Washington State

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82. *Cf. Graham v. Florida*, 560 U.S. 48, 68–71 (2010).

83. *Miller*, 132 S. Ct. at 2465.

84. *Id.*

85. *Id.*

86. *Id.* (alterations in original) (quoting *Graham*, 560 U.S. at 73).

87. *Id.* at 2465 (quoting *Graham*, 569 U.S. at 74). This discussion of the traditional rationale behind criminal sentences in *Miller* follows on from the Court’s analysis in earlier cases. *See, e.g., Graham*, 560 U.S. at 71–74 (discussing how penological justifications regarding sentencing are significantly different when applied to children).

88. There are currently thirty men serving life without parole sentences for crimes committed as children. WASH. STATE DEP’T OF CORR., OFFENDERS IN CUSTODY THAT WERE SENTENCED TO LWOP PRIOR TO TURNING 18 YEARS OF AGE [hereinafter DOC JLWOP INFORMATION]. One other man, Ansel Hofstetter, was sentenced to life without parole as a child in 1992. Recently the Pierce County Superior Court resentenced him to a determinate forty-year term. *See* discussion *infra* notes 123–125 and accompanying text.

were sixteen years old or younger at the time of their offenses.<sup>89</sup> Barry Massey was thirteen years old at the time of his crime and was one of the youngest people ever sentenced to life without the possibility of parole in the United States.<sup>90</sup> Three others were only fourteen years old.<sup>91</sup>

Experts who evaluated the then thirteen-year-old Barry Massey described him as “passive and naïve;” a child who lacked the capacity to appreciate the consequences of his actions.<sup>92</sup> He and a fifteen-year-old boy killed a store owner during the commission of a robbery.<sup>93</sup> Barry’s co-defendant became involved in the robbery that ended in murder to steal fishing equipment, food, and money so that he could “live off the land” and support himself, after learning that his father was leaving for Germany to get married.<sup>94</sup> After his arrest, Barry indicated that one of his life goals was to overcome his fear of the dark.<sup>95</sup>

As in the Massey case, peer pressure played a role in a number of the other murders that led to life without parole sentences for children. In several instances, the boys committed their crimes with teenage or older peers.<sup>96</sup> Six of the youth had adult co-defendants, two of whom received significantly lower sentences than the child. In a number of instances, the fellow youthful co-defendant received a much shorter determinate

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89. See WASH. COAL. FOR THE JUST TREATMENT OF YOUTH, A REEXAMINATION OF YOUTH INVOLVEMENT IN THE ADULT CRIMINAL JUSTICE SYSTEM IN WASHINGTON: IMPLICATIONS OF NEW FINDINGS ABOUT JUVENILE RECIDIVISM AND ADULT BRAIN DEVELOPMENT 12–13 (2009) [hereinafter COALITION REPORT], available at [http://www.columbialegal.org/files/JLWOP\\_cls.pdf](http://www.columbialegal.org/files/JLWOP_cls.pdf). The Washington Coalition for the Just Treatment of Youth, a coalition of organizations that work with children, reviewed the case files and other available information related to most of the men currently serving life without parole for crimes committed as children in Washington. Much of the data discussed herein can be found in the Coalition’s report and findings. The report identified twenty-eight adolescents serving life without parole for crimes committed as children. Following the report’s publication, new information provided by Department of Corrections (DOC) indicated that there were an additional two men serving juvenile life without parole in addition to those discussed in the Coalition Report.

90. EQUAL JUSTICE INITIATIVE, CRUEL AND UNUSUAL: SENTENCING 13- AND 14-YEAR-OLD CHILDREN TO DIE IN PRISON 20 (2008).

91. COALITION REPORT, *supra* note 89, at 13.

92. See Psychological Evaluation of Barry Massey by Norma D. Tropp, Ph.D. 4 (Mar. 27, 1987). Some of the information to which the authors refer herein is unverified and based upon reports from the men themselves.

93. Judgment & Sentence, *State v. Massey*, No. 87-1-01354-7 (Pierce Cnty. Wash. Super. Ct. Aug. 5, 1998).

94. Source document held on file with Columbia Legal Services.

95. *Id.*

96. COALITION REPORT, *supra* note 89, at 16–17 (a number of the children offended with other juveniles or with adults).

prison sentence.<sup>97</sup> In some cases, a younger child may have been influenced by older co-defendants.<sup>98</sup> Other cases raise questions about the youth's degree of planning and participation in the crime.<sup>99</sup>

Because of their immaturity, youth are also “at a significant disadvantage in criminal proceedings.”<sup>100</sup> As Justice Kennedy noted, “[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, all can lead to poor decisions by one charged with a juvenile offense.”<sup>101</sup> Most children lack the autonomy and understanding to protect themselves or seek assistance upon their involvement with the criminal system.<sup>102</sup>

Many of the twenty-nine men serving juvenile life without parole in Washington had little-to-no experience with the criminal justice system at the time of their arrests. Roughly one-third of them had no prior criminal history before being sentenced to life without parole.<sup>103</sup> Available records indicate that not one defendant had ever been transferred out of juvenile court until being charged with the offense for which he is currently serving life without parole.<sup>104</sup> Moreover, less than

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97. *Id.* at 17.

98. *Id.*

99. *Id.* at 16 (“[A] number of these youth were charged along with co-defendants and therefore had varying levels of participation in the crime.”). This is not to suggest that these men do not deserve punishment for their participation in these terrible crimes. The seriousness of their crimes must be taken into account when determining an appropriate sentence and when evaluating whether they should be eligible for release. In fact, it may be appropriate to continue to incarcerate some or all of these men for more time. As discussed in more detail later, individual sentencing hearings and parole eligibility provide appropriate means to balance the myriad factors and reach a just result.

100. *Miller v. Alabama*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2455, 2468 (2012) (quoting *Graham v. Florida*, 560 U.S. 48, 78 (2010)).

101. *Graham*, 560 U.S. at 78.

102. *Miller*, 132 S. Ct. at 2468 (mandatory life without parole for juveniles “ignores that [the youth] might have been charged and convicted of a lesser offense if not for incompetencies associated with youth”); see also *Graham*, 560 U.S. at 78 (“[T]he features that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings. Juveniles mistrust adults and have limited understandings of the criminal justice system and the roles of the institutional actors within it. They are less likely than adults to work effectively with their lawyers to aid in their defense. Difficulty 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, all can lead to poor decisions by one charged with a juvenile offense. These factors are likely to impair the quality of a juvenile defendant’s representation.” (internal citations omitted)).

103. COALITION REPORT, *supra* note 89, at 16 (“A third of the . . . adolescents were first time offenders with no prior juvenile or adult record.”).

104. See Judgment & Sentence, *State v. Alexander*, No. 02-1-00527-9 (Whatcom Cnty. Wash. Super. Ct. Mar. 29, 2004); Judgment & Sentence, *State v. Thang*, No. 98-1-00278-7 (Pierce Cnty.



half committed prior offenses serious enough to be calculated in their offender scores at the time of their sentencings.<sup>105</sup> As a result, many were unprepared to understand the adult criminal justice system or operate in a sophisticated manner within it. A number of the boys were questioned by police, and in none of the cases did the boys have either an attorney or even a parent present during the interrogations.<sup>106</sup>

Donald Lambert's case highlights the vulnerabilities of youth within the adult criminal justice system. Accused of two counts of aggravated first degree murder, he agreed to the juvenile court's decline of

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Wash. Super. Ct. Mar. 5, 2003); Judgment & Sentence, State v. Phet, No. 98-1-03162-1 (Pierce Cnty. Wash. Super. Ct. June 28, 2002); Judgment & Sentence, State v. Lembcke, No. 01-1-00001-7 (Stevens Cnty. Wash. Super. Ct. Aug. 7, 2001); Judgment & Sentence, State v. Leo, No. 98-1-03161-3 (Pierce Cnty. Wash. Super. Ct. Feb. 11, 2000); Judgment & Sentence, State v. Anderson, No. 97-1-00421-3 (King Cnty. Wash. Super. Ct. Jan. 7, 2000); Judgment & Sentence, State v. Baranyi, No. 97-1-00343-8 (King Cnty. Wash. Super. Ct. Jan. 15, 1999); Judgment & Sentence, State v. Backstrom, No. 97-1-01993-6 (Snohomish Cnty. Wash. Super. Ct. Jan. 6, 1999); Judgment & Sentence, State v. Munguia, No. 97-1-00679-5 (Benton Cnty. Wash. Super. Ct. July 10, 1998); Judgment & Sentence, State v. Lambert, No. 97-1-00415-5 (Grant Cnty. Wash. Super. Ct. Dec. 10, 1997); Judgment & Sentence, State v. Loukaitis, No. 96-1-00548-0 (Grant Cnty. Wash. Super. Ct. Oct. 10, 1997); Judgment & Sentence, State v. Weaver, No. 96-1-00123-9 (Whatcom Cnty. Wash. Super. Ct. Feb. 27, 1997); Judgment & Sentence, State v. Skay, No. 95-1-01942-5 (Snohomish Cnty. Wash. Super. Ct. Aug. 14, 1996); Judgment & Sentence, State v. Comeslast, No. 95-1-02260-1 (Spokane Cnty. Wash. Super. Ct. June 28, 1996); Judgment & Sentence, State v. Bassett, No. 95-1-00415-9 (Grays Harbor Cnty. Wash. Super. Ct. Apr. 1, 1996); Judgment & Sentence, State v. Boot, No. 95-1-00310-0 (Spokane Cnty. Wash. Super. Ct. Mar. 21, 1996); Judgment & Sentence, State v. Ngoeung, No. 94-1-03719-8 (Pierce Cnty. Wash. Super. Ct. June 27, 1995); Judgment & Sentence, State v. Haag, No. 94-1-00411-2 (Cowlitz Cnty. Wash. Super. Ct. Jan. 13, 1995); Judgment & Sentence, State v. Delbosque, No. 93-100256-4 (Mason Cnty. Wash. Super. Ct. Oct. 10, 1994); Judgment & Sentence, State v. Gaitan, No. 93-1-01018-0 (Yakima Cnty. Wash. Super. Ct. Dec. 21, 1993); Judgment & Sentence, State v. Gilbert, No. 92-1-00108-1 (Klickitat Cnty. Wash. Super. Ct. June 7, 1993); Judgment & Sentence, State v. Bourgeois, No. 92-1-06444-4 (King Cnty. Wash. Super. Ct. Apr. 23, 1993); Judgment & Sentence, State v. Hofstetter, No. 91-1-02993-0 (Pierce Cnty. Wash. Super. Ct. Feb. 12, 1992); Judgment & Sentence, State v. Rice, Jr., No. 88-1-00427-2 (Yakima Cnty. Wash. Super. Ct. Jan. 5, 1990); Judgment & Sentence, State v. McNeil, No. 88-1-00428-1 (Yakima Cnty. Wash. Super. Ct. Aug. 26, 1989); Amended Judgment & Sentence, State v. Furman, No. 89-1-00295-5 (Kitsap Cnty. Wash. Super. Ct. Aug. 9, 1989); Judgment & Sentence, State v. Massey, No. 87-1-01354-7 (Pierce Cnty. Wash. Super. Ct. Aug. 5, 1988); Judgment & Sentence, State v. Stevenson, No. 87-1-00011-5 (Skamania Cnty. Wash. Super. Ct. June 12, 1987).

105. See *supra* note 104 (judgments and sentences demonstrating that less than half of defendants committed prior offenses that were calculated into their offender scores). An offender score is the calculation of the defendant's criminal history used as part of the sentencing range calculation. WASH. REV. CODE § 9.94A.525 (2012). The offender score and the seriousness of the crime determine the sentencing range. See *id.* § 9.94A.530(1) ("The intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the standard sentence range . . ."); *id.* § 9.94A.510 (standard range sentencing grid). The higher the offender score, the longer the criminal sentence imposed upon a particular defendant. *Id.*

106. COALITION REPORT, *supra* note 89, at 14 ("[I]n every case where the youth was questioned, not one had a parent or attorney present during interrogation by the police.").

jurisdiction without a hearing.<sup>107</sup> In preparing for trial, Lambert's attorney did not hire an investigator or investigate Mr. Lambert's background or the backgrounds of his co-defendants who were scheduled to testify against him.<sup>108</sup> Shortly after the start of his trial, Lambert engaged in a hasty discussion with his attorney. After this discussion he pled guilty to aggravated first degree murder, and accepted a sentence of life without parole even though he was not eligible for a more severe sentence; a plea which offered him "no benefit."<sup>109</sup> He was sentenced to life without parole that afternoon.<sup>110</sup> Had his attorney done any investigation, he would have discovered that Mr. Lambert had suffered lifelong problems as a result of his mother's alcohol abuse during pregnancy.<sup>111</sup>

Collectively, the family and home environments of Washington's juvenile lifers were abysmal, marked by abuse and neglect, chemical dependency, homelessness, and other negative forces. Seventy-one percent of them had significant substance abuse problems as teenagers; forty-three percent suffered from mental illness; sixty percent reported experiencing abuse or severe neglect; and sixty-eight percent had been homeless at some point during their childhoods.<sup>112</sup> Additionally, many of these children had parents who suffered from mental illness or substance abuse, were murdered, or were incarcerated themselves.<sup>113</sup> The majority

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107. *Lambert v. Blodgett*, 248 F. Supp. 2d 988, 993 (E.D. Wash. 2003), *rev'd in part*, 393 F.3d 943 (9th Cir. 2004).

108. *Id.* at 1000.

109. *Id.* at 1002. Mr. Lambert's attorney was subsequently disbarred after the Washington State Supreme Court determined that he had "engaged in many different kinds of misconduct, involving many different clients, over a prolonged period of time." *In re Disciplinary Proceeding Against Romero*, 152 Wash. 2d 124, 136, 94 P.3d 939, 945 (2004). Mr. Lambert's youth probably played a role in his inability to challenge his attorney or recognize the poor representation he provided.

110. *Lambert*, 248 F. Supp. 2d at 993. Procedural barriers have barred Mr. Lambert from receiving any post-conviction relief based upon ineffective assistance of counsel. *See Lambert*, 393 F.3d at 943.

111. *Lambert*, 248 F. Supp. 2d at 1000.

112. COALITION REPORT, *supra* note 89, at 14–15. A national study of people serving life without parole for crimes committed as children mirror these results from Washington. *See* ASHLEY NELLIS & THE SENTENCING PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 2–12 (2012) (forty-seven percent of 1579 people serving juvenile life without parole who responded to survey reported being victims of physical abuse, seventy-nine percent reported witnessing violence in their homes before entering prison, eighty-five percent had been suspended or expelled from school, and almost sixty percent had at least one incarcerated parent).

113. COALITION REPORT, *supra* note 89, at 15 (though available information is limited, records showed that fourteen percent of the youth had at least one parent with mental illness, thirty-six percent had a parent with chemical dependency, eighteen percent experienced foster care, seven percent had at least one parent murdered, and twenty-one percent had at least one parent in prison). Each of these risk factors increases the likelihood of juvenile criminal behavior. For example,

of the boys also battled serious educational deficits, developmental delays, or learning disabilities.<sup>114</sup> At the times of their crimes, only a few of them were on track to graduate from high school and many had completely dropped out of school—one as early as the fourth grade.<sup>115</sup>

While their young ages and troubled childhoods do not excuse their crimes, the experiences of three of the men—Michael Furman, Barry Loukaitis, and Michael Skay—illustrate the trauma and circumstances many of the men serving life without parole sentences faced as children.

Michael Furman was born into a life of physical and sexual abuse, addiction, and violence. Michael was sexually abused as a child and was getting high with his uncle at thirteen.<sup>116</sup> After discovering that his father was sexually abusing his sister, Michael dropped out of school at fifteen to protect her. He and his siblings were thereafter placed in foster care.<sup>117</sup> At the time of his offense, he was high on methamphetamine and other drugs. His addled state of mind, when combined with his already diminished capacity and limited forethought, probably influenced the decisions he made before and during his crime.<sup>118</sup>

Barry Loukaitis suffers from bipolar disorder and severe depression, and he was likely delusional when he entered a junior-high classroom with a gun, killed a teacher and two other students and injured another.<sup>119</sup> While grappling with their son's mental illness, Barry's

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children with parents in prison are five to six times more at-risk to become involved in the criminal justice system. Keva M. Miller, *The Impact of Parental Incarceration on Children: An Emerging Need for Effective Interventions*, 23 CHILD & ADOLESCENT SOC. WORK. J. 472, 478 (2006).

114. COALITION REPORT, *supra* note 89, at 14 (“A quarter of the youth functioned in the low average range to borderline mentally retarded range at the time of the crime. Records also indicate that another eighteen percent showed indications of developmental delays, including provision of special education services.”). Developmental delays exacerbate the difficulties these youth had in navigating the criminal justice system. *Id.* (discussing one case in which psychologist testified that confession of youth was likely false as a result of developmental delays and police interrogation).

115. *Id.* at 15 (“One dropped out of school in the fourth grade; eleven others only made it through grades in middle school. Several of the youth bounced around from school to school—one was in as many as fourteen schools by the eighth grade. Another dropped out in the eighth grade so that he could stay home to protect his sister from being molested by his father. Despite the young age at which these youth left the school system, their departures appear to have gone unnoticed.”).

116. WASH. DEP'T OF CORR., CRIMINAL HISTORY SUMMARY REGARDING MICHAEL FURMAN (2005).

117. *Id.*

118. *Cf.* State v. Furman, 122 Wash. 2d 440, 445, 858 P.2d 1092, 1096 (1993) (relating an expert witness' testimony that Furman's use of methamphetamine made him unable to reflect or deliberate about the mechanics or consequences of his actions).

119. Judgment & Sentence, State v. Loukaitis, No. 96-1-00548-0 (Grant Cnty. Wash. Super. Ct. Oct. 10, 1997). The sentencing court recognized that Mr. Loukaitis suffered from mental illness at the time of his crime. The court recommended that Mr. Loukaitis receive treatment while in prison for his serious mental health disorders. *Id.*

parents divorced and his mother became suicidal. Diagnosed with bipolar disorder herself, Barry's mother often threatened to kill herself in front of Barry, including telling him her plan to kidnap his father and his new girlfriend and force them to watch her commit suicide. These threats continued up to the period directly before his crimes.<sup>120</sup>

Michael Skay's mother was a prostitute and chronic drug abuser who often left him alone for days on end from the time he was an infant. Michael did not meet his father until he was ten years old, upon his father's release from prison. One of his mother's live-in boyfriends physically and psychologically abused Michael, his siblings, and his mother. After the family moved out-of-state to escape the boyfriend's violence, the man stalked them, repeatedly threatening Michael's mother's life. The man eventually murdered her only one year before Michael and an older co-defendant murdered an acquaintance and threw his body in a Snohomish County river.<sup>121</sup>

Furman, Loukaitis, and Skay experienced horrific childhoods before they turned on their victims. Similar stories of abuse, chemical dependency, and mental illness can be found in the records of other juvenile offenders.<sup>122</sup>

Many of the men currently serving life without parole illustrate the degree to which rehabilitation is possible as children age and become adults. Barry Massey and others have taught and counseled newly arrived inmates on how to take steps to change their lives in order to prosper upon release.<sup>123</sup> Herbert Rice was sentenced to life without

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120. Peggy Andersen, *Loukaitis' Mother Says She Told Son of Plan to Kill Herself*, SEATTLE TIMES, Sept. 8, 1997, at B1.

121. Memorandum of Defendant Re: Sentencing, *State v. Skay*, No. 95-1-01942-5 (Snohomish Cnty. Wash. Super. Ct. Aug. 13, 1996).

122. A few of the men were sentenced before the Washington State Supreme Court outlawed application of the death penalty to children in 1993. *See Furman*, 122 Wash. 2d at 440, 858 P.2d at 1092. In a few other cases, courts held pre-trial declination hearings in order to decide whether to transfer the child from juvenile to adult court. *See, e.g., State v. Massey*, 60 Wash. App. 131, 135, 803 P.2d 340, 343 (1990). Court records contain some information regarding these men because of the development of some mitigation evidence as part of death penalty or declination proceedings. However, even though some information may have been considered by courts at the time of the original sentencings, these cases arose before the development of the new neurological science that supports *Miller's* holding and the analysis it requires. Moreover, the *Miller* Court explicitly found that the evaluation of mitigating evidence during a declination process to adult court is not sufficient to support a life without parole sentence for a child. *Miller v. Alabama*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2455, 2474–75 (2012). Mitigating information regarding many of the men has yet to be investigated or developed because the mandatory nature of the life without parole sentence imposed upon them rendered such factual development irrelevant to their sentencing decisions.

123. Paige Dickerson, *Lifers Lead Classes to Prepare Other Prisoners for Success Beyond Cell Walls*, PENINSULA DAILY NEWS (Sept. 7, 2010), <http://www.peninsuladailynews.com/article/>

parole for the double murder of an elderly couple in their home that he and another boy committed in 1988.<sup>124</sup> While serving his sentence, Mr. Rice has supported other Native American prisoners and their families from behind bars and organized cultural events that honor and celebrate Native American culture and community.<sup>125</sup>

While these men committed terrible crimes as children, they have demonstrated the development and redemption that can occur while behind bars as teenagers age into grown men. Their lives illustrate real world examples of why the *Roper*, *Graham*, and *Miller* Courts compelled states to treat youth differently than adults when considering extreme criminal sentences. A court or parole board should consider how detrimental environmental factors, typical immaturity of youth, and characteristics particular to the individual child combined to lead these now men to prison and whether they have used the time there wisely.

The example of Ansel Hofstetter proves that resentencings may result in significantly different sentences than those originally imposed. Ansel Hofstetter was originally sentenced to life without parole for a murder he committed as a sixteen-year-old.<sup>126</sup> He was recently resentenced after he directly petitioned the original sentencing court for a new sentence following *Miller*.<sup>127</sup> The Pierce County Superior Court vacated his 1992 life without parole sentence and imposed a determinate forty-year sentence in its place.<sup>128</sup> While he is still subject to an extremely long sentence, Ansel Hofstetter's case demonstrates how resentencings may result in many of these men receiving different sentences from the ones originally imposed. However, his new forty-year mandatory determinate sentence also illustrates another related issue: whether and to what extent the principles announced in *Roper*, *Graham*, and *Miller* apply anytime a

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20100907/news/309079993/lifers-lead-classes-to-prepare-other-prisoners-for-success-beyond; Nina Shapiro, *Gov. Gregoire: One Tough Clemency Judge*, SEATTLE WEEKLY (July 3, 2007), <http://www.seattleweekly.com/2007-07-04/news/gov-gregoire-one-tough-clemency-judge>.

124. *See* State v. Rice, 120 Wash. 2d 549, 554, 844 P.2d 416, 418 (1993).

125. Sara Jean Green, *Children Bring Joy to Prison Powwows*, SEATTLE TIMES, May 28, 2012, at A1.

126. State v. Hofstetter, 75 Wash. App. 390, 391 n.1, 878 P.2d 474, 475 n.1 (1994).

127. Ansel Hofstetter's case is unique in that he sought relief directly from the trial court. Most of the other thirty men filed personal restraint petitions directly with the Washington State Supreme Court, which has not yet ruled on any of those petitions. *See, e.g., In re McNeil*, No. 87654-1 (Wash. Sup. Ct. filed July 23, 2012). The trial court resentenced him after *Miller* without waiting for direction from the Washington State Supreme Court.

128. Rob Carson, *Orting Clerk Killer's Life Sentence Reduced to 40 Years*, THE NEWS TRIBUNE (Oct. 18, 2013), <http://www.thenewstribune.com/2013/10/18/2844694/orting-clerk-killers-life-sentence.html>.

court imposes a long determinate sentence upon a child.<sup>129</sup>

#### IV. THE PRINCIPLES FROM THE *MILLER/GRAHAM* LINE OF CASES APPLY TO OTHER LONG SENTENCES IMPOSED UPON CHILDREN

There are many people in Washington's prisons serving long determinate sentences that functionally amount to life without parole. Though in theory a term of years will end, in many cases, because of the extreme length of the imposed term, the condemned will not survive to see his release date. In function, these long, determinate "life equivalent" or "de facto life" sentences *are* life in prison without the possibility of parole; both extreme sentences ensure that the defendant will die in prison. Furthermore, even if a child can actuarially expect to survive a long prison sentence, decades-long mandatory determinate sentences may be grossly disproportionate when applied to that particular child. Accordingly, principles from *Graham* and *Miller* should equally apply to long determinate sentences.<sup>130</sup>

*Graham* and *Miller* announced two new rules related to the criminal sentencing of children. *Miller* commanded that before sentencing any child to life without parole, a court must provide the child with an individualized sentencing hearing.<sup>131</sup> *Graham* required that any child convicted of a non-homicide receive a "realistic opportunity to obtain release" at some point in the future.<sup>132</sup> The Supreme Court's message in *Graham* and *Miller* is clear: individualized sentencing and parole eligibility should be essential features of sentencing structures involving children where long sentences are contemplated.

In most cases, Washington's Sentencing Reform Act (SRA)

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129. Mr. Hofstetter was sentenced to a forty-year term under Washington's Sentencing Reform Act (SRA), WASH. REV. CODE § 9.94A.010 *et seq.* (2012), which requires that a judge impose a sentence within a sentencing range determined by the nature of the conviction, the existence of other sentence enhancements, and the defendant's criminal record. *See id.* § 9.94A.530 (standard sentence range); *id.* § 9.94A.533 (adjustments to standard sentences). Because of the mechanistic manner in which criminal sentences are imposed under the SRA, Hofstetter's recent SRA sentencing did not include the type of thorough individualized examination of all mitigating factors that *Miller* and now Washington law require.

130. *See State v. Ragland*, 836 N.W.2d 107, 121 (Iowa 2013) ("*Graham* requires a 'meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation' during the offender's expected lifetime, and *Miller* requires an individualized consideration of youth as a mitigating factor at a sentencing hearing if such a realistic, meaningful opportunity will not be available." (citations omitted)).

131. *Miller v. Alabama*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2455, 2469–75 (2012).

132. *Graham v. Florida*, 560 U.S. 48, 82 (2010).

determines the range of a permissible criminal sentence, based upon the nature and seriousness of the crime and the defendant's offender score.<sup>133</sup> Sentences for certain crimes must be served consecutively and mandatory sentence "enhancements" can add many additional years.<sup>134</sup> In limited, exceptional circumstances, a court may impose a sentence below the standard range.<sup>135</sup> However, "age is not alone a substantial and compelling reason to impose an exceptional sentence."<sup>136</sup> And courts may not rely on many of the *Miller* factors to grant an exceptional downward departure from the standard sentencing range.<sup>137</sup> In fact, "[t]he SRA does not require courts to be more lenient to juveniles or even encourage it."<sup>138</sup> The interplay of these various sentencing laws can, in certain circumstances, require the imposition of determinate term sentences of fifty years or longer.<sup>139</sup> Such long mandatory determinate sentences or "life-equivalent" sentences, while not technically life without parole, carry with them similar constitutional deficiencies.<sup>140</sup>

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133. WASH. REV. CODE § 9.94A.505. The defendant's prior criminal record determines the offender score. *Id.* § 9.94A.525. As detailed below, special rules apply to sentencing for aggravated first degree murder. *See id.* § 10.95.030.

134. *Id.* § 9.94A.589(b) (sentences for serious violent crimes must be served consecutively); *id.* § 9.94A.533(e) (firearms enhancements must be served consecutively to sentence for underlying offense).

135. *Id.* § 9.94A.535; *cf. In re Mulholland*, 161 Wash. 2d 322, 331, 166 P.3d 677, 682 (2007) (holding that trial courts with discretion to run sentences for multiple counts of first degree assault concurrently in exceptional circumstances).

136. *State v. Ha'mim*, 132 Wash. 2d 834, 847, 940 P.2d 633, 639 (1997); *see also State v. Scott*, 72 Wash. App. 207, 218–19, 866 P.2d 1258, 1264 (1993), *aff'd sub nom. State v. Ritchie*, 126 Wash. 2d 388, 894 P.2d 1308 (1995) ("Scott asserts that his youth, 17 years old at the time of the crime, limited his 'capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law,' and thus, the exceptional sentence [above the standard range] was improper. This argument borders on the absurd." (quoting WASH. REV. CODE § 9.94A.390(1)(e))).

137. *See, e.g., Ha'mim*, 132 Wash. 2d at 847, 940 P.2d at 639 (age); *State v. Freitag*, 127 Wash. 2d 141, 144, 896 P.2d 1254, 1256 (1995) (desire to improve self through community service); *State v. Hodges*, 70 Wash. App. 621, 624, 855 P.2d 291, 293 (1993) (selling drugs to put food on the table); *State v. Sanchez*, 69 Wash. App. 255, 260, 848 P.2d 208, 211 (1993) (limited education); *State v. Allert*, 58 Wash. App. 200, 205, 791 P.2d 932, 935 (1990), *rev'd*, 117 Wash. 2d 156, 815 P.2d 752 (1991) (depression and alcoholism); *State v. Estrella*, 115 Wash. 2d 350, 359–60, 798 P.2d 289, 293 (1990) (willingness to rehabilitate); *State v. Pennington*, 112 Wash. 2d 606, 611, 772 P.2d 1009, 1012 (1989) (drug or alcohol problem); *State v. Rogers*, 112 Wash. 2d 180, 185, 770 P.2d 180, 182 (1989) (emotional and psychological stress); *State v. Pascal*, 108 Wash. 2d 125, 137, 736 P.2d 1065, 1072 (1987) (lack of danger to community and no criminal record).

138. *State v. Ramos*, 174 Wash. App. 1042, No. 30279–2–III, at \*13 (Apr. 16, 2013) (unpublished).

139. *See, e.g., State v. Solis-Diaz*, 152 Wash. App. 1038, 2009 WL 3261249, at \*3 (Oct. 13, 2009) (unpublished) (sixteen-year-old defendant sentenced to 1111 months in prison following conviction on six counts of first degree assault with mandatory firearm enhancements).

140. *See Moore v. Biter*, 725 F.3d 1184, 1191 (9th Cir. 2013) (finding a 254-year sentence

These life-equivalent cases and the life-without-parole cases share defining characteristics. Each involves a crime committed by a child. Many of these children are undoubtedly impacted by the psychosocial, neurological, and environmental factors that led Kuntrell Jackson and Evan Miller to commit murder. Furthermore, each faces a long determinate sentence that the child will not outlive; functionally life without parole.<sup>141</sup> The unpleasant realities of prison life reduce the life expectancies of many prisoners incarcerated as children.<sup>142</sup> And so, even determinate term sentences of no more than a few decades may actually

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“indistinguishable” from life without parole); *State v. Ragland*, 836 N.W.2d 107, 121–22 (Iowa 2013) (holding a mandatory minimum sixty-year term before parole eligibility is “functional equivalent of life without parole”); *People v. Caballero*, 282 P.3d 291, 295 (Cal. 2012) (finding a 110-year mandatory minimum term violates *Graham*); *In re Grisby*, 121 Wash. 2d 419, 424, 853 P.2d 901, 903 (1993) (finding that consecutive minimum sentences that require more than two hundred years before first parole eligibility result in “functional equivalent” of life without parole sentence).

141. A number of courts have recognized that, at some point, long determinate sentences become life-without-parole sentences. *Moore*, 725 F.3d at 1191 (“Moore’s sentence of 254 years is materially indistinguishable from a life sentence without parole because Moore will not be eligible for parole within his lifetime.”); *Ragland*, 836 N.W.2d at 121–22 (mandatory minimum sixty-year term is “functional equivalent of life without parole”); *Caballero*, 282 P.3d at 295; *Grisby*, 121 Wash. 2d at 424, 853 P.2d at 903. However, efforts to determine the length of a “life” term prospectively have been criticized. See *In re Diaz*, 170 Wash. App. 1039, 2012 WL 5348865, at \*7 n.6 (Sept. 8, 2012) (unpublished); *Henry v. State*, 82 So. 3d 1084, 1089 (Fla. Dist. Ct. App. 2012), review granted, 107 So. 3d 405 (Fla. 2012) (“At what number of years would the Eighth Amendment become implicated in the sentencing of a juvenile: twenty, thirty, forty, fifty, some lesser or greater number? Would gain time be taken into account? Could the number vary from offender to offender based on race, gender, socioeconomic class or other criteria? Does the number of crimes matter? There is language in the *Graham* majority opinion that suggests that no matter the number of offenses or victims or type of crime, a juvenile may not receive a sentence that will cause him to spend his entire life incarcerated without a chance for rehabilitation, in which case it would make no logical difference whether the sentence is ‘life’ or 107 years. Without any tools to work with, however, we can only apply *Graham* as it is written. If the Supreme Court has more in mind, it will have to say what that is.”).

142. A person suffers a two-year decline in life expectancy for every year locked away in prison. Evelyn J. Patterson, *The Dose–Response of Time Served in Prison on Mortality: New York State, 1989–2003*, 103 AM. J. OF PUB. HEALTH 523, 526 (2013). The high levels of violence and communicable diseases, poor diets, and shoddy health care all contribute to a significant reduction in life expectancy behind bars. See *United States v. Taveras*, 436 F. Supp. 2d 493, 500 (E.D.N.Y. 2006) (finding “persistent problems in United States penitentiaries of prisoner rape, gang violence, the use of excessive force by officers, [and] contagious diseases” that lead to a lower life expectancy in prisons in the United States), *aff’d in part, vacated in part sub nom.* *United States v. Pepin*, 514 F.3d 193 (2d Cir. 2008); JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, *CONFRONTING CONFINEMENT* 11 (2006). Entering prison at a young age is particularly dangerous. Youth incarcerated in adult prisons are five times more likely to be victims of sexual or physical assault than are adults. GIBBONS & KATZENBACH, *supra* note 142, at 11; Deborah LaBelle, *Michigan Life Expectancy Data for Youth Serving Natural Life Sentences*, <http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf> (last visited Dec. 12, 2013).



result in life in prison. Finally, even if a prisoner survives long enough to see release after a long determinate sentence, parole may be effectively meaningless because of the prisoner's age and related disabilities and limitations.

The Supreme Court in *Graham* viewed the concept of "life" as broader than simply biological survival. It implicitly endorsed the notion that release from prison should be available at a time at which a defendant might actually "live" outside the prison walls for some appreciable period.<sup>143</sup>

Life in prison without the possibility of parole gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope. Maturity can lead to that considered reflection which is the foundation for remorse, renewal, and rehabilitation. A young person who knows that he or she has no chance to leave prison before life's end has little incentive to become a responsible individual.<sup>144</sup>

Parole eligibility must therefore begin early enough that the prisoner can expect to enjoy some significant quality of life upon release. Until very recently, children like Guadelupe Solis-Diaz faced decades long sentences, with no realistic opportunity for any future life outside prison walls, and without any court considering any of the mitigating factors identified in *Miller*.

Sixteen-year-old Guadelupe Solis-Diaz fired seven shots at a group of people standing in front of a Centralia bar from a car driven by a twenty-one-year-old accomplice on August 10, 2007.<sup>145</sup> He missed everyone. Following his arrest, Solis-Diaz was charged with six counts of first-degree assault, one count of drive-by shooting, and the unlawful possession of a firearm.<sup>146</sup> The teenager rejected a prosecution plea offer of 180 months and proceeded to trial. Tried as an adult, he was convicted and sentenced to 1111 months—over ninety-two years—in

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143. *Graham v. Florida*, 560 U.S. 48, 69–70 (2010) ("The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration.").

144. *Id.* at 79.

145. *In re Diaz*, 170 Wash. App. 1039, 2012 WL 5348865, at \*1 (Sept. 18, 2012) (unpublished). Solis-Diaz's case also demonstrates how a defendant's youth can cloud his judgment as discussed above. Solis-Diaz rejected a plea offer of 180 months imprisonment. Even though video evidence placed him with a gun in the car at the time of the shooting, eyewitnesses identified him as the shooter, and his alleged alibi witnesses were all easily discredited, he nonetheless rejected the plea offer and decided to proceed to trial. *Id.*; see also *State v. Solis-Diaz*, 152 Wash. App. 1038, 2009 WL 3261249 (Oct. 13, 2009) (unpublished).

146. *In re Diaz*, 170 Wash. App. 1039, at \*1.

prison. His attorney called no witnesses on his behalf at his sentencing hearing.<sup>147</sup> Solis-Diaz was condemned to die in prison for a crime which injured no one and without any court considering any mitigating factors. His case exemplifies the harsh and disproportionate consequences that can arise under a mandatory determinate sentencing scheme that does not allow for individualized sentencing or a realistic opportunity for parole.

Other men and women housed in Washington's prisons share similar fates. And while the particular circumstances that led these life-equivalent inmates to prison have not received significant attention, certain facts are known. Data provided by Washington State's Department of Corrections (DOC) indicates that as of November 2010 there were more than 220 people serving sentences of longer than twenty years for crimes they committed as children.<sup>148</sup> More than twenty people are serving determinate terms of between forty and fifty years, and an additional twenty-three people are serving terms of more than fifty years.<sup>149</sup> Forty percent of people serving more than twenty years are people of color.<sup>150</sup> The DOC estimates that over fifteen percent of people serving more than twenty years are serving long determinate sentences for non-homicide related crimes committed as children.<sup>151</sup> While they committed crimes in which no one died, they nonetheless received long, mandatory determinate sentences. Fortunately, courts, legislatures, and the public in general have begun to push back against the imposition of such severe criminal sentences.

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147. *Id.* Because of the nature of the charges against him and his age, Solis-Diaz was "auto-declined" without a hearing from juvenile court into adult court. *See* WASH. REV. CODE § 13.04.030(1)(e)(v)(E)(I) (2012). Solis-Diaz's attorney failed to call a single witness at his sentencing hearing or even argue that his age should be considered a mitigating factor in deciding the appropriate sentence within the 927 to 1111 month range. *In re Diaz*, 170 Wash. App. 1039, at \*2. Upon collateral review, the Court of Appeals remanded Solis-Diaz's case to the trial court for resentencing because of ineffective assistance of counsel at the sentencing stage. *Id.* at \*7.

148. In October 2009 and again in November 2010, advocates with Columbia Legal Services (CLS) requested and received demographic data from DOC for all people incarcerated as children in Washington's prisons as of those dates. The authors and others have reviewed that data which is on file with CLS. DOC JLWOP INFORMATION, *supra* note 88.

149. *Id.*

150. *Id.* The Washington State DOC recently released information about the people that it believes are eligible for resentencings or parole reviews under the Senate Bill. CLS independently reviewed extensive DOC records and has reached different conclusions regarding the precise numbers of inmates the Senate Bill affects. CLS is working with DOC to clarify the discrepancy and ensure that all eligible people receive resentencings or parole reviews.

151. DOC JLWOP INFORMATION, *supra* note 88.

V. *MILLER AND GRAHAM ILLUSTRATE A LARGER TREND AWAY FROM SENTENCING YOUTH TO THE MOST SEVERE CRIMINAL SENTENCES*

Science reaffirms the fundamental differences between youth and adults that the law and society have long recognized. Laws prohibit children under eighteen from engaging in a number of otherwise legal activities—from smoking and drinking to voting and serving on a jury. Private industry also regulates the behavior of young people. Because they tend to drive more recklessly and cause more accidents, most automobile rental companies refuse to rent to anyone under the age of twenty-one and require that anyone under the age of twenty-five pay an additional “risky driver surcharge.”<sup>152</sup> These long-standing limitations on the conduct of children are justified—largely because of their diminished capacities, the likelihood that they will act in rash and socially irresponsible ways, and because of their susceptibility to harsh environmental influences.<sup>153</sup>

Because of these inherent traits of childhood, such legally recognized limitations do not violate a child’s rights. “States validly may limit the freedom of children to choose for themselves in the making of important, affirmative choices with potentially serious consequences.”<sup>154</sup> This “separate analysis of juvenile constitutional rights [is] justified by

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152. See, e.g., *Terms and Conditions*, AVIS, [http://redirect.avis.com/corp\\_accounts/tandc.html](http://redirect.avis.com/corp_accounts/tandc.html) (last visited Aug. 22, 2014); *Age Restrictions and Surcharges*, BUDGET, <http://www.budget.com/budgetWeb/html/en/common/agePopUp.html> (last visited Aug. 22, 2014); *Rent a Car Under 25*, DOLLAR, [http://www.dollar.com/car\\_rental\\_information/main/rent\\_a\\_car\\_under\\_25](http://www.dollar.com/car_rental_information/main/rent_a_car_under_25) (last visited Aug. 22, 2014).

153. By statute, people under the age of eighteen may not legally engage in any of the following activities: serve in the military without parental consent, 10 U.S.C. § 505(a) (2012); marry without parental permission, WASH. REV. CODE § 26.28.015(1) (2012); execute a will, *id.* § 26.28.015(2); vote, *id.* § 26.28.015(3); enter into legally binding contracts, *id.* § 26.28.015(4); consent to all forms of medical care without parental permission, *id.* § 26.28.015(5); serve on a jury, *id.* § 2.36.070 (2012); consent to sexual activity, *id.* § 9A.44.093 (2012) (sexual misconduct with a minor in the first degree); purchase or view pornography, *id.* §§ 9.68.050–9.68.060 (2012); smoke, *id.* § 70.155.080 (2012); gamble, *id.* § 67.70.120; drink alcohol, *id.* § 66.44.270 (2012); purchase tobacco, *id.* § 26.28.080; or pawn personal items, *id.* § 19.60.066 (2012).

154. *Bellotti v. Baird*, 443 U.S. 622, 635 (1979); *cf.* *State v. Sieyes*, 168 Wash. 2d 276, 304, 222 P.3d 995, 1009 (2010) (“[T]he State may limit the constitutional rights of adolescents in circumstances different from those applied to adults in some contexts.”). For example, states may limit children’s First Amendment rights, *Ginsberg v. New York*, 390 U.S. 629, 636–43 (1968), access to abortion services, *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 899 (1992) (holding that states may require parental consent for a minor to obtain an abortion), and procedural protections in criminal matters, *Application of Gault*, 387 U.S. 1, 30 (1967) (holding that juvenile court need not provide same procedural protections as adult criminal court), without violating the Constitution.

(1) the particular vulnerability of children; (2) their inability to make decisions in an informed, mature manner; and (3) the importance of the parental role in child rearing.”<sup>155</sup> Therefore, the legal landscape is “replete with laws and judicial recognition that children cannot be viewed simply as miniature adults.”<sup>156</sup>

Society and the law treat youth differently than adults because youth and adults *act* differently. The *Miller* decision reaffirms this time-honored principle.<sup>157</sup> However, during the period when most of the men serving life without parole in Washington were sentenced, there was a movement away from this belief.

In the 1980s and 1990s, criminal justice policy and practice was influenced by the notion that the country was facing an epidemic of “juvenile superpredators.” Princeton Professor John DiIulio, who coined the term, warned of a growing storm of “radically impulsive, brutally remorseless” teenagers who “murder, assault, rape, rob, burglarize, deal deadly drugs, join gun-toting gangs, and create serious communal disorders.”<sup>158</sup> Academics blamed this development on a culture of “moral poverty” in which youth were “surrounded by deviant delinquent and criminal adults in abusive, violence-ridden, fatherless, Godless and jobless settings.”<sup>159</sup> These views were shared by many influential academics and policy makers.<sup>160</sup>

This focus on “predatory teenagers” had a racist overtone. Throughout the 1990s, youth of color were “overrepresented as perpetrators and underrepresented as victims in media crime stories.”<sup>161</sup>

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155. *Sieyes*, 168 Wash. 2d at 305 n.11, 222 P.3d at 1009 n.11 (Johnson, J., concurring in part and dissenting in part).

156. *J.D.B. v. North Carolina*, \_\_ U.S. \_\_, 131 S. Ct. 2394, 2404 (2011) (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 114–15 (1982)).

157. See generally *Miller v. Alabama*, \_\_ U.S. \_\_, 132 S. Ct. 2455 (2012).

158. John J. DiIulio, Jr., *The Coming of the Superpredators*, WEEKLY STANDARD, Nov. 27, 1995, at 23 (“We’re talking about elementary school youngsters who pack guns instead of lunches. We’re talking about kids who have absolutely no respect for human life and no sense of the future.”).

159. Knight-Ridder, *Experts: Kids Not Mutating Rising Violence Rate Blamed on Firearms*, SPOKANE SPOKESMAN-REVIEW, May 29, 1996, at 1.

160. See, e.g., James Q. Wilson, CRIME AND PUBLIC POLICY 507 (1995) (predicting thousands more “young muggers, killers and thieves”); Peter Annin, ‘Superpredators’ Arrive: Should We Cage this New Breed of Vicious Kids, NEWSWEEK, Jan. 22, 1996, at 57 (Cook County State Attorney Jack O’Malley stated, “It’s ‘Lord of the Flies’ on a massive scale . . . Those states that fail to prepare for the superpredators will regret it.”); *Violent Crimes Down For Fifth Straight Year*, SPOKANE SPOKESMAN-REVIEW, Jun. 4, 1997, available at <http://www.spokesman.com/stories/1997/jun/04/violent-crimes-down-for-fifth-straight-year> (Spokane Police Chief Terry Mangan claimed that the five-year decrease in Washington’s juvenile crime rate would be “short-lived” and that “we shouldn’t rest on our laurels.”).

161. Perry L. Moriearty, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 MD. L.

Academics played to the fear of children of color:

Think how many black children grow up where parents neglect and abuse them, where other adults and teenagers harass and harm them, where drug dealers exploit them. Not surprisingly, in return for the favor, some of these children kill, rape, maim, and steal without remorse.<sup>162</sup>

Though crime rates had remained steady since the 1970s and fell to historically low levels in the following years,<sup>163</sup> this discourse infected the media's coverage of youth and crime throughout the 1990s,<sup>164</sup> and affected how children were tried and sentenced. Forty-nine states, including Washington State, passed laws to allow for easier or automatic transfer of juveniles to the adult criminal system between 1992 and 1999.<sup>165</sup> Supporters demanded that children convicted of serious crime face adult sentences.<sup>166</sup> Juveniles transferred into the adult criminal court

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REV. 849, 852 (2010).

162. John J. DiIulio, Jr., *My Black Crime Problem, and Ours*, CITY JOURNAL (1996), available at [http://www.city-journal.org/html/6\\_2\\_my\\_black.html](http://www.city-journal.org/html/6_2_my_black.html).

163. In 1994, eighty-eight percent of Americans believed that crime was at an all-time high. In fact, violent crime rates had remained relatively steady since the early 1970s and property crime was significantly reduced from what it had been in earlier decades. Crime rates began dropping precipitously in the early 1990s and have remained historically low since that time. Lydia Salad, *Most Americans Believe Crime in U.S. is Worsening*, GALLUP WELLBEING (Oct. 31, 2011), <http://www.gallup.com/poll/150464/americans-believe-crime-worsening.aspx>.

164. Between 1990 and 1995, the three major television networks increased the number of crime stories aired during their nightly newscasts from an average of fewer than 560 stories per year to over 2500; a 462 percent increase in just five years. See Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 422–23 (2006). National magazines warned Americans about the supposed "superpredators." See, e.g., Annin, *supra* note 160; Margaret Carlson, *Children Without Souls*, TIME, Dec. 2, 1996, at 70; Richard Lacayo, *Now for the Bad News: A Teenage Time Bomb*, TIME, Jan. 15, 1996, at 52 ("So long as we fool ourselves in thinking that we're winning the war against crime, we may be blindsided by this bloodbath of teenage violence that is lurking in the future."); Tom Morganthau, *The Lull Before the Storm?*, NEWSWEEK, Dec. 5, 1995, at 40; *Kids Without a Conscience?*, PEOPLE, Jun. 23, 1997, at cover. Local media added its voice. "More and more children in this state are killing and beating people. . . . Almost no community is immune." Marsha King, *Youth Crime Is Rising Fast, and Everyone Is a Victim*, SEATTLE TIMES, Oct. 17, 1993, at A1; Laura Myers, *The Rise of 'The Young and the Ruthless': Juvenile-Crime Report Finds America's Children More Violent, More Victimized*, SEATTLE TIMES, Sept. 7, 1995, at A5 (predicting an approaching tsunami of youth crime, because "[t]he children are poorer. There are more minorities. And they have more guns.>").

165. See JESSICA SHORT ET AL., DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM 7 (2005). In 1997, the Washington State Legislature passed House Bill 3900, which permitted the automatic transfer of sixteen- and seventeen-year-olds into the adult criminal system for certain offenses. Engrossed 3d Substitute H.B. 3900, 55th Leg., Reg. Sess. (Wash. 1997).

166. See Norm Maleng, Editorial, *A Stronger Response to Youth Violence*, SEATTLE TIMES (Jan. 7, 1994), available at <http://community.seattletimes.nwsourc.com/archive/?date=19940107&slug=>

were on the whole sentenced to *longer* terms than adults with similar convictions during the 1990s.<sup>167</sup> Eighty percent of the men sentenced to juvenile life without parole in Washington were sentenced between 1987 and 1999.<sup>168</sup> While youth of color make up twenty-nine percent of the children in Washington, fifty percent of the men serving life without parole for crimes they committed as children are people of color.<sup>169</sup>

The juvenile “superpredators” never arrived. After a brief, small increase in juvenile crime, violent crime rates among young people have plummeted since 1993 to all-time lows despite an increase in the overall juvenile population.<sup>170</sup> These demographic realities have led even Professor DiIulio and other former proponents of this discredited theory to acknowledge they were wrong.<sup>171</sup>

As the public concern died away, sentencing behaviors changed. No

1888390; cf. Kery Murakami, *Legislators, Locke Agree on Juvenile-Justice Bill*, SEATTLE TIMES, Apr. 26, 1997, at C5.

167. Donna Bishop & Charles Frazier, *Consequences of Transfer*, in THE CHANGING BORDERS OF JUVENILE JUSTICE: TRANSFER OF ADOLESCENTS TO THE CRIMINAL COURT 234–36 (Jeffrey Fagan & Franklin E. Zimmering eds., 2000). During most of the period between 1985 and 2001, youth convicted of murder in the United States were more likely to be sentenced to life without parole sentences than adult murder offenders. HUMAN RIGHTS WATCH & AMNESTY INT’L, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 2 (2005); cf. *State v. Null*, 836 N.W.2d 41, 53, 71 (Iowa 2013) (discussing superpredator theory and its impact on sentencing of youth, while holding that *Miller* requires individualized sentencing of youth sentenced to mandatory minimum 52.5 year term).

168. See *infra* Appendix A.

169. COALITION REPORT, *supra* note 89, at 16 (“As with declination and other sentencing, the sentencing of youth to life in prison without the possibility of parole in Washington is racially disproportionate. Of the twenty-eight youth serving life in prison without the possibility of parole, fourteen are white, three are African American, four are Asian, three are Hispanic, three are Native American, and one is African American/Native American. Youth of color make up just over 29 percent of Washington’s youth population, but 50 percent of youth sentenced to life in prison without the possibility of parole.”).

170. See CHARLES PUZZANCHERA & BENJAMIN ADAMS, OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, U.S. DEP’T OF JUSTICE, NCJ 121052, JUVENILE ARRESTS 2009, at 8 (Dec. 2011). Criminologists attribute this brief uptick in youthful violent crime in the early 1990s to the introduction of crack cocaine onto American streets, a corresponding surge in gang-related violence, and easy access to firearms. David M. Kennedy et al., *Youth Violence in Boston: Gun Markets, Serious Youth Offenders, and a Use-Reduction Strategy*, 59 L. & CONTEMP. PROBS. 147, 152 (1996).

171. See Elizabeth Becker, *As Ex-Theorist on Young “Superpredators,” Bush Aide Has Regrets*, N.Y. TIMES, Feb. 9, 2001, at A19 (quoting DiIulio, “[i]f I knew then what I know now, I would have shouted for prevention of crimes”); James Alan Fox, *A Too-Harsh Law on Juvenile Murder*, BOSTON GLOBE, Jan. 25, 2007, at A11 (“[i]t’s time to rethink our rigid juvenile murder law”). Both Professors DiIulio and James Fox signed onto an amici brief in support of the petitioners in the *Miller* case. See Brief of Jeffrey Fagan et al. as Amici Curiae in Support of Petitioners, *Miller v. Alabama*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2455 (2012) (No. 10-9647); cf. *Null*, 836 N.W.2d at 53 (discussing Professors DiIulio and Fox and the discredited superpredator theory).

Washington child has been sentenced to life without parole since 2004 and only four received such sentences from 2000 to 2004.<sup>172</sup> In recent surveys, members of the public have supported criminal justice policies that treat children as children, even those children who have committed terrible crimes.<sup>173</sup> These changing societal notions and the Supreme Court decisions set the framework for the Washington State Legislature's examination of extreme juvenile sentencing during the 2014 legislative session.

## VI. WASHINGTON'S RESPONSE TO MILLER AND GRAHAM

The 2014 legislative session saw a significant rewrite of the sentencing structure applied to children who commit serious crimes. Second Substitute Senate Bill 5064 (hereinafter "the Act" or "the Senate Bill")<sup>174</sup> that passed out of the legislature and which Governor Inslee signed on March 28, 2014, addresses two types of extreme sentences for

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172. See *infra* Appendix A. Children continue to commit terrible murders, but are not receiving life without parole sentences. See, e.g., Jonathan Martin, *Youth Confesses to Role in Murder; 14-Year Sentence Surprises Courtroom*, SEATTLE TIMES, Apr. 29, 2005, at A1 (two boys who were twelve at time of crime sentenced to twenty-six years and fourteen years respectively for murder of thirteen-year-old playmate); Josh Farley, *South Kitsap Teen Guilty of Murdering 87-Year-Old Neighbor*, KITSAP SUN, Dec. 14, 2010, available at <http://www.kitsapsun.com/news/2010/dec/14/mustard-found-guilty-in-murder-of-87-year-old/> (seventeen-year-old receives fifty-year sentence for robbing and killing eighty-seven-year-old victim); *Josh Tucker Pleads Guilty in West Richland Murder Case*, KNDO (Mar. 14, 2008), <http://www.kndu.com/global/story.asp?s=8019620>; M.L. Lyke, *Heather Opel, 14, Is Sentenced to 22 Years for Role in Murder*, SEATTLE P-I (Aug. 16, 2002), <http://www.seattlepi.com/news/article/Heather-Opel-14-is-sentenced-to-22-years-for-1093792.php> (fourteen-year-old girl sentenced to twenty-two years for participation in pre-meditated murder of a sixty-four-year-old victim); Josh Peterson, *Donald Schalchlin Sentenced to Nearly 11 Years in Prison*, KAPP TV (July 22, 2009), <http://www.kapptv.com/article/2009/jul/22/donald-schalchlin-sentenced-to-nearly-11-years-in/> (sixteen-year-old and fifteen-year-old adolescents sentenced to forty years and eleven years respectively for murder of thirteen-year-old girl and her mother); *Tacoma Brothers Plead Guilty to Killing Fellow Teenager Last Year, Get Prison Terms*, TACOMA NEWS TRIBUNE, May 20, 2013, available at <http://blog.thenewstribune.com/crime/2013/05/20/tacoma-brothers-plead-guilty-to-killing-fellow-teenager-last-year-get-prison-terms/> (sixteen- and fourteen-year-old brothers sentenced to twenty-six years and twenty-four years for murder of fifteen-year-old boy).

173. COALITION REPORT, *supra* note 89, at 19; see also NAT'L JUVENILE JUSTICE NETWORK, POLLING ON PUBLIC ATTITUDES ABOUT THE TREATMENT OF YOUNG OFFENDERS 1 (2010) (discussing a number of polls on the public's feelings regarding juvenile justice issues). In a 2012 poll, Washington residents indicated that eighty-two percent of respondents believed that all youthful murders should be eligible for parole after serving twenty-five years, while ninety-four percent believed parole eligibility is appropriate after serving thirty years. Jennifer L. Devenport, W. Wash. Univ., *Life Without Parole for Juvenile Offenders: A Survey of Washington State Residents* (2012) (unpublished manuscript) (on file with Western Washington University Department of Psychology).

174. 2d Substitute S.B. 5064, 63d Leg., Reg. Sess. (Wash. 2014).

children: sentences for aggravated first degree murder and determinate sentences of more than twenty years. The Act grants individualized sentencing hearings in some cases and automatic parole eligibility in others.

Life without the possibility of parole was the only available sentence for a child convicted of aggravated first degree murder before passage of the Senate Bill.<sup>175</sup> Courts were barred from reducing a life without parole sentence due to any mitigating factor.<sup>176</sup> The lack of sentencing discretion rendered Washington's aggravated first degree murder statute unconstitutional as applied to children following *Miller*. The Senate Bill was the legislature's effort to respond to the constitutional deficiencies of Washington's aggravated murder statute.

The Act provides for different aggravated murder sentences based upon the age of the child at the time of the crime.<sup>177</sup> Children under the age of sixteen at the time of the murder must be sentenced to an indeterminate twenty-five-to-life term.<sup>178</sup> Such children will become parole eligible after serving twenty-five years. However, release is not guaranteed.<sup>179</sup> A court may not set a lower minimum term based upon individual characteristics of the child or other mitigating factors.<sup>180</sup>

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175. WASH. REV. CODE § 10.95.030 (2012). Former Revised Code of Washington (RCW) section 10.95.030 (2012) provided for only two possible sentences following a conviction for aggravated first-degree murder: death or life in prison without the possibility of parole. *See id.* (“(1) Except as provided in subsection (2) of this section, any person convicted of the crime of aggravated first degree murder shall be sentenced to life imprisonment without possibility of release or parole . . . (2) If, pursuant to a special sentencing proceeding held under RCW 10.95.050, the trier of fact finds that there are not sufficient mitigating circumstances to merit leniency, the sentence shall be death.”). The Washington State Supreme Court prohibited the imposition of the death penalty against children in 1993. *State v. Furman*, 122 Wash. 2d 440, 458, 858 P.2d 1092, 1102–03 (1993) (*Furman* predated the United States Supreme Court's opinion in *Roper v. Simmons*, 543 U.S. 551 (2005), where the Court ruled unconstitutional the application of the death penalty to children of any age.). Therefore, prior to passage of the Senate Bill, life without parole was a mandatory sentence for any child convicted of aggravated first degree murder.

176. WASH. REV. CODE § 10.95.030(1) & (2).

177. *Compare* Act of Mar. 31, 2014, ch. 130, sec. 9(3)(a)(i), § 3, 2014 Wash. Sess. Laws 659, 667 (codified at WASH. REV. CODE § 10.95.030(3)(a)(i)) (requiring sentence of minimum twenty-five year term and maximum of life for children fifteen and younger), *with id.* ch. 130, sec. 9(3)(a)(ii), § 3, 2014 Wash. Sess. Laws at 667–68 (codified at WASH. REV. CODE § 10.95.030(3)(a)(ii)) (allowing sentence of minimum of “no less than twenty-five years” and maximum term of life for any child who is sixteen or seventeen at time of crime and explicitly providing that “[a] minimum term of life may be imposed, in which case the person will be ineligible for parole or early release”).

178. *Id.* sec. 9(3)(a)(i), § 3, 2014 Wash. Sess. Laws at 667 (codified at WASH. REV. CODE § 10.95.030(3)(a)(i)).

179. *See id.*; *id.* sec. 9(3)(f), § 3, 2014 Wash. Sess. Laws at 668 (codified at WASH. REV. CODE § 10.95.030(3)(f)).

180. *Compare id.* sec. 9(3)(a)(i), § 3, 2014 Wash. Sess. Laws at 667 (codified at WASH. REV.



Sixteen- or seventeen-year-olds convicted of aggravated first degree murder will be sentenced differently. The Senate Bill requires an individualized sentencing hearing at which the court must consider the factors set out in *Miller* before sentencing an older child.<sup>181</sup> Following such a hearing, the court must impose a maximum term of life, but has the discretion to set a minimum sentence of anywhere between twenty-five years and life.<sup>182</sup> Therefore, even after the recent statutory change, a court may sentence a sixteen or seventeen-year-old defendant to life without parole, but is no longer required to do so.<sup>183</sup>

In addition to providing parole eligibility to some children convicted of aggravated first degree murder, the Act also guarantees parole review to another category of people: those serving long determinate sentences for crimes committed as children.<sup>184</sup> Any person sentenced to a determinate sentence of more than twenty years as a child may seek parole after serving twenty years of “total confinement.”<sup>185</sup> However, the Act does not allow a court to hold a *Miller* individualized hearing during this determinate sentencing.<sup>186</sup>

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CODE § 10.95.030(3)(a)(i) (mandating indeterminate twenty-five to life term), *with id.* sec. 9(3)(b), § 3, 2014 Wash. Sess. Laws at 668 (codified at WASH. REV. CODE § 10.95.030(3)(b)) (requiring court to consider *Miller* factors when setting minimum term for sixteen and seventeen-year-olds).

181. *Id.* sec. 9(3)(b), § 3, 2014 Wash. Sess. Laws at 668 (codified at WASH. REV. CODE § 10.95.030(3)(b)). The Act explicitly requires courts to “take into account mitigating factors that account for the diminished culpability of youth as provided in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), including, but not limited to, the age of the individual, the youth’s childhood and life experience, the degree of responsibility the youth was capable of exercising, and the youth’s chances of becoming rehabilitated.” *Id.* This is a slightly different formulation than the Court’s actual language in *Miller*, which requires at a minimum that a sentencing court examine the defendant’s “chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences,” his “family and home environment,” “the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him,” and the prospects for rehabilitation while incarcerated. *Miller v. Alabama*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2455, 2468 (2012).

182. Act of Mar. 31, 2014, ch. 130, sec. 9(3)(a)(ii), § 3, 2014 Wash. Sess. Laws at 667–68.

183. *Id.*

184. *Id.* at § 10, 2014 Wash. Sess. Laws at 669 (codified at WASH. REV. CODE § 9.94A.641). As discussed above, the Act grants younger children convicted of aggravated first degree murder automatic parole eligibility after serving twenty-five years. Sentencing courts will determine the parole eligibility dates for older children after individualized sentencing hearings.

185. *Id.* at § 10(1), 2014 Wash. Sess. Laws at 669. Youth convicted of aggravated first degree murder and any person convicted of a crime committed after his eighteenth birthday are not eligible for early release under this section. *Id.* § 10(1).

186. *Compare id.* sec. 9(3)(b), § 3, 2014 Wash. Sess. Laws at 668 (providing for sentencing hearing at which *Miller* factors evaluated for sixteen- or seventeen-year-old convicted of aggravated murder), *with id.* § 10, 2014 Wash. Sess. Laws at 669 (granting parole eligibility to “any person convicted of one or more crimes committed prior to the person’s eighteenth birthday,” but not granting individualized sentencing).

The Act refers all parole decisions to Washington's Indeterminate Sentencing Review Board (ISRB). The ISRB reviews all relevant information and holds a hearing. Only limited due process protections apply in ISRB hearings.<sup>187</sup> The ISRB must order the person released unless it determines that it is likely that the person will commit a new crime after release.<sup>188</sup> This standard for release is substantially similar to that included in RCW 9.95.420, which prescribes when the ISRB must order offenders convicted of certain sex offenses paroled from prison.<sup>189</sup> If the board denies release after the parole review, it must again consider the person for parole at least every five years thereafter.<sup>190</sup> If the parole

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187. See, e.g., *In re McCarthy*, 161 Wash. 2d 234, 245, 164 P.3d 1283, 1288 (2007) (though due process does require "minimum procedural protections," an inmate serving an indeterminate term for a sex offense has no right to counsel during ISRB hearing on petition for early release); WASH. ADMIN. CODE §§ 381-90-080 to 381-90-170 (2014) (ISRB procedures that govern parole hearings for people convicted of certain sex offenses).

188. Act of Mar. 31, 2014, ch. 130, sec. 9(3)(f), § 3, 2014 Wash. Sess. Laws at 668; *id.* § 10(3), 2014 Wash. Sess. Laws at 669 (the ISRB "shall order the person released . . . unless the board determines by a preponderance of the evidence that . . . it is more likely than not that the person will commit new criminal law violations if released"). The Act obligates DOC to assess all people eligible for parole five years before the expiration of their minimum terms. As part of this assessment, DOC must identify appropriate programming and services to prepare the particular person for release. *Id.* sec. 9(3)(d), § 3, 2014 Wash. Sess. Laws at 668; *id.* § 10 (2), 2014 Wash. Sess. Laws at 669. Then, shortly before the expiration of the minimum term, DOC must again evaluate the person to gauge the likelihood the person will commit new crimes upon release. *Id.* sec. 9(3)(f), § 3, 2014 Wash. Sess. Laws at 668; *id.* § 10(3), 2014 Wash. Sess. Laws at 669 ("No later than one hundred eighty days from receipt of the petition for early release, [DOC] shall conduct, and the offender shall participate in, an examination of the person, incorporating methodologies that are recognized by experts in the prediction of dangerousness, and including a prediction of the probability that the person will engage in future criminal behavior."). DOC then passes this evaluation and other information on to the ISRB which conducts the parole eligibility review. *Id.* sec. 9(3)(f), § 3, 2014 Wash. Sess. Laws at 668; *id.* § 10(1), 2014 Wash. Sess. Laws at 669.

189. Cf. WASH. REV. CODE § 9.95.420(3)(a) (2012) ("The board shall order the offender released, under such affirmative and other conditions as the board determines appropriate, unless the board determines by a preponderance of the evidence that, despite such conditions, it is more likely than not that the offender will commit sex offenses if released."). The ISRB utilizes a series of factors in making a determination whether a sex offender is likely to reoffend. WASH. ADMIN. CODE § 381-90-150. They include: (1) any refusal to participate in available programming designed to reduce risk of re-offense; (2) serious and repeated disciplinary infractions while in prison; (3) evidence of an inmate's continuing intent or propensity to engage in sex offenses; (4) whether the inmate has expressed unwillingness to comply with any conditions of community custody; and (5) the assessment of the likelihood of future risk of re-offense. *Id.* Similar considerations will likely direct the ISRB's decision making process when addressing people to whom the Act grants parole eligibility. According to ISRB data, over forty percent of ISRB hearings resulted in a finding that the offender should be released from prison in FY 2011. See WASH. STATE DEP'T OF CORR., INDETERMINATE SENTENCE REVIEW BOARD AT A GLANCE (2011), available at [http://www.doc.wa.gov/isrb/docs/at\\_a\\_glance.pdf](http://www.doc.wa.gov/isrb/docs/at_a_glance.pdf).

190. Act of Mar. 31, 2014, ch. 130, sec. 9(3)(f), § 3, 2014 Wash. Sess. Laws at 668; *id.* § 10(1), 2014 Wash. Sess. Laws at 669.

board orders the person released, the ISRB will also set the length of community supervision to which the individual will be subject once on the outside.

The Act will have an immediate impact on the sentences of a number of people currently serving life without parole or long determinate sentences for crimes committed as children. The legislature explicitly applied the Act's provisions retroactively to the men currently serving life without parole for murders committed as children and to anyone else currently serving determinate sentences of more than twenty years.<sup>191</sup> The twenty-nine men serving life without parole will all be resentenced in the near future. Those who were sixteen or seventeen at the time of their crimes will receive individualized sentencing hearings. The men who were younger will be sentenced to indeterminate twenty-five to life terms. Some of them will be immediately parole eligible, as will a number of people serving determinate sentences of more than twenty years.<sup>192</sup>

## VII. MORE REMAINS TO BE DONE

The Senate Bill significantly alters the sentencing of children convicted of many serious crimes. While clear in certain respects, the new law leaves ample room for interpretation by courts in a number of areas. The nature of the individualized sentencing hearings required for older teenagers convicted of aggravated murder is one such area confronting Washington courts. The Senate Bill requires consideration of the *Miller* factors at sentencing, but does not provide other guidance to courts regarding these hearings.<sup>193</sup> Courts should take direction from precedent governing death penalty sentencing in fashioning rules and procedures for these hearings.

In addition, the Senate Bill does not go far enough to treat children as children during criminal sentencing. It allows courts to continue to sentence children to life without parole and it does not require individualized sentencing hearings in all cases in which such hearings are warranted. The science, societal shifts away from extreme sentences for children, and the spirit of recent Supreme Court opinions support both the complete elimination of life without parole sentences for children and the use of individualized sentencing hearings any time a

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191. *Id.* § 11, 2014 Wash. Sess. Laws at 670.

192. *Id.* sec. 9(3)(f), § 3, 2014 Wash. Sess. Laws at 668; *id.* § 10(3), 2014 Wash. Sess. Laws at 669.

193. *Id.* sec. 9(3)(b), § 3, 2014 Wash. Sess. Laws at 668.

child faces many years in prison.

A. *Similar Procedures and Rules Should Apply to the Hearings Required by the Senate Bill Because the Miller Hearings Are Substantially Similar to the Penalty Phase Hearings in Capital Murder Trials*

The Senate Bill was the legislature's response to the Supreme Court's recent juvenile sentencing cases. *Miller* and *Graham* should therefore guide the new individualized sentencing hearings that the Senate Bill creates.

The Court first in *Graham* and again in *Miller* recognized that a life without parole sentence for a child is tantamount to a sentence of death.<sup>194</sup> In reaching this conclusion, the Court asserted that life without parole sentences "share some characteristics with death sentences that are shared by no other sentences."<sup>195</sup> They both "alter[] the offender's life by a forfeiture that is irrevocable."<sup>196</sup> The severity of a life without parole sentence is particularly acute for a child because "he will inevitably serve more years and a greater percentage of his life in prison than an older offender. The penalty when imposed on a teenager, as compared with an older person, is therefore the same . . . in name only."<sup>197</sup>

Justice Kagan, writing for the *Miller* Court, reasoned that because life without parole sentences are "akin to the death penalty," they demand "a distinctive set of legal rules,"<sup>198</sup> including the need for "individualized sentencing."<sup>199</sup> *Miller*'s requirement of individual sentencing hearings explicitly rests upon the Court's capital punishment jurisprudence, which requires the same type of hearings before putting a defendant to death.<sup>200</sup> That death penalty case law should therefore guide Washington

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194. *Miller v. Alabama*, \_\_ U.S. \_\_, 132 S. Ct. 2455, 2466–67 (2012); *Graham v. Florida*, 560 U.S. 48, 70 (2010).

195. *Graham*, 560 U.S. at 70.

196. *Id.*

197. *Miller*, 132 S. Ct. at 2466 (internal citations and quotations omitted).

198. *Id.*

199. *Id.* at 2467.

200. *Id.* at 2467 ("Graham's treatment of juvenile life sentences as analogous to capital punishment makes relevant here a second line of our precedents, demanding individualized sentencing when imposing the death penalty." (quoting *Graham*, 560 U.S. at 89 (Roberts, C.J., concurring) and citing *Woodson v. North Carolina*, 428 U.S. 280 (1976) (holding that the imposition of mandatory death penalty is unconstitutional because it fails to allow for consideration of character and record of individual defendant)).

courts when deciding what is required as part of the new Act's individualized sentencings.<sup>201</sup>

Courts must consider all relevant mitigating factors before sentencing a child to die in prison to ensure the sentence is reserved for only the most extreme circumstances. As Justice Kagan noted in *Miller*, the Court's "[death penalty] decisions have elaborated on the requirement that capital defendants have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses."<sup>202</sup> Similarly, a court considering a life sentence for a child must "have the ability to consider the mitigating qualities of youth."<sup>203</sup> The breadth of the required inquiry is vast.

A sentencer must be allowed to consider "any relevant circumstance that could cause it to decline to impose the [death] penalty" during the penalty phase of a capital murder trial.<sup>204</sup> This mandate in death penalty cases requires extensive and exhaustive pre-hearing preparation and investigation. The Court has explicitly endorsed guidelines developed by the American Bar Association as indicative of what the constitution

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201. *Miller*, 132 S. Ct. at 2467. The body of case law regarding death penalty phase hearings is extensive. *See, e.g.*, *Sears v. Upton*, 561 U.S. 945 (2010) (holding that failure to develop and present evidence of abusive home environment and deficits in mental cognition and reasoning was constitutionally deficient representation); *Porter v. McCollum*, 558 U.S. 30, 40 (2009) (noting that even though defendant was "fatalistic and uncooperative" defense attorney must nonetheless conduct reasonable mitigation investigation); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (holding that defense attorney who had defendant evaluated by psychologist and gathered some documents nonetheless provided inadequate assistance of counsel because he failed to gather all relevant documents, seek additional expert testimony, or follow up on potentially mitigating evidence that review of available records uncovered); *Williams v. Taylor*, 529 U.S. 362, 395–96 (2000) (holding that defense attorney was constitutionally ineffective when he began penalty phase preparation week before trial, failed to gather relevant records, develop or introduce evidence that defendant was "borderline mentally retarded," or other evidence that militated against imposition of death); *cf. In re Yates*, 177 Wash. 2d 1, 42, 296 P.3d 872, 892 (2013) (holding counsel's failure to interview victims' family members to determine whether any of them would testify that death penalty should not be imposed constituted ineffective assistance of counsel).

202. *Miller*, 132 S. Ct. at 2467 (citing *Sumner v. Shuman*, 483 U.S. 66, 74–76 (1987); *Eddings v. Oklahoma*, 455 U.S. 104, 110–12 (1982); *Lockett v. Ohio*, 438 U.S. 586, 597–609 (1978)).

203. *Miller*, 132 S. Ct. at 2467 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

204. *McCleskey v. Kemp*, 481 U.S. 279, 306 (1987); *see also id.* ("[T]he State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant."); *Smith v. Spisak*, 558 U.S. 139, 144 (2010) ("First, the Constitution forbids imposition of the death penalty if the sentencing judge or jury is precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Second, the sentencing judge or jury may not refuse to consider or be precluded from considering any relevant mitigating evidence." (emphasis removed, internal citations and quotations omitted)).

requires as part of death penalty proceedings.<sup>205</sup> Those guidelines require pre-hearing “efforts to discover *all* reasonable available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.”<sup>206</sup>

An attorney representing an older child facing an aggravated murder charge must investigate, develop, and present a great deal of evidence regarding the child’s crime, family life, schooling, medical history and social networks to sentencing courts. Mitigation experts will be necessary to review this evidence, evaluate the defendant, and provide opinions on a variety of relevant issues.

The financial resources required to carry out a constitutionally sufficient pre-sentence investigation and individualized sentencing hearing will be substantial.<sup>207</sup> In Washington, at a minimum, a county must appoint two full-time, experienced death penalty attorneys, a mitigation specialist, and an investigator to any defendant facing the death penalty.<sup>208</sup> Counties must also provide the defense with sufficient funds to retain relevant experts.<sup>209</sup> Similar efforts will be required before a child facing a life without parole sentence can be sentenced.<sup>210</sup>

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205. *Wiggins*, 539 U.S. at 524–25 (2003); *cf. In re Yates*, 177 Wash. 2d at 41, 296 P.3d at 892 (“Prevailing norms of practice as reflected in American Bar Association [ (ABA) ] standards and the like . . . are guides to determining what is reasonable.” (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984))).

206. *Wiggins*, 539 U.S. at 524 (emphasis added) (quoting ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(C), 93 (1989)).

207. *See* WASH. REV. CODE § 10.101.030 (2012) (requiring all Washington counties and cities to adopt standards for delivery of public defense services, including standards on compensation of counsel, experts, investigators, and other administrative support for defense).

208. WASH. REV. CODE § 10.010.030 requires that all Washington counties adopt standards for public defense that track the Washington State Bar Association’s (WSBA) Standards for Indigent Defense Services. The WSBA approved standards for indigent defense services on June 3, 2011. WASH. STATE BAR ASS’N, STANDARDS FOR INDIGENT DEFENSE SERVICES (2011). WSBA Standard Fourteen delineates some of the resources that counties must make available to defendants in death penalty cases. *Id.* at 10. They include, “at a minimum, [two death penalty qualified] attorneys, a mitigation specialist and an investigator. Psychiatrists, psychologists and other experts and support personnel should be added as needed.” *Id.*; *see also id.* at 4 (WSBA Standard Four provides that “[r]easonable compensation for expert witnesses necessary to preparation and presentation of the defense case shall be provided.”); *id.* at 5 (WSBA Standard Six delineates that “[p]ublic defense attorneys shall use investigation services as appropriate. Public defender offices, assigned counsel, and private law firms holding public defense contracts should employ investigators with investigation training and experience.”); *id.* at 6 (WSBA Standard Seven provides that “[e]ach agency or attorney should have access to mental health professionals to perform mental health evaluations.”).

209. WASH. REV. CODE § 10.010.030.

210. The passage of time will significantly complicate the resentencings of some of the men currently serving juvenile life without parole. The Senate Bill applies retroactively to all of the thirty men currently serving life without parole for crimes committed as children. *See* Act of March

Counties must make those resources available because the legislature did not eliminate life without parole sentences for children. It should have.

*B. Life Without Parole Is an Unnecessary and Unjust Sentence When Imposed upon a Child*

The legislature did not go far enough during the 2014 session. It allowed Washington courts to impose life without parole sentences upon children in narrow circumstances. It should revisit this decision and completely ban them in every case. Life without parole sentences should never be imposed upon children.

The United States is the only country in the world that sentences children to die in prison.<sup>211</sup> In fact, the International Convention on the Rights of the Child explicitly forbids sentencing anyone under the age of eighteen to life without parole.<sup>212</sup> Because of the harsh consequences such sentences impose upon children and the availability of other more effective and just sentencing options, a growing number of states have entirely outlawed such sentences in all cases involving children.<sup>213</sup> As

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31, 2014, ch. 130, § 11, 2014 Wash. Sess. Laws 659, 670 (codified at WASH. REV. CODE. § 10.95.0001). Nine of them were younger than sixteen years old at the times of their crimes. DOC JLWOP INFORMATION, *supra* note 88. These nine men therefore face mandatory, indeterminate twenty-five to life terms. Act of March 31, 2014, ch. 30, sec. 9(3)(a)(i), § 3, 2014 Wash. Sess. Laws at 667. The other twenty men will be returned to the original sentencing court for full individualized resentencings. *Id.* sec. 9(3)(a)(ii), § 3, 2014 Wash. Sess. Laws at 667–68. These resentencings present many significant obstacles because of the length of time that has elapsed since the original crimes. For example, John Lee Forrester was convicted in Spokane County of aggravated first degree murder as a seventeen-year-old in 1977. *See* DOC JLWOP INFORMATION, *supra* note 88. Constructing an accurate picture of Mr. Forrester's childhood and life circumstances before coming to prison will be daunting. Potential witnesses have undoubtedly passed away, reliable records have disappeared, expert testimony regarding the person he used to be may be difficult to develop. The passage of time will require significant resources and truly able counsel in order to properly present mitigation evidence demanded by *Miller*.

211. CONNIE DE LA VEGA ET AL., CRUEL AND UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 61 (2012) (“The United States remains the only country in the world to sentence a juvenile to life without parole in practice. Eight countries have been identified as having laws that could allow for a sentence of JLWOP; however there are no known cases of the sentence being imposed. Additionally, four countries have ambiguous language regarding JLWOP; however, since there are no known cases of juveniles being sentenced, it can be determined that the country does not practice the sentence. As such, there is only one country in the world with a child serving an LWOP sentence.” (citations omitted)).

212. U.N. CONVENTION ON THE RIGHTS OF THE CHILD, Art. 37, G.A. Res 44/25, Annex, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49, at 167 (1989), *entered into force* Sept. 2, 1990. The United States and Somalia are the only two countries in the world that have not adopted the U.N. Convention on the Rights of the Child. *Graham v. Florida*, 560 U.S. 48, 81 (2010).

213. COLO. REV. STAT. § 18-1.3-401 (LexisNexis 2014) (notes reflect that the Supreme Court held “that the eighth amendment prohibits a mandatory life sentence without the possibility of parole for juvenile offenders” (citing *Miller v. Alabama*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2455 (2012)); *D.C.*

detailed above, recent local sentencing practices appear to reflect this international disfavor in sentencing children to life without parole.<sup>214</sup> While not categorically outlawing life without parole sentences for children, the Supreme Court in *Miller* expressed significant disfavor of such sentences.<sup>215</sup> International norms, societal pressures, and developing jurisprudential principles all support eradicating life without parole sentences for children in all cases.

Legitimate concerns for public safety do not require life without parole terms. The neurological and psychosocial development that all teenagers undergo means that no court can know with any certainty at the time of sentencing whether a particular defendant will become rehabilitated and redeemed over the course of many years behind bars. A long minimum-term sentence with parole eligibility allows for an extended period of incapacitation and potential rehabilitation, while also ensuring that no determination is irrevocable.<sup>216</sup> The possibility of parole also encourages defendants to pursue available rehabilitative services and avoid destructive behaviors while incarcerated.<sup>217</sup> Parole eligibility

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CODE § 22-2104 (LexisNexis 2014); HAW. REV. STAT. § 706-656 (West 2014); KAN. STAT. ANN. § 21-6618 (West 2014); KY. REV. STAT. ANN. § 640.040 (West 2014); MASS. GEN. LAWS ANN. ch. 265, § 2 (West 2014); NEB. REV. STAT. ANN. § 28-105.02 (West 2014) (providing that the maximum penalty for a person who committed a Class 1A felony under the age of eighteen is life imprisonment); N.M. STAT. ANN. § 31-21-10 (West 2014); OHIO REV. CODE ANN. § 2929.03 (West 2013–2014) (prohibiting the death penalty if the offense was committed when the perpetrator was under eighteen years old); TEX. PENAL CODE ANN. § 12.31 (West 2013); WYO. STAT. ANN. § 6-2-101 (West 2014); H.B. 4210, 81st Leg., Reg. Sess. (W. Va. 2014).

214. See discussion *supra* notes 35–36.

215. *Miller v. Alabama*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 2455, 2469 (2012) (“[G]iven all we have said in *Roper*, *Graham*, and this decision about children’s diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty . . . of distinguishing at this early age between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.’ Although we do not foreclose a sentencer’s ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” (internal citations omitted)).

216. As the Court in *Graham* recognized, the possibility that a sentence may be commuted by the Governor at some future point does not provide a realistic opportunity for release. *Graham v. Florida*, 560 U.S. 48, 70 (2010); see also *Solem v. Helm*, 463 U.S. 277, 301 (1983) (“Commutation . . . is an *ad hoc* exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards.”). Parole eligibility is the means to ensure that legitimate public safety concerns and the individual characteristics of the inmate are appropriately balanced and release granted when warranted.

217. *Graham*, 560 U.S. at 73; see also Simon Fraser University, *Prison Rehab Tied to Parole Decisions*, SCIENCE DAILY (Sept. 25, 2012), <http://www.sciencedaily.com/releases/2012/09/120925143914.htm> (stating that recent research indicates that parole board decisions impact whether and to what extent prisoners seek out opportunities for rehabilitation) (citing and quoting D.



allows a future parole board to evaluate the circumstances of each individual case in order to determine whether release is appropriate at that point. Life without parole does not present such an opportunity.

Well-known racial disparities endemic to the criminal justice system in Washington also counsel against imposition of irrevocable life without parole terms. Children of color make up a disproportionate number of the juveniles caught up in Washington's criminal justice system,<sup>218</sup> and are also overrepresented among the people serving extreme sentences for crimes committed as children.<sup>219</sup> Absent some realistic opportunity for parole and recognition at the sentencing stage of the role that race, poverty, and their attendant consequences played upon the actions of the child before the bench, those disparate impacts will be forever solidified among the people serving the longest sentences. Locking children of color behind bars for the rest of their lives with no possibility of release needlessly perpetuates a racially biased sentencing system.

As many other nations, states and courts have recognized, life without parole sentences for children are unjust and unnecessary. While the Senate Bill makes important first steps in treating children as children, the Washington Legislature should go a step further and prohibit life without parole sentences for children in all cases.

*C. A Court Should Hold an Individualized Sentencing Hearing Anytime It Imposes an Exceptionally Long Sentence upon a Child*

The Washington legislature should also require a court to consider the individual characteristics of youth whenever it is deciding whether to sentence a child to many years behind bars. Absent a change to existing law, courts will continue to impose life with parole and "life equivalent" sentences without ever considering the individual circumstances of the children before them. Individualized sentencing should occur even in circumstances where parole is possible.

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Bernhardt et al., *Rehabilitated or Not: An Informational Theory of Parole Decisions*, 28 J.L. ECON. & ORG. 186 (2010)).

218. See generally WASH. STATE TASK FORCE ON RACE AND THE CRIMINAL JUST. SYS., JUVENILE JUSTICE AND RACIAL DISPROPORTIONALITY: A PRESENTATION TO THE WASHINGTON STATE SUPREME COURT 1 (Mar. 28, 2012) (finding that "youth of color continue to be disproportionately arrested, referred to juvenile court, prosecuted, detained and sentenced to secure confinement compared to their white peers" and that "[t]here is clear evidence of persistent over-representation of youth of color at every stage of the juvenile justice system").

219. See COALITION REPORT, *supra* note 89, at 16 (people of color make up fifty percent of men serving life without parole for crimes committed as children while only twenty-nine percent of Washington's population are people of color).

Even after the Act's passage, in many cases, courts are required to sentence children to long mandatory sentences. By operation of Washington's automatic decline statute, teenagers charged with a variety of different crimes are automatically transferred to the adult system for prosecution.<sup>220</sup> Upon conviction in the adult system, sentencing enhancements, mandatory minimum terms, and mandatory consecutive sentencing laws mandate long determinate sentences without regard for the individual circumstances of the children before them.

While the Act provides parole eligibility to some children, a mandatory two decades behind bars may in many cases be an unjust sentence once all relevant factors are appropriately considered and weighed. Furthermore, in no case is parole guaranteed. A child sentenced to life with the possibility of parole may nonetheless actually serve life in prison. In each instance, a court makes a determination at sentencing whether a life sentence is appropriate based upon the individual circumstances of the case and defendant before them.

Washington courts have recognized that in some cases long prison sentences are constitutionally indistinct from life without parole sentences.<sup>221</sup> In *Matter of Grisby*,<sup>222</sup> the Washington State Supreme Court addressed the appeal of a defendant sentenced to life without the possibility of parole for the murders of five people. The *Grisby* Court ruled that such a sentence "while obviously not identical, [is] substantially similar" to the only alternative sentence for which he was eligible: five consecutive life sentences *with* the possibility of parole sentences, with initial parole eligibility only after serving two hundred years.<sup>223</sup> Given that the defendant would never live to see parole, the Court ruled that the two sentences were identical for constitutional

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220. WASH. REV. CODE § 13.04.030(1)(e)(v) (2012) (sixteen- or seventeen-year-old defendants who are charged with variety of violent offenses must be tried in adult court).

221. See *State v. Rivers*, 129 Wash. 2d 697, 714, 921 P.2d 495, 503 (1996) ("[D]istinction between life sentences with and without parole is not significant."); *In re Personal Restraint of Grisby*, 121 Wash. 2d 419, 425–31, 853 P.2d 901, 903–08 (1993) (life with parole eligibility after hundreds of years substantially similar to life without parole); *State v. Frampton*, 95 Wash. 2d 469, 528–30, 627 P.2d 922, 952–53 (1981) (Dimmick, J., concurring in part) (because life with parole and life without parole are substantially similar sentences, a statute does not treat a defendant who pleads guilty and receives life with parole differently from a defendant who elects to go to trial and receives life without parole). *But see* *State v. Thomas*, 150 Wash. 2d 821, 848, 83 P.3d 970, 983–84 (2004) (holding that "there is a significant difference between a life sentence with parole and a sentence of life without parole in the context of capital sentencing").

222. 121 Wash. 2d 419, 853 P.2d 901.

223. *Grisby*, 121 Wash. 2d at 427, 853 P.2d at 905 (quoting *Frampton*, 95 Wash. 2d at 529–30, 627 P.2d at 952–53).

harmless error analysis.<sup>224</sup>

Similarly, in *State v. Frampton*,<sup>225</sup> a majority of the Court agreed with Justice Dimmick's concurrence that life without parole sentences and life with parole sentences may be constitutionally indistinguishable in certain circumstances.<sup>226</sup> The discretionary nature of parole and the limited review available over parole decisions means that:

a defendant who pleads guilty and receives a life sentence with a possibility of parole must expect he will serve a life sentence. He will, in fact, serve the identical sentence as a defendant who . . . was sentenced to life without possibility of parole; unless the State deigns to exercise its discretion and mollify his life sentence.<sup>227</sup>

The Washington State Supreme Court recognized in this line of cases that the mere possibility of parole may not substantially alter the likelihood that an inmate will ever leave prison. The individual circumstances of each case will determine whether a particular defendant survives to see freedom. This is precisely the type of analysis the United States Supreme Court required a court to undertake when considering whether to sentence a child to life without parole.

The principle that the criminal justice system must treat children as children extends beyond the life without parole sentencing context. In *J.D.B. v. North Carolina*,<sup>228</sup> the Court, citing *Roper* and *Graham*, determined that different procedural rules apply when police interrogate children.<sup>229</sup> Because "children cannot be viewed simply as miniature adults," the constitution requires that they be treated differently than adult defendants facing police questioning.<sup>230</sup> The Supreme Court in *J.D.B.* extended the rationale of *Miller*, *Graham*, and *Roper* and

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224. *Grisby*, 121 Wash. 2d at 424–25, 853 P.2d at 903.

225. 95 Wash. 2d 469, 627 P.2d 922.

226. *Frampton*, 95 Wash. 2d at 529–30, 627 P.2d at 952–53 (Dimmick, J., concurring in part, dissenting in part).

227. *Grisby*, 121 Wash. 2d at 426–27, 853 P.2d at 905 (quoting *Frampton*, 95 Wash. 2d at 529–30, 627 P.2d at 952–53).

228. *J.D.B. v. North Carolina*, \_\_ U.S. \_\_, 131 S. Ct. 2394, 2406 (2011).

229. *Id.* at 2403 ("Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children generally are less mature and responsible than adults, that they often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them, that they are more vulnerable or susceptible to outside pressures . . . than adults, and so on.") (quoting *Roper v. Simmons*, 543 U.S. 551, 569 (2005); *Graham v. Florida*, 560 U.S. 48, 130 (2010) (internal quotations and other citations omitted)).

230. *J.D.B.*, 131 S. Ct. at 2404 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982)).

indicated that a child's "chronological age and its hallmark features"<sup>231</sup> are relevant in many different phases of the criminal justice system. Consideration of the particular characteristics of youth at sentencing is one of the most important of these principles.

Nonetheless, the Senate Bill provides sentencing courts with the discretion to make individualized sentencing decisions only when an older child is convicted of aggravated first degree murder, the most serious charge available under Washington's criminal code. The legislature should promote good public policy and preempt legal challenges to the Act by amending it to require individualized sentencing in all cases where children face decades behind bars.

### CONCLUSION

Science, legal principles, and societal norms all counsel against condemning children to die in prison. During the last session, the legislature took steps to mitigate the harsh, unnecessary consequences of long-term extreme sentences imposed upon children. However, it allowed courts to impose life without parole sentences under some circumstances and did not require individualized sentencing hearings in all cases where children face decades behind bars. The Washington State Legislature should reexamine its reforms in order to treat all children like children and provide all of them the real possibility of release.

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231. *Miller v. Alabama*, \_\_ U.S. \_\_, 132 S. Ct. 2455, 2468 (2012).

## APPENDIX A

## Information Regarding People Serving Juvenile Life Without Parole in Washington

Last Name	First Name	County	Age at Crime	Year of Crime	Year of Sentencing
Alexander	Ryan	Whatcom	16	2002	2004
Anderson	David	King	17	1997	2000
Backstrom	Brandon	Snohomish	17	1997	1999
Baranyi	Alex	King	17	1997	1999
Bassett	Brian	Grays Harbor	16	1995	1996
Boot	Kevin	Spokane	17	1994	1996
Bourgeois	Jeremiah	King	14	1992	1993
Comeslast	Kenneth	Spokane	15	1995	1996
Delbosque	Cristian	Mason	17	1993	1994
Forrester	John Lee	Spokane	17	1976	1977
Furman	Michael	Kitsap	17	1989	1990
Gaitan	Miguel	Yakima	14	1993	1993
Gilbert	Jeremiah	Klickitat	15	1992	1993
Haag	Timothy	Cowlitz	17	1994	1995
Harris	Michael	Pierce	15	1987	1988
Hofstetter	Ansel	Pierce	16	1991	1992
Lambert	Donald	Grant	14	1997	1997
Lembcke	William	Stevens	16	2000	2001
Leo	Marvin	Pierce	17	1998	2000
Loukaitis	Barry	Grant	14	1996	1997
Massey	Barry	Pierce	13	1987	1988
McNeil	Russell	Yakima	17	1988	1989
Munguia	Jose	Benton	15	1997	1998
Ngoeung	Nga	Pierce	17	1994	1995
Phet	John	Pierce	16	1998	2002
Rice	Herbert	Yakima	17	1988	1990
Skay	Michael	Snohomish	16	1995	1996
Stevenson	Sean	Skamania	16	1987	1987
Thang	Vy	Spokane	17	1997	2003
Weaver	Terence	Whatcom	16	1996	1997