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Recommended Citation

Courtney Amelung, *Responding to the Ambiguity of Miller v. Alabama: The Time Has Come for States to Legislate for a Juvenile Restorative Justice Sentencing Regime* , 72 Md. L. Rev. 21 (2013),
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RESPONDING TO THE AMBIGUITY OF *MILLER v. ALABAMA*: THE TIME HAS COME FOR STATES TO LEGISLATE FOR A JUVENILE RESTORATIVE JUSTICE SENTENCING REGIME

COURTNEY AMELUNG*

Between the late 1970s and 1990s, the criminal justice system in the United States became increasingly punitive, as a movement to restructure the sentencing process and increase sentence severity took hold.[1] The prior "rehabilitative ideal" fell apart and was replaced by an ideology that emphasized incapacitation and retribution as primary goals of criminal sentencing.[2] This shift toward a punitive ideal influenced not only the treatment of adult offenders but also juvenile offenders.[3] States enacted "tough on crime" policies in response to concerns that the juvenile justice system was unable to effectively address violent youth crime.[4] One such policy permitted states to lower the minimum age at which an adult court could exercise jurisdiction over a juvenile.[5] Consequently, some juveniles

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1. Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 413–14.

2. *Id.* at 414. Prior to its demise, the theory of rehabilitation dominated our nation's criminal justice system, receiving nearly unanimous support from criminal justice professionals. Stephen D. Sowle, *A Regime of Social Death: Criminal Punishment in the Age of Prisons*, 21 N.Y.U. REV. L. & SOC. CHANGE 497, 498 (1995). Commencing in the 1970s, however, these professionals, as well as the greater public, increasingly viewed rehabilitation as an impossible feat that rarely produced desired results (such as recidivism). *Id.* at 498–99.

3. Beale, *supra* note 1, at 415. This shift was partly a result of policymakers' prediction that "juvenile superpredators" were on the brink of committing massive violent crime throughout the nation. James Traub, *The Criminals of Tomorrow*, NEW YORKER, Nov. 4, 1996, at 50. Such crime never occurred, however, and the superpredator theory was ultimately deemed inaccurate. JODY KENT LAVY, JUVENILE JUSTICE INFO. EXCH., IN THE WAKE OF *MILLER V. ALABAMA*, STATES SHOULD RETHINK HOW TO HOLD YOUTHFUL OFFENDERS ACCOUNTABLE (2012), *available at* http://jjie.org/wake-of-miller-v-alabama-states-should-rethink-how-hold-youthful-offenders-accountable/91413.

4. Petition for Writ of Certiorari at 43, Miller v. Alabama, 132 S. Ct. 2455 (2012) (No. 10-9647), 2012 WL 523347.

5. *Id.* At the end of the 1999 legislative session, twenty-three states and the District of Columbia had at least one statutory provision that did not specify a minimum age at which a juvenile could be transferred to an adult court. Sixteen states set the minimum age at fourteen, with the remaining states falling within the spectrum of ten and fifteen years of age. OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, DEP'T OF JUSTICE, STATISTICAL BRIEFING BOOK, *available at*

convicted of homicide in adult court became subject to the mandatory life-without-parole sentences imposed by twenty-eight states and the federal government.[6] In the United States, more than 2,500 individuals are serving life-without-parole sentences for homicides they committed as juveniles.[7] More than 2,000 of those individuals were sentenced under a mandatory sentencing regime.[8]

In *Miller v. Alabama*,[9] the United States Supreme Court held unconstitutional a sentencing scheme that mandates life in prison without parole for juvenile homicide offenders. The Court's decision involved the consolidated cases of *Miller v. State*[10] and *Jackson v. State*.[11] In each case, a fourteen-year-old was convicted of murder and sentenced to a mandatory term of life without parole pursuant to a state criminal statute specifying such punishment.[12]

In *Jackson v. State*, petitioner Kuntrell Jackson and two other boys went to a video store to commit a robbery.[13] On the way to the store, Jackson became aware that one of the boys was carrying a sawed-off shotgun in his coat sleeve.[14] Jackson remained outside of the store for most of the robbery, but entered before one of his co-conspirators shot and killed the store clerk.[15] Jackson was charged as an adult, and a jury found him guilty of capital felony murder and aggravated robbery.[16] The judge imposed a statutorily mandated sentence of life imprisonment without parole.[17] After the Arkansas Supreme Court affirmed his conviction, Jackson filed a petition for a writ of habeas corpus, arguing that the Eighth and Fourteenth Amendments

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http://ojjdp.gov/ojstatbb/structure_process/qa04105.asp?qaDate=20020425&text= (last visited Apr. 17, 2013).

6. Brett Kendall, *Justices Reject Required Life Sentences for Juveniles*, WALL ST. J., June 26, 2012, at A6.

7. *U.S. Supreme Court Bans Mandatory Life Without Parole for Youth*, NAT'L CTR. FOR YOUTH LAW, http://www.youthlaw.org/juvenile_justice/6/us_supreme_court_bans_mandatory_life_without_parole_for_youth/ (last visited Feb. 11, 2013).

8. *Id.*

9. 132 S. Ct. 2455 (2012).

10. Miller v. State, 63 So. 3d 676 (Ala. Crim. App. 2010), *rev'd*, Miller v. Alabama, 132 S. Ct. 2455 (2012).

11. Jackson v. State, 194 S.W.3d 757 (Ark. 2004), *rev'd sub nom.* Miller v. Alabama, 132 S. Ct. 2455.

12. *Miller*, 132 S. Ct. at 2461–63.

13. *Jackson*, 194 S.W.3d at 758.

14. *Id.*

15. *Id.* at 758–59.

16. *Miller*, 132 S. Ct. at 2461.

17. *Id.*; ARK. CODE ANN. § 5-4-104(b) (West 1997).

prohibit the mandatory sentencing of life without parole for juveniles fourteen years of age or younger.[18] The circuit court dismissed Jackson's petition, and the Supreme Court of Arkansas affirmed on the grounds that a life-without-parole sentence is not unconstitutional when imposed pursuant to a state statute.[19]

In *Miller v. State*, petitioner Evan Miller and his friend, after a night of drinking and drug use, savagely beat Miller's neighbor and set his trailer on fire, killing the neighbor.[20] Miller was initially charged as a juvenile, but the District Attorney sought, and the court granted, removal of the case to adult court.[21] A jury found Miller guilty of murder in the course of arson.[22] The trial court imposed a statutorily mandated minimum punishment of life without parole.[23] The Alabama Court of Criminal Appeals affirmed, holding that the sentence was not disproportionate in comparison to the crime committed, and that its mandatory nature was permissible under the Eighth Amendment.[24]

Both Miller and Jackson filed a petition for certiorari with the Supreme Court, asserting two constitutional challenges to their sentences: (1) that the Eighth and Fourteenth Amendments categorically prohibit sentencing fourteen-year-olds to life without the possibility of parole, and (2) that the Eighth and Fourteenth Amendments prohibit the imposition of life without the possibility of parole under a mandatory sentencing scheme that does not consider the offender's age or other mitigating evidence.[25]

The Supreme Court granted certiorari and held that the mandatory imposition of life-without-parole sentences for juveniles convicted of homicide violates the Eighth Amendment's prohibition of cruel and unusual punishment.[26] The Court reasoned that a

18. Jackson v. Norris, 378 S.W.3d 103, 104–05 (Ark. 2011).

19. *Id.* at 105.

20. Miller v. State, 63 So. 3d 676, 683 (Ala. Crim. App. 2010), *rev'd*, Miller v. Alabama, 132 S. Ct. 2455 (2012).

21. *Miller*, 132 S. Ct. at 2462.

22. *Id.* at 2463.

23. *Id.*; ALA. CODE § 13A-6-2(c) (West 1982).

24. *Miller*, 63 So. 3d at 686, 691.

25. Petition for Writ of Certiorari at i, *Miller*, 132 S. Ct. 2455 (2012) (No. 10-9646), 2012 WL 588454; Petition for Writ of Certiorari at i, *Miller*, 132 S. Ct. 2455 (2012) (No. 10-9647), 2012 WL 523347. The Eighth Amendment's prohibition against cruel and unusual punishment applies to the states through the Fourteenth Amendment. Robinson v. California, 370 U.S. 660, 667 (1962). The remainder of this Comment will refer exclusively to the Eighth Amendment.

26. *Miller*, 132 S. Ct. at 2455.

mandatory sentencing scheme disregards a juvenile's lessened culpability and greater capacity for change, and thus contravenes the requirement, established in prior decisions, of individualized sentencing for defendants facing the most serious penalties.[27] Accordingly, the Court reversed the sentences and remanded the cases for reconsideration by the state trial courts.[28]

In the wake of *Miller*, states that endorsed mandatory life-without-parole sentences for juvenile homicide offenders will implement changes to bring them in compliance with that decision.[29] *Miller's* vague language left many questions unanswered, however, including whether the holding should be applied retroactively and which sentences judges may legally impose upon juvenile homicide offenders.[30] Furthermore, *Miller* does not impose a duty to respond on either the legislative or executive branch of government.[31] While the Court's decision does not provide guidance for its implementation, it does provide a significant impetus to change the manner in which the legal system holds juvenile criminals accountable for their crimes. This Comment will argue that states should respond to *Miller* by enacting a juvenile sentencing regime that is grounded in the principles and values of restorative justice.[32] Such a regime should consist of a blended sentencing approach, under which juvenile offenders would receive restorative sentences as a complement to existing sentencing practices.[33]

I. BACKGROUND

The Eighth Amendment of the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines

27. *Id.* at 2460.

28. *Id.* at 2475. In early April 2013, the Arkansas Supreme Court held a hearing to consider a re-sentencing request filed on behalf of Kuntrell Jackson. *Hearing Set Over Youth's Life Sentence*, COURIER (Mar. 1, 2013), http://www.couriernews.com/view/full_story/21856510/article-Hearing-set-over-youths-life-sentence. Jackson's attorneys requested that the supreme court send the case back to the circuit court for re-sentencing. *Id.*

29. LAVY, *supra* note 3.

30. Maggie Clark, *States Reconsider Juvenile Life Sentences*, STATELINE (July 27, 2012), http://www.pewstates.org/projects/stateline/headlines/states-reconsider-juvenile-life-sentences-85899407729 ("The court did not specify whether the rule changes apply to the more than 2,500 juvenile life sentences already handed down, or what judges should do in the interim before the legislature can offer a new sentencing structure.").

31. LAVY, *supra* note 3.

32. *See infra* Part II.B.

33. *See infra* Part II.D.

imposed, nor cruel and unusual punishments inflicted."[34] To determine whether a punishment is cruel and unusual, courts should not look "through a historical prism," rather "courts should observe the evolving standards of decency that mark the progress of a maturing society."[35] Furthermore, the concept of proportionality is a crucial factor in the court's determination.[36]

Two strands of precedent reflect the Court's concern with proportional punishment. First, the Court has prohibited the mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of an offense before issuing a death sentence.[37] Second, the Court has adopted a categorical ban on certain sentencing practices based on disparities between the culpability of a class of offenders and the severity of a penalty.[38] For example, the Court has held unconstitutional the imposition of the death penalty for nonhomicidal crimes and crimes committed by mentally disabled defendants.[39] The Court's decision in *Miller* represents the confluence of these two strands of precedent.[40]

A. The Eighth Amendment Prohibits the Mandatory Imposition of Capital Punishment

In the first line of cases, the Court has demanded individualized sentencing when imposing the death penalty. In *Woodson v. North Carolina*,[41] the Court held unconstitutional a statute mandating a death sentence for first-degree murder because it precluded consideration of "mitigating factors," such as the personality and criminal record of the defendant, as well as the circumstances under

34. U.S. CONST. amend. VIII.

35. Miller v. Alabama, 132 S. Ct. 2455, 2463 (2012) (internal quotation marks omitted).

36. 130 S. Ct. 2011, 2021 (2010). As prior case law explains, the Eighth Amendment's prohibition against cruel and unusual punishment "guarantees individuals the right to not be subject to excessive sanctions." Roper v. Simmons, 543 U.S. 551, 560 (2005). That right derives from the "precept of justice that punishment for crime should be graduated and proportioned" to the offense. Weems v. United States, 217 U.S. 349, 367 (1910).

37. *See infra* Part I.A.

38. *See infra* Part I.B.

39. *See* Kennedy v. Louisiana, 554 U.S. 407 (2008) (referring to nonhomicidal crimes); Atkins v. Virginia, 536 U.S. 304 (2002) (referring to mental disability).

40. *See infra* Part I.C.

41. 428 U.S. 280 (1976).

which the crime occurred.[42] This conclusion was warranted by the fact that a death sentence is final and should, therefore, be imposed cautiously.[43]

Subsequent decisions have elaborated on the requirement that capital defendants have an opportunity to provide the judge or jury with any relevant mitigating evidence. For example, in *Eddings v. Oklahoma*,[44] the Court held unconstitutional the mandatory imposition of the death sentence for first-degree murder where state courts refused to consider the particular qualities of youth as mitigating evidence in the sentencing process.[45] The Court noted that "youth is more than a chronological fact"; rather, "[i]t is a time and condition of life when a person may be most susceptible to influence and to psychological damage."[46] Thus, in addition to the chronological age of a minor, the sentencing judge should also consider factors such as the minor's maturity level, emotional development, and family history.[47]

By contrast, in *Harmelin v. Michigan*,[48] the Court addressed a mandatory life-without-parole sentence in a felony drug case and held that imposing such a sentence without any consideration of mitigating factors in noncapital cases does not violate the Constitution.[49] The Court reasoned that while mandatory penalties are severe, they are not unconstitutional, as they have been imposed consistently throughout American history.[50] Furthermore, the Court concluded that the "individualized capital sentencing doctrine," applied in previous death penalty cases such as *Woodson* and *Eddings*, did not

42. *Id.* at 304–05. The Court was concerned that a sentencing process that neglected such factors would treat "uniquely individual human beings . . . as members of a faceless, undifferentiated mass . . . ." *Id.* at 304.

43. *Id.* at 305 ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.").

44. 455 U.S. 104 (1982).

45. *Id.* at 115–16. In so holding, the Court distinguished between the admissibility and the weight of the evidence: The sentencing judge "may determine the weight to be given relevant mitigating evidence," but he "may not give it no weight by excluding such evidence from [his] consideration." *Id.* at 114–15.

46. *Id.* at 115.

47. *Id.* at 116. In *Eddings*, the mitigating evidence was the defendant's unhappy upbringing and emotional disturbance, including evidence of a turbulent family history and beatings by a harsh father. *Id.* at 114–16.

48. 501 U.S. 957 (1991).

49. *Id.* at 961, 994–95.

50. *Id.* at 994–95.

apply outside the capital context because of the distinct nature of the death penalty.[51]

B. The Eighth Amendment Categorically Prohibits Particular Penalties as Applied Against Juveniles Because of Their Diminished Culpability

Courts apply a two-step analysis to determine whether the Eighth Amendment categorically prohibits a particular sentence against a class of offenders. First, courts determine "whether there is a national consensus against the sentencing practice at issue."[52] This objective test looks first to federal and state statutes because legislation is the "clearest and most reliable . . . evidence of contemporary values," and then considers sentencing practices.[53] Consensus, however, is not conclusive, and courts must also use their judgment when determining whether the Eighth Amendment categorically prohibits a particular sentence.[54] Courts are guided by "the standards elaborated by controlling precedents and by [their] own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose."[55] Three principal guiding factors have emerged: (1) "the culpability of the offenders at issue in light of their crimes and characteristics," (2) "the severity of the punishment in question," and (3) "whether the challenged sentencing practice serves legitimate penological goals."[56]

Several of the cases in this group have specifically focused on juvenile offenders because of their diminished culpability. For example, the Court applied the two-step analysis in *Graham v. Florida*,[57] a case in which Terrance Jamar Graham, a sixteen-year-old boy, was found guilty of armed burglary and attempted armed robbery.[58] Graham was sentenced to life imprisonment in Florida, a state that had abolished its parole system, effectively leaving Graham with executive clemency as his only chance of release.[59] On review, the Court held that the Eighth Amendment categorically forbids sentencing juveniles to life without the possibility of parole for the

51. *Id.* at 995 (internal quotation marks omitted); *see supra* note 43 and accompanying text.

52. Graham v. Florida, 130 S. Ct. 2011, 2022 (2010).

53. *Id.* at 2023.

54. Kennedy v. Louisiana, 554 U.S. 407, 421 (2012); *Graham*, 130 S. Ct. at 2022.

55. *Kennedy*, 554 U.S. at 421.

56. *Graham*, 130 S. Ct. at 2026.

57. 130 S. Ct. 2011 (2010).

58. *Id.* at 2018, 2020.

59. *Id.* at 2020.

commission of nonhomicide crimes.[60] Applying the two-step test, the Court first looked to legislation and sentencing practices in concluding that a national consensus existed against the sentence under consideration.[61]

In the second step of its two-step analysis, the *Graham* Court found an independent justification for categorically prohibiting life-without-parole sentences for juvenile nonhomicide offenders.[62] Regarding the offenders' culpability, the Court found that nonhomicide juvenile offenders had "twice diminished moral culpability" due to their age and the nonhomicidal nature of their crimes.[63] The *Graham* Court relied on the *Roper v. Simmons*[64] holding that the Eighth Amendment prohibits the imposition of the death penalty on offenders who were under the age of eighteen when committing their crimes.[65]

In *Roper*, the Court established that juveniles are less deserving of the most severe punishments than adults because juveniles are different from adults in three crucial respects. First, juveniles have "'[a] lack of maturity and an underdeveloped sense of responsibility,'" which "'often result in impetuous and ill-considered actions and decisions.'"[66] Second, "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure."[67] According to the Court, juveniles experience such vulnerability

60. *Id.* at 2030. When *Graham* was decided, there were 123 juvenile nonhomicide offenders serving life-without-parole sentences in the United States. *Id.* at 2024. Seventy-seven of those individuals were serving sentences imposed in Florida. *Id.* The other forty-six were imprisoned in ten states: California, Delaware, Iowa, Louisiana, Mississippi, Nebraska, Nevada, Oklahoma, South Carolina, and Virginia. *Id.*

61. *Id.* at 2026. Looking to legislative enactments in the United States, the Court determined that six jurisdictions did not allow life-without-parole sentences for any juvenile offenders; seven jurisdictions permitted life without parole for juvenile offenders convicted of homicide crimes; and thirty-seven states, the District of Columbia, and the federal government permitted sentences of life without parole for a juvenile nonhomicide offender in some circumstances. *Id.* at 2023. Despite the apparent legislative endorsement of the sentence, the Court also looked to actual sentencing practices and discovered that, of the thirty-nine jurisdictions having statutory authorization to sentence juveniles to life without parole for nonhomicidal crimes, only eleven had in fact done so. *Id.* at 2024. Thus, the Court determined that the imposition of a life-without-parole sentence for juveniles was just as infrequent as other sentences deemed unconstitutional. *Id.* at 2025.

62. *Id.* at 2030.

63. *Id.* at 2027.

64. 543 U.S. 551 (2005).

65. *Id.* at 578.

66. *Id.* at 569 (alteration in original) (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

67. *Id.*

because of their general inability to control their surrounding environment.[68] Third, juveniles' character and personality traits are "more transitory" and "not as well formed" as those of adults.[69] Because juveniles possess these unique characteristics, the Court found that they deserve special consideration during the sentencing process.[70]

Regarding the severity of the punishment, the *Graham* Court noted that life without parole is the "'second most severe penalty permitted by law.'"[71] Although the Court conceded that a death sentence is "'unique in its severity and irrevocability,'" it argued that life without parole was not unlike death sentences in a number of key ways.[72] For example, a sentence of life without parole is permanent, much like a death sentence, as it precludes the offender's release regardless of subsequent character or behavior improvement.[73] Furthermore, according to the *Graham* Court, life without parole is a particularly harsh sentence for juvenile offenders because they ultimately spend more time in prison than would an adult offender who receives the same punishment.[74]

Finally, relying once more on *Roper*, the *Graham* Court reasoned that no penological goal justified sentencing juvenile nonhomicide offenders to life without the possibility of parole.[75] According to the Court, the case for retribution was weak because a juvenile nonhomicide offender is less culpable than an adult offender, and thus should not receive the second most severe sentence as punishment.[76] Additionally, the Court found that deterrence did not justify imposition of the sentence because juveniles' distinct characteristics make them less likely to be deterred from committing

68. *Id.*

69. *Id.* at 570.

70. *Id.*

71. Graham v. Florida, 130 S. Ct. 2011, 2027 (2010) (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991)).

72. *Id.* (quoting Gregg v. Georgia, 428 U.S. 153, 187 (1976)).

73. *See id.* (noting that a life-without-parole sentence "'means 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.'" (quoting Naovarath v. State, 105 Nev. 525, 526 (1989))).

74. *See id.* at 2028 (arguing that due to this discrepancy, "[a] 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only.").

75. *Id.*

76. *Id.* This conclusion was warranted because "'[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.'" *Id.* (quoting Tison v. Arizona, 481 U.S. 137, 149 (1987)).

crime.[77] Likewise, the Court found that incapacitation could not serve as a justification because it required the sentencing judge to decide that the juvenile can never be reformed, a judgment the Court found questionable given the characteristics of juveniles.[78] Finally, the Court found that rehabilitation could not justify a life-without-parole sentence for juveniles because such a sentence by its nature implicitly rejects the goal of rehabilitation.[79]

C. The Miller *Decision Represents the Confluence of the Two Strands of Precedent*

In *Miller v. Alabama*, the Court combined its reasoning from these two strands of precedent to hold "that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment."[80] First, the Court noted that while *Graham*'s categorical ban on life without parole was for nonhomicidal crimes, nothing that *Graham* said about children was "crime-specific."[81] The characteristics that make juveniles less culpable and less deserving of severe punishment are present regardless of the type of crime committed.[82] Thus, the *Graham* Court's reasoning that children are constitutionally different for sentencing purposes applies to every juvenile life-without-parole sentence, not only those imposed for nonhomicidal offenses.[83] Furthermore, the Court emphasized *Graham*'s insistence that the attributes of youth matter when considering whether life without parole is appropriate for a juvenile.[84] According to the Court, the mandatory penalty schemes in *Miller* violated the *Graham* holding

77. *Id.* Specifically, juveniles' "'impetuous and ill-considered actions'" make them "less likely to take a possible punishment into consideration when making decisions." *Id.* at 2028–29 (quoting Johnson v. Texas, 509 U.S. 350, 367 (1993)).

78. *Id.* at 2029 ("It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." (internal quotation marks omitted)).

79. *See id.* at 2030 (reasoning that denying the offender the right to re-enter the community is an irrevocable judgment that is improper in light of a juvenile's "capacity for change and diminished culpability").

80. Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012).

81. *Id.* at 2465.

82. *See id.* (stating that juveniles' "distinctive (and transitory) mental traits and environmental vulnerabilities . . . are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing").

83. *Id.*

84. *Id.*

because they precluded the sentencing judge from considering such attributes before imposing a sentence of life without parole.[85]

Second, the Court noted that *Graham* equated life-without-parole sentences to the death penalty, which, in the Court's opinion, made relevant the precedent demanding individualized sentencing in capital cases.[86] The Court found those cases to emphasize that sentencing judges must consider juveniles' special attributes as mitigating evidence before imposing the death penalty.[87] Thus, the Court noted that "in light of *Graham*'s reasoning," the capital cases reveal that mandatory life-without-parole sentences, like mandatory death sentences, are unacceptable for juvenile offenders.[88] The Court also rejected the states' argument that *Harmelin* forecloses a holding that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment, as that case did not involve children and its holding was not intended to apply to juvenile offenders.[89] Ultimately, these two strands of precedent led the Court to conclude that a sentencing scheme that fails to assess the special characteristics of youth before imposing juvenile life-without-parole sentences "poses too great a risk of disproportionate punishment" and thus violates the Eighth Amendment.[90]

II. ANALYSIS

States that impose mandatory life-without-parole sentences for juvenile homicide offenders will now need to implement new sentencing laws that conform to the constitutional requirements set forth in *Miller*.[91] While some states have already responded to *Miller*, these responses are inadequate.[92] Instead, the appropriate response

85. *Id.* at 2466 (reasoning that the "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children").

86. *Id.* at 2466–67.

87. *Id.* at 2467 (reasoning that the discussion of youthfulness in *Roper* and *Graham* also appeared in the capital cases).

88. *Id.* (arguing that a sentencing judge would be "strictly forbidden" from neglecting the differences between adult and juvenile offenders when imposing the death penalty).

89. *Id.*

90. *Id.* at 2469. Because that holding adequately resolved the issue in this case, the *Miller* Court declined to address the question of whether a categorical ban on juvenile life-without-parole sentences is required under the Eighth Amendment. *Id. But see* Doriane Lambelet Coleman & James E. Coleman, Jr., *Getting Juvenile Life Without Parole "Right" After* Miller v. Alabama, 8 DUKE J. CONST. L. & PUB. POL'Y 61, 62 (Special Issue 2012) (arguing that the *Miller* Court should have categorically banned juvenile life-without-parole sentences).

91. *See infra* Part II.A.

92. *See infra* Part II.A.

for all states, including those not affected by the *Miller* decision, is to incorporate a restorative justice sentencing regime into the juvenile justice system.[93] A basic overview of the regime is necessary to understand why restorative justice is the right approach. Part II.B is devoted to describing restorative justice theory, including where and how it operates. Part II.C then explains why the implementation of restorative justice sentencing is an appropriate response to *Miller* directly and to juvenile cases in general. Finally, Part II.D posits that to overcome the hurdles of enacting a restorative justice sentencing regime through legislation, states should adopt blended sentencing models, under which juvenile offenders would receive both a restorative and a traditional adult sentence.

A. Current State Responses to the Miller *Decision Are Inadequate*

Following the Court's decision in *Miller v. Alabama*, a common issue has arisen in many states across the country: State statutes do not provide an alternative sentence now that mandatory life without parole is no longer available for juvenile homicide offenders, leaving judges with no guidance as to the sentences that are legally acceptable.[94] In some states, this issue will not be resolved until the legislature amends the relevant sentencing statute.[95] Legislators in all twenty-eight states that had previously endorsed mandatory life-without-parole sentences for juvenile homicide offenders have said that they will consider alternative sentencing laws.[96] Until then, however, states have demonstrated a variety of potential responses to *Miller*.

In North Carolina, Governor Perdue signed an amendment to the sentencing laws on first-degree murder that mandates life with parole if the juvenile is convicted under the felony-murder doctrine.[97] The amendment also outlines the hearing procedure that must be used to determine whether a juvenile's sentence should be life with or without parole if the juvenile is not convicted under that doctrine.[98] Mitigating factors to be considered by the court at such a hearing include the juvenile defendant's age, maturity level, mental capacity,

93. *See infra* Part II.B.

94. Scott Michels, *A Reprieve for Juvenile Lifers?*, CRIME REPORT (July 26, 2012, 5:51 AM), http://www.thecrimereport.org/news/articles/2012-07-a-reprieve-for-juvenile-lifers.

95. *Id.*

96. *Id.*; *see also* Coleman & Coleman, *supra* note 90, at 68–75 (suggesting three potential legislative responses to the *Miller* decision).

97. S. 635, 2011th Sess. (N.C. 2012).

98. *Id.*

personal background, prior criminal conduct, and potential for rehabilitation.[99] The amendment also provides that life with parole means that the defendant is eligible for a five-year term of parole after a minimum of twenty-five years of imprisonment.[100] North Carolina's amendment is consistent with Justice Breyer's concurrence in the *Miller* opinion. Justice Breyer maintained that only juveniles who had killed or intended to kill another individual could be sentenced to life without parole without violating the Constitution.[101] North Carolina's response is not comprehensive, however, because it fails to expressly address the sentence that should apply to juveniles who are not charged under the felony-murder doctrine.

In Pennsylvania, House Judiciary Committee Chairman Ron Marsico introduced an amendment in late September 2012 to the sentencing law for juveniles convicted of first- and second-degree murder.[102] In October, the Pennsylvania General Assembly voted to adopt the amendment, which ended the mandatory life-without-parole sentence for any juvenile convicted of those crimes and significantly shortened the applicable sentence.[103] Now, when considering the appropriate punishment for a juvenile convicted of first-degree murder, a judge or jury can still impose a life-without-parole sentence, but the decision maker also has the option of imposing a sentence of thirty-five years to life for a juvenile of at least age fifteen, or twenty-five years to life for a juvenile under age fifteen, both with the possibility of parole.[104] With respect to juveniles convicted of second-degree murder, a judge or jury can no longer impose life without parole.[105] Rather, juveniles between ages fifteen and seventeen receive a minimum of thirty years to life, while juveniles under age fifteen receive a minimum of twenty years to life.[106] Although the amendment brings the state into compliance

99. *Id.* This list of factors is not exhaustive. The court is free to consider "[a]ny other mitigating factor or circumstance" that the defendant or defense counsel may choose to present. *Id.*

100. *Id.*

101. Miller v. Alabama, 132 S. Ct. 2455, 2476 (2012) (Breyer, J., concurring) (arguing that while transferred intent is typically attributed to all participants in felony-murder cases, this intent is not sufficient to impose a life-with-parole sentence on a juvenile who did not actually kill or intend to kill).

102. Moriah Balingit, *Other States Watch How Pennsylvania Handles Life Terms for Juveniles*, PITTSBURGH POST-GAZETTE, Sept. 23, 2012, at A1.

103. S. 850, Reg. Sess. 2011–2012 (Pa. 2012).

104. *Id.*

105. *Id.*

106. *Id.*

with *Miller*, the question remains whether mere compliance is an adequate response. Some commentators have expressed fear that judges will continue to impose life-without-parole sentences for juveniles, even though, under *Miller*, these sentences are tolerated only in certain circumstances.[107] Others view the proposed amendment as a "quick fix" to comply with *Miller* rather than a careful reconsideration of how to treat juveniles convicted of serious crimes.[108]

In Iowa, Governor Terry Branstad has arguably implemented the least constructive response to *Miller*. While he technically reduced the life sentences of thirty-eight homicide offenders who committed their crimes as minors, he ordered each offender to serve a mandatory sentence of sixty years before being eligible for parole.[109] Governor Branstad plans to propose a new sentencing law in next year's legislative session that would require a sixty-year minimum sentence for juvenile homicide offenders in Iowa.[110]

B. The Appropriate Response to Miller*: A Restorative Justice Sentencing Regime*

In the wake of *Miller*, states with criminal statutes that impose mandatory life-without-parole sentences for juvenile homicide offenders will need to enact sentencing laws that comply with the

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107. Balingit, *supra* note 102. This fear is well-founded given the *Miller* Court's statement that "appropriate occasions for sentencing juveniles to [life without parole] will be uncommon." Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

108. *Id.* Marsha Levick of the Juvenile Law Center "th[ought] the Legislature should take some time to consider what the alternatives are." *Id.*

109. James Q. Lynch, Trish Mehaffey & Mike Wiser, *Branstad Commutes Life Sentences for 38 Iowa Juvenile Murderers*, GAZETTE (July 16, 2012), http://thegazette.com/2012/07/16/branstad-commutes-life-sentences-for-38-iowa-juvenile-murderers/. The Iowa Supreme Court heard arguments in a case challenging Branstad's order in early April 2013. David Pitt, *Iowa Supreme Court Hears Juvenile Parole Case*, SFGATE (Apr. 9, 2013), http://www.sfgate.com/news/crime/article/Iowa-Supreme-Court-hears-juvenile-parole-case-4420746.php. Defense counsel, whose client would not be eligible for parole until age seventy-seven, argued that the governor's order was violative of the "spirit or intent" of the *Miller* decision. *Id.* The Assistant Attorney General who represented the state argued that the *Miller* decision requires only the possibility, not the guarantee, of release on parole. *Id.*

110. Clark, *supra* note 30. Commentators argue that sixty-year sentences are essentially "life" sentences for offenders who commit their offenses at the age of thirteen or fourteen. Tamar Rebecca Birckhead, *States Respond to Supreme Court JLWOP Decision*, JUVENILE JUSTICE BLOG (July 19, 2012), http://juvenilejusticeblog.web.unc.edu/2012/07/17/states-respond-to-supreme-court-jlwop-decision/. Thus, it is possible that long term-of-years sentences will be the next issue the Supreme Court addresses within this line of cases.

constitutional demands of that decision.[111] The appropriate response for these—and all—states is to incorporate restorative justice sentences into the juvenile sentencing structure.[112] According to an international advocacy group, "[r]estorative justice is a[n] [alternative] theory of justice that emphasizes repairing the harm caused or revealed by criminal behaviour. It is best accomplished through cooperative processes that include all stakeholders."[113] The remainder of this Section elaborates on the theory of restorative justice by discussing its development in the United States and abroad[114] and describes the four most pervasive restorative justice programs in the United States.[115]

1. What Is Restorative Justice?

Restorative justice is a social reform movement that, since the 1970s, has steadily gained popularity across the globe.[116] It is grounded in a theory of justice that emphasizes the repair of harm caused by criminal behavior, a process that involves the cooperation and involvement of offenders, victims, and their respective communities.[117] Although disagreement exists as to the precise definition of restorative justice,[118] Howard Zehr, the leading visionary

111. Michels, *supra* note 94.

112. The *Miller* decision had no impact on eight states and the District of Columbia, which already prohibited mandatory life-without-parole sentences for juveniles. Liliana Segura & Matt Stroud, *The Uncertain Fate of Pennsylvania's Juvenile Lifers*, NATION (Aug. 7, 2012), http://www.thenation.com/article/169268/uncertain-fate-pennsylvanias-juvenile-lifers#. Sixteen states, including Maryland, which have sentencing laws that give decision-makers discretion to impose life without parole for juveniles (as opposed to unconstitutional mandatory sentencing laws), can decide whether they want to amend their laws in light of *Miller*. *Id.* For the reasons outlined below, even these states should consider enacting a new sentencing regime that incorporates restorative justice sentences.

113. *Introduction to Restorative Justice*, RESTORATIVE JUSTICE ONLINE, http://www.restorativejustice.org/university-classroom/01introduction (last visited Feb. 14, 2013).

114. *See infra* Part II.B.1.

115. *See infra* Part II.B.2.

116. Mark S. Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 254 (2005).

117. RESTORATIVE JUSTICE ONLINE, http://www.restorativejustice.org/ (last visited Feb. 14, 2013).

118. John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1728–29 (1999) ("Restorative justice is a process of bringing together the stakeholders (victims, offenders, communities) in a search of justice that heals the hurt of crime, instead of responding to hurt with more hurt."); Lode Walgrave, *Restoration in Youth Justice*, 31 CRIME & JUST. 543, 552 (2004) ("[B]y restorative justice I mean an option on doing justice after the occurrence of a crime which gives priority to repairing the harm that has been caused by that crime." (internal quotation marks omitted)).

and architect of the restorative justice movement, has provided the most succinct definition: "Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible."[119] The movement has been influenced by the concern for greater rights for crime victims, community involvement in the justice system, and decreasing recidivism and incarceration rates.[120]

Canada, which began using restorative programs in 1974, is considered the "birthplace" of the restorative justice movement.[121] Today, however, the movement has resulted in thousands of programs across many countries,[122] and it has become particularly significant in discussions regarding juvenile justice reform.[123] Restorative justice theory currently influences the juvenile justice systems in New Zealand, Australia, Hong Kong, Israel, South Africa, and a large part of Western Europe.[124]

In the United States, restorative justice has only recently gained popularity.[125] Restorative justice programs first arose in the late 1970s; significant development of these programs, however, did not occur until the 1990s.[126] Despite the increasing interest in restorative justice, it continues to operate primarily on the periphery of the United States criminal justice system in small programs run by private agencies and churches.[127] Most programs are only available to

119. Umbreit et al., *supra* note 116, at 256.

120. DONALD J. SCHMID, RESTORATIVE JUSTICE IN NEW ZEALAND: A MODEL FOR U.S. CRIMINAL JUSTICE 9 (2001), *available at* http://www.fulbright.org.nz/wp-content/uploads/2011/12/axford2001_schmid.pdf.

121. Hon. T. Bennett Burkemper, Jr. et al., *Restorative Justice in Missouri's Juvenile System*, 63 J. MO. B. 128, 130 (2007).

122. Umbreit et al., *supra* note 116, at 254.

123. Walgrave, *supra* note 118, at 543–44.

124. Burkemper, *supra* note 121, at 130. New Zealand was the first country to enact legislation to incorporate restorative justice principles into its juvenile justice system. *Id.* In 1989, the country passed a law that requires the participation of juvenile offenders in family group conferencing, either "as a diversionary measure, or as a prerequisite for the judge to sentence the child in youth court." *Id.* Unfortunately, the sample size is small; other than New Zealand, only a few isolated experiments exist. Walgrave, *supra* note 118, at 577.

125. Christopher D. Lee, Comment, *They All Laughed at Christopher Columbus When He Said the World Was Round: The Not-So-Radical and Reasonable Need for a Restorative Justice Model Statute*, 30 ST. LOUIS U. PUB. L. REV. 523, 529 (2011).

126. Burkemper, *supra* note 121, at 130.

127. Beale, *supra* note 1, at 413.

juveniles convicted of minor, nonviolent, and nonsexual crimes.[128] Moreover, these programs have been unable to substantially influence the juvenile justice system because they lack legislative attention and financial resources.[129] Many state statutes do not reference restorative justice at all.[130] Others have inserted restorative ideas into the purpose clauses of their juvenile justice legislation, but provide no specific framework or parameters for the implementation of those ideas.[131] A few state statutes, however, provide explicit guidelines for the establishment of juvenile restorative justice programs.[132]

2. How Does Restorative Justice Operate?

Restorative justice programs typically fall into one of two categories: They provide either restorative processes or restorative outcomes.[133] A restorative process is one in which the offender and the victim, and sometimes community members, work together to

128. Leena Kurki, *Restorative and Community Justice in the United States*, 27 CRIME & JUST.: A REVIEW OF RESEARCH 235, 240 (2000). The use of restorative justice in the United States is not nearly as prevalent or as established as it is in other countries around the world. For example, in New Zealand, family group conferencing is used for all juvenile crimes except murder and homicide. *Id.* In Germany, approximately seventy percent of adult and juvenile cases that used victim-offender mediation in 1995 involved violent crimes. *Id.* In Austria in 1996, seventy-three percent of adult cases and forty-three percent of juvenile cases that took advantage of some form of restorative justice involved violent crimes. *Id.*

129. Amanda L. Paye, Comment, *Communities Take Control of Crime: Incorporating the Conferencing Model into the United States Juvenile Justice System*, 8 PAC. RIM L. & POL'Y J. 161, 163 (1999).

130. Sylvia Clute, *Creating Statutes to Deliver Restorative Justice*, RESTORATIVE JUSTICE ONLINE (July 18, 2011), http://www.restorativejustice.org/RJOB/creating-statutes-to-deliver-restorative-justice.

131. Walgrave, *supra* note 118, at 568. Maryland, for example, utilizes restorative justice language in the purpose clause of its state code. MD. CODE ANN., CTS. & JUD. PROC. § 3-8A-02 (West 2001). According to the statute, the juvenile justice system must balance three objectives: "(i) [p]ublic safety and the protection of the community; (ii) [a]ccountability of the child to the victim and the community for the offenses committed; and (iii) [c]ompetency and character development to assist children in becoming responsible and productive members of society." *Id.*

132. Clute, *supra* note 130. In Colorado, for example, the Children's Code establishes a council to provide assistance and education related to restorative justice programs. COL. REV. STAT. ANN. § 19-2-213 (West 2007). This council, known as the Restorative Justice Coordinating Council, "support[s] the development of restorative justice programs, serve[s] as a central repository for information, assist[s] in the development and provision of related education and training, and provide[s] technical assistance to entities engaged in or wishing to develop restorative justice programs." *Id.*

133. Daniel W. Van Ness & Pat Nolan, *Legislating for Restorative Justice*, 10 REGENT U. L. REV. 53, 54 (1998).

resolve the impact of a particular crime.[134] Restorative processes emphasize dialogue among the parties affected by the crime and include mechanisms for communication, such as victim-offender mediation, family group conferences, sentencing circles, and community reparative boards, among others.[135] Restorative outcomes, in comparison, constitute the agreements reached after participation in a restorative process.[136] These agreements might include undertakings such as victim support groups, offender rehabilitation, and community service activities.[137] An ideal restorative justice system would include both restorative processes and restorative outcomes.[138]

Victim-offender mediation allows victims to reveal how the crime has affected them physically, emotionally, and financially, and to confront their offender by asking him any questions.[139] Likewise, the offender has the opportunity to explain how the crime occurred, take ownership for his actions, and make amends with the victim.[140] Victim-offender mediation is usually conducted in a structured setting with a trained mediator who leads the discussion.[141] To qualify for victim-offender mediation, the offender must confess and agree to participate in the process.[142]

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134. UNITED NATIONS OFFICE ON DRUGS AND CRIME, HANDBOOK ON RESTORATIVE JUSTICE PROGRAMMES 7 (2006), *available at* http://www.unodc.org/pdf/criminal_justice/06-56290_Ebook.pdf.

135. Nancy Rodriguez, *Restorative Justice at Work: Examining the Impact of Restorative Justice Resolutions on Juvenile Recidivism*, 53 CRIME & DELINQ. 355, 357 (2007). In the United States, the most popular restorative justice process is victim-offender mediation. Approximately 300 victim-offender mediation programs exist throughout the country, and roughly half of these programs deal exclusively with juveniles. Beale, *supra* note 1, at 421. Family conferencing, sentencing circles, and community reparative boards are also frequently utilized in juvenile justice systems. Rodriguez, *supra* note 135, at 357–58.

136. UNITED NATIONS OFFICE ON DRUGS AND CRIME, *supra* note 134.

137. Van Ness & Nolan, *supra* note 133, at 54.

138. *Id.*

139. Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, 53 DRAKE. L. REV. 667, 674 (2005).

140. *Id.*

141. Gordon Bazemore & Mark Umbreit, *A Comparison of Four Restorative Conferencing Models*, JUV. JUST. BULL., Feb. 2001, at 2. Most victim-offender mediations result in a restitution agreement. Kurki, *supra* note 128, at 270. However, the participants do not always reach an agreement, as it is "often seen as secondary to emotional healing and growth." *Id.* Victims and offenders alike have reported that the opportunity to express their thoughts and feelings is more meaningful than the restitution agreement. *Id.*

142. Ilyssa Wellikoff, Note, *Victim-Offender Mediation and Violent Crimes: On the Way to Justice*, 5 CARDOZO ONLINE J. CONFLICT RESOL. 2 (2004). Some cases are referred to victim-offender mediation as an alternative to formal prosecution and punishment. Other cases are referred as part of the offender's probation or other punishment after formal adjudication by the court. Bazemore & Umbreit, *supra* note 141, at 2.

Family group conferencing is similar to victim-offender mediation in that the offender can describe what happened, take responsibility for his actions, and understand how those actions have impacted both the victim and the community at large.[143] It differs from victim-offender mediation, however, because it involves a broader group of people—family, friends, community members, and representatives of the criminal justice system may participate in the conference.[144] Thus, rather than solely focusing on restoring the victim and offender, family group conferences also seek to restore the offender's ties with his community and family.[145] Together, this group of individuals decides how best to hold the offender accountable.[146]

Like family group conferencing, circle sentencing takes a more "holistic" approach to restorative justice through its inclusion of all those who may be affected by a crime, including the offender, the victim, community members, friends, and family.[147] These circles often also include judges, attorneys, and local law enforcement.[148] These individuals gather in a circle and take turns speaking as they pass a "talking piece."[149] The point of these circles is not only reparation for the harm caused, but also rehabilitation and re-integration of the victim and offender into the community.[150] As is the case with family group conferencing, members of the circle determine how the offender should be held accountable for his crime.[151]

143. Walgrave, *supra* note 118, at 572. A trained facilitator guides the discussion during the conference. Bazemore & Umbreit, *supra* note 141, at 5. The offender begins the discussion by describing how the crime took place. *Id.* The remaining participants respond by describing the impact the crime has had on their respective lives. *Id.*

144. Rodriguez, *supra* note 135, at 357. Both the offender and the victim can recommend who should be invited to participate in the conference. Bazemore & Umbreit, *supra* note 141, at 5.

145. Lee, *supra* note 125, at 546.

146. Burkemper, *supra* note 121, at 129. After the discussion, the victim typically suggests sanctions for the offender, receiving input from the other participants. Bazemore & Umbreit, *supra* note 141, at 5. The conference ends when all participants sign an agreement outlining the agreed upon sanctions. *Id.*

147. Rodriguez, *supra* note 135, at 357. In some cases, the judge refers a case to circle sentencing, and then uses the resultant agreement as a recommendation during the sentencing process. Kurki, *supra* note 128, at 281. In other cases, the judge, prosecutor, and defense attorney participate in the sentencing circle, and the agreement reached at the circle becomes the offender's final sentence. *Id.*

148. Lee, *supra* note 125, at 550.

149. *Id.*

150. *Id.* at 548.

151. Reimund, *supra* note 139, at 677. All circle members participate in the development of a sentencing plan for the offender. Bazemore & Umbreit, *supra* note 141,

Reparative boards bring the offender, and sometimes the victim, before a panel of community members who together discuss the offender's crime and the resultant harm to the community.[152] The panel decides how to address the harm caused by the crime, which typically results in a written agreement stipulating that the offender will make reparations, often through restitution or community service.[153]

C. Why Should States Adopt Restorative Justice?

States should incorporate concepts of restorative justice into their juvenile justice systems for two primary reasons. First, doing so would appropriately address the Supreme Court's concerns in *Miller*, which include the need to treat juveniles differently from adults for sentencing purposes, as well as the need for individualized sentencing when imposing life-without-parole sentences on juveniles.[154] Second, notwithstanding the requirements of *Miller*, incorporating restorative sentences is appropriate because such sentences would supplant the current punitive approach to the justice system by emphasizing the goals of rehabilitation, restoration, and re-integration.

1. A Restorative Sentencing Regime Would Respond to the Supreme Court's Concerns in Miller

Justice systems are evaluated based on their ability to fulfill certain goals or objectives.[155] The success of the American criminal justice system, for example, has typically been measured by its ability to accomplish the goals of retribution, deterrence, incapacitation, and rehabilitation.[156] In *Miller*, however, the Court emphasized that the distinctive attributes of youth diminish these traditional penological justifications for imposing harsh sentences on juveniles,

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at 6. Sometimes the plan requires the justice system, community, or family members to take certain actions. *Id.* The process may include secondary circles that monitor compliance with that plan. *Id.*

152. Rodriguez, *supra* note 135, at 357. These community members must receive extensive training prior to participating on the board. Bazemore & Umbreit, *supra* note 141, at 3.

153. Burkemper, *supra* note 121, at 129. The board subsequently monitors the offender to ensure compliance with the agreement, and submits a report of its findings to the court. Bazemore & Umbreit, *supra* note 141, at 4.

154. *See supra* Part I.C.

155. Paye, *supra* note 129, at 177–78 ("A successful model of justice is dependent upon measuring it against its identified objectives.").

156. *Id.*

even when they commit terrible crimes.[157] Consequently, the Court found that none of these goals could justify imposing a mandatory life-without-parole sentence on a juvenile homicide offender.[158] Although the Court did not completely foreclose the possibility of sentencing juvenile homicide offenders to life without parole, it made clear that such a harsh penalty should be uncommon in light of children's diminished culpability and heightened capacity for change.[159]

If traditional penological goals no longer justify imposition of the harshest sentences on juveniles, and if opportunities for imposing these sentences after *Miller* will be limited, it seems appropriate to pursue new goals in holding juveniles accountable for their crimes. Restorative justice sentences, which emphasize restoration and re-integration of the offender, provide such alternative goals. By emphasizing restoration and re-integration, restorative justice recognizes that juveniles have diminished culpability and increased capacity for change, and thus accommodates juveniles better than the traditional criminal justice system. Restorative sentences, as opposed to traditional sentences, have a greater positive effect on juvenile offenders for three principal reasons. First, restorative sentences help remediate the harm that the offender caused to himself—such as social exclusion and stigmatization—if he assumes responsibility for the offense and expresses a willingness to accept punishment.[160] Second, restorative sentences have an educational potential that is not available with traditional punishment.[161] For example, offenders often engage in learning experiences, identity building, and social integration when restorative sentences are imposed.[162] Finally, restorative sentences assist the offender, as well as the offender's family, in discovering and acknowledging personal problems that may have contributed to the offender's behavior.[163] The benefits of restorative sentences, and their ability to accommodate juveniles'

157. *See supra* Part I.C.

158. *See supra* Part I.C.

159. Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

160. Walgrave, *supra* note 118, at 572 (reasoning that if the offender "'makes good' his personal life experience," re-acceptance and re-integration are more likely to result than social exclusion and stigmatization).

161. *Id.* at 572–73 (explaining that restorative sentences can take into account the special needs of each particular offender).

162. *Id.* at 573.

163. *Id.* ("The conversation in the conference, for example, may make clear that drug use is a serious problem or that family conflicts have been dysfunctional to the education of children, and it may lead families to accept or seek voluntary welfare assistance.").

special attributes, support the contention that restoration and re-integration should become the new goals of the juvenile justice system.

Traditionally, sentencing uniformity has been a hallmark of the criminal justice system.[164] Uniformity, in its basic sense, demands that offenders of similar crimes receive similar punishment, while offenders of different crimes receive different punishment.[165] Skeptics of restorative justice worry that a restorative regime would sacrifice this traditional ideal of sentencing uniformity.[166] Yet the lack of sentencing uniformity associated with restorative justice is precisely why a restorative sentencing regime is an appropriate response to *Miller*. The Court's decision in *Miller* rested primarily on the notion that the mandatory imposition of life-without-parole sentences precludes a sentencing judge from taking into account a juvenile offender's age, as well as the characteristics and specific circumstances that accompany youth.[167] The Court expressed a concern with the traditional need for sentencing uniformity, noting that under the mandatory sentencing schemes at issue, every juvenile homicide offender receives the same sentence—"the 17-year-old and the 14-year-old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one."[168]

Restorative justice addresses this concern because it facilitates individualized solutions.[169] Communities and victims differ greatly in their temperaments, which can lead to varying agreements and sentences.[170] Although sentencing under a restorative justice regime would not obtain uniform results, uniformity must be sacrificed in favor of consideration of the variable and rapidly changing characteristics of juveniles. While uniformity must give way to individualized solutions, accountability need not: restorative justice

164. Beale, *supra* note 1, at 433.

165. *Id.* ("Uniformity requires that offenders with similar records, or who have committed similar offenses, receive similar punishments.").

166. *See, e.g.*, Richard Delgado, 52 STAN. L. REV. 751, 759 (2000) (criticizing victim-offender mediation for producing inconsistent punishments); Beale, *supra* note 1, at 433 (arguing that restorative justice is at odds with uniformity). *But see* Michael M. O'Hear, *Is Restorative Justice Compatible with Sentencing Uniformity?*, 89 MARQ. L. REV. 305, 308 (2005) (arguing that the concern for uniformity is not a compelling reason to reject restorative justice).

167. *See supra* Part I.C.

168. Miller v. Alabama, 132 S. Ct. 2455, 2467–68 (2012).

169. *See* Beale, *supra* note 1, at 433 ("By emphasizing individualized solutions, sentencing under a restorative justice scheme would not have uniform results.").

170. Lee, *supra* note 125, at 567.

sentences would require the offender to assume responsibility for his actions and make amends for the resultant harm to the victim and the larger community.

2. *A Restorative Sentencing Regime Would Re-Orient the Juvenile Justice System*

A restorative justice sentencing regime is also an appropriate response generally because restorative justice provides a way of thinking about crime, and particularly how to hold juvenile offenders accountable for their crimes, that is distinct from the current punitive approach.[171] In our juvenile justice system, as in the justice system as a whole, the justification for holding offenders accountable is significantly linked to the concept of retribution.[172] By violating the law, offenders become liable to society and cannot be held accountable until they have been appropriately punished.[173] In a retributive system, "the state" is the victim of the crime and, consequently, is responsible for determining how to hold offenders accountable for their crimes.[174] The actual crime victim is the secondary victim, and generally maintains no legal standing in the proceedings against the offender.[175] Accordingly, "[t]he resulting criminal justice system is almost entirely offender driven."[176]

Restorative justice, by comparison, "provides a uniquely different orientation to the administration of justice," by including offenders, victims, and community members in a collective response to crime.[177] A restorative form of accountability empowers offenders to assume direct responsibility in making amends to the victims they have harmed, not to an abstract "state."[178] Offenders actively repair the

171. SCHMID, *supra* note 120, at 6.

172. Mark S. Umbreit, *Holding Juvenile Offenders Accountable: A Restorative Justice Perspective*, 46 JUV. & FAM. CT. J. 31, 31 (1995).

173. *Id.*

174. *See* Umbreit et al., *supra* note 116, at 254 (explaining that the criminal justice system focuses on state interests, which include accountability and punishment).

175. *Id.*

176. *Id.*

177. Rodriguez, *supra* note 135, at 355. According to the legal philosopher Conrad Brunk, the differences between a retributive and restorative system should not be overstated. Umbreit et al., *supra* note 116, at 257. Brunk argues that retribution and restoration are not entirely antagonistic; rather, both seek to hold an offender accountable for his crime through a punishment that is roughly proportional to that crime. *Id.* Where they differ significantly is in how to "even the score." *Id.* (internal quotation marks omitted).

178. Umbreit, *supra* note 172, at 31.

harm they have caused, rather than passively accept punishment.[179] In a restorative system, "crime is defined by the harm it causes and not by its transgression of a legal order."[180] The victim also plays a primary role in resolving the conflict.[181] Restorative justice focuses on providing assistance to victims, with the ultimate goal of successfully re-integrating the victims and the offenders into the community.[182]

States should not implement a restorative justice sentencing regime for juveniles simply because it is distinguishable from our current juvenile justice system. Rather, states should implement such a regime because it would accomplish the original, and seemingly abandoned, rehabilitative goals that governed the juvenile justice system prior to the adoption of a punitive ideology in the late 1980s and 1990s.[183] Additionally, a restorative sentencing regime would broaden the rehabilitative ideology to include restoration and re-integration, and hold juveniles more accountable for their actions. Therefore, a restorative sentencing regime would simultaneously emphasize rehabilitative goals and respond effectively to youth crime, a concern that motivated the shift towards a punitive juvenile justice system.[184]

Restorative justice is guided by three distinct principles, which make it a rehabilitative, restorative, and re-integrative process not only for the offender, but also for the victim and the community at large. First, restorative justice aims to hold offenders accountable by helping them to comprehend and compensate society for the consequences of their actions.[185] Restorative justice amends harm caused to the victim, the offender, and their respective communities.[186] By involving offenders in the process of resolving the crime, they are enabled to

179. *Id.*

180. Reimund, *supra* note 139, at 671 (internal quotations marks omitted).

181. Umbreit et al., *supra* note 116, at 255.

182. Van Ness & Nolan, *supra* note 133, at 53.

183. Beale, *supra* note 1, at 413.

184. *See* Gail B. Goodman, Comment, *Arrested Development: An Alternative to Juveniles Serving Life Without Parole in Colorado*, 78 U. COLO. L. REV. 1059, 1093 (2007) (arguing that the inclusion of restorative sentences "advances the rehabilitative goals of the juvenile court system while addressing society's concern that the juvenile justice system is too lenient on young, violent offenders").

185. Paye, *supra* note 129, at 165.

186. Rodriguez, *supra* note 135, at 356.

accept responsibility for their actions.[187] Once they accept full responsibility, they can be re-integrated into the community.[188]

Second, restorative justice involves victims by giving them a voice in the adjudication process.[189] In the traditional criminal justice system, "[i]ndividual crime victims are left on the sidelines of justice, with little or no input."[190] Restorative justice, by comparison, encourages victims to become actively involved in resolving the crime.[191] In most cases, victims meet with their offenders face to face and engage in dialogue that addresses the impact of the crime and how to repair the resultant harm.[192] When victims have the opportunity to work through the effects of the crime, they are generally better able to forgive their offenders, allowing the re-integration process to begin.[193]

The final goal of restorative justice is to make communities safer by attacking, and hopefully preventing, the commission of violent crime.[194] Crime harms not only the individual victim, but also the larger community. Harm caused to the community must therefore be redressed as well.[195] To do so, restorative practices involve the community in the adjudication process.[196] Community members provide assistance in the resolution process by suggesting ways in

187. Paye, *supra* note 129, at 165.

188. *Id.* at 165–66. In comparison to incarceration, restorative justice programs have produced lower rates of recidivism, and thus more successful re-integration. A U.S. study compared one-year re-offense rates among 1,300 juveniles, and determined that those juveniles who had participated in victim-offender mediation were approximately one-third less likely to commit another offense than those juveniles who had not. Burkemper, *supra* note 121, at 129. Less than one in five (eighteen percent) of the juveniles who participated in victim-offender mediation committed a crime within a year, as compared to more than one in four (twenty-seven percent) of those juveniles who did not participate. *Id.* Furthermore, the juveniles who participated in victim-offender mediation and re-offended within the year were involved in less serious crimes than those who did not participate. *Id.*

189. Paye, *supra* note 129, at 166.

190. Wellikoff, *supra* note 142.

191. Umbreit et al., *supra* note 116, at 255.

192. *Id.* at 269.

193. Paye, *supra* note 129, at 166.

194. *Id.*

195. Lee, *supra* note 125, at 532.

196. Paye, *supra* note 129, at 166. Proponents of the restorative justice framework have not reached a consensus on what constitutes a "community." Rodriguez, *supra* note 135, at 358. While some researchers endorse a narrow conception of community that includes only family and friends, others view a community more broadly and include family, friends, juvenile justice professionals, and community volunteers. *Id.*

which the offender can compensate the victim and subsequently re-enter society.[197]

D. How Can States Implement a Restorative Justice Sentencing Regime?

In response to *Miller*, all states should enact laws that incorporate restorative sentences into their juvenile justice systems. Such legislation should not merely include restorative language in its purpose clause or authorize the imposition of restorative sentences. Rather, this legislation should mandate the development of restorative sentences and provide the specific framework and parameters for their implementation. Since an immediate overhaul of the existing juvenile justice system is not feasible, states can take an initial step by enacting legislation that uses restorative sentencing as a complement to existing sentencing practices, especially for offenders of violent crimes.[198] This complementary system should be achieved through the enactment of state sentencing laws that provide for "blended sentences."

There are five blended sentencing models that judges can utilize when sentencing juveniles.[199] Three of the five approaches permit the juvenile court to assert jurisdiction over a juvenile's case: The "juvenile-exclusive" model allows the judge to impose either a juvenile sentence or an adult sentence; the "juvenile-inclusive" model allows the judge to impose both a juvenile and an adult sentence; and the "juvenile-contiguous" model allows the judge to impose a sentence that begins in the juvenile system and transfers to the adult system once the juvenile reaches the age of majority.[200] Adult courts have jurisdiction over a juvenile's case under the final two approaches: The "criminal-exclusive" model allows the judge to choose between imposing a juvenile or an adult sentence and the "criminal-inclusive"

197. Rodriguez, *supra* note 135, at 358.

198. *See* Wellikoff, *supra* note 142 (arguing that while victim-offender mediation involving less serious crimes could be used appropriately as an alternative to the prosecutorial system, mediations involving more violent crimes should be held in conjunction with the prosecutorial system).

199. *See* Goodman, *supra* note 184, at 1091.

200. FRED CHEESMAN, NAT'L CTR. FOR STATE COURTS, A DECADE OF NCSC RESEARCH ON BLENDED SENTENCING OF JUVENILE OFFENDERS: WHAT HAVE WE LEARNED ABOUT "WHO GETS A SECOND CHANCE?" (2011), http://www.ncsc.org/sitecore/content/microsites/future-trends-2011/home/Special-Programs/4-4-Blended-Sentencing-of-Juvenile-Offenders.aspx. Under the "juvenile-inclusive" model, the second (adult) sentence is normally suspended or stayed, and is imposed only if the offender commits some pre-determined violation. *Id.* Twenty-four states within the United States currently employ some form of blended sentencing. *Id.*

model allows the imposition of both a juvenile and an adult sentence.[201]

The most appropriate way to blend restorative sentences with existing sentencing practices is through the "juvenile-inclusive" model. Under this sentencing scheme, juvenile offenders would receive both a restorative sentence and a suspended adult sentence.[202] The offender would begin his restorative sentence in a juvenile facility, where he would have access to educational and rehabilitative services.[203] Once the offender reaches the age of majority, the court would determine whether he should be re-integrated into society or transferred to the adult system where he would serve the rest of his sentence.[204] Such a system would hold juvenile offenders accountable for their crimes, while also giving them another chance at life outside of jail.[205] A second, but less effective, way that restorative sentences could be blended with existing sentencing practices is through the "criminal-inclusive" model, which was recently employed in a first-degree murder case in Florida.[206] Under traditional Florida law, the offender would have been sentenced to a mandatory life sentence, or possibly the death penalty.[207] Instead, after participation in a lengthy and painstaking victim-offender mediation conference, the prosecutor offered the offender the choice between a twenty-year prison sentence plus ten years of probation or a twenty-five-year prison sentence.[208] The ability to reduce the adult sentence after

201. Goodman, *supra* note 184, at 1092.

202. *See id.* (urging the Colorado legislature to adopt the "juvenile-inclusive" model).

203. *Id.*

204. *Id.*

205. *See id.* at 1092–93 ("Because blended sentencing requires juvenile offenders to make decisions that will have a significant impact on their futures, this model forces violent adolescents to alter their thought processes so they are capable of considering the long-term consequences of their behavior.").

206. Paul Tullis, *Forgiven*, N.Y. TIMES MAG., Jan. 6, 2013, at 28. Although either approach to blended sentencing would be appropriate, the first approach is favorable because it is more embracive of the restorative justice ideology. Under the first approach, the juvenile offender has the opportunity to prove he has been restored and can live lawfully among the larger community upon reaching the age of majority. Thus, the primary focus of this approach is restoration and reintegration. By affording him this opportunity earlier in life, the first approach is also cognizant of *Miller's* concern for juveniles' diminished culpability and heightened capacity for change. Under the second approach, however, the juvenile offender only has the opportunity for restoration and re-integration after he has lived nearly a quarter of his life in prison.

207. *Id.*

208. *Id.* Although this case involved a nineteen-year-old rather than a juvenile, it demonstrates that restorative justice can be effectively incorporated into the traditional criminal justice system.

successful completion of a restorative sentence could also prove a viable option for incorporating restorative justice into the juvenile justice system.

An issue with adopting restorative justice legislation is deciding whether restorative justice should constitute an entirely new system of justice, or whether restorative justice should operate in conjunction with the existing justice system.[209] As one commentator has shrewdly noted, "[n]o one has a magic wand to wave that will instantly transform the criminal justice system into a restorative one."[210] Blended sentencing addresses this concern by imposing restorative sentences as a complement to existing sentencing practices.

Another hurdle associated with adopting restorative justice legislation is that most restorative justice programs in the United States are available only to juveniles who commit nonviolent crimes.[211] Critics of restorative justice argue that restorative sentences are inappropriate for juvenile offenders who commit violent crimes because such offenders only respond to deterrence and punishment.[212] This opinion is untenable, however, particularly because it blindly imposes judgment upon all juvenile offenders.[213] Even offenders who commit violent crimes can feel remorse, express willingness to repair the harm they caused their victims, and are therefore suitable candidates for restorative justice sentences.[214] Restorative sentences are also more demanding than traditional sentences, making them a credible response to violent crime.[215] Some victim-offender mediation programs in the United States have already extended their services to offenders of serious crimes such as homicide, sexual assault, and armed robbery.[216] Blended sentencing

209. Reimund, *supra* note 139, at 669.

210. *Id.* at 672.

211. Kurki, *supra* note 128, at 240.

212. Walgrave, *supra* note 118, at 575; *see also* Wellikoff, *supra* note 142 (noting that critics view violent crimes as "too complex and severe to allow restorative justice to play a role in [their] outcome[s]").

213. Walgrave, *supra* note 118, at 575 (responding that this "position reflects a naïve view of the etiology of crime, as if crime seriousness expresses the offender's social callousness").

214. *Id.*

215. *See, e.g.*, *id.* at 577 (arguing that while "[t]raditional procedures make the confrontation indirect, impersonal, and filtered through ritual," restorative sentences force offenders to directly confront the harm they have caused and experience unpleasant emotions such as shame, guilt, remorse, embarrassment, and humiliation).

216. Wellikoff, *supra* note 142. In 1996, the Center for Restorative Justice & Peacemaking at the University of Minnesota School of Social Work performed a national survey of victim-offender mediation programs throughout the United States. MARK S.

is the right means to transition the country toward enacting restorative justice legislation that includes all juvenile offenders, even those who commit violent crimes. Implementing this model of sentencing would pacify the concerns of critics because violent offenders would receive both a restorative and a traditional sentence.

III. CONCLUSION

In *Miller v. Alabama,* the Court combined two strands of precedent to hold that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment.[217] The decision has forced many states to re-evaluate the way in which they hold juveniles accountable for their crimes.[218] Because the Court's decision was vague, states are not confined to any one option when deciding how best to reform their juvenile justice systems.[219] This Comment argues that all states—even those not directly affected by the *Miller* decision—should earnestly consider adopting a restorative justice model.[220] Restorative justice is an appropriate response to juvenile criminal activity because it appropriately accommodates the needs of juveniles during the sentencing process and ensures individualized sentencing, two concerns that the Court addressed in *Miller*.[221] Furthermore, it centers the juvenile justice system on a rehabilitative ideal, and imposes greater accountability on juvenile offenders by encouraging restoration and re-integration.[222] States could effectively implement a restorative sentencing regime, without completely abandoning the traditional criminal justice regime, by adopting a blended sentencing approach: Juvenile offenders, including offenders of violent crimes, could receive a restorative sentence in addition to a

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UMBREIT ET AL., DEP'T OF JUSTICE, NATIONAL SURVEY OF VICTIM-OFFENDER MEDIATION PROGRAMS IN THE UNITED STATES (2000), *available at* https://www.ncjrs.gov/ovc_archives/reports/restorative_justice/restorative_justice_ascii_pdf/ncj176350.pdf. The survey identified 289 programs, which were asked whether they had previously mediated violent crimes. *Id.* The following results were reported: Forty-seven programs had mediated cases of assault with bodily injury; twenty-five programs had mediated cases of assault with a deadly weapon; fifteen programs had mediated cases of negligent homicide; and twelve programs had mediated cases of domestic violence. *Id.*

217. *See supra* Part I.C.

218. *See supra* Part II.A.

219. *Id.*

220. *See supra* Part II.B.

221. *See supra* Part II.C.

222. *See supra* Part II.C.

traditional sentence under existing practice.[223] The Court's decision in *Miller* has given states the opportunity to legislate for restorative justice within the juvenile justice system. States should take advantage of this opportunity to impose sentences that hold juvenile offenders accountable for their crimes, repair the damage caused to the victims, and allow the community to participate in the sentencing process.

223. *See supra* Part II.D.