MISCONSTRUING *GRAHAM* & *MILLER*

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INTRODUCTION

In the last three years, the Supreme Court has decreed a sea change in its juvenile Eighth Amendment jurisprudence. In particular, in *Graham v. Florida* and *Miller v. Alabama*, the Court struck down a majority of the states' juvenile sentencing laws by outlawing life without parole ("LWOP") for juveniles who commit non-homicide offenses and by mandating individualized sentencing for juveniles who commit even the most serious murders.[1] An examination of state laws and sentencing practices since these rulings, however, suggests that the *Graham* and *Miller* rulings have fallen on deaf ears.

After briefly describing what these two decisions required of the states, in this Essay, I outline the many ways in which state actors have failed to comply with the Court's mandate. Finally, I map out a path for future compliance that relies heavily upon the strength and agility of the executive branch.

GRAHAM & *MILLER*: A MANDATE FOR CHANGE

In its 2010 *Graham* decision, the Supreme Court held that the Eighth Amendment forbids the sentence of LWOP for juveniles who commit non-homicide offenses. In *Graham*, the Court struck down laws in thirty-nine jurisdictions that permitted juveniles to receive LWOP for some non-homicide offenses.[2] In addition, the *Graham* Court signaled that, whatever sentence is imposed on a juvenile offender, the juvenile must be afforded a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[3]

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1. Graham v. Florida, 560 U.S. 48 (2010); Miller v. Alabama, 132 S. Ct. 2455 (2012).

2. *Graham*, 560 U.S. at 62 (Thirty-seven states, plus the District of Columbia and federal law permitted LWOP for juvenile non-homicide offenses).

3. *Id.* at 75.

Two years later, the Court further developed its "kids are different"[4] rationale in the *Miller* case by holding that even juveniles convicted of homicide offenses must receive an individualized sentencing hearing at which their youth and any other relevant mitigating factors must be taken into account. In *Miller*, the Court struck down the laws in at least twenty-nine states that permitted juveniles to be tried as adults and automatically sentenced to LWOP if convicted.[5]

These decisions required proactive responses from each branch of state governments. State courts were required to determine which previously-sentenced inmates benefited from these decisions, what shape resentencing hearings would take, and what alternative sentences were appropriate for inmates currently serving LWOP.[6] State legislatures were required to fill gaps where judges were stymied by outdated legislation. For example, in Florida, lawmakers had effectively abolished parole in the 1980s, leaving no mechanism in place for reviewing an inmate's sentence once LWOP had been imposed.[7] Moreover, in all states, lawmakers were required to reexamine juvenile incarceration practices in order to meet the *Graham* declaration that inmates be afforded the "chance to demonstrate maturity and reform."[8] The Court sent executive actors a message, too: children are categorically different in the eyes of the law at sentencing, and prosecutorial practices should reflect that interpretation of the Constitution.[9]

STATES ACTORS ARE MISCONSTRUING *GRAHAM* & *MILLER*

Legislative Responses

While *Graham* and *Miller* necessarily required a great deal from state actors, a survey of reform at the state level suggests resistance to the

4. *See generally* Stephen St. Vincent, Commentary, *Kids Are Different*, 109 MICH. L. REV. FIRST IMPRESSIONS 9 (2010), *available at* http://www.michiganlawreview.org/assets/fi/109/stvincent.pdf.

5. Jody Kent Lavy, *Life Without Parole? No Child Deserves That*, WASH. POST (June 27, 2013), http://www.washingtonpost.com/opinions/life-without-parole-no-child-deserves-that/2013/06/27/d3c7db52-df45-11e2-b2d4-ea6d8f477a01_story.html.

6. *See generally* Cara H. Drinan, Graham *on the Ground*, 87 WASH. L. REV. 51 (2012) (discussing issues before state courts in the wake of *Graham*).

7. *Id.* at 77–78.

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

9. The *Miller* Court made clear that states do not sufficiently consider a defendant's youth when deciding whether to try the defendant as an adult. Noting that many states have mandatory transfer statutes, that prosecutors may decide where the defendant is tried, and that judges have limited information at the transfer juncture, the *Miller* Court found that the transfer decision is no replacement for discretion at post-trial sentencing. Miller v. Alabama, 132 S. Ct. 2455, 2474–75 (2012).

Court's decisions or at least unwillingness to attend to the legal issues these cases raised. To begin, as of August 2013, only eleven state legislatures had enacted laws to comport with *Miller*,[10] and for the most part, such reform has not occurred in the states most directly impacted by the *Graham* and *Miller* rulings. While there are more than 2,500 inmates nationwide serving LWOP for crimes they committed as a child, the bulk of these inmates are in five states: Pennsylvania, Louisiana, Michigan, California, and Florida.[11] Among those states, California, Louisiana and Pennsylvania have enacted post-*Miller* legislation. It is particularly disappointing that Florida has not enacted comprehensive legislation in the wake of the *Graham* decision. As the focal point of the *Graham* decision,[12] Florida has been uniquely on notice of the need to reform its juvenile sentencing practices, and yet its legislators have been unable to do so. One could say the same of Michigan. Because Michigan houses the second largest population of juvenile LWOP inmates nationwide,[13] it too has been on notice for several years that its sentencing practices were out of step with the country and with the Supreme Court. Yet, as discussed below in greater detail, both state legislatures have failed to comprehensively address juvenile sentencing reform. As a result of this inertia, Florida and Michigan have all but courted judicial activism on the part of state and federal judges.

Among the states that have altered their statutory sentencing schemes after the Supreme Court's decisions, only California's new law reflects the vision of the *Graham* and *Miller* Courts. California's Fair Sentencing for Youth Act went into effect in January 2013.[14] The new law allows inmates sentenced to LWOP for crimes they committed before the age of eighteen to seek a resentencing hearing.[15] In March 2013, a California state senator

10. *Life Without Parole for Juveniles: States and Courts Weigh In*, PEW CHARITABLE TRUSTS (Aug. 26, 2013), http://www.pewstates.org/research/data-visualizations/life-without-parole-for-juveniles-states-and-courts-weigh-in-85899500114# [hereinafter *LWOP for Juveniles*].

11. *State Distribution of Youth Offenders Serving Juvenile Life Without Parole (JLWOP)*, HUMAN RIGHTS WATCH (Oct. 2, 2009), http://www.hrw.org/news/2009/10/02/state-distribution-juvenile-offenders-serving-juvenile-life-without-parole (listing number of juvenile LWOP inmates by state).

12. The *Graham* Court estimated that there were only 123 inmates nationwide serving LWOP for a juvenile, non-homicide offense, seventy-seven of whom were serving sentences imposed in Florida. *Graham*, 560 U.S. at 49.

13. *State Distribution of Youth Offenders Serving Juvenile Life Without Parole (JLWOP)*, *supra* note 11.

14. *Senate Bill 9—California Fair Sentencing for Youth*, FAIR SENTENCING FOR YOUTH http://www.fairsentencingforyouth.org/legislation/senate-bill-9-california-fair-sentencing-for-youth/ (last visited Jan. 8, 2014).

15. S.B. 9, 2011 Leg., Reg. Sess. (Cal. 2011), *available at* http://www.fairsentencingforyouth.org/wp/wp-content/uploads/2011/02/SB-9-Chaptered.pdf.

introduced an additional juvenile reform bill that would enable convicted juveniles to receive a parole hearing based on different criteria than those used in standard parole hearings.[16] California is on the right path toward enforcing the *Graham* and *Miller* decisions because its approach does not merely modify grudgingly its sentencing scheme to formally comply with the Supreme Court's recent Eighth Amendment decisions. Instead, its recent legislation tries to give meaningful effect to the substantive principles that animate the *Graham* and *Miller* decisions.

In contrast, legislation recently enacted in Pennsylvania, the state that houses the most juvenile LWOP inmates in the nation, reflects an anemic reading of *Graham* and *Miller*. Pennsylvania's new legislation permits an LWOP sentence and simply adds less punitive alternatives for juveniles convicted of first and second-degree murder.[17] For example, under the new law, a Pennsylvania juvenile convicted of first-degree murder may be sentenced either to LWOP or a minimum of thirty-five years to life if the defendant is between fifteen and seventeen.[18] Similarly, Louisiana's revised law requires juveniles convicted of murder to serve a mandatory minimum of thirty-five years before parole eligibility.[19] Both laws fail to give meaningful impact to the *Miller* Court's admonition that sentencing for a juvenile defendant should be individualized, taking into account the unique experiences of each juvenile that may impact culpability.

As mentioned at the outset of this section, the remaining two of the five states that house the most juvenile LWOP inmates–Michigan and Florida–have yet to pass legislation to bring their laws into compliance with *Graham* and *Miller*. In Michigan, a federal judge has ruled that every person convicted of first-degree murder in the state as a juvenile and who was sentenced to life in prison shall be eligible for parole,[20] but Michigan's Attorney General persists in trying to limit the reach of *Miller*, and state legislators have yet to enact post-*Miller* laws.[21] In Florida,

16. S.B. 260, 2013 Leg., Reg. Sess. (Cal. 2013), *available at* http://www.fairsentencingforyouth.org/wp/wp-content/uploads/2013/03/SB-260-Amended-8-12-121.pdf.

17. *Juvenile Life Without Parole (JLWOP) in Pennsylvania*, JUV. L. CTR., http://www.jlc.org current-initiatives/promoting-fairness-courts/juvenile-life-without-parole/jlwop-pennsylvania (last updated Mar. 26, 2013); S.B. 850, 2012 Leg., Reg. Sess. (Pa. 2012), *available at* http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/2012/0/0204..HTM.

18. http://www.legis.state.pa.us/WU01/LI/LI/US/HTM/2012/0/0204..HTMS.B. 850 § 2 (Pa. 2012).

19. H.B. 152, 2013 Leg., Reg. Sess. (La. 2013), *available at* http://www.legis.la.gov/legis/BillInfo.aspx?i=222016.

20. Hill v. Snyder, No. 10-14568, 2011 WL 2788205 (E.D. Mich. Aug. 12, 2013), *available at* http://www.aclumich.org/sites/default/files/ACLU_JuvenileLife_Order.pdf (holding that every person convicted of first-degree murder in the state as a juvenile and who was sentenced to life in prison shall be eligible for parole).

21. Jonathan Oosting, *Federal Judge Says All Michigan 'Juvenile Lifers' Eligible for Parole; Bill*

legislators have floated proposals that suggest indifference to the Supreme Court's rulings. For example, the Senate Criminal Justice Committee recently voted to approve a law that would impose a new sentencing scheme requiring judges, if deciding against a life sentence, to impose a minimum sentence of fifty years for a juvenile convicted of murder.[22] Juveniles convicted of non-homicide offenses would serve a maximum of fifty years.[23] Other states have enacted legislation that allows LWOP but sets a mandatory minimum for a juvenile defendant convicted of murder, ranging from twenty-five to forty years.[24]

There are at least two problems with the kind of legislation enacted in Pennsylvania and proposed in Florida. First, it may be that a fifty or even a thirty-five-year sentence is effectively the same thing as a life sentence and thereby unconstitutional under *Graham* and *Miller*, especially if the sentence is fifty years before a parole review rather than fifty years with periodic parole reviews throughout. Second, the *Miller* Court emphasized throughout its opinion the need for discretion when sentencing juveniles.[25] To the extent that states replace prior mandatory LWOP schemes with new mandatory, lengthy term of year sentences, those new laws may be equally invalid under *Miller*.[26]

Perhaps most troubling is the complete absence of discussion among state lawmakers regarding the need to change the mode of juvenile incarceration. If the *Graham* decision is to have any real substantive meaning and impact–and if juvenile inmates are to be afforded a "chance to demonstrate maturity and reform"–then states must seriously consider a complete overhaul of juvenile incarceration altogether. A juvenile

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Schuette Disagrees, MLIVE (Aug. 13, 2013, 10:43 AM), http://www.mlive.com/politics/index.ssf/2013/08/federal_judge_every_juvenile_l.html; *see also* Paul Egan, *Parole Hearings on Hold for 360 Michigan Juveniles Serving Life Sentences*, DETROIT FREE PRESS (Dec. 23, 2013, 3:05 PM), *available at* http://www.freep.com/article/20131223/NEWS06/312230084/juvenile-life-Michigan-parole.

22. James Swift, *Florida Juvenile Murderers May Face 50 Year Minimum Sentences*, JUV. JUST. INFO. EXCH. (Apr. 12, 2013), http://jjie.org/florida-juvenile-murderers-may-face-50-year-minimum-sentences/.

23. *Id.*

24. *Life Without Parole for Juveniles*, *supra* note 10 (demonstrating the range of mandatory minimum sentences).

25. *See, e.g.*, Miller v. Alabama, 132 S. Ct. 2455, 2467–2569 (2012) (discussing the importance and variety of mitigating variables that sentencing parties should take into account); *Id.* at. 2469 n.8 ("Our holding requires factfinders to . . . take into account the differences among defendants and crimes.")

26. The claim that *Miller* rendered invalid any and all mandatory minimums for juveniles is outside the scope of this Essay, but I think the *Miller* opinion supports that position. As noted *supra* text accompanying note 25, the *Miller* Court consistently insisted upon the importance of discretion at post-trial sentencing of a juvenile. One has to wonder how the discretion described by the *Miller* Court can exist under a mandatory sentencing scheme of any kind.

convicted of a crime, housed in an adult prison, and locked in a cell all day only allowed to shower, eat and perhaps attend recreation time will neither mature nor reform, at least not in the way that Justice Kennedy and the *Graham* Court envisioned.

Terrence Graham is an excellent case in point. After the Supreme Court struck down his LWOP sentence in 2010, Mr. Graham received a re-sentencing hearing and a new sentence of twenty-five years. Because of his time served to date, he will be released in twelve years at the age of thirty-eight if, as he says, he can "make it out."[27] Like many juvenile inmates serving lengthy sentences, Mr. Graham does not have access to educational or vocational opportunities.[28] Occasionally, if he is lucky, Mr. Graham can visit the prison library, but for the most part, he is left to pass the hours with fellow inmates in the recreation pavilion where even a chess game can be a risky undertaking. As he explains, Mr. Graham may think he's playing chess with another inmate to pass the time, but, as it turns out, that other inmate is "playing to win," and even when he is trying to "stay out of trouble, trouble can find [him]." Thus, the "education" that he receives is from his fellow inmates, many of whom are serving LWOP sentences and have "nothing to lose." Mr. Graham and those like him across the country currently have no opportunity to demonstrate "maturity and reform," and state legislatures have their work cut out for them if this is to change.

Judicial Responses

In the absence of legislative action, state court judges have been required to muddle through various post-*Graham* and *Miller* questions, and the results have been mixed. For example, as a threshold matter, courts have had to determine whether these decisions apply retroactively.[29] Courts have correctly treated the *Graham* decision as substantive and have

27. After writing about *Graham v. Florida*, I interviewed Mr. Graham at the Taylor Correctional Institute, where he is incarcerated in Perry, Florida. Since that interview, conducted in August 2012, Mr. Graham and I have maintained correspondence through the mail. I am currently working on a larger project that shares the narrative of his life while illuminating the need for holistic juvenile justice reform.

28. *Id. See also* ASHLEY NELLIS, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 23–24 (2012), *available at* http://sentencingproject.org/doc/publications/jj_The_Lives_of_Juvenile_Lifers.pdf.

29. A full discussion of retroactivity analysis is outside the scope of this Essay. *See* Drinan, *supra* note 6, at 65–69. In general, substantive rules are retroactively applicable, while procedural ones are not.

held that it is retroactively applicable.[30] But courts have been conflicted on the question of whether *Miller* applies to defendants who have completed their direct appeal. Courts in Florida, Michigan, and Minnesota have held that the *Miller* decision is not retroactively applicable to cases pending on collateral review.[31] These courts have explicitly found that the *Miller* rule was merely procedural and thus has no retroactive application. In contrast, state courts in Mississippi, Massachusetts, Illinois, Iowa and Louisiana have held that *Miller* announced a new substantive rule that applies retroactively to cases on collateral review.[32] Alongside the state courts, there is an emerging federal court debate over *Miller's* retroactivity.[33] In light of the volume of federal habeas petitioners who may seek relief under *Miller* and the split on the question of retroactivity, it seems inevitable that the United States Supreme Court will need to squarely address this issue in the near future.

By far, the greatest judicial debate in the state courts has been around the issue of "de facto life sentences." Both *Graham* and *Miller* preclude LWOP sentences—in one case for an entire category of offenders and in another unless certain procedures are followed. But state courts are divided on whether that rule also applies to, say, an eighty-nine year sentence without the possibility of parole. Defendants have challenged extremely long term of year sentences under *Graham* and *Miller* and have achieved mixed results. In Florida alone, where Mr. Graham received twenty-five years upon re-sentencing, another inmate received ninety-nine years as a single sentence; one inmate received 170 years under consecutive sentences.[34] This issue continues to percolate in the court system, and at least for the time being, it appears that the Supreme Court

30. *See, e.g.*, Bell v. Haws, No. CV09-3346-JFW (MLG), 2010 WL 3447218, at *9 n.6 (C.D. Cal. July 14, 2010), *vacated sub nom.* Bell v. Lewis, 462 F. App'x 692 (9th Cir. 2011) (holding *Graham* retroactively applicable); Bonilla v. State, 791 N.W.2d 697, 700–01 (Iowa 2010) (same); *but see* Lawson v. Pennsylvania, No. Civ.A. 09-2120, 2010 WL 5300531, at *3 (E.D. Pa. Dec. 21, 2010).

31. Geter v. State, 115 So.3d 375 (Fla. Dist. Ct. App. 2012), *reh'g denied*, 115 So. 3d 385 (Fla. Dist. Ct. App. 2013) (*Miller* does not apply retroactively); Chambers v. State, 831 N.W.2d 311 (Minn. 2013) (same); People v. Carp, 828 N.W.2d 685 (Mich. Ct. App. 2012), *appeal granted*, 838 N.W.2d 873 (Mich. 2013) (same).

32. Diatchenko v. Dist. Atty., 2013 WL 6726856 (Mass. Dec. 24, 2013); State v. Ragland, 836 N.W.2d 107 (Iowa 2013); Jones v. State, 122 So. 3d 698 (Miss. 2013); People v. Williams, 982 N.E.2d 181 (Ill. App. Ct. 2012); State v. Simmons, 99 So. 3d 28 (La. 2012).

33. *Compare* Craig v. Cain, No. 12-30035, 2013 WL 69128 (5th Cir. Jan. 4, 2013) (finding Miller not retroactive) *with In re* Pendleton, 732 F.3d 280 (3d Cir. 2013) (finding that petitioners had made a prima facie showing that *Miller* was retroactive).

34. Maggie Lee, *Florida Struggles with Youth Life Sentences*, JUV. JUST. INFO. EXCH. (July 30, 2012), http://jjie.org/florida-struggles-youth-life-sentences/.

will not weigh in on the question; the Court just denied certiorari in a case asking it to do just that.[35]

Finally, executive actors have been largely absent from the process of implementing the *Graham-Miller* mandate. The one noteworthy instance of executive action, moreover, was done in a ham-handed manner and should not be replicated elsewhere. Shortly after the *Miller* ruling, Iowa Governor Terry Branstad exercised his executive clemency power and commuted the sentences of the state's thirty-eight juvenile homicide offenders who had been sentenced to LWOP: he commuted the sentences to sixty year terms and instructed that no credit be given for earned time.[36]

The Governor's action was procedurally and substantively flawed, and just this summer the Iowa Supreme Court held that his actions exceeded his executive clemency power.[37] The *Miller* Court emphasized that "individualized sentencing" was required when dealing with juveniles, and it further asserted that "appropriate occasions for sentencing juveniles to [LWOP] will be uncommon."[38] By commuting the thirty-eight sentences in a blanket manner, the Governor ignored the Court's requirement to treat each defendant as an individual and to consider factors such as family and home environments, the circumstances of the homicide itself and the ways in which the defendant's youth may have hampered his interactions with law enforcement and even with his own counsel.[39] At the same time, as a practical matter, these inmates will likely die in prison[40]—something the *Miller* Court stated should be an uncommon outcome.[41] The Iowa Supreme court correctly recognized these facts and agreed with an inmate's challenge to his sixty year commuted sentence, roundly criticizing the Governor in its decision.[42] Thus, while the *Graham* and *Miller* rulings are still fresh, initial state efforts indicate a reluctant adoption of the Supreme Court's decisions.

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35. Bunch v. Smith, 685 F.3d 546 (6th Cir. 2012), *cert. denied sub nom.* Bunch v. Bobby, 133 S. Ct. 1996 (2013).

36. State v. Ragland, 836 N.W.2d 107, 111 (Iowa 2013).

37. *Id.* at 122.

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

39. *Id*. at 2468.

40. MICHIGAN LIFE EXPECTANCY DATA FOR YOUTH SERVING NATURAL LIFE SENTENCES, ACLU OF MICHIGAN JUVENILE LIFE WITHOUT PAROLE INITIATIVE, http://fairsentencingofyouth.org/wp-content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf.

41. *Miller*, 132 S. Ct. at 2469 ("[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.").

42. *Ragland*, 836 N.W.2d at 117–18 (stating that the Governor's attempt to circumvent the dictates of *Miller* constitutes a breach of the separation of powers).

A BLUEPRINT FOR PROGRESS

In the wake of *Graham* and *Miller*, the real onus is on state lawmakers. Removing mandatory LWOP, as some states have done, is a start, but replacing that sentence with new, steep mandatory minimums, contravenes the spirit of *Miller* if not its holding. More importantly, though, as those actors whose job it is to think and act prospectively, state lawmakers need to explore ways to impact juvenile inmates in the long run. If lawmakers want to make a juvenile's release hinge upon factors such as whether they have educated themselves, reflected on their wrongdoing and demonstrated their capacity to contribute to society, then prison must afford an array of growth opportunities, including classes, substance abuse and alcohol education and treatment, and employment and skills training. There are models for productive juvenile incarceration that are more likely to foster reform and are more affordable long term.[43] State lawmakers need to abandon shortsighted, technical attempts to comport with the Supreme Court's decisions and begin to embrace the Court's vision of juvenile rehabilitation.

Where lawmakers have not acted, state court judges can play a more active role in ensuring that youth is taken into account at sentencing, as the *Graham* and *Miller* decisions demand. For example, state court judges can rely upon state constitutional provisions to expand the reach of the *Graham* and *Miller* decisions, as the Massachusetts high court just did. In Massachusetts, the Supreme Judicial Court not only held that the *Miller* decision applies retroactively, but also held that even discretionary LWOP sentences for juvenile homicide offenders were unconstitutional under the Massachusetts Declaration of Rights.[44] State court judges have the tools to give substantive meaning to the *Graham* and *Miller* decisions, as well as the ability to ensure even-handed application of the two decisions, and they should use those tools liberally.

Finally, executive actors at the state level should ensure state compliance with the *Graham* and *Miller* decisions. Not only do executive actors share a responsibility to uphold the law of the land, but also they are

43. In recent years, for example, Ohio has enacted sweeping juvenile justice reform designed to treat young people as juveniles and to reduce recidivism. *See* CAMPAIGN FOR YOUTH JUSTICE: STATE TRENDS: LEGISLATIVE VICTORIES FROM 2011–2013 6, http://www.campaignforyouthjustice.org/documents/ST2013.pdf; *see also* Press Release, R Strategy Group, Judges, Youth Corrections Experts, and Advocates Thank Governor Kasich, General Assembly Leaders for Passage of Historic Juvenile Justice Reforms, *available at* http://clcky.squarespace.com/storage/documents/JJReformreleaseed.pdf. Other jurisdictions should follow suit.

44. Diatchenko v. Dist. Atty., 2013 WL 6726856, at **8–**9 (Mass. Dec. 24, 2013).

uniquely situated to do so in the post-*Miller* era because of the executive branch's agility and discretion. State executive actors can contribute to the implementation of *Graham* and *Miller* in at least two concrete ways.

To begin, state prosecutors should reconsider charging and sentencing policies for juveniles. For example, in some states, prosecutors have the discretion to decide which juvenile cases should be transferred to adult court. In these states, prosecutors should consider instituting a policy stating that non-homicide juvenile offenders should not be charged as adults for first offenses.[45] At the same time, prosecutors should support legitimate post-*Miller* legislation rather than legislation that merely replaces LWOP with its practical equivalent.[46]

Governors, whose clemency power is enormous, should take seriously their obligation to exercise mercy where it is appropriate and to bring state practice into compliance with the dictates of *Graham* and *Miller*. Governor Branstad's blanket commutation of Iowa's juvenile homicide inmates serves as an example of "what not to do." Instead, Governors should consider appointing "*Miller* Commissions," whose charge will be: (1) to identify all state inmates affected by the *Graham* and *Miller* decisions; (2) to identify a range of appropriate sentences for such inmates; and (3) to make recommendations to the Governor regarding each inmate and what new sentence may be appropriate in light of the *Miller* sentencing factors. These Commissions are urgently needed in those states housing the most people serving juvenile LWOP sentences, but they make sense in all jurisdictions.

In this way, the executive branch can remedy several problems at once. It can reach cases that the courts cannot. In particular, governors can apply the *Miller* decision even in states where courts have held that the decision is not retroactively applicable. This ensures even-handed application of federal law. Also, an executive "*Miller* Commission" can address post-*Miller* issues in a holistic fashion, avoiding the piecemeal nature of failed legislative attempts and wildly unpredictable court outcomes. Finally, it can afford relief to juvenile inmates in perhaps the most expeditious way possible.

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45. Thanks to Professor Doug Berman who made a similar suggestion at a recent roundtable discussion of vulnerable inmates.

46. In recent speeches, Attorney General Holder has addressed the reality that we are a nation that over-incarcerates. *See, e.g.*, Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), *available at* http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html. These speeches should set the tone for state attorneys general and should encourage state reconsideration of charging and sentencing practices, particularly as they relate to juveniles.

The *Graham* and *Miller* opinions signaled to the states a need to overhaul juvenile sentencing and incarceration practices. To date, no such overhaul has occurred. Until state lawmakers can enact comprehensive legislation that implements the *Graham-Miller* mandates, executive actors have the capacity and responsibility to do so.