

**AMERICAN BAR ASSOCIATION**

**CRIMINAL JUSTICE SECTION**

**REPORT TO THE HOUSE OF DELEGATES**

**RESOLUTION**

1       RESOLVED, That the American Bar Association urges federal, state, local, tribal, and  
2 territorial, governments to adopt sentencing laws and procedures that both protect public safety  
3 and appropriately recognize the mitigating considerations of age and maturity of youthful  
4 offenders i.e., those under age 18 at the time of their offense who are subject to adult penalties  
5 upon conviction, by enacting sentencing laws and rules of procedure that will:  
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- 7       1. Eliminate life without the possibility of release or parole for youthful offenders both  
8       prospectively and retroactively;  
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- 10       2. Provide youthful offenders with meaningful periodic opportunities for release based on  
11       demonstrated maturity and rehabilitation beginning at a reasonable point into their  
12       incarceration, considering the needs of the victims.

## REPORT

### **I. INTRODUCTION**

In 2008, the American Bar Association (ABA) approved Resolution 105C (see the conclusion of this report), urging governments to authorize and implement sentences for youthful offenders that are generally less punitive than comparable sentences for older offenders, and by requiring that such offenders generally be eligible for parole consideration at a reasonable point during their sentences and, if parole is denied, be reconsidered for parole periodically thereafter. This resolution was based on the considerations endorsed by the United States Supreme Court in *Roper v. Simmons*, 543 U.S. 551 (2005). Subsequent to the passage of Resolution 105C, the Supreme Court issued two additional decisions addressing sentencing for youthful offenders. The purpose of this resolution is to build on the prior work of the ABA by recognizing the further developments in law set forth by the United States Supreme Court in *Graham v. Florida*, 130 S.Ct. 2011 (2010) and *Miller v. Alabama*, 132 S.Ct. 2455 (2012). It should be noted that this resolution defines youthful offenders as those under 18 at the time of the offense. The Criminal Justice Section Council discussed the fact that there is movement in some states to raise the age at which offenders are considered adults. But the Council determined that it was appropriate to continue to define youthful offenders as those under 18 because it is reflective of the current state of the law and maintains consistency with the definition used in Resolution 105C.

### **II. DEVELOPING CASE LAW**

The United States Supreme Court, drawing on brain and behavioral development research, has ruled three times within the last decade that children are constitutionally different from adults and should not be subject to our nation's harshest penalties. In *Roper* the Court struck down the death penalty for children, finding it to be a violation of the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>1</sup> In that opinion, the Court emphasized the brain and behavioral development science showing that children are fundamentally different than adults in their development and that they have a unique capacity to grow and change as they mature.<sup>2</sup> ABA Resolution 105C was approved in light of the holding in this opinion. Subsequently, the Supreme Court issued two additional opinions declaring certain sentences as applied to juveniles to violate the Eighth Amendment of the U.S. Constitution except in certain circumstances.

In *Graham* the Court struck down life without parole sentences for non-homicide offenses, holding that states must give children a "realistic opportunity to obtain release."<sup>3</sup> In that case, *Graham* was sentenced to a life sentence for a robbery and assault

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<sup>1</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>2</sup> *Id.*

<sup>3</sup> *Graham v. Florida*, 130 S. Ct. 2011 (2010).

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committed with several other boys when he was 16.<sup>4</sup> Although the sentence was technically life rather than life without parole, because the state of Florida abolished its parole system and there was no mechanism for release consideration other than clemency, the sentence was de facto life without parole.<sup>5</sup> The court analyzed the sentence under the four theories of punishment – retribution, deterrence, incapacitation, and rehabilitation – and found that none justified life without parole for juvenile nonhomicide offenders.<sup>6</sup> The court went on to make it clear that its holding does not require a state to guarantee eventual freedom to juvenile nonhomicide offenders.<sup>7</sup> Rather, it “forbid[s] States from making the judgment at the outset that those offenders never will be fit to reenter society.”<sup>8</sup> Thus, *Graham* requires the states to provide “meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”<sup>9</sup>

Two years later, in *Miller* the Court struck down mandatory life without parole sentences for homicide offenses.<sup>10</sup> *Miller* addressed sentencing in two murder cases: one involving a 14-year-old who participated in a robbery during which another individual shot and killed a store clerk, and one involving a 14-year-old who directly participated in the beating and murder of a neighbor while under the influence of drugs.<sup>11</sup> Both received sentences of life without parole.<sup>12</sup> In discussing the cases, the court stated:

So *Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult. To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys.<sup>13</sup>

Although the court did not foreclose the possibility that life without parole might be appropriate in some instances, the court explained that because children have diminished

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<sup>4</sup> *Id.* at 2018.

<sup>5</sup> *Id.* at 2020.

<sup>6</sup> *Id.* at 2028-30.

<sup>7</sup> *Id.* at 2030.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

<sup>11</sup> *Id.* at 2461-63.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 2468.

culpability and greater prospects for reform, the court’s expectations were that “appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”<sup>14</sup> The court held that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles.”<sup>15</sup>

The effect of *Graham* and *Miller* has been to invalidate mandatory sentencing schemes in 28 states and require consideration of the mitigating considerations of age and maturity at the time of sentencing any time a juvenile faces a possible life sentence in the U.S.

### III. LEGISLATIVE RESPONSES TO *GRAHAM* AND *MILLER*

In the wake of *Roper*, *Graham*, and *Miller*, several state legislatures have taken action to reform their juvenile sentencing policies. Recently, states such as Texas, Wyoming, West Virginia, Delaware, Massachusetts, and Hawaii have all passed legislation eliminating life without the possibility of release or parole as a sentencing option for children.<sup>16</sup> These states joined others such as Kentucky, Kansas, and Montana, which had previously banned its use.<sup>17</sup>

Despite positive movement in recent years, some states, such as Minnesota, still authorize the use of life without the possibility of release or parole as a sentencing option for juveniles.<sup>18</sup> Some states have passed legislation to comply with the U.S. Supreme Court decisions by enacting measures that build in consideration of the factors iterated in *Miller*, but that still presume that a sentence of life or life without parole will be imposed absent a strong showing of mitigation.<sup>19</sup>

There also remains uncertainty about the retroactivity of the Court’s rulings. States that have considered this issue are split. Michigan, Pennsylvania, Louisiana, and Minnesota have ruled that *Miller* is not a substantive rule and therefore people who were previously sentenced to life without parole are not entitled to re-sentencing hearings.<sup>20</sup> Texas, Mississippi, Nebraska, Iowa, and Massachusetts have found *Miller* to apply retroactively.<sup>21</sup> This split results in two kinds of lack of uniformity. In states that have decided *Miller* is not retroactive, offenders convicted in the past continue to serve life sentences without the possibility of review while offenders who commit offenses going

<sup>14</sup> *Id.* at 2469.

<sup>15</sup> *Id.* at 2475.

<sup>16</sup> S.B. 2, 83d Leg., 2d Spec. Sess. (Tex 2013); H.B. 23, 62d Leg., Gen. Sess. (Wy. 2013); H.B. 4210, 2014 Leg., Reg. Sess. (W. Va. 2014); S.B. 9, 147th Gen. Assembly, Reg. Sess (Del. 2013); H.B. 4307, 188th Leg., Reg. Sess. (2014); H.B. 2116, 2014 Leg. Sess. (HI 2014).

<sup>17</sup> Ky. Rev. Stat. Ann. § 640.040 (2014); Kan. Stat. Ann. § 21-6618 (2014); Mont. Code Ann. § 46-18-222(1) (2013).

<sup>18</sup> *See, e.g.*, Minn. Stat. §§ 609.106, subd. 2 and 609.3455, subd. 2.

<sup>19</sup> *See, e.g.*, 18 Pa. C.S.A. § 1102.1 (2014).

<sup>20</sup> *Michigan v. Carp*, 496 Mich. 440 (2014); *Pennsylvania v. Cunningham*, 81 A.3d 1 (Pa. 2013); *Louisiana v. Tate*, 130 So.3d 829 (La. 2013); *Chambers v. Minnesota*, 831 N.W.2d 311 (Minn. 2014).

<sup>21</sup> *Ex Parte Maxwell*, 424S.W.2d 66 (Tex. Crim. App. 2014); *Jones v. Mississippi*, 122 So. 3d 698 (Miss. 2013); *Nebraska v. Mantich*, 842 N.W.2d 716 (Neb. 2014); *Iowa v. Ragland*, 836 N.W.2d 107 (Iowa 2013); *Diatchenko v. Dist. Atty. for Suffolk*, 1 N.E.3d 270 (Mass. 2013).

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forward are permitted opportunities for review. Between and among the states, states that have determined *Miller* must be applied retroactively are instituting procedures to provide opportunities for review for offenders currently serving life without parole sentences, while in states that have decided *Miller* is not retroactive, offenders are continuing to serve the remainder of their life sentences with no opportunity for review.

In addition to the lack of uniformity with regard to retroactivity, there also is uncertainty regarding the scope of the Court's decisions in *Graham* and *Miller*. The Sixth Circuit, for example, has held that *Graham* does not apply to multiple non-homicide offenses, extremely long fixed-term sentences, or consecutive sentences that run together.<sup>22</sup> Rather, the Sixth Circuit has decided to read *Graham* narrowly and adopt the approach of some courts that have said that "if the Supreme Court has more in mind [beyond "life without parole" for a single non-homicide offense], it will have to say what it is."<sup>23</sup> However, other courts have held that long fixed-term or consecutive sentences constitute a de facto life sentence and "violate the spirit, if not the letter, of *Graham*."<sup>24</sup>

## IV. CONCLUSION

The *Miller* Court did not specifically foreclose the possibility of imposing a life without the possibility of release or parole after the consideration of the child's age. However, it did express that "appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon."<sup>25</sup> The United States stands alone in permitting life without parole for juveniles. It is the only country other than Somalia that has not yet ratified the Convention on the Rights of the Child, which prohibits life without parole sentences for youth.<sup>26</sup> The legal developments in *Graham* and *Miller*, along with the advances in brain and behavioral development science showing how children are fundamentally different from adults, as explained in *Roper* and in the report accompanying ABA Approved Resolution 105C, support a conclusion that it is inappropriate to decide at the time of sentencing that life without parole is an appropriate sentence for a juvenile offender. This resolution encourages jurisdictions to go one step further than *Miller* and to join the policy position of the rest of the world by eliminating mandatory life without parole sentences for youthful offenders.

Instead, juvenile offenders should be given a periodic and meaningful opportunity to demonstrate maturity and rehabilitation, even in jurisdictions where such processes are not available for adults. The resolution does not specify a time frame within which the first review must occur. The most current draft of the Model Penal Code suggests that the first review should occur at 10 years for juveniles.<sup>27</sup> But many states have recently

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<sup>22</sup> *Bunch v. Smith*, 685 F.3d 546 (6th Cir. 2012); see also *Henry v. Florida*, 82 So.3d 1084, 1089 (Fla. Dist. Ct. App. 2012); *Arizona v. Kasic*, 265 P.3d 410, 415 (Ariz. Ct. App. 2011).

<sup>23</sup> *Id.*

<sup>24</sup> See, e.g., *California v. J.I.A.*, 127 Cal. Rptr. 3d 141, 149 (Cal. Ct. App. 2011); *California v. Nunez*, 125 Cal. Rptr. 3d 616, 624 (Cal. Ct. App. 2011).

<sup>25</sup> *Miller*, 132 S.Ct. at 2469.

<sup>26</sup> United Nations, *Convention on Rights of the Child*, § 37(a) (Sept. 2, 1990).

<sup>27</sup> American Law Institute, *Model Penal Code, Sentencing Tentative Draft No. 2*, § 6.11A(h) (March 25, 2011).

enacted legislation that sets the minimum time to serve prior to review at 20 to 25 years.<sup>28</sup> Given the potential range of possibility, the Council chose not to take a specific position other than to suggest that review should occur at a “reasonable point” into the juvenile’s incarceration. Additionally, it should be noted that periodic review does not mean frequent review. It is recognized that the parole process – especially when applied retroactively to juveniles originally sentenced to life without parole – can be a source of continuing distress for the victims of the offense and/or their families and can make it difficult for these individuals to find closure with regard to the crime. As such, it is not intended for this “periodic review” to be a frequent event, and it is recommended that governmental bodies exercise restraint in establishing the frequency with which it occurs.

**Midyear 2008 105C**

RESOLVED, That the American Bar Association urges federal, state, tribal, local and territorial governments to authorize and implement sentencing laws and procedures that both protect public safety and appropriately recognize the mitigating considerations of age and maturity of youthful offenders (i.e., those under age 18 at the time of their offense who are subject to adult penalties upon conviction) based on the following principles:

1. Sentences for youthful offenders should generally be less punitive than sentences for those age 18 and older who have committed comparable offenses;
2. Sentences for youthful offenders should recognize key mitigating considerations particularly relevant to their youthful status, including those found by the United States Supreme Court in *Roper v. Simmons*, 543 U.S. 551, 567-570 (2005), as well as the seriousness of the offense and the delinquent and criminal history of the offender; and
3. Youthful offenders should generally be eligible for parole or other early release consideration at a reasonable point during their sentence; and, if denied, should be reconsidered for parole or early release periodically thereafter.

Respectfully submitted,

**James Felman and Cynthia Orr**  
 Chairs, Criminal Justice Section  
 February 2015

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<sup>28</sup> See, e.g., 11 Del.C. § 4204A(d) (2014) (20 years for non-homicide crimes; 30 years for homicide crimes); Mass. Gen. Laws. Ann. ch. 279 § 24 (2014) (20 years for homicide); N.C. Gen. Stat. Ann. § 15A-1340.19A (2014) (25 years for homicide); Wy. Stat. § 6-10-301(c) (2014) (25 years for homicide).

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## GENERAL INFORMATION FORM

Submitting Entity: Criminal Justice Section

Submitted By: Jim Felman and Cynthia Orr, Chairs

1. Summary of Resolution(s).  
This resolution urges elimination of life without the possibility of release or parole sentences for youthful offenders both prospectively and retroactively and provides youthful offenders with meaningful periodic opportunities for release based on demonstrated maturity and rehabilitation beginning at a reasonable point into their incarceration, considering the needs of the victims.
2. Approval by Submitting Entity. This resolution was approved by the Criminal Justice Section Council at its Fall Meeting on October 25, 2014.
3. Has this or a similar resolution been submitted to the House or Board previously? No similar resolution has been previously submitted.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? In 2008, the American Bar Association (ABA) approved Resolution 105C (see conclusion of the report), urging governments to authorize and implement sentences for youthful offenders that are generally less punitive than comparable sentences for older offenders, and by requiring that such offenders generally be eligible for parole consideration at a reasonable point during their sentences and, if parole is denied, be reconsidered for parole periodically thereafter. This resolution was based on the considerations endorsed by the United States Supreme Court in *Roper v. Simmons*, 543 U.S. 551 (2005). Subsequent to the passage of Resolution 105C, the Supreme Court issued two additional decisions addressing sentencing for youthful offenders. The purpose of this resolution is to build on the prior work of the ABA by recognizing the further developments in law set forth by the United States Supreme Court in *Graham v. Florida*, 130 S.Ct. 2011 (2010) and *Miller v. Alabama*, 132 S.Ct. 2455 (2012).
5. If this is a late report, what urgency exists which requires action at this meeting of the House? Not applicable.
6. Status of Legislation. (If applicable) Not applicable.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. The policy will be distributed to various criminal justice stakeholders as a tool to offer guidance on the role of the prosecutor and defense counsel. The policy will also be featured on the Criminal Justice Section website and in Section publications.

8. Cost to the Association. (Both direct and indirect costs) No cost to the Association is anticipated.

9. Disclosure of Interest. (If applicable) None

10. Referrals.

At the same time this policy resolution is submitted to the ABA Policy Office for inclusion in the 2015 Midyear Agenda Book for the House of Delegates, it is being circulated to the chairs and staff directors of the following ABA entities:

Standing Committees

American Judicial System Standing Committee  
Ethics and Professional Responsibility  
Federal Judiciary  
Legal Aid and Indigent Defendants  
Professionalism

Special Committees and Commissions

Children and the Law  
Coalition on Racial and Ethnic Justice  
Commission on Domestic and Sexual Violence  
Commission on Youth at Risk  
Death Penalty Representation Project  
Hispanic Legal Rights and Responsibilities  
Sexual Orientation and Gender Identity

Sections, Divisions

Government and Public Sector Lawyers Division  
Individual Rights and Responsibilities  
Family Law  
Judicial Division  
Litigation  
State and Local Government Law  
Young Lawyers Division

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

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12. Contact Name and Address Information. (Who will present the report to the House? Please include name, address, telephone number, cell phone number and e-mail address.)

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## EXECUTIVE SUMMARY

1. Summary of the Resolution

This resolution urges elimination of life without the possibility of release or parole sentences for youthful offenders both prospectively and retroactively and provides youthful offenders with meaningful periodic opportunities for release based on demonstrated maturity and rehabilitation beginning at a reasonable point into their incarceration, considering the needs of the victims.

2. Summary of the Issue that the Resolution Addresses

In 2008, the American Bar Association (ABA) approved Resolution 105C (see conclusion of the report), urging governments to authorize and implement sentences for youthful offenders that are generally less punitive than comparable sentences for older offenders, and by requiring that such offenders generally be eligible for parole consideration at a reasonable point during their sentences and, if parole is denied, be reconsidered for parole periodically thereafter. This resolution was based on the considerations endorsed by the United States Supreme Court in *Roper v. Simmons*, 543 U.S. 551 (2005). Subsequent to the passage of Resolution 105C, the Supreme Court issued two additional decisions addressing sentencing for youthful offenders.

3. Please Explain How the Proposed Policy Position will address the issue

The purpose of this resolution is to build on the prior work of the ABA by recognizing the further developments in law set forth by the United States Supreme Court in *Graham v. Florida*, 130 S.Ct. 2011 (2010) and *Miller v. Alabama*, 132 S.Ct. 2455 (2012).

4. Summary of Minority Views

None are known.