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# REVIEW

*A journal of  
legal theory  
and practice  
“to the end  
that human  
rights shall  
be more  
sacred than  
property  
interests.”*

—Preamble, NLG  
Constitution



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**By Meredith O'Harris, Editor in Chief  
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The Left doesn't have much to thank Associate Justice Anthony Kennedy for. During his 30 years on the Supreme Court, he generally helped move the nation rightward and was especially reactionary late in his career on issues involving workers' rights<sup>1</sup> and allowing corporate money to influence elections,<sup>2</sup> using his status as the Court's "swing vote" to determine the outcomes of major cases in both areas. But there were a few aspects of the law in which this Reagan appointee genuinely surprised and strengthened progressive political movements. One was juvenile sentencing.<sup>3</sup>

During the seven years between 2005 and 2012, Kennedy became an unlikely progressive champion of children's rights in a trio of 5-4 cases (even penning the majority opinion in two of them). In the most recent of these cases, *Miller v. Alabama*, Kennedy helped transform the United States from a draconian nation that allowed children to be sentenced to die,<sup>4</sup> to a draconian nation that at least prohibits sentencing children to life in prison without the possibility of parole (LWOP).<sup>5</sup>

Although *Miller* was rightly decided, it left many issues unresolved and injustices unredressed for juvenile "lifers." Presently, it remains unclear how the parole process should work for these individuals, now that they're entitled to the possibility of parole. Some states are using "Risk Assessment Instruments," designed for adult offenders, to determine their parole eligibility. But while these assessment tools theoretically allow for juveniles' eventual release, they may unintentionally preclude it through their assessment criteria—leaving *Miller* an empty promise. Consequently, juveniles remain in prison indefinitely; a *de facto* life sentence. In our feature article,

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## Emily Barber

# NAVIGATING *MILLER V. ALABAMA* WITH COMPAS: HOW RISK ASSESSMENT INSTRUMENTS SQUARE WITH A MEANINGFUL OPPORTUNITY FOR RELEASE

## Introduction

In October 2017, during his tenth parole board hearing, 54-year-old Carlos Flores told commissioners through a camera, “[t]oday, I’m compassionate. I’m more able to think. I’m educated. I’m able to distinguish exactly what I couldn’t distinguish then.”<sup>1</sup> When he was 17, Flores, a victim of abuse and abject poverty,<sup>2</sup> struck up a friendship with 24-year-old Nicholas DeNicolantonio, whom he hoped would be a mentor and “older brother figure.”<sup>3</sup> DeNicolantonio easily convinced Flores to assist him in robbing a local bar with two other teenagers.<sup>4</sup> While Flores waited in the back of the bar, a 16-year-old accomplice shot and killed an off-duty police officer, Robert Walsh, in another room. Under the felony murder rule, Flores was convicted of second-degree murder and sentenced to 21 years to life, despite his age and lack of prior criminal history.<sup>5</sup>

As of 2017, Flores had been incarcerated for 37 years—16 more than the minimum term imposed by the judge.<sup>6</sup> Over these decades, Flores obtained a GED and college degree, was given “commendable behavior reports,” and received the lowest possible risk score on the COMPAS Risk and Needs Assessment evaluation, which is an algorithm instrument used by New York State to predict the likelihood that an individual will reoffend.<sup>7</sup> With these factors, Flores had many reasons to be hopeful about his parole application. But despite his pleas to the commissioners to consider his application for the person he is today, and not “the kid [he] was then,” the board denied Flores parole for a tenth time, reasoning that his release “would not be compatible with the welfare of society.”<sup>8</sup>

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The United States is the only country in the world that allows juveniles (those between the ages of 13 and 17) to be sentenced to life without parole.<sup>9</sup> These sentences are not uncommon; there are approximately 1,100 individuals currently serving a life sentence for a crime they committed as a child.<sup>10</sup> Many more juveniles are given indeterminate life sentences or lengthy term-of-years sentences with parole eligibility,<sup>11</sup> but like Carlos Flores, they are denied parole indefinitely, constituting a *de facto* life sentence.<sup>12</sup>

Research demonstrates that youths who receive life sentences disproportionately exhibit “high rates of socioeconomic disadvantage,” “high levels of exposure to violence in their homes and communities,” high rates of physical and sexual abuse, and “extreme racial disparities in the imposition of these punishments.”<sup>13</sup> Additionally, critics contend that none of the recognized purposes of incarceration—retribution, deterrence, incapacitation, or rehabilitation—are furthered by juvenile life sentences.<sup>14</sup> Advocacy groups, such as the Juvenile Law Center, assert that extreme sentences for juveniles “keep youth in prison well past the point at which they have been rehabilitated and well beyond any reasonable risk of re-offending.”<sup>15</sup>

Over the past two decades, the Supreme Court has consistently increased constitutional protections for juvenile defendants against extreme punishment, announcing categorical bans against the death penalty for juveniles and sentences of life without parole for juvenile non-homicide offenders.<sup>16</sup> This line of cases culminated with *Miller v. Alabama* in 2012.<sup>17</sup> Ostensibly, *Miller* granted juvenile homicide offenders the substantive right to “a meaningful opportunity for release” from prison.<sup>18</sup> But scholars have been critical of the decision, noting that it does not categorically ban juvenile life without parole sentences (JLWOP), but requires only that “chronological age” and “the background and mental and emotional development of a youthful defendant be duly considered” by judges at sentencing.<sup>19</sup> Juveniles found to be “irreparably corrupt” or “permanently incorrigible” remain eligible for JLWOP.<sup>20</sup>

A considerable amount of litigation and scholarly debate focused on what the *Miller* decision requires of judges at the time of sentencing, but a lack of focus exists on what, if anything, *Miller* requires after sentencing.<sup>21</sup> “*Miller* kids,” or juveniles that a sentencing court has determined are *not* irreparably corrupt or deserving of a life sentence with no opportunity for parole, are nevertheless subject to the same parole process as adult offenders, with no special consideration given to their status as a juvenile offender.<sup>22</sup> Through highly idiosyncratic statutory parole schemes, states are empowered to make their own determinations about those individuals’ readiness for release, often through the use of algorithmic risk assessment instruments (RAIs).<sup>23</sup> As seen in the case of Carlos Flores, a favorable score from one of these assessment tools is no guarantee of release, even for juveniles. Flores’s case

also raises procedural concerns about the “black box” use of the COMPAS algorithm and deficiencies in New York parole commissioners’ understanding of the tool.<sup>24</sup> This article will critically examine *Miller*’s mandate and how algorithmic risk assessments square with “a meaningful opportunity for release.”

## I. “Children are Different” Jurisprudence and the Use of RAIs in Parole Proceedings Today

In order to discuss the implications of *Miller v. Alabama*, it is crucial to first understand the case law upon which *Miller* rests. The Supreme Court recognized that children are deserving of unique considerations with respect to moral culpability in criminal cases as early as 1988, when it acknowledged that “less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.”<sup>25</sup> However, the true foundation of the “children are different” jurisprudence came in 2005 with *Roper v. Simmons*, which dealt with a 17-year-old defendant convicted of first-degree murder and sentenced to death in Missouri.<sup>26</sup> The defendant’s petition for state post-conviction relief relied upon the Supreme Court’s decision in *Atkins v. Virginia*—which barred the imposition of the death penalty for mentally retarded persons—and the recognition that a national consensus had developed against the execution of juvenile offenders.<sup>27</sup>

In *Roper*, the Supreme Court held that “objective indicia of national consensus” supported a finding that society views juveniles as “categorically less culpable than the average criminal.”<sup>28</sup> The Court then imposed a categorical ban on juvenile death sentences, finding that juveniles have diminished culpability based on three factors: 1) “immaturity and irresponsibility,”<sup>29</sup> 2) vulnerability or susceptibility to “negative influences and outside pressures,”<sup>30</sup> and 3) an ongoing “struggle to define their identity.”<sup>31</sup> The Court held that, combined, these factors indicate a death sentence is a disproportionate punishment to the crime of homicide for juveniles, and sentencing juveniles to death is therefore an Eighth Amendment violation.<sup>32</sup> Notably, the *Roper* Court accepted that in some rare circumstances, a juvenile may be mature enough, and commit a crime sufficiently depraved, to merit a death sentence.<sup>33</sup> Even so, it concluded that a categorical ban was justified based on the inherent difficulty in differentiating between “transient immaturity” and “irreparable corruption,” and the Court ultimately erred on the side of caution when it came to the irrevocable action of death.<sup>34</sup>

The *Roper* Court’s concern over “false positives”—cases in which a sentencing judge mistakenly determines that a juvenile is sufficiently culpable to warrant a death sentence—was reiterated in *Graham v. Florida* five years

later.<sup>35</sup> In that case, the Court extended its logic in *Roper* to invalidate a JLWOP sentence for a sixteen-year-old convicted of armed burglary,<sup>36</sup> categorically banning life sentences without parole for juvenile non-homicide offenders. Citing data on the evolving national consensus against JLWOP and its own balancing test (of juvenile culpability against the severity of the punishment), the Court found that sentences of life without the possibility of parole are a disproportionate punishment for non-homicide offenses.<sup>37</sup> While the death penalty may be “unique in its severity and irrevocability,” the Court acknowledged that JLWOP sentences share key characteristics with a death sentence, such as their permanence, deprivation of basic liberties with no chance of restoration, and the ultimate “denial of hope.”<sup>38</sup> In keeping with the logic of *Roper*, the Court reasoned that the severity of a life sentence is simply not justified when a juvenile’s diminished culpability is considered. Again, while a categorical ban means that some “irredeemably depraved” offenders deserving of a life sentence would not receive one, the Court reaffirmed its preference for a categorical ban as opposed to a case-by-case analysis which would make “false positives” possible.<sup>39</sup>

Importantly, while the Court in *Graham* refused to “guarantee eventual freedom” to juvenile offenders, it did mandate “a meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.”<sup>40</sup> The Court did not provide any further definition of such a “meaningful opportunity,” nor instructions for how states should apply its rule.<sup>41</sup> Moreover, although *Roper* and *Graham* established a “children are different” jurisprudence that greatly expanded Eighth Amendment protections for juvenile offenders, neither reached the question of life without parole for juvenile homicide offenders.<sup>42</sup> That question was finally addressed in *Miller v. Alabama*.<sup>43</sup>

### **A. *Miller v. Alabama*: A Departure in Rationale**

In 2012, the Supreme Court consolidated the appeals of two fourteen-year-olds, Miller and Jackson, who were each convicted of murder and sentenced to life without parole.<sup>44</sup> Writing for the majority, Justice Kagan cited *Roper*’s factors for diminished culpability to hold that mandatory JLWOP sentences for homicide violate the Eighth Amendment’s proportionality requirement.<sup>45</sup>

In many ways, the *Miller* decision is a logical outgrowth of *Roper* and *Graham*. However, the decision still represents a departure from previous “children are different” jurisprudence. The Court stopped short of imposing a categorical ban on JLWOP sentences for homicide, seemingly abandoning the concern over “false positives” that was so prominent in *Roper* and *Graham*.<sup>46</sup> Instead, the Court required only that judges be afforded “an

opportunity to consider mitigating circumstances before imposing the harshest penalty for juveniles.<sup>47</sup> The “rare juvenile offender whose crime reflects irreparable corruption,” protected from the death penalty by *Roper*, may still be sentenced to life without parole, so long as a sentencing judge has sufficiently considered his age.<sup>48</sup> To that end, the Court provided five guideposts for judges to use in sentencing, known as the “*Miller* factors”:

[1] [I]mmaturity, impetuosity, and failure to appreciate risks and consequences . . . [2] the family and home environment . . . [3] 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 . . . [4] [whether] he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth . . . [and] [5] the possibility of rehabilitation.<sup>49</sup>

Although *Miller* made clear that sentencing judges must use these factors to assess a juvenile’s capacity for reform, the decision caused widespread confusion and disagreement between the states and federal circuits with respect to its scope and implementation.<sup>50</sup>

## B. Confusion Over *Miller*’s Mandate

In the wake of *Miller*, a number of cases have been brought in state and federal court over the details of its implementation, and the debate has focused on what the decision actually requires of sentencing judges. Two primary issues have been the focus: whether requiring a judge to make preliminary findings of “incurability” is practically administrable, and whether *Miller* prohibits *de facto* life sentences. Because *Miller* extends to parole decision-makers, these inquiries are necessarily implicated here.

### 1. Factual Findings of Incurability

Though the *Miller* factors provide some guidance to judges evaluating incurability during the sentencing stage, there is confusion over whether *Miller* actually requires finding factual support of incurability on the record before a JLWOP sentence can be imposed.<sup>51</sup> In other words, some states construe *Miller* and *Montgomery* as requiring a sentencing judge to make “an express determination of ‘irreparable corruption’” before imposing a sentence of JLWOP,<sup>52</sup> while other states read the cases more broadly, requiring merely that the court “contemplated the defendant’s youth” before handing down a life sentence without the possibility of parole.<sup>53</sup>

Currently, both state and federal courts are split on the issue.<sup>54</sup> The Supreme Court could have answered the question in *Mathena v. Malvo*, argued

in October of 2019,<sup>55</sup> but the case was dismissed<sup>56</sup> when the State of Virginia passed legislation mandating parole eligibility for juvenile offenders after twenty years of imprisonment.<sup>57</sup>

The Court will have a second opportunity to answer this question in *Jones v. Mississippi* which it granted certiorari in March 2020.<sup>58</sup> Brett Jones, who killed his grandfather in an altercation when he was 15 years old, was granted a resentencing hearing in 2015 following *Miller*. At his resentencing hearing, Jones was once again sentenced to life without possibility of parole, but the court did not make a finding of permanent incorrigibility or address Jones' "capacity for rehabilitation at all."<sup>59</sup> Furthermore, the court made only a "passing reference" to Jones' age at the time of his offense and citing evidence that Jones was intimate with his then-girlfriend and therefore had "reached some degree of maturity in at least one area."<sup>60</sup>

Like *Malvo*, *Jones* asserts that if *Miller* does not require an express finding of permanent incorrigibility, "the command of *Miller* and *Montgomery* to restrict" JLWOP sentences to only "rare, permanently incorrigible juveniles loses its force as a rule of law."<sup>61</sup> Critics, on the other hand, argue that requiring federal courts to grant retroactive habeas relief for every case in which a state judge failed to make an express incorrigibility finding during sentencing is a "legal quagmire unintended by the *Montgomery* decision."<sup>62</sup> Additionally, assuming an express factual finding is required, scholars raise concerns over the tenability of such a finding, because social science indicates that predicting a juvenile's behavior as an adult is an "incredibly difficult," if not impossible, task.<sup>63</sup>

## 2. Sentencing

In addition to the circuit split on whether express findings of incorrigibility are required by *Miller*, circuits are also split on the question of whether *de facto* JLWOP sentences are unconstitutional for non-incorrigible juveniles.<sup>64</sup> Presently, the Seventh, Ninth, and Tenth Circuit Courts of Appeals have ruled that *de facto* and *de jure* JLWOP sentences are equally unconstitutional under *Miller*.<sup>65</sup> While none of these courts have established a definitive time when a juvenile offender must be released, they have held that it is "unconstitutional for them to be in prison beyond their natural life expectancy."<sup>66</sup> Other federal circuit courts, such as the Sixth and Eighth, reached the opposite conclusion and refuse to extend *Miller*'s protection to lengthy term-of-years sentences, reasoning that the decision only reached mandatory JLWOP sentencing schemes.<sup>67</sup>

Most recently, the Third Circuit addressed this issue in *United States v.*

*Grant*.<sup>68</sup> Children’s rights advocates hailed the decision as a win, as it went even further than other circuits by concluding that *Miller* and *Graham*’s “meaningful opportunity for release” mandate requires juvenile offenders to be released “early enough in their lives that they may still achieve personal growth and re-enter society.”<sup>69</sup> To that end, the court reasoned, judges should employ a rebuttable presumption that a non-incorrigible juvenile has an opportunity for release before the national age of retirement.<sup>70</sup> This victory was short-lived, however, as the Third Circuit subsequently granted an *en banc* hearing, vacated the panel decision, and “issued an order holding the appeal pending the Supreme Court’s judgment in *Mathena v. Malvo*.”<sup>71</sup> As noted, *Malvo* was dismissed by the Supreme Court in March 2020,<sup>72</sup> and the Third Circuit has not yet handed down their *en banc* decision.<sup>73</sup>

This article assesses the constitutionality of risk assessment instruments used to evaluate juveniles deemed parole eligible under *Miller*. In other words, these “*Miller* kids” were evaluated by a sentencing judge and determined to be capable of reform and are, therefore, constitutionally entitled to a meaningful opportunity for release. However, a guarantee of parole *eligibility* is not a guarantee of release and, if continually denied parole, many of these juveniles will spend their entire life (or nearly all of it) behind bars. These lengthy term-of-years sentences are *de facto* life sentences, and are equally unconstitutional under *Miller*.

### **C. Risk Assessment Instrument (RAI) Use in the Parole Process Today**

The Court in *Graham* explicitly left the “means and mechanisms” of a meaningful opportunity for release to the states.<sup>74</sup> In response, most states have attempted to satisfy *Graham* and *Miller* by ensuring that juvenile offenders become *eligible* for release, without regard to whether their parole processes will actually ensure release.<sup>75</sup> Similarly, the vast majority of litigation and debate have focused on *when* states must make a juvenile offender parole-eligible; little attention is paid to “the standards and procedures that should be used when entities consider whether to grant release.”<sup>76</sup> A brief historical background of parole and its mechanisms is relevant to understanding why the present use of risk assessment instruments in parole evaluations may run afoul of *Miller*’s mandate.

At the outset, it is crucial to understand that parole exists at the nexus of the three branches of government. In most jurisdictions, the judiciary determines when an offender may become eligible for parole, pursuant to a system established by the legislature and implemented by the executive branch.<sup>77</sup> In other words, sentencing judges hold the power to determine if

or when an individual will become eligible for parole. When that individual eventually applies for parole, their application will be evaluated by a Parole Board, which (in most states) functions as a part of the state executive branch. State legislatures, however, create the statutory schemes governing parole, which may include rules for the application process and factors that the Parole Board must consider in evaluating applications.

In addition, legislatures may prohibit parole for certain crimes or even abolish it altogether (as the federal government did through the Sentencing Reform Act of 1984).<sup>78</sup> In terms of how parole is implemented, decision-making processes are highly idiosyncratic between states and many parole boards do not codify or publish the rules of their procedures.<sup>79</sup> In this regard, parole board commissioners have historically had “unfettered discretion” in making their determinations.<sup>80</sup> Scholars have been critical of this, characterizing a parole board decision as “a judgment (usually made by inadequately informed decisionmakers) of whether an inmate meets some subjective, largely unarticulated standard” of reform.<sup>81</sup>

Starting in the mid-1970s, some observers began to argue that the constitutional right to due process should require procedural safeguards during parole evaluations.<sup>82</sup> That argument was effectively quashed with the Supreme Court’s 1979 decision in *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, where the Court held that “due process procedural requirements apply only if prisoners can establish a liberty interest in the parole granting process” and a “statutory or other entitlement to parole had to be demonstrated” to establish that interest.<sup>83</sup>

Although *Greenholtz* implicitly ruled that there is “no inherent or constitutional right to parole,” the due process argument has not entirely disappeared.<sup>84</sup> In response to growing concerns about procedural deficiencies<sup>85</sup> and shifting cultural attitudes about parole,<sup>86</sup> scholars argue that *Graham*’s “meaningful opportunity for release” requirement should be interpreted as requiring procedural safeguards during parole evaluations for juveniles or, alternatively, that states should “craft special rules for boards to use when considering release for juvenile offenders” to ensure compliance with *Graham* and *Miller*.<sup>87</sup> A few state and federal district courts have been open to recognizing that *Miller* creates a liberty interest, but the Supreme Court has not squarely addressed the question yet.<sup>88</sup>

## **1. Risk Assessment Instruments**

If juvenile offenders have a liberty interest in parole proceedings, due process requirements could bear heavily on how risk assessment instruments

are used in those proceedings.

As noted above, RAIs are “statistical formulas that predict the likelihood a person will commit crime in the future.”<sup>89</sup> Notably, the use of RAIs is not exclusive to parole proceedings—these tools are also used in bail applications, sentencing, or even at trial in determinations of guilt.<sup>90</sup> Such assessments were first developed in the 1920s, but their employment in the criminal system began in earnest during the 1970s.<sup>91</sup> Initially, the tools used “static” input factors, which are criteria that “cannot be changed through psychobehavioral intervention,” as opposed to “dynamic” factors, which are “subject to change through planned intervention.”<sup>92</sup> In the following decades, the algorithms were developed to include not just a few “static” factors, but “anywhere from 42 to approximately 150 factors,” both “static” and “dynamic.”<sup>93</sup> With the emergence of commercially available RAI tools came widespread use; today they are used in some form by nearly every state as well as the federal system.<sup>94</sup>

Proponents of these algorithmic assessments reason that they are more “fair, efficient, and accurate than the clinical judgments made by human beings.”<sup>95</sup> The evidence, however, is far from settled; one study showed that mechanical prediction techniques are about 10 percent more accurate than clinical judgments when predicting human behavior,<sup>96</sup> while another indicated that COMPAS, an RAI used in New York, was no better at predicting recidivism than a random selection of “untrained humans” recruited from a “popular online crowdsourcing marketplace.”<sup>97</sup> Additionally, critics characterize them as secretive “black-box” tools, the details of which are generally not made public.<sup>98</sup>

RAIs are also particularly problematic when it comes to age, because many traits associated with youth, such as impulsivity, low risk aversion, and susceptibility to peer influence can be recognized as aggravating instead of mitigating factors.<sup>99</sup> In other words, age mitigates blame but aggravates risk,<sup>100</sup> thereby becoming a “double-edged sword,” which may either increase or decrease an offender’s chance of release, depending on the particular factors under consideration in a given algorithm.<sup>101</sup> In their critique of this “double-edged sword,” Megan Stevenson and Christopher Slobogin note that if judges or parole authorities are aware of “the conflicting roles youth plays in a particular case,” they can properly balance the aggravating effect of youth against its mitigating impact.<sup>102</sup> Black-box algorithms, on the other hand, do not reveal the extent to which the risk evaluation is being influenced by the defendant’s youthfulness.<sup>103</sup> Stevenson and Slobogin advocate for increased transparency about the factors that influence RAI scores as a way to ensure youth is properly weighed as a mitigating factor, but note that even if “the black box is opened” and algorithms made publicly available, the relative weight of the defendant’s age in the final score “may not

be fully explained or understood” by the judge or parole decision-maker.<sup>104</sup>

Yet another controversial aspect of the tools is their capacity for racial bias. While proponents claim that algorithms are race-blind—unlike biased individuals—critics point out that although race may not be an explicit input factor, an algorithm is still racially discriminatory if its input factors are correlated to race.<sup>105</sup> Despite this mixed feedback from academics, as noted above, RAIs are used by virtually every state.<sup>106</sup> New York’s use of the assessment tool “COMPAS” in parole proceedings for juvenile applicants is one example of an RAI that is particularly problematic in light of *Miller*’s reform-focused inquiry.

## II. RAIs in Practice: The Use of COMPAS in New York State

COMPAS, or “Correctional Offender Management Profiling for Alternative Sanctions,” is one of the most widely used risk assessment instruments in the country.<sup>107</sup> The use of COMPAS in New York, where Carlos Flores was repeatedly evaluated and denied release, highlights how RAIs may run afoul of *Miller* and *Graham* and their requirement that juveniles have a “meaningful opportunity for release.” Using New York as just one example, the consequences of its reliance on COMPAS suggests that the tool is fundamentally at odds with the constitutional requirements of *Miller* if the decision actually reaches beyond the moment of sentencing and applies to parole proceedings.

### A. Function and Purpose of COMPAS in the New York State Parole System

In New York, there are several statutorily-mandated factors to be considered in parole proceedings. A brief review of these factors, the legislative history of COMPAS in New York, and how the use of this particular RAI has proliferated in New York’s parole decision-making process is useful to understanding how COMPAS may violate *Miller* by causing *de facto* life sentences for juveniles.

#### 1. Statutory Factors and Consideration of Age

The New York State parole process is governed by Executive Law § 259.<sup>108</sup> Until recently, the statute mandated that discretionary release will be granted only if there is a “reasonable probability” that an inmate will

“remain at liberty without violating the law, and that his or her release is not incompatible with the welfare of society and will not so deprecate the seriousness of his or her crime as to undermine respect for the law.”<sup>109</sup> That is, release would be granted if there was an assurance the individual would never recidivate.

Recently, however, reform legislation passed, which requires that release be granted “unless the parole case record demonstrates there is a current and unreasonable risk” the person will violate the law and that risk cannot be mitigated by parole supervision.<sup>110</sup> Thus, release is required unless there is a significant risk that the individual would recidivate.

As part of this reform, the New York Parole Board<sup>111</sup> is required to consider the following factors, among others: the institutional record of academic and vocational achievements of the inmate, interactions with prison staff and other inmates, release plans, victim statements, the seriousness of the underlying offense, and any prior criminal record.<sup>112</sup> However, the Board is not required to give equal weight to each factor, nor must it explicitly discuss every factor,<sup>113</sup> and the Board is still entitled to “place a greater emphasis on the gravity” of the underlying crime.<sup>114</sup>

While the amended statute does not differentiate between parole board assessments of inmates sentenced as adults and those sentenced as juveniles, it does provide that the Board may consider factors such as “remorse and insight into the offense,” which are unenumerated but “nonetheless relevant to an assessment of whether an inmate presents a danger to the community.”<sup>115</sup> Thus, the statute grants some degree of discretion to the Board to account for an inmate’s age at the time of offense (but, again, does not require it to do so).

Perhaps the most important post-*Miller* litigation regarding parole decision-making in New York came in 2016, when the New York Appellate Division held in *Hawkins v. New York State Department of Corrections and Community Supervision* that the principles of *Miller* pertain as much to the Board of Parole as to the sentencing court.<sup>116</sup> The division held that for juvenile offenders who, “but for a favorable parole determination will be punished by life in prison, the Board must consider youth and its attendant characteristics in relationship to the commission of the crime at issue.”<sup>117</sup>

Despite this favorable holding, critics contend that in reality, discretionary release in New York is still “exceptionally difficult to obtain,” and that Board decisions are “often arbitrary, highly subjective, and frequently unlawful.”<sup>118</sup> Critics accuse the Board specifically of “disregard[ing] the many accomplishments,” “deep personal transformations,” and “low [RAI] risk scores” of applicants, usually citing the nature of the crime as the primary reason for denial.<sup>119</sup> This disregard of demonstrated rehabilitation and age at the

time an offense was committed defies the Hawkins holding, and in turn, the *Miller* mandate.

## **2. Growing Reliance on COMPAS in New York**

In 2011, the New York Legislature required the Parole Board to “establish written procedures” that “incorporate risk and needs principles to measure the rehabilitation” of applicants and aid in “determining which inmates may be released to parole supervision.”<sup>120</sup> To comply, the Board selected COMPAS,<sup>121</sup> a commercially available risk assessment instrument developed by Northpointe Institute for Public Management, Inc.<sup>122</sup> The Department of Corrections and Community Supervision (DOCCS) implemented the system, requiring Offender Rehabilitation Counselors (ORCs) to administer COMPAS “at the time of the pre-Parole Board interview” or “when an inmate is interviewed for a release investigation.”<sup>123</sup> Northpointe designed the system to allow for flexibility in administration of the exam.<sup>124</sup> ORCs may choose between a formal, scripted interview with the applicant or a rapport-building “guided discussion,” or may even ask applicants to fill out some sections on their own.<sup>125</sup> According to Northpointe, the process can take “anywhere from 10 minutes to an hour” depending on the method of data collection chosen by the ORC.<sup>126</sup>

Administering COMPAS poses a number of problems to Offender Rehabilitation Counselors. First, applicants report that ORCs make frequent mistakes and misreport information.<sup>127</sup> Applicants are also often given their COMPAS reports just days before their Parole Board interview, leaving “little time and no viable process” to correct factual errors input by ORCs.<sup>128</sup> Third, ORCs may have no expertise or familiarity with how to administer the exam, and may misunderstand the data they are collecting for input.<sup>129</sup>

In addition to these procedural administrative problems, applicants take issue with the substantive racial implications of certain input factors.<sup>130</sup> While race is not made explicit in any COMPAS factor, many are correlated to race and/or socioeconomic status, such as “Financial Problems/Poverty,” “Vocational/Education Problems,” “Social Environment Problems,” and “Residential Instability.”<sup>131</sup> Critics argue that these considerations purport to be neutral, yet they “necessarily reflect our biases” and may in fact be “exacerbating them.”<sup>132</sup> Programmers may design or “train” data systems with their own biases even inadvertently—strong evidence that “data fundamentalism,” or the belief that “numbers cannot lie and always represent objective truth,” can lead to dangerous outcomes with respect to race or socioeconomic status.<sup>133</sup>

Both the administrative deficiencies of COMPAS and the possibility of racially disproportionate outcomes may be of diminished concern if the scores play little to no role in the Board's ultimate determination. In Carlos Flores's case, in fact, the Parole Board effectively ignored his favorable COMPAS score in ten consecutive hearings.<sup>134</sup> And in response to litigation concerning its repeated denials of inmates with the lowest possible COMPAS risk score, the Parole Board insisted that it was entitled to afford "whatever weight it deemed appropriate" to the COMPAS results.<sup>135</sup>

Again, under New York law, the Parole Board "need not expressly discuss each of the statutory guidelines in its determination . . . and is not required specifically to articulate every factor considered."<sup>136</sup> But courts have held that not only must COMPAS be administered for every parole applicant, the mere existence of a score in an inmate's file is not enough; there must be indication in the record that the Board actually reviewed and considered the score.<sup>137</sup> Otherwise, the inmate is entitled to a new parole hearing.<sup>138</sup> Additionally, Governor Andrew Cuomo proposed new regulations in 2016, providing that "[i]f a Board determination, denying release, departs from the COMPAS scores, an individualized reason for such departure shall be given in the decision."<sup>139</sup> The regulation also mandated that the Board "factor youth into its determinations," though it did not specify how the Board should do so.<sup>140</sup>

Today, it is still unclear exactly how much weight the New York Board of Parole affords to COMPAS scores, and advocates are calling for it to publish data on "the degree to which the Board deviates" from COMPAS results.<sup>141</sup> According to a New York Times review of over a hundred parole hearing transcripts, it was difficult to "pinpoint what the deciding factor [was] for commissioners."<sup>142</sup> Some commissioners appeared to focus more on the inmate's criminal record or past drug abuse, while other appeared more interested in family or community ties.<sup>143</sup> In the transcripts reviewed, COMPAS scores were usually mentioned, but "rarely appeared to be the deciding factor."<sup>144</sup>

Still, there is reason to believe the impact of COMPAS on final determinations is growing. In his testimony to the New York Senate in 2018, former Parole Board member James Ferguson stated that although COMPAS scores are merely one factor that must be considered, "I think it's becoming a controlling factor."<sup>145</sup> Ferguson argued that requiring commissioners to explain their disagreement with the score "elevates [its] status," claiming that they must "write a novel saying why [they] disagree with COMPAS."<sup>146</sup> He also claimed that other states make final parole determinations based solely on an RAI score without interviewing the applicant.<sup>147</sup> Finally, Ferguson went as far as to state, "People are following the COMPAS, and whatever else anybody says does not matter."<sup>148</sup>

Whether or not Ferguson's subjective analysis of COMPAS' importance is accurate, the growth of RAI reliance is also evidenced by the sweeping reform legislation passed in New York in 2019. That legislation included the "Fair and Timely Parole" and "Elder Parole" bills, both of which were designed to base parole determinations on applicants' demonstrated rehabilitation instead of their original crime.<sup>149</sup> These bills reflect a broader push by reformists to center rehabilitation as the primary goal of incarceration, as opposed to retribution.<sup>150</sup> Because COMPAS and other RAIs are designed in part to measure rehabilitation, greater reliance upon them should be expected in states engaged in this type of reform.

While the precise extent of COMPAS' influence on parole determinations remains unclear, any algorithm use that runs afoul of a constitutional guarantee is unacceptable. Thus, the expanding use of RAIs requires constitutional scrutiny.

### **B. COMPAS Values and the *Miller* Mandate: Should RAI Use be Different for Juveniles?**

The foundational question of this article is whether risk assessment instruments can be a constitutionally proper tool for parole evaluation for juveniles. Ultimately, parole board review and the objectives of risk assessment instruments are fundamentally at odds with the *Miller* decision. *Miller* is primarily concerned with measuring an individual's ability to reform and mature. Parole boards and the assessment tools they use, on the other hand, concern themselves with the risk that an individual poses to the community based on past behavior<sup>151</sup> and whether they have been sufficiently punished without respect to subsequent rehabilitation.<sup>152</sup> Although many parole boards are required to consider factors relating to demonstrated reform, they are still allowed to account for static factors, such as the "seriousness of the crime," as a justification for denying parole.<sup>153</sup>

The contradiction between the *Miller* factors and COMPAS factors is compounded by the problem of the "double-edged sword," whereby youth becomes an aggravating, rather than mitigating factor.<sup>154</sup> While *Miller* considers youth to lessen a person's moral culpability, some RAIs assume that individuals who commit crimes at a young age demonstrate "natural proclivity towards crime," and are more likely to assess young offenders as having a high likelihood of recidivism.<sup>155</sup> Parole Board commissioners themselves have noted that the way COMPAS flags age as a risk factor is "patently unfair."<sup>156</sup>

This fundamental tension could be resolved if courts read *Miller* as reaching only to sentencing judges and not parole proceedings. However, New

York made clear in *Hawkins* that just as juveniles are entitled to consideration of youth at the sentencing stage, they are equally entitled to “an analogous procedural requirement . . . at the parole release hearing stage.”<sup>157</sup> Of course, New York is only one state; there are 49 others with highly idiosyncratic parole systems,<sup>158</sup> many of which do not construe *Miller* as reaching beyond the moment of sentencing. Such a limited construal of *Miller*, however, renders the spirit of the decision moot. *Miller* was intended to severely limit the number of juveniles who spend their lives incarcerated; it holds that only the “irreparably depraved”—a rare exception—should die behind bars.<sup>159</sup> Yet, if juveniles are subject to the same parole board review as adult offenders, and granted release with the same low rate as adult offenders,<sup>160</sup> many of them will remain incarcerated indefinitely, constituting a *de facto* life sentence.

However, even if courts were to respect the spirit of the *Miller* decision and follow New York in applying *Miller* to the parole review process, parole boards will still only consider past behavior in spite of the purely forward-looking inquiry of the *Miller* factors. This contradiction is not resolvable for the following practical reasons.

Even if a risk assessment algorithm allocates more weight to dynamic factors, and thereby predicts an individual’s likelihood of recidivism very accurately, that prediction is based upon the individual’s circumstances and behavior at the time of their parole application. *Miller*, on the other hand, asks for a determination about likelihood of recidivism at the time of sentencing.<sup>161</sup> It may be possible to design an algorithm that properly accounts for “youth and its attendant circumstances” and an individual’s growth over time, but institutional data about an individual’s behavior in prison is unavoidably affected by poor prison programming,<sup>162</sup> the presence of gangs and violence in prison,<sup>163</sup> the use of solitary confinement (whether protective or punitive),<sup>164</sup> or myriad other negative influences and traumatic experiences. These effects are exacerbated for black inmates, who are punished by correctional officers at twice the rate of white inmates and sent to solitary confinement more often and for longer periods of time.<sup>165</sup> It is simply impossible to conduct a true *Miller* analysis after an individual has matured into adulthood while incarcerated.

Therefore, even a “clean” RAI assessment, based upon dynamic factors and updated to reflect change over time, is tainted by the carceral system. Because the contradiction between what *Miller* assessments and parole hearings evaluate is impossible to resolve, courts should strengthen *Miller*’s protection to the fullest extent possible: by recognizing a liberty interest in release, and granting procedural protections to juveniles beyond those afforded to adult offenders.

### III. Proposal: Due Process Protection in RAI Evaluation of Juveniles

In light of *Miller* and *Graham*, RAIs should be subject to additional requirements when they are used to evaluate juvenile offenders. Scholars have proposed various solutions to *Miller*'s deficiencies and the ongoing crisis of juvenile life sentences, and as discussed below, two previously proposed solutions implicating RAI use could partially alleviate the problem. But, ultimately, the strongest protection for juveniles is judicial recognition that *Miller*'s "meaningful opportunity for release" requirement creates a liberty interest in release.

#### A. Previously Proposed Solutions

Scholars have proposed two solutions to the continued denial of parole for juveniles that bear implications for the use of RAIs. The first is by creating a statutory presumption in favor of release, which is advantageous only if unfavorable RAI scores cannot be used to rebut the presumption. The second solution advocates for an increased reliance on dynamic risk factors, so that RAIs accounting for change over time are more compatible with the goals of *Miller*.

##### 1. A Rebuttable Presumption in Favor of Release

Before *Miller*, numerous scholars called on legislatures to codify a presumption in favor of release on parole.<sup>166</sup> In other words, "once a juvenile offender has served the required minimum term of years, the parole board should ordinarily release him."<sup>167</sup> The presumption would be rebuttable, but only in limited circumstances where there is "clear and objective evidence" demonstrating that a juvenile offender is not capable of reform.<sup>168</sup> The presumption is further bolstered by *Miller*, which recognizes that most juveniles will change and mature, and that "incurable" offenders are exceptions to the norm.<sup>169</sup> One strength of this proposal is that it could effect change quickly, because it modifies existing parole structures without requiring significant legislative changes.<sup>170</sup> Theoretically, the majority of parole-eligible individuals currently serving time for a juvenile offense would be released under it.<sup>171</sup>

Although a presumption in favor of release for juveniles is consistent with *Miller* and has the potential to result in the release of many individuals still

incarcerated on life sentences, it still poses the risk that unfavorable RAI scores could serve as “clear and objective evidence” to rebut the presumption. Put simply, RAIs could still (improperly) prevent release. This concern could be avoided if state legislatures specifically enumerated the circumstances under which the presumption may be rebutted—rather than granting parole boards “broad discretion to deny parole based on vague or subjective reasons”<sup>172</sup>—and exclude RAI scores from that list. This is because, as described above, instruments like COMPAS employ both backward-looking (static) and forward-looking (dynamic) factors in evaluating an individual, making them logically inconsistent with *Miller*.

If state legislatures ensure that RAI use cannot be cited as a rebuttal to the presumption of release, creating such a presumption has the potential to secure release for many incarcerated juvenile offenders. However, states can further protect *Miller* kids by adopting RAIs that best account for “age and its attendant circumstances,” by relying primarily on dynamic (as opposed to static) risk factors.

## **2. Heavier Reliance on Dynamic Risk Factors and Additional Research**

The second proposal calls for an increased reliance on dynamic risk factors within RAI instruments. In an analysis conducted by neurocognitive experts Shelby Arnold et al., researchers examined static and dynamic risk factors as they relate to RAI assessments of juveniles.<sup>173</sup> Static risk factors are those that do not change, such as gender or age at time of arrest, while dynamic risk factors are those that change over time on their own or are changed through intervention, such as education or current age.<sup>174</sup>

The study found that dynamic risk factors are particularly important in JLWOP resentencing and parole.<sup>175</sup> On the one hand, Arnold and her research colleagues assert that, in addition to being at odds with *Miller*, static factors are less probative of an individual’s likelihood of criminal behavior for several reasons: they fail to account for “substantial contextual or personal changes” in influences on the individual’s behavior, they may afford so much weight to historical high-risk factors that an individual can never achieve a low-risk appraisal, and there is some uncertainty about whether some static risk factors are actually causal.<sup>176</sup> Meanwhile, dynamic factors better reflected “changeable aspects of human functioning” and therefore make risk assessment more sensitive to growth over time.<sup>177</sup>

Despite a preference for dynamic factors in parole proceedings, the Arnold analysis is careful to avoid endorsing an exclusive focus on dynamic

factors, in part because there is a dearth of research on “the causal nature” of dynamic factors, or the strength of their predictive value.<sup>178</sup> As such, the study calls for additional empirical, neurocognitive studies that find a proper balance of static and dynamic factors to best predict human behavior.<sup>179</sup> Further, while it is true that dynamic factors and their ability to account for change are more closely aligned with the rationale of *Miller*, reliance on them alone cannot ensure a “meaningful opportunity for release.”<sup>180</sup>

Ultimately, although the above proposed solutions would provide greater opportunities for release for juveniles, courts should go further by finding a liberty interest in release. Recognizing a liberty interest in release would trigger due process requirements that would, in turn, alleviate many of the problematic aspects of RAI use in juvenile parole proceedings.

## **B. Lower Courts Signaling Judicial Recognition of a Liberty Interest in Release**

As discussed above, the concept of a liberty interest in parole was effectively rejected by the Supreme Court in *Greenholtz*, but advocates still call for its recognition.<sup>181</sup> Indeed, since *Greenholtz*, the Court has recognized various rights within the “continuum of post-conviction due process,” starting with sentencing, extending to prison discipline, and continuing through parole revocation proceedings.<sup>182</sup> However, there remains “one conspicuous void” in this continuum: “the parole granting decision itself.”<sup>183</sup>

Lower courts, on the other hand, have demonstrated a willingness to reevaluate a liberty interest in release for juveniles under the Supreme Court’s “children are different” jurisprudence. The question was reached most recently by the Iowa Supreme Court in *Bonilla v. Iowa Board of Parole*.<sup>184</sup> In *Bonilla*, Julio Bonilla claimed that under *Graham* and *Miller*, he was constitutionally entitled to “adequate procedures that [would] give him a meaningful opportunity to demonstrate maturity and rehabilitation that would entitle him to release.”<sup>185</sup> To support his argument, Bonilla cited *Greiman v. Hodges*, where a federal district court had distinguished juvenile offenders from adult offenders, concluding that only the latter group was denied a liberty interest in parole under *Greenholtz*.<sup>186</sup> Instead, the court in *Greiman* held that *Graham* provides juveniles with “substantially more than a possibility of parole or a ‘mere hope’ of parole,” and creates a “categorical entitlement” to demonstrate rehabilitation and readiness for release.<sup>187</sup> The Iowa Supreme Court agreed with this reasoning and held that Bonilla possessed a liberty interest in release under the *Miller* line of cases.<sup>188</sup>

Similarly, in revisiting the case of Carlos Flores, the District Court for the Southern District of New York agreed to recognize a liberty in-

terest for juveniles in the parole process.<sup>189</sup> The court reasoned that to have a protectable liberty interest, “a prisoner must have more than a hope . . . of release. He must, instead, have a legitimate claim of entitlement to it.”<sup>190</sup> Courts have traditionally held that prisoners do not have a claim of entitlement to parole,<sup>191</sup> but the *Miller* trilogy changed that with respect to juveniles.<sup>192</sup> Because the parole board “is the vehicle through which the rights recognized in *Graham*, *Miller*, and *Montgomery* are delivered,” it must “make parole determinations in a constitutional manner for juveniles to whom *Graham*, *Miller*, and *Montgomery* apply.”<sup>193</sup> The *Flores* court also cited to *Greiman* and *Bonilla* for the proposition that *Graham* provides more than “mere hope” of parole, but was careful to clarify that it does not create a categorical entitlement to release itself, but to a meaningful opportunity for release. Therefore, juveniles have “a constitutionally protected ‘liberty interest in a meaningful parole review.’”<sup>194</sup> On this reasoning, the *Flores* court denied the state’s motion to dismiss, and Carlos Flores awaits a pre-trial conference.<sup>195</sup>

The recognition of a liberty interest in parole review in *Flores*, *Greiman*, and *Bonilla* was a significant step in establishing that juveniles must be afforded due process considerations beyond those recognized in *Greenholtz*. Although these courts represent a small minority of jurisdictions, all courts should adopt this understanding of the *Miller* mandate.

### C. What Will a Liberty Interest Require of RAI Use?

Though parole procedures remain within the purview of state legislatures, a judicial recognition of a liberty interest in release will mean that states are constitutionally required to create parole procedures that comport with due process.<sup>196</sup> Due process has no static standard, but rather “calls for such procedural protections as the particular situation demands.”<sup>197</sup> At a minimum, it requires “the opportunity to be heard at a meaningful time and in a meaningful manner,” balancing defendants’ interests against the interests of the state.<sup>198</sup>

Although judicial recognition of a liberty interest in release would bear major implications for all parts of the parole application and review process,<sup>199</sup> this article is primarily concerned with its implications on the use of COMPAS and other RAIs. Due process should at least require increased transparency about “black box” proprietary algorithms and a procedural opportunity for applicants to review and respond to their scores. Moreover, parole board commissioners and COMPAS administrators should be sufficiently trained to understand the meaning of an applicant’s score. The need for both of these particular requirements is discussed below.

## 1. Transparency and an Opportunity to Respond

One important procedural change that due process should require of RAIs is the opportunity for parole applicants to correct or respond to factually inaccurate information in their files before an ORC administers the test, well in advance of their Board hearing.

As explained above, weaknesses of RAIs are exacerbated when ORCs evaluate an applicant based on mistaken information, and commissioners often “misunderstand or misstate correct information in the inmate’s file.”<sup>200</sup> Parole applicants may even be denied the chance to correct mistakes due to redactions in their COMPAS questionnaire; for example, New York’s 2015 Directive guiding COMPAS implementation mandates that “[a]ll sections with questions 24, 29, and 30 must be redacted prior to giving a copy to the inmate.”<sup>201</sup> A parole process that does not afford individuals any recourse to review and correct potentially erroneous information in their RAI does not comport with the “opportunity to be heard at a meaningful time and in a meaningful manner.”<sup>202</sup> Instead, due process requires that individuals have “an effective opportunity . . . to ensure that the records before the Board are in fact the records relating to his case.”<sup>203</sup> This requirement should extend to the factual record used to generate the COMPAS score.

According to *Flores*, parole applicants are denied this “effective opportunity” partly because there is no procedural opportunity to do so, and partly because COMPAS is a commercial product developed by a private company, “comprising ‘secret algorithms’ unknown to applicants.”<sup>204</sup> This concern has been echoed by scholars who note that because the COMPAS software is proprietary,<sup>205</sup> “it is not subject to federal oversight and there is almost no transparency about its inner workings, including how it weighs certain variables.”<sup>206</sup> Such a lack of transparency is particularly problematic when it comes to the evaluation of juveniles, because if parole commissioners do not fully understand the algorithm, they cannot know for certain whether the test adequately “considers the diminished culpability of juveniles and the hallmark features of youth.”<sup>207</sup> The lack of knowledge and understanding therefore deprives juveniles of the “individualized assessments” to which they are entitled under *Miller*.<sup>208</sup>

The question of whether COMPAS’ proprietary nature violates due process was most recently addressed in 2016 by the Wisconsin Supreme Court in *State v. Loomis*.<sup>209</sup> Loomis, who was not a juvenile when he pleaded guilty to charges related to his involvement in a drive-by shooting,<sup>210</sup> claimed that the use of COMPAS at his initial sentencing hearing violated due process because the “proprietary nature of COMPAS prevent[ed] him from assess-

ing its accuracy.”<sup>211</sup> Writing for the majority, Justice Bradley agreed that the right to due process includes the “right to be sentenced based upon accurate information [which] includes the right to review and verify information.” The court found no due process violation, however, because although Loomis did not have access to the COMPAS algorithm, the score it generated was based solely upon information that was either publicly available or provided by Loomis himself, meaning that he had an adequate opportunity to verify that the report was based on accurate data.

Notably, however, the court recognized the possible racial bias of COMPAS and studies suggesting its inaccuracy, concluding that its use should be subject to procedural limitations.<sup>212</sup> Specifically, any “Presentence Investigation Report” provided to a judge during sentencing must inform her that the algorithm is secret, and caution that questions remain about the algorithm’s accuracy and bias.<sup>213</sup> Importantly, the court was also careful to stipulate that Loomis was “not challenging the use of a COMPAS risk assessment for decisions other than sentencing,” leaving the door open for questions about due process implications at other stages, such as during a parole evaluation.<sup>214</sup>

Thus, although the Wisconsin Supreme Court was unwilling to recognize due process protection for adult offenders regarding secret risk evaluation algorithms used during sentencing, *Loomis* demonstrates that courts are willing to recognize that RAIs can be used in unconstitutional ways, a claim that is only bolstered by the heightened constitutional protections afforded to juveniles under *Miller*.

## ***2. Commissioner Training and Expertise***

In addition to concerns about parole applicants’ access to information about COMPAS, *Flores* asserts that due process should also require Parole Board commissioners or ORCs to possess some degree of COMPAS expertise, because many commissioners themselves do not understand the algorithm.<sup>215</sup> As former commissioner Ferguson conceded to the New York Legislature, state Parole Board members were initially provided zero training on the COMPAS procedure, and he described the process of learning the tool “an exceptional challenge” for those without “decades of experience” in the criminal justice field—making it impossible for inmates to correct possible inaccuracies.<sup>216</sup>

Given the overall unfamiliarity and inexperience by everyone involved, Ferguson advocated for the creation of a formal training manual on the tool.<sup>217</sup> Still, he noted that there remains no oversight or supervision of the

decision-making process with respect to the COMPAS score or overall parole determination; instead, commissioners simply “hone their instincts.”<sup>218</sup> The lack of training, supervision, and opportunities for inmates to respond to inaccuracies in their COMPAS scores are unacceptable procedural deficiencies that must also be remedied through due process considerations.

Ultimately, the *Miller* decision left many holes in its protection of juveniles against lifelong prison sentences.<sup>219</sup> In addition to other questions about its scope and implementation, *Miller* did not state explicitly that it was intended to reach beyond the moment of sentencing and apply equally to parole boards and sentencing judges.<sup>220</sup> Nevertheless, courts should construe the “meaningful opportunity for release” as a substantive right and liberty interest subject to due process that applies beyond an individual’s initial sentencing hearing. This outcome would provide greater protections for juvenile offenders throughout the parole review process, including higher standards for the administration and use of RAIs. At the same time, states can still take advantage of the efficiency of these algorithms,<sup>221</sup> but they must ensure that their use of RAIs does not amount to a “black-box” system that undermines *Miller*’s goal of ensuring release for rehabilitated individuals.

Furthermore, juvenile offenders should be fully informed about any algorithm they are subjected to and be afforded opportunities to inspect the data, correct factual errors, and prepare a response or rebuttal with ample time before their parole hearing. As noted above, although a presumption in favor of release and increased reliance on dynamic factors may alleviate some of the problematic aspects of RAI use, courts must go further in finding a liberty interest because neither of these proposed solutions ensure procedural safeguards against improper RAI use which may contribute to repeated parole denials, and in turn, *de facto* life sentences for juveniles. Indeed, absent a categorical guarantee of release, recognizing a due process liberty interest in *Miller*’s “meaningful opportunity for release” mandate will provide the highest likelihood of release for reformed individuals still incarcerated for crimes they committed as a child.

## Conclusion

The *Miller* decision has drawn much attention for its lack of clarity with respect to implementation at sentencing, but scholars have largely overlooked one of its greatest deficiencies: that it did not explicitly mandate parole processes for eligible juvenile offenders. Even if a juvenile is deemed capable of reform by a sentencing judge, that individual may die behind bars due to repeated parole denials. As the use of risk assessment instruments in the parole process continues to expand and parole boards’ reliance upon them

increases, the judiciary must recognize that *Miller* kids are constitutionally entitled to a meaningful opportunity for release and, for that reason, require state legislatures to create procedural rules for RAI use that comport with due process.

Due process considerations would bear major implications for all aspects of parole proceedings, but with respect to RAIs, should ensure—at a minimum—that juvenile parole applicants have an adequate opportunity to respond to factually inaccurate information in the records used to generate their RAI score; that administrators are properly trained to input data; that commissioners are properly educated on the tools and understand the meaning of the scores they generate; and that RAI developers provide enough transparency in their algorithms that commissioners can ensure they afford greater weight to dynamic factors and do not consider age at the time of offense to raise an individual’s risk to the community. Absent a categorical ban of juvenile life without parole sentences that includes *de facto* sentences, construing the *Miller* decision as creating a liberty interest in release and affording juvenile applicants due process during parole review would provide the greatest protection for juveniles from death by incarceration.

## NOTES

- 1 Katie Rose Quandt, *Juvenile Offenders in New York Find Parole a Distant Hope*, VILLAGE VOICE (May 14, 2018), available online at <https://www.villagevoice.com/2018/05/14/juvenile-offenders-in-new-york-find-parole-a-distant-hope/>.
- 2 Complaint at 5, *Flores v. Stanford*, 2019 WL 4572703 (S.D.N.Y. 2019) (No. 7:18-cv-02468-VB), filed Mar. 20, 2018 [hereinafter Complaint], available online at <https://www.clearinghouse.net/chDocs/public/CJ-NY-0014-0001.pdf>.
- 3 Quandt, *supra* note 1.
- 4 *Id.*
- 5 *Id.*
- 6 *Id.*
- 7 *Id.*
- 8 Complaint, *supra* note 2, at 6.
- 9 The Sentencing Project, *Life Goes On: The Historic Rise in Life Sentences in America*, 11 (2013), available online at <https://www.sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf>.
- 10 The Campaign for the Fair Sentencing of Youth, *Tipping Point: A Majority of States Abandon Life-Without-Parole Sentences for Children 2*, 7 (2018), available online at <https://www.fairsentencingofyouth.org/wp-content/uploads/Tipping-Point.pdf>. For more statistics on parole grant rates for juvenile “lifers,” see American Civil Liberties Union, *False Hope: How Parole Systems Fail Youth Serving Extreme Sentences*, 45–47 (2016), available online at [https://www.aclu.org/sites/default/files/field\\_document/121416-aclu-parolereportonlinesingle.pdf#page=47](https://www.aclu.org/sites/default/files/field_document/121416-aclu-parolereportonlinesingle.pdf#page=47). In a particularly egregious example, the State of Maryland has not granted release for a single juvenile serving a life sentence, despite their general parole grant rate of 40 percent. *Id.* at 46.
- 11 As of 2016, there were 7,346 individuals serving life sentences with parole eligibility for a crime they committed as a child. The Sentencing Project, *Youth Sentenced to Life Imprisonment*, 1 (Oct. 8, 2019), available online at <https://www.sentencingproject.org/publications/youth-sentenced-life-imprisonment/>.
- 12 In his home state of New York, Flores is one of approximately 630 individuals serving a life sentence for a crime they committed as a child. Quandt, *supra* note 1.
- 13 Ashley Nellis, *The Lives of Juvenile Lifers: Findings from a National Survey*, The Sentencing Project 2 (March 2012), available online at <https://www.sentencingproject.org/wp-content/uploads/2016/01/The-Lives-of-Juvenile-Lifers.pdf>.
- 14 Heather Renwick, *Rejecting Harsh Sentences for Children: 20 Years of Sentencing Reform*, American Bar Association (July 9, 2018).  
 “Retribution relates to culpability, and the Supreme Court unequivocally has said that children are categorically less culpable than adults for their actions. *Montgomery*, 136 S. Ct. at 733. Deterrence is not a justification for sentencing children to life without parole because “the same characteristics that render juveniles less culpable than adults—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment.” *Id.* Incapacitation does not justify sentencing children to life without parole because “ordinary adolescent development diminishes the likelihood that a juvenile offender forever will be a danger to society.” *Id.* Rehabilitation is not furthered by sentencing children to a lifetime in prison, given that it “forswears altogether the rehabilitative ideal.” *Id.*

- 15 Juvenile Law Center, *Juvenile Life Without Parole (JLWOP)*, available online at <https://jlc.org/issues/juvenile-life-without-parole>.
- 16 J.M. Kirby, *Graham, Miller, & The Right to Hope*, 15 CUNY L. REV. 149, 149 (2011).
- 17 *Id.*
- 18 Megan G. Crane et al., *Reimagining the Throwaway Kid*, 41 HARBINGER 165, 166 (2016) (“The [Montgomery] Court was abundantly clear that how states seek to vouchsafe the substantive constitutional right delineated in Miller” is left to the states. Some state schemes may not be “fully in step with the substantive holding of Montgomery.”).
- 19 *Miller* at 476 (citation omitted). See also Kelly Scavone, *How Long is Too Long?: Conflicting State Responses to De Facto Life Without Parole Sentences After Graham v. Florida and Miller v. Alabama*, 82 FORDHAM L. REV. 3439, 3444 (2014) (discussing the variation between state statutory schemes resulting from the “inconsistencies” that *Miller* created).
- 20 *Miller* at 479-80 (“[W]e do not foreclose a sentencer’s ability to make that judgement [between ‘the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption’] in homicide cases.”).
- 21 Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373, 387 (2014); Richard A. Bierschbach, *Proportionality and Parole*, 160 U.PENN. L. REV. 1745, 1746 (2012) (“[D]espite an ever-expanding literature [on Miller-Graham], the significance of parole to the decision remains almost entirely unexplored . . . On one level, this is mystifying. After all, parole was the distinguishing factor in Graham between a constitutional and unconstitutional life sentence. On another level, it is hardly shocking. Criminal law scholarship has long neglected parole and other “back-end” sentencing mechanisms.”).
- 22 Generally, juveniles are incarcerated in a juvenile facility until their 18th birthday, at which point they are transferred to an adult prison and subsequently receive no special processes or considerations unique to their status as a juvenile offender. For one example of a juvenile who came of age in federal prison, see Anonymous, *When Your 18th Birthday Gift is a Transfer to Adult Prison*, THE MARSHALL PROJECT, (Dec. 7, 2017), available online at <https://www.themarshallproject.org/2017/12/07/when-turning-18-means-a-transfer-to-an-adult-prison>.
- 23 Matt Henry, *Risk Assessment: Explained*, The Appeal (Mar. 25, 2019), available online at <https://theappeal.org/risk-assessment-explained/>.
- 24 Complaint, *supra* note 2, at 4.
- 25 *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988).
- 26 543 U.S. 551, 556 (2005).
- 27 536 U.S. 304 (2002); see also Natalie Pifer, *Is Life the Same as Death?: Implications of Graham v. Florida, Roper v. Simmons, and Atkins v. Virginia on Life Without Parole Sentences for Juvenile and Mentally Retarded Offenders*, 43 LOYOLA L.A. L. REV. 1495, 1498 (2010) (“Atkins had not only inspired further reform, but it had also provided the necessary impetus for a successful, categorical Eighth Amendment challenge to capital punishment sentences for juvenile offenders.”).
- 28 *Roper* at 567.
- 29 *Id.* at 569.
- 30 *Id.*
- 31 *Id.* at 570.

- 32 *Roper* at 552 (“Both objective indicia of consensus, as expressed . . . and the Court’s own determination in the exercise of its independent judgment, demonstrate that the death penalty is a disproportionate punishment for juveniles.”); U.S. Const. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).
- 33 *Roper* at 572.
- 34 *Id.* at 573.
- 35 560 U.S. 48 (2010); *see also* Michael M. O’Hear, *Not Just Kid Stuff? Extending Graham and Miller to Adults*, 78 MO. L. REV. 1087, 1103–04 (2013) (suggesting that the *Graham* court’s rationale is not based on the frequency of false positives, but rather the idea that “false positives are simply a less acceptable type of error than false negatives.” To that end, the Court seems to implicitly reason that there is a “moral responsibility of society to respond to efforts made by the offender to achieve atonement.”).
- 36 *Graham* at 53.
- 37 *Graham* at 74.
- 38 *Id.* at 6970.
- 39 *Id.* at 74 (“This clear line is necessary to prevent the possibility that life without parole sentences will be imposed on juvenile nonhomicide offenders who are not sufficiently culpable to merit that punishment.”).
- 40 *Id.* at 75.
- 41 *Id.*
- 42 Mary Marshall, *Miller v. Alabama and the Problem of Prediction*, 119 COLUM. L. REV. 1633, 1640 (2019).
- 43 *Id.* at 1641.
- 44 *Miller v. Alabama*, 567 U.S. 460, 465 (2012).
- 45 *Id.* at 471–74.
- 46 Marshall, *supra* note 42, at 1644.
- 47 *Miller* at 489.
- 48 *Miller* at 479–80.
- 49 *Id.* at 477–78.
- 50 For blog updates on circuit splits and state court decisions interpreting *Miller*, *see* Sentencing Law and Policy, “Assessing Miller and its Aftermath,” Douglas Berman, Moritz College of Law, *available online at* [https://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/assessing-miller-and-its-aftermath/](https://sentencing.typepad.com/sentencing_law_and_policy/assessing-miller-and-its-aftermath/) (last visited Mar. 23, 2020).
- 51 Marshall, *supra* note 42, at 1645; Alice Reichman Hoestery, *Confusion in Montgomery’s Wake: State Responses, the Mandates of Montgomery, and Why a Complete Categorical Ban on Life Without Parole for Juveniles is the Only Constitutional Option*, 45 FORDHAM URBAN L.J. 149, 161 (2017).
- 52 *Id.*
- 53 *Id.* at 162.
- 54 Marshall, *supra* note 42, at 1652–53. Examples of states which have held that *Montgomery* requires a specific determination of incorrigibility on the record include Georgia, Pennsylvania, Florida, and Oklahoma, as well as lower appellate courts in Illinois, California, and Michigan. Hoestery, *supra* note 51, at 162. States which have held that no specific finding is required include Washington, Virginia, and lower appellate courts in Tennessee, California, and Illinois. *Id.* at 163. The majority of states

that still allow discretionary JLWOP sentences do not explicitly require a finding of irreparable corruption. *Id.* at 164.

- 55 Robert Barnes, *Supreme Court Seems Divided Over Whether Beltway Sniper Deserves Resentencing*, WASH. POST (Oct. 16, 2019), available online at [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-seems-divided-over-whether-beltway-sniper-deserves-resentencing/2019/10/16/89cb5222-f028-11e9-8693-f487e46784aa\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-seems-divided-over-whether-beltway-sniper-deserves-resentencing/2019/10/16/89cb5222-f028-11e9-8693-f487e46784aa_story.html). *Malvo* involved the notorious “D.C. Snipers,” one of whom was a juvenile at the time the pair committed their string of killings in 2002. *Id.* Because *Malvo* pleaded guilty with an agreed sentence of life without parole, the judge who sentenced him “never undertook the required consideration of his youth.” Joanna R. Lampe, Mathena v. Malvo: A Challenge to Life Without Parole for the D.C. Sniper, Congressional Research Service, 4 (Oct. 10, 2019), <https://fas.org/spp/crs/misc/LSB10350.pdf>.
- 56 Stipulation of Dismissal, *Mathena v. Malvo* (Feb. 24, 2020), available online at [https://www.supremecourt.gov/DocketPDF/18/18217/133958/20200224132941465\\_Rule%2046.1%20Dismissal.pdf](https://www.supremecourt.gov/DocketPDF/18/18217/133958/20200224132941465_Rule%2046.1%20Dismissal.pdf).
- 57 Elizabeth Tyree, *Gov. Northam Signs First 16 Bills into Law During Democrat-Controlled Session*, ABC 13 NEWS (Feb. 25, 2020), available online at <https://wset.com/news/at-the-capitol/gov-northam-signs-first-16-bills-into-law-during-democrat-controlled-session>.
- 58 Petition for Writ of Certiorari, *Jones v. Mississippi*, available online at [https://www.supremecourt.gov/DocketPDF/18/18-1259/94684/20190329124507004\\_No.\\_.\\_%20Cert%20Petition.pdf](https://www.supremecourt.gov/DocketPDF/18/18-1259/94684/20190329124507004_No._._%20Cert%20Petition.pdf) [hereinafter *Jones* Petition].
- 59 *Jones* Petition at 5.
- 60 *Id.* at 5-6.
- 61 *Id.* at 8.
- 62 Petition for Writ of Certiorari, *Mathena v. Malvo*, at 9 (citation omitted), available online at [https://www.supremecourt.gov/DocketPDF/18/18-217/59718/20180816135603749\\_Malvo%20v%20Mathena%20Petition%20for%20Writ%20of%20Certiorari.pdf](https://www.supremecourt.gov/DocketPDF/18/18-217/59718/20180816135603749_Malvo%20v%20Mathena%20Petition%20for%20Writ%20of%20Certiorari.pdf).
- 63 *Id.* at 1654; Hoestery, *supra* note 51, at 181 (“[T]he science of adolescent brain development . . . plainly states that making an accurate determination about a juvenile’s permanent character is impossible.”). *But see* Summer L. Davidson, *The Relationship Between Childhood Conduct Disorder and Antisocial Personality*, 39 L. & PSYCH. REV. 239 (arguing that antisocial personality disorder can be reliably diagnosed, is very difficult to treat, and warrants imposition of a mandatory life sentence). For an extended discussion of the types of developmental and psychological evidence implicated by the *Miller* factors, see generally Thomas Grisso & Antoinette Kavanaugh, *Prospects for Developmental Evidence in Juvenile Sentencing Based on Miller v. Alabama*, PUB. POL., AND L. (2016), available online at <https://www.apa.org/pubs/journals/features/law-law0000090.pdf>.
- 64 See generally, Daniel Jones, *Technical Difficulties: Why A Broader Reading of Graham and Miller Should Prohibit De Facto Life Without Parole Sentences for Juvenile Offenders*, 90 ST. JOHN’S L.REV. 169 (2016) (arguing that the circuit split on *de facto* life sentences is a result of the “technical difficulty” of following the letter of the law announced in *Graham* and *Miller*, as opposed to the spirit of the law).
- 65 Anton Tikhomirov, *A Meaningful Opportunity for Release: Graham and Miller Applied to De Facto Sentences of Life Without Parole for Juvenile Offenders*, 60 B.C.L. REV. E-Supplement II-332, II-344 (2019). See also *United States v. Grant*, 887 F.3d 131, 145 (2018) (summarizing the decisions of sister circuits); *McKinley v. Butler*, 809 F.3d 908 (7th Cir. 2016) (applying *Miller*’s “children are different” logic to vacate a 100-

- year sentence on a non-incorrigible juvenile); *Moore v. Biter*, 725 F.3d 1184, 1194 (9th Cir. 2013) (finding de facto LWOP “irreconcilable” with a meaningful opportunity for release); *Budder v. Addison*, 851 F.3d 1047 (10th Cir. 2017) (invalidating a 155-year sentence under *Graham*).
- 66 Tikhomirov, *supra* note 65, at 344.
- 67 *Id.*; see also *Bunch v. Smith*, 685 F.3d 546 (2012) (finding *Graham* inapplicable to offenders who receive consecutive, fixed-term sentences for multiple offenses); *United States v. Jefferson*, 816 F.3d 1016 (8th Cir. 2016) (finding that Miller intended to authorize discretionary life sentences).
- 68 887 F.3d 131 (3rd Cir. 2018).
- 69 Tikhomirov, *supra* note 65, at 343; see also Juvenile Law Center amicus brief at 6–7 (arguing that release late in life cannot satisfy the constitutional requirement of “meaningful,” because “it is the possibility of fulfillment, not life expectancy, which determines whether a sentence provides a meaningful opportunity for release.”), available online at <https://jlc.org/sites/default/files/attachments/2019-02/2018.12.24%20Rehearing%20En%20Banc%20Amicus%20Brief%20-%20FILE%20STAMPED.pdf>.
- 70 Alison M. Smith, *Third Circuit Invalidates De Facto Life Sentences for “Non-Incorrigible” Juvenile Offenders*, Congressional Research Service, 3 (Apr. 30, 2018), available online at <https://fas.org/sgp/crs/misc/LSB10123.pdf>.
- 71 Tikhomirov, *supra* note 65, at 337. According to the Congressional Research Service, the issue in *Malvo* turned on the Commonwealth of Virginia’s construal of *Miller* as inapplicable because the state sentencing scheme was not mandatory. However, *Malvo* was sentenced roughly a decade before the Supreme Court of Virginia held that the sentencing scheme was not mandatory, raising questions of retroactivity that implicate *Montgomery*. The Court was expected to address in their decision whether sentencing courts must revisit pre-*Miller* discretionary LWOP sentences. Joanna R. Lampe, Mathena v. Malvo: *A Challenge to Life Without Parole for the D.C. Sniper*, Congressional Research Service (Oct. 10, 2019), available online at <https://fas.org/sgp/crs/misc/LSB10350.pdf>.
- 72 See discussion of *Malvo* *supra* notes 55-57.
- 73 On March 9th, 2020, both parties in *US v. Grant* filed Rule 28(j) letters with the court regarding the dismissal of *Malvo* and evaluating some additional recent precedent. The appellant asserts that *Malvo*’s withdrawal is “objective indicia” of the unconstitutionality of his sentence. Letter Pursuant to Fed. R. App. P. 28(j), *US v. Corey Grant*, No. 16-3820, Larry Lustberg (Mar. 9, 2020); Response to Grant’s Letter Pursuant to Fed. R. App. P. 28(j), *US v. Corey Grant*, No. 16-3820, Craig Carpenito (Mar. 10, 2020).
- 74 *Graham*, *supra* note 35, at 75.
- 75 Russell, *supra* note 21.
- 76 *Id.* at 387.
- 77 In most jurisdictions, the judiciary has no authority to grant or deny parole. However, a few limited exceptions exist: In Pennsylvania, both the Court of Common Pleas and the Board of Probation and Parole retain authority to parole defendants convicted of a crime carrying a maximum sentence of two years or less. In Missouri, a circuit court may grant parole to a defendant “already confined under a sentence issued by the court,” but loses that authority after 120 days for defendants committed to the Department of Corrections for imprisonment. §4:1.Introduction, Law of Probation & Parole § 4:1 (2d).
- 78 Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?* 50 AM. CRIM. L. REV. 303, 304 (2013); see also Jorge Renaud, *Grading the Parole Release Systems of All 50 States*. Prison Policy

Initiative, available online at [https://www.prisonpolicy.org/reports/grading\\_parole.html](https://www.prisonpolicy.org/reports/grading_parole.html). Note that a few states, however, have enacted legislation meant specifically to bring juvenile parole proceedings in line with *Miller*. For example, California passed Senate Bill 9 in 2012, creating a specialized parole process for juveniles sentenced to life or a lengthy fixed term, and Senate Bill 260 in 2013, expanding upon *Graham* and *Miller* to create parole opportunities for “virtually all juveniles sentenced in adult court.” Beth Caldwell, *Creating Meaningful Opportunities for Release: Graham, Miller, and California’s Youth Offender Parole Hearings*, 40 N.Y.U. REV. L. & SOC. CHANGE. 245, 263 (2016).

79 Russell, *supra* note 21, at 376.

80 Kimberly Thomas & Paul Reingold, *From Grace to Grids: Rethinking Due Process Protection for Parole*, 107 J. CRIM. L. & CRIMINOLOGY 213, 218 (2017).

81 *Id.* at 218–19.

82 *Id.* at 213.

83 Introduction, Law of Probation & Parole § 4:1 (2d); *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 99 S.Ct. 2100 (1979).

84 Introduction, Law of Probation & Parole § 4:1 (2d).

85 A recent national survey identified the following potential constitutional deficiencies common in parole procedures from state to state: prisoners are denied the chance to present their case for release; prisoners are prevented from seeing and rebutting information relied upon by the decision-maker; prisoners have limited (and sometimes no) access to counsel during parole process; and prisoners in some jurisdictions are not provided adequate notice of hearing dates, a recording of the proceedings, or a statement of reasons for the decision. Russell, *supra* note 21, at 424–428. For other deficiencies and problematic aspects of parole proceedings denounced by advocates, see Renaud, *supra* note 78.

86 “To the extent that the Court’s vision of parole was true at the time [of *Greenholtz*], it is not true now. Today, parole occurs in a different landscape, against a backdrop of a shift in sentencing systems, additional broad constitutional protections at sentencing itself, and a blurring of the line between sentencing and parole. Further, modern parole decisions are made with detailed guidelines and based on actuarial tables about the statistical likelihood that a person with the inmate’s characteristics will reoffend.” Thomas & Reingold, *supra* note 80, at 215. See also Beth Schwartzapfel, *How Parole Boards Keep Prisoners in the Dark and Behind Bars*, WASH. POST (July 11, 2015), available online at [https://www.washingtonpost.com/national/the-power-and-politics-of-parole-boards/2015/07/10/49c1844e-1f71-11e5-84d5-eb37ee8ea61\\_story.html](https://www.washingtonpost.com/national/the-power-and-politics-of-parole-boards/2015/07/10/49c1844e-1f71-11e5-84d5-eb37ee8ea61_story.html) (claiming that the “national mood has swung away from the punitive excesses of the 1990s” with respect to parole, although that national consensus has had little effect on national grant rates).

87 Russell, *supra* note 21, at 433.

88 See *Bonilla v. Iowa Board of Parole*, 930 N.W.2d 751, 775–78 (Iowa 2019) (finding that *Miller-Graham* does not create a liberty interest in parole itself, but does create a liberty interest in a meaningful parole review); *Flores v. Stanford*, No. 18 CV 2468 (VB), 2019 WL 4572703, at \*10 (S.D.N.Y. Sept. 20, 2019) (finding a “cognizable liberty interest in obtaining parole upon demonstrating maturity and rehabilitation.”).

89 Megan T. Stevenson & Christopher Slobogin, *Algorithmic Risk Assessments and the Double-Edged Sword of Youth*, 96 WASH. U.L. REV. 681, 681 (2018).

- 90 Electronic Privacy Information Center, *Algorithms in the Criminal Justice System: Pre-Trial Risk Assessment Tools* (last visited Dec. 28, 2019), available online at <https://epic.org/algorithmic-transparency/crim-justice/>.
- 91 Chris Baird et al., *A Comparison of Risk Assessment Instruments in Juvenile Justice*, National Council on Crime & Delinquency (Aug. 2013), available online at [http://nccdglobal.org/sites/default/files/publication\\_pdf/nccd\\_fire\\_report.pdf](http://nccdglobal.org/sites/default/files/publication_pdf/nccd_fire_report.pdf).
- 92 Shelby Arnold et al., *Risk Assessment and Juvenile Resentencing: A Critical Analysis*, 36 BEHAVIORAL SCI. & L. 1, 9 (Oct. 2018).
- 93 Baird, *supra* note 91.
- 94 Matt Henry, *Risk Assessment: Explained*, THE APPEAL (Mar. 25, 2019), available online at <https://theappeal.org/risk-assessment-explained/>.
- 95 Ric Simmons, *Big Data and Procedural Justice: Legitimizing Algorithms in the Criminal Justice System*, 15 OHIO ST. J. CRIM. L. 573, 574 (2018). See also Jason Tashea, *Calculating Crime*, 103 A.B.A. J. 54, 56-57 (2017) (quoting Christine Remington, the Wisconsin assistant attorney general who argued *State v. Loomis*: “I don’t think there’s any question that [Compass] is a good thing.” It allows the corrections department to “tailor limited resources in the best way possible.”).
- 96 Jeremy Isard, *Under the Cloak of Brain Science: Risk Assessments, Parole, and the Powerful Guise of Objectivity*, 105 CAL. L. REV. 1223, 1241 (2017).
- 97 Julia Dressel & Hany Farid, *The Accuracy, Fairness, and Limits of Predicting Recidivism*, 4 SCI. ADV. 1, 1 (Jan. 2018), available online at <https://advances.sciencemag.org/content/4/1/eaao5580>.
- 98 Stevenson & Slobogin, *supra* note 89, at 681; Danielle Kehl et al., *Algorithms in the Criminal Justice System: Assessing the Use of Risk Assessments in Sentencing*, at 28, Responsive Communities Initiative, Berkman Klein Center for Internet & Society, Harvard Law School (2017), available online at [https://dash.harvard.edu/bitstream/handle/1/33746041/2017-07\\_responsivecommunities\\_2.pdf](https://dash.harvard.edu/bitstream/handle/1/33746041/2017-07_responsivecommunities_2.pdf).
- 99 Stevenson & Slobogin, *supra* note 89, at 685.
- 100 Age is not the only factor which can function as a “double-edged sword” in a risk assessment algorithm. Other factors which can be considered both “risk-aggravating and blame-mitigating” include mental health issues, substance abuse or addiction, and lack of education. *Id.* at 681 n. 2.
- 101 *Id.* But see Deborah W. Denno, *The Myth of the Double-Edged Sword: An Empirical Study of Neuroscience Evidence in Criminal Cases*, 56 B.C. L. REV. 493 (2015) (arguing that neuroscience evidence is typically introduced for its proper purpose of providing fact-finders with precise and reliable information about a defendant).
- 102 Stevenson & Slobogin, *supra* note 89, at 681-82.
- 103 *Id.* Christine Remington, who argued for the government in *State v. Loomis*, counters that “We don’t know what’s going on in a judge’s head; it’s a black box, too,” and therefore COMPAS actually provides more transparency to the process, not less. Jason Tashea, *Calculating Crime*, 103 A.B.A. J. 54, 58 (2017).
- 104 *Id.* at 682.
- 105 Dressel & Farid, *supra* note 97, at 1. See also Julia Angwin et al., *Machine Bias*, PROPUBLICA (May 23, 2016), <https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing> (demonstrating from a statistical analysis that the COMPAS algorithm is more likely to peg black defendants at a high risk for recidivism). Northpointe disputes the findings of the ProPublica study. For their response letter, see Equivant, *Response to ProPublica: Demonstrating Accuracy Equity*

and Predictive Parity (Dec. 1, 2018), available online at <https://www.equivant.com/response-to-propublica-demonstrating-accuracy-equity-and-predictive-parity/>.

- 106 Henry, *supra* note 94.
- 107 Electronic Privacy Information Center, *Algorithms in the Criminal Justice System: Pre-Trial Risk Assessment Tools* (last visited Dec. 28, 2019), available online at <https://epic.org/algorithmic-transparency/crim-justice/>.
- 108 New York Consolidated Laws, Executive Law – EXC § 259-i.
- 109 83 N.Y. Jur. 2d Penal and Correctional Institutions § 364.
- 110 Fair & Timely Parole Bill, S.B. S497A (Jan. 9, 2019), available online at <https://www.nysenate.gov/legislation/bills/2019/s497>.
- 111 For a critical overview of the politics of Parole Board commissioner appointments and the problematic relationship between the Board, law enforcement, and the district attorney’s offices, see Michelle Lewin & Nora Carroll, *Collaborating Across the Walls: A Community Approach to Parole Justice*, 20 CUNY L. REV. 249, 261–65 (2017); Michael Winerip et al., *For Blacks Facing Parole in New York State, Signs of a Broken System*, N.Y. TIMES (Dec. 4, 2016), available online at <https://www.nytimes.com/2016/12/04/nyregion/new-york-prisons-inmates-parole-race.html>.
- 112 An act to amend the executive law, in relation to deference in discretionary release on parole, A.B. 4291 (Feb. 4, 2019), available online at <https://www.nysenate.gov/legislation/bills/2019/a4291>. The Board may also consider any deportation orders or recommendations for deportation, performance in a temporary release program, activities following arrest but prior to confinement, adjustment in prior institutional confinement or parole supervision, aggravating or mitigating circumstances of the underlying crime, and any recommendations of the district attorney. *Id.*
- 113 Public Hearings: To Examine the State’s Current Parole Policies and Governor Cuomo’s Executive Order Allowing Conditional Pardons that Enable Parolees to Vote: Joint Hearing Before the N.Y. State Senate Standing Comm. On Crime Victims, Crime and Correction and Standing Comm. On Elections, at 27 (Oct. 1, 2018) [hereinafter Hearings] (Statement of James Ferguson), available online at <https://www.nysenate.gov/transcripts/public-hearing-10-01-18-nys-senate-parole-hearing-finaltxt>.
- 114 *Id.*; *Serrano v. Alexander*, 70 A.D.3d 1099, 1100 (2010).
- 115 83 N.Y. Jur. 2d Penal and Correctional Institutions § 364.
- 116 30 N.Y.S.3d 397, 398 (N.Y. App. Div. 2016) (The Board . . . [is] required to consider the significance of petitioner’s youth and its attendant circumstances . . . before making a parole determination. That consideration is the minimal procedural requirement necessary” to satisfy *Miller-Graham*).
- 117 *Id.* at 400.
- 118 Lewin & Carroll, *supra* note 111, at 253. Several litigants have accused the Board of unlawful parole denials. See *Rossakis v. New York State Bd. of Parole*, 146 A.D.3d 22, 27, (N.Y. App. Div. 2016) (holding that the Board improperly focused on the seriousness of the conviction and victim impact statements without giving genuine consideration to petitioner’s remorse, institutional achievements, and lack of other violent history); *Platten v. NYS Bd. of Parole*, 47 Misc. 3d 1059, 1064, (N.Y. Sup. Ct. 2015) (finding the Board’s parole denial arbitrary and capricious for citing an unsubstantiated belief that petitioner posed a risk to the welfare of society); *Ciaprazi v. Evans*, 52 Misc. 3d 1212(A), at 3 (N.Y. Sup. Ct. 2016) (reversing the Board’s denial for failure to consider petitioner’s program achievements, letters of support from corrections officers, and development of skills, insight, and maturity).

- 119 Lewin & Carroll at 254.
- 120 Jeremy Benjamin, *Newly Proposed Parole Regulations*, New York State Bar Association (Oct. 21, 2016), available online at <https://communities.nysba.org/blogs/jeremy-benjamin/2016/10/21/newly-proposed-parole-regulations>.
- 121 *Id.*
- 122 Jeff Larson et al., *How We Analyzed the COMPAS Recidivism Algorithm*, PROPUBLICA (May 23, 2016), available online at <https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm>.
- 123 New York State Corrections and Community Supervision, Directive No. 8500, *COMPAS Assessments/Case Plan* (Aug. 14, 2019), available online at <http://www.doccs.ny.gov/Directives/8500.pdf>.
- 124 Northpointe, Inc., *COMPAS Risk & Need Assessment System: Selected Questions Posed by Inquiring Agencies* (2012), available online at [http://www.northpointeinc.com/files/downloads/FAQ\\_Document.pdf](http://www.northpointeinc.com/files/downloads/FAQ_Document.pdf).
- 125 *Id.*
- 126 *Id.*
- 127 Lewin & Carroll, *supra* note 111, at 276.
- 128 *Id.* Directive 8500 requires that a copy of the inmate’s COMPAS interview must be given to them before any Parole Board appearance, but does not stipulate how soon. Directive No. 8500, *supra* note 108, at 7.
- 129 Hearings, *supra* note 113, at 56-59.
- 130 Lewin & Carroll, *supra* note 111, at 276 (“COMPAS has also been found to be racially biased.”).
- 131 Equivant, *Practitioner’s Guide to COMPAS Core* (April 4, 2019), available online at <http://www.equivant.com/wp-content/uploads/Practitioners-Guide-to-COMPAS-Core-040419.pdf>.
- 132 Ellora Thadaneey Israni, *When an Algorithm Helps Send You to Prison*, N.Y. TIMES (Oct. 26, 2017), available online at <https://www.nytimes.com/2017/10/26/opinion/algorithm-compas-sentencing-bias.html>.
- 133 Executive Office of the President, *Big Data: A Report on Algorithmic Systems, Opportunity, and Civil Rights*, 10 (May 2016), available online at [https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/2016\\_0504\\_data\\_discrimination.pdf](https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/2016_0504_data_discrimination.pdf). Some scholars suggest that “bias mitigation” in algorithms can be achieved through research-based corrective methods that are not race-blind, and instead account for racial inequity. *Id.* For a study on one type of corrective anti-bias action applied to COMPAS that was successful in reducing misclassification rates for African-Americans as repeat offenders, see Daniel Fuchs, *The Dangers of Human-Like Bias in Machine-Learning Algorithms*, 2 MISSOURI UNIV. OF SCI. AND TECH. 1, 10 (2018). But see Omer Tene & Jules Polonetsky, *Taming the Golem: Challenges of Ethical Algorithmic Decision-Making*, 19 N.C. J. L. & TECH 125 (2017) (arguing that when companies interfere with their algorithms and fix the results through “active social engineering,” they must do so with transparency so that users know they are seeing “a manicured version of the world.”).
- 134 Quandt, *supra* note 1.
- 135 Benjamin, *supra* note 120.
- 136 McKinney’s Executive Law § 259–c(4); *Fraser v. Evans*, 971 N.Y.S.2d 332, 333 (App. Div. 2d Dep’t 2013) (citations omitted).

- 137 *Diaz v. New York State Bd. of Parole*, 42 Misc.3d 532, 535-36 (2013) (citations omitted). See also *Montane v. Evans*, 116 A.D.3d 197, 203 (2014) (confirming that Board members must consider COMPAS outcomes, but need not explicitly discuss every statutory factor, and the Board's determination should be upheld unless it exhibits "irrationality bordering on impropriety").
- 138 *Diaz* at 535-36.
- 139 Benjamin, *supra* note 120.
- 140 *Id.*
- 141 Release Aging People in Prison, Testimony Before the New York State Legislature: 2018 Public Protections Budget Hearing 7 (Jan. 30, 2018) (Statement of Dave George), available online at [http://rappcampaign.com/wp-content/uploads/RAPP-2018-Budget-Hearing-Testimony\\_FINAL.pdf](http://rappcampaign.com/wp-content/uploads/RAPP-2018-Budget-Hearing-Testimony_FINAL.pdf).
- 142 Winerip et al., *supra* note 111.
- 143 *Id.*
- 144 *Id.*
- 145 Hearings, *supra* note 113, at 54.
- 146 *Id.* at 106.
- 147 *Id.* at 55.
- 148 *Id.* at 69. Ferguson was referring to the diminished weight afforded to victim impact statements.
- 149 Noah Goldberg, *Parole Reform Aims to Put a Stop to a 'Culture of Punishment'*, BROOKLYN DAILY EAGLE (Nov. 27, 2019), available online at <https://brooklyneagle.com/articles/2019/11/27/parole-reform-aims-to-put-a-stop-to-a-culture-of-punishment/>.
- 150 *Id.* (quoting former Parole Board Commissioner "We have to understand what the purpose of parole is . . . Our focus must be: are you prepared to go home? . . . We have an addiction to punishment in this country, and New York is certainly part of that."); Steven Zeidman, *The State Legislature's Criminal Justice Reform Failures*, N.Y. DAILY NEWS (July 8, 2019), <https://www.nydailynews.com/opinion/ny-oped-the-state-legislatures-criminal-justice-reform-failures-20190708-hs6rk7xw3zcpze7z567k7d13vy-story.html> ("The [Fair & Timely Parole] bill unequivocally promotes parole decisions based on rehabilitation and is grounded in the values of redemption and transformation as opposed to retribution and eternal punishment."). See also Danielle Kehl et al., *supra* note 98 (arguing that the rehabilitative focus that dominated the late 19th century gave way to retributivism in the 1970s and 1980s, while recent years have seen a shift towards evidence-based methods designed to assess risk of recidivism).
- 151 Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479, 480 (1999) ("[The parole board] asks the tough questions about what has been done to make sure this criminal is no longer a danger before he is released.").
- 152 *Id.* at 493 (arguing that although parole was originally intended "to foster reformation rather than increase punitiveness," a growing sentiment that the correctional system is meant "to isolate and punish" took hold in the 1980s).
- 153 *Montgomery* confirmed that the *Miller* decision meant that heinousness of the crime itself is not a sufficient basis to find a juvenile incorrigible or justify a life sentence. *Montgomery* at 734.
- 154 Stevenson & Slobogin, *supra* note 89, at 681.
- 155 Sloan, *infra* note 167, at 267.
- 156 Hearings, *supra* note 113, at 105.

- 157 *Hawkins*, *supra* note 116, at 400.
- 158 Russell, *supra* note 21, at 376.
- 159 *Miller* hearings begin with the expectation that exceptions to the rehabilitative presumption are “exceptionally rare,” and the State must show that the youth is “one of Miller’s ‘rarest’ of juveniles.” Thomas Grisso & Antoinette Kavanaugh, *Prospects for Developmental Evidence in Juvenile Sentencing Based on Miller v. Alabama*, 22 PSYCH. PUB. POL’Y & L. 235, 237 (2016).
- 160 Currently, there is no national data on parole grant rates. Many studies rely on anecdotal evidence or extrapolate data from states which release data on their individual grant rates (although this is also unreliable, as states each calculate grant rates differently). Beth Schwartzapfel, *How Parole Boards Keep Prisoners in the Dark and Behind Bars*, WASH. POST (July 11, 2015), available online at [https://www.washingtonpost.com/national/the-power-and-politics-of-parole-boards/2015/07/10/49c1844e-1f71-11e5-84d5-eb37ee8eaa61\\_story.html](https://www.washingtonpost.com/national/the-power-and-politics-of-parole-boards/2015/07/10/49c1844e-1f71-11e5-84d5-eb37ee8eaa61_story.html). For one report analyzing and comparing states’ parole systems based partially on grant rates, see Renaud, Jorge, *Grading the Parole Release Systems of All 50 States. Prison Policy Initiative*, available online at [https://www.prisonpolicy.org/reports/grading\\_parole.html](https://www.prisonpolicy.org/reports/grading_parole.html).
- 161 At pre-sentencing *Miller* hearings, prosecutors must demonstrate evidence of “irreparable corruption” which is not based solely on the “heinousness of the crime,” but based substantially upon “the individual’s psychological character.” *Id.* at 239.
- 162 See Beth A. Colgan, *Teaching A Prisoner to Fish: Getting Tough on Crime by Preparing Prisoners to Reenter Society*, 5 SEATTLE J. FOR SOC. JUST. 293 (2006) (claiming that “tough on crime” policies of the 1980s and 1990s caused the public to view prison programming as “coddling” prisoners, which led states to “slash” prison budgets and largely abandon prison programming).
- 163 Approximately 20 percent of female inmates and 25 percent of male inmates report being physically assaulted by either another inmate or a prison guard while incarcerated. Eleanor Taylor Nicholson & Barry Krisberg, Contagion of Violence, Workshop Summary, Forum on Global Violence Prevention, (Feb. 6, 2013). See also Dave Gilson, *What We Know About Violence in America’s Prisons*, MOTHER JONES (2016), available online at <https://www.motherjones.com/politics/2016/06/attacks-and-assaults-behind-bars-cca-private-prisons/> (summarizing statistics about physical and sexual assault in prisons); Graeme Wood, *How Gangs Took Over Prisons*, THE ATLANTIC (2014), available online at <https://www.theatlantic.com/magazine/archive/2014/10/how-gangs-took-over-prisons/379330/> (examining the history and prevalence of prison gangs through a California case study).
- 164 Studies have shown that long-term solitary confinement causes numerous harmful psychological effects, including hallucinations, insomnia and paranoia, post-traumatic stress disorder, and increased risk of suicide. American Friends Service Committee, *Solitary Confinement Facts*, available online at <https://www.afsc.org/resource/solitary-confinement-facts> (last visited Jan. 14, 2020). These effects are magnified for still-developing juveniles. *Id.*; American Civil Liberties Union, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States* (Oct. 2012), available online at <https://www.aclu.org/report/growing-locked-down-youth-solitary-confinement-jails-and-prisons-across-united-states>. Activists in the United States argue that solitary confinement fits the definition of torture as stated in international treaties. UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, Dec. 10, 1984, 1465 U.N.T.S. 85, available online at <http://www.hrweb.org/legal/cat.html>.

- 165 Winerip et al., *supra* note 111.
- 166 See generally Prateek Shukla, *The Criminal Child and Its Potential for Change: A Presumption in Favor of Rehabilitation in Sentencing Juvenile Offenders*, 38 REV NEW ENG. J. CRIM. & CIV. CONFINEMENT (2012) (arguing that rehabilitation is a “self-fulfilling prophecy” and incarcerating juveniles should be done with the sole purpose of rehabilitation); Tamara L. Reno, *The Rebuttable Presumption for Serious Juvenile Crimes: An Alternative to Determinate Sentencing in Texas*, 26 TX. TECH L. REV. 1421 (1995) (discussing a rebuttable presumption of unfitness for determinate sentencing for juveniles).
- 167 Sarah Sloan, *Why Parole Eligibility Isn’t Enough: What Roper, Graham, and Miller Mean for Juvenile Offenders and Parole*, 47 COLUM. HUM. RTS. L. REV. 243, 270 (2016).
- 168 *Id.* at 270–71, n. 163.
- 169 *Id.* at 273.
- 170 *Id.* at 272, n. 167. Sloan notes that because her proposal is based on current sentencing and parole structures, it could hold less relevance if parole systems or Eighth Amendment jurisprudence changes as our understanding of adolescent brain development increases. Juveniles sentences today may not achieve parole eligibility until decades into the future. *Id.*
- 171 *Id.*
- 172 *Id.* at 275.
- 173 Shelby Arnold et al., *Risk Assessment and Juvenile Resentencing: A Critical Analysis*, 36 BEHAVIOR SCI. & L. 576, 580 (2018).
- 174 Nathan James, *Risk and Needs Assessment in the Federal Prison System*, Congressional Research Service (July 10, 2018), available online at <https://fas.org/sgp/crs/misc/R44087.pdf>.
- 175 Arnold, *supra* note 173, at 580.
- 176 *Id.* at 581.
- 177 *Id.*
- 178 *Id.*
- 179 *Id.* at 582.
- 180 The Arnold study also suggests that in order to bring risk-need tools closer in line with *Miller* and *Montgomery*, evaluators should employ a framework that incorporates four of the *Miller* factors. They suggest this framework include dynamic factors, but should allow for “evaluator discretion” to further consider age, personal change, and other attendant circumstances. *Id.* at 583.
- 181 These scholars argue that because the liberty interest in release stems from Fourteenth Amendment protections, it is a right that belongs to all prisoners, regardless of age. See Adam Yefet, *Shock Incarceration and Parole A Process Without Process*, 81 BROOK. L. REV. 1319, 1338 (2016).
- 182 *Id.* at 1320. See also *Morrissey v. Brewer*, 408 U.S. 471 (1972) (holding that parolees are entitled to various due process considerations during parole revocation, including written notice, a record of the evidence against him, the right to be heard in person, and the right to confront adverse witnesses); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (holding that due process requires written notice, a statement of factual findings, and the right to present evidence in disciplinary proceedings that may result in solitary confinement).
- 183 *Id.*

- 184 930 N.W.2d 751 (Iowa 2019).
- 185 *Id.* at 768.
- 186 79 F. Supp.3d 933 (S.D. Iowa 2015); *Bonilla* at 775.
- 187 *Greiman* at 945.
- 188 *Bonilla* at 778 (“We conclude that a juvenile offender has a liberty interest in the proper application of Graham-Miller principles under the Due Process Clause in the Fourteenth Amendment to the Federal Constitution . . .”).
- 189 *Flores v. Stanford*, 2019 WL 4572703, at \*10 (S.D.N.Y. Sept. 20, 2019) (“*Graham, Miller, and Montgomery* therefore confer on juvenile offenders a constitutionally protected “liberty interest in a meaningful parole review.”).
- 190 *Flores* at \*10 (citing *Victory v. Pataki*, 814 F.3d 37, 59 (2d Cir. 2016)).
- 191 “In order for a state prisoner to have an interest in parole that is protected by the Due Process Clause, he must have a legitimate expectancy of release that is grounded in the state’s statutory scheme . . . Neither the mere possibility of release, nor a statistical probability of release, gives rise to a legitimate expectancy of release on parole.” *Barna v. Travis*, 239 F.3d 169, 170–71 (2d Cir. 2001) *See also Berard v. Vermont Parole Board*, 730 F.2d 71, 75 (2d Cir.1984) (holding that parole eligibility does not create a protectible liberty interest); *Pugliese v. Nelson*, 617 F.2d 916, 925 (2d Cir.1980) (finding that an expectation of release does not trigger due process protections); *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981) (holding that a statistical probability of clemency does not generate constitutional protections).
- 192 *Flores* at \*10.
- 193 *Flores* at \*9.
- 194 *Flores* at \*10 (emphasis added).
- 195 *Flores* at \*12.
- 196 Julia M. Glencer, *An ‘Atypical and Significant’ Barrier to Prisoners’ Procedural Due Process Claims Based on State-Created Liberty Interests*, 100 DICKINSON L. REV. 861, 870 (1996) (“First, the court must ascertain whether a liberty or property interest as defined within the meaning of the [Due Process] Clause is at stake. If a protected right is implicated, the need for procedural safeguards is triggered.”).
- 197 *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).
- 198 *Flores* at \*11, citing *Brown v. Precythe*, 2017 WL 498072, at \*12; *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Bonilla v. Iowa*, 930 N.W.2d at 775.
- 199 The complainant in *Bonilla* proposed the following changes to the parole process that due process should require: the right to review files and respond in writing, in-person presence at review hearings, the right to verifiable information, adequate notice of future hearings and written guidance, programming and treatment to aid in rehabilitation, the right to counsel at annual parole reviews, the right to independent experts in psychological evaluations. *Bonilla* at 775-91.
- 200 Yefet, *supra* note 181, at 1344.
- 201 New York State Corrections and Community Supervision, Directive No. 8500, *COMPAS Assessments/Case Plan* (Aug. 14, 2019), available online at <http://www.doccs.ny.gov/Directives/8500.pdf>.
- 202 “[The opportunity to be heard] is the bare minimum that due process requires, and while ‘the constitution does not require more,’ it cannot tolerate less.” Yefet, *supra* note 181, at 1344.

- 203 *Id.* at 1343 (citing *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 99 S.Ct. 2100 (1979)).
- 204 *Flores* at \*4.
- 205 COMPAS representatives have defended the secrecy of their software, arguing that it is a key component of their business model. Adam Liptak, *Sent to Prison by a Program's Secret Algorithms*, N.Y. TIMES (May 1, 2017), available online at <https://www.nytimes.com/2017/05/01/us/politics/sent-to-prison-by-a-software-programs-secret-algorithms.html> (“The key to our product is the algorithms, and they’re proprietary . . . We’ve created them, and we don’t release them because it’s certainly a core piece of our business.”).
- 206 Kehl, *supra* note 98, at 11.
- 207 *Flores* at \*4.
- 208 *Flores* at \*4.
- 209 881 N.W.2d 749 (Wis. 2016).
- 210 *Id.* at 754.
- 211 *Id.* at 757.
- 212 *Id.* at 763.
- 213 *Id.* at 763-64. However, one analysis of the *Loomis* decision argues that although the court holds that only jurisdictions with the capacity to monitor the accuracy of their RAI tools should use them, the decision both largely disregarded the fact that accuracy is subject to debate and ignored the reality that most judges are “unlikely to understand” the algorithms at all. *State v. Loomis: Wisconsin Supreme Court Requires Warning Before Use of Algorithmic Risk Assessments in Sentencing*, 130 HARV. L. REV. 1530, 1535 (Mar. 10, 2017), available online at <https://harvardlawreview.org/2017/03/state-v-loomis/>. Justice Abrahamson’s concurrence in the decision notes this, and demonstrates that the court is mistaken to assume that “as long as judges are informed about COMPAS’ potential inaccuracy, they can discount appropriately.” *Id.* The analysis concludes that risk assessment instruments with secret methodology be excluded, or at least “rein[ed] in” until more studies are available. *Id.* at 1537.
- 214 *Id.* at 757.
- 215 *Flores* at \*4.
- 216 Hearings, *supra* note 113, at 54.
- 217 *Id.* at 57.
- 218 *Id.* at 58-59.
- 219 Marshall, *supra* note 42, at 1669 (“When the Court stopped short of a full ban on juvenile life without parole sentences in *Miller*, it created an unmanageable and likely impossible set of guidelines for levying these sentences.”).
- 220 Richard A. Bierschbach, *Proportionality and Parole*, 160 U.PENN. L. REV. 1745, 1746 (2012).
- 221 Proponents assert that the tools “help judges make informed decisions that better allocate resources instead of judges being motivated by emergency-release rules to alleviate jail overcrowding.” Jason Tashea, *Calculating Crime*, 103 A.B.A. J. 54, 58 (2017).

**Matthew L.M. Fletcher**

**THE LAW OF GENOCIDE  
AND INDIGENOUS PEOPLES**

**Book Review: Laurelyn Whitt and Alan W. Clarke,  
*North American Genocides: Indigenous Nations, Settler  
Colonialism, and International Law* (Cambridge U. Press, 2019).**

In the mid-20th century, state governments—enabled by the United States federal government—removed 25 to 35 percent of American Indian\* children from their families and placed them with new families. Roughly 80 percent of the time, this meant placing Indian children with complete strangers. The removals of Indian children were a continuation of forced removals of children by the federal government—and church missions authorized and funded by the United States—in the latter half of the 19th century and early part of the 20th century to Indian boarding schools. Was this genocide?

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\* A word about nomenclature. The National Lawyers Guild’s stated preference is to use the term “indigenous.” However, the author of this review (who is a prominent indigenous scholar and a member of the Grand Traverse Band of Ottawa and Chippewa Indians uses the word “Indian” to refer to the original inhabitants of North America. We are aware that this may seem controversial to some. However, on many U.S. reservations, tribal members proudly refer to themselves as “Indian” as have many of the leaders of the American Indian Movement. Indeed, the premier newspaper across Indian country is *Indian Country Today*. Moreover, as explained in note 3 of *NORTH AMERICAN GENOCIDES: INDIGENOUS NATIONS, SETTLER COLONIALISM, AND INTERNATIONAL LAW*, the most usual alternative term in the U.S., “Native American” presents its own difficulty:

“In this book, we use the term Indigenous in most cases. Exceptions to this are largely a function of context, as for example, when a source uses a different term or when a more specific term is preferable or required, such as Australian Aboriginal or American Indian. In the Canadian context we tend to avoid the term ‘Canadian Aboriginal’ in favor of First Nations, Metis, or Inuit. Indian is used in the Canadian context only in connection with the Indian Act. ‘American Indian’ is sometimes shortened to ‘Indian’ although we avoid the term Native ‘American’ (primarily because it tends to conflate nationhood with ethnicity). Alaska Native and Native Hawaiian are used where appropriate.”

In the 1950s, the United States terminated its political relationship with hundreds of American Indian nations, often liquidating the tribes' assets with little compensation to the tribes or their citizens. A few tribes consented to termination, but most did not. In the 1970s, the United States began restoring some—but not all—of those tribes. Was this genocide?

In the latter half of the 19th century into the early decades of the 20th century, the United States implemented a land allotment scheme that divested American Indian nations of more than two-thirds of their lands. A few tribes consented to allotment, but most did not. Was this genocide?

In the 20th century, the United States confiscated numerous Indian reservations — and compensated the tribes—for large hydrologic projects that flooded large swaths of those reservations, primarily the best land near the rivers available to Indian people. The tribes took the compensation. Was this genocide?

In the 21st century, it is now established and understood that federal Indian policy undermines tribal governance powers to enforce criminal laws against non-Indians. When coupled with federal and state governments' failures to adequately police Indian country, this has contributed to a horrific rise in physical and sexual assaults against Indian women and children in Indian country, an epidemic of human trafficking of Indian women and children, and thousands of missing and murdered Indian women. Is this genocide?

Professors Laurelyn Whitt and Alan W. Clarke set forth a stirring legal analysis of why each of these circumstances likely constitutes genocide. Whitt and Clarke choose the extermination of the Beothuk Nation over three centuries and the extermination of the Powhatan Confederacy in the 17th century to make a pair of easy cases that what happened to these Indian nations was genocide. (Whitt and Clark at 100-161). They prepare an excellent case, almost like a long-form criminal complaint, identifying the individuals and nations responsible and detailing the horrific histories of these nations. Great Britain acknowledged in writing in 1837 that the indigenous people once found in Newfoundland had been exterminated. (Whitt and Clark at 116). The Powhatan Confederacy was “disappeared.” (Whitt and Clark at 160).

The cases are easy to make, in part, because the Convention on the Prevention and Punishment of the Crime of Genocide, adopted in 1948 in the wake of the horrors of World War II, defines “genocide” very broadly. Article 2 of the Convention states:

[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;

- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Surely, the intentional extermination of entire Indian nations by warfare fits subpart (a) of this definition, *killing members of the group with an intent to destroy in whole a national group*. Massacres like Wounded Knee and Sand Creek also probably fit this definition, given that the American military *killed members of those groups* — Lakota bands and Cheyenne and Arapaho bands, respectively — *with an intent to destroy in part*. Of course, those acts occurred before there was an established definition of “genocide.” But settler colonial states like the United States defended those actions as mere acts of war, which under international law are legitimate. As Whitt and Clarke establish, those states now deny that those actions were genocidal. (Whitt and Clarke at 8-25). These states might apologize, as the United States has generally in relation to Indian nations and more specifically on matters such as the Native Hawaiian conquest, but they will not admit responsibility for genocide. In fact, if pressed, as former Canadian Prime Minister Stephen Harper was, they might deny any wrongdoing whatsoever. (Whitt and Clarke at 11).

Consider the termination era of federal Indian policy in the United States. In 1953, a mere five years after the genocide convention, the United States Congress adopted House Concurrent Resolution 108. That resolution used the language of freedom and emancipation to accomplish what its opponents would call “termination.” In the resolution, Congress called for the end of the status of Indian people as “wards” of the United States, and identified five Indian nations to be granted immediate “freedom.” How this worked in reality was apparent with the first tribe terminated, the Menominee Tribe of Wisconsin. The United States Department of the Interior confiscated the main asset of the tribe, a timber products company (perhaps the first profitable sustainable forestry company in the world), then sold it off at pennies on the dollar of the fair market value, took an administrative fee off the top, and distributed what remained in small, per capita payments to the former members of the terminated tribe. The tribe itself would no longer receive services like health care, public safety, or housing from federal agencies. Despite the pretty language of the House resolution, this was intentional. The Menominee Tribe was targeted for termination *because* of their successes, with their business competitors reaching out to the Wisconsin Congressional delegation to suggest this tribe as a termination test case.

The tribe and its citizens, of course, suffered horribly. The only legal right left to the Menominee people was the treaty—guaranteed right to hunt and fish. Without that right, tribal members could not eat. Naturally, the state of Wisconsin began to enforce its conservation laws against the Menominee people—undermining the treaty right.

Was the Menominee “termination” genocide? Arguably yes, but maybe not. Note that the actual instrument of termination, the Menominee Termination Act of 1954, disposed with the pretty language of freedom, but cut to the heart of the matter—termination. This statute was overtly designed to destroy the Menominee Tribe. But no Menominee people were killed or tortured, or their children forcibly removed (they were, of course, but not because of this law). Instead, the best argument that the termination act was genocide comes from subpart (c) of the definition of genocide: “Deliberately inflicting on the group conditions of life calculated to bring about [the nation’s] physical destruction in whole or in part. . . .” The meanings of those words are themselves undefined by the genocide convention, presumably to be determined through the adversarial process of litigation and the methodology of the common law. It might not be an easy case to win. But as we all know, the United States would never allow such a proceeding to occur, and if it did occur, the United States would never have participated. So we’ll never know. The Menominee Tribe’s restoration began, not with Congress, but with the Supreme Court in 1968, which recognized that the tribe’s treaty rights to hunt and fish remained. Congress did eventually restore the tribe in 1973, but the tribe still suffers the consequences of termination and is, arguably, *the* tribe in Wisconsin that struggles the most.

What’s important is that the United States—fresh from fighting World War II, fresh from seeing the horrors of genocide in Europe, fresh from imposing its will and its justice on those nations and their leaders it had defeated in that war—is the same United States who righteously engaged in the termination of Indian tribes. After Menominee, Congress terminated dozens of small tribes in Oklahoma and elsewhere, and about a hundred more tribes in California. Some of those tribes were never restored. They were politically exterminated. Few of the restored tribes recovered completely. At the same time of termination, Congress undermined reservation governance—authorized by state governments on 70 percent of reservations—to assume control, pulling back federal services from those reservations. Crime rates in Indian country began to climb and continue to climb to this day. The Executive branch embarked on forced fee patent land sales, interfered with tribal political and religious activities, and impeded tribal attorney contracts. The U.S. leaders that perpetrated the termination policy would have been shocked to be told they were engaged in acts that bordered on genocide. This was the government that was finally enforcing Reconstruction era civil rights statutes by outlawing racial segregation.

Genocide as a legal matter is woefully incomplete without a political reckoning. The most well-known persons found guilty of genocide, the perpetrators of the European genocide during World War II, the perpetrators of the Bosnian genocide of the war in the former Yugoslavia, and the perpetrators of the Rwandan genocide, were held responsible by more powerful nations through international tribunals. A cynic might say the only persons likely to be charged with and convicted of genocide are those persons who are from a weak or defeated state.

Professors Whitt and Clarke rightly identify the most critical problem with the definition of “genocide,” that the crime of genocide is inherently political.

But there is another question, at least in relation to the 574 American Indian nations who are federally recognized by the United States: the question of modern self-determination and the historic relationship between Indian nations and the United States. Like other national perpetrators of genocide, the United States has not acknowledged its actions as meeting the definition of genocide. But unlike other national perpetrators of genocide, the United States does acknowledge a duty of protection—what we normally call the trust responsibility—to Indian nations and individual Indians. This duty of protection is a matter of recognized international law where a superior sovereign agrees to be responsible for the exterior, or international, affairs of the inferior sovereign, while leaving the internal political matters of the weaker nation intact. What this means—if the United States is guilty of the crime of genocide against American Indians and Indian tribes—is that the victims of genocide place themselves, at least in part, in the protective hands of the genocidal perpetrator. What an odd circumstance!

Self-determination and the trust responsibility gives the United States political cover for its past and continuing actions (and omissions) that, arguably, meet the definition of genocide. The federal government can claim that these tribes are still here, not exterminated, and that we contract with them to provide basic governmental services and generally honor the duty of protection. Hence, the government can plausibly state that it has not been a perpetrator of genocide. Everything described in the opening paragraphs of this review that happened historically and currently may meet the definition of genocide, but the continuing self-governing status of modern Indian tribes complicates that conclusion. My only significant regret after reading *North American Genocides*, an otherwise important and well-researched book, is that Professors Whitt and Clarke do not engage this complication.



**Book Review: Jack Jackson, *Law Without Future: Anti-Constitutional Politics and the American Right* (U. Penn. Press, 2019).**

In *Law Without Future*, Jack Jackson explores a broad set of legal and political developments to support his analysis that we now live in a world where legal decisions have less fealty to precedent and less commitment to regulating future behavior than ever before. He leads with President Trump's pardon of Sheriff Joe Arpaio of Arizona, who had been convicted of criminal contempt for refusing to obey court orders enjoining him from engaging in discriminatory anti-immigrant practices—racial profiling and violations of the Fourth Amendment. The pardon demonstrated Trump's disdain for constitutional government and the principle of equality. At the same time, Arpaio "represents the ethos and energy of the political movement that ushered [Trump] into power."

In subsequent chapters, Jackson explores the habeas corpus ruling by the Supreme Court in *Teague v. Lane* (1989), the "torture memos" promulgated by the Office of Legal Counsel in the Bush Administration (and President Obama's failure to hold the authors responsible), the Court's decision in *Bush v. Gore*, Congress's legislation with respect to Terry Schiavo's life support, and the Senate's refusal to hold hearings on President Obama's nomination of Merrick Garland to the Supreme Court.

*Teague v. Lane* is a good example of Jackson's thesis. The Court expanded the definition of "new" legal rules, which provide no relief to a convicted prisoner through habeas corpus, and limited the universe of rules dictated by precedent, thus making it more difficult for prisoners held in violation of the Constitution to be released. The politically motivated ruling both narrowed the impact of previous decisions and limited the effect that current decisions would have on future cases. Jackson labels this sort of "self-destructive legal analysis" as "anti-constitutionalism." This notion of law without future was manifest in *Bush v. Gore*, where the Court explicitly limited the impact of its ruling to the case before it. As Jackson puts it, the "Court issued a landmark decision that marked the land not at all." Jackson explains how the same dynamic in *Teague v. Lane* and *Bush v. Gore* is found in the other matters he analyzes.

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Jackson develops a secondary theme as well, the relationship between law and politics. He cautions that the criticism of political decisions emanating from the War on Terror as “lawless” is misplaced. He argues that politics have always influenced and been integral to legal theory and developments. In response to *Bush v. Gore*, liberals called for a return to the “rule of law” to protect democracy. Jackson finds the criticism misguided, convincingly arguing that “the power of the law had long been waging war against democracy.” Consider the Electoral College, it is an institution that allows the election of a president rejected by a majority of the popular vote. The nondemocratic Senate, per the Constitution, serves as a brake on the more popularly representative House, due to less frequent elections and the structural rejection of the one person/one vote principle. Indeed, one could argue that with respect to the recent acquittal of President Trump in impeachment proceedings, the Senate operated as designed. Legal rulings and state laws that outlaw fusion voting, which would allow a candidate to be the nominee of more than one party, limit the influence of minor parties. Privatized debates are legally beyond regulation by the First Amendment, which requires state action, and can exclude minor parties and less well-known candidates. The law restricts access to the ballot through felon disenfranchisement and measures requiring stricter proof of identity.

The book is strongest when discussing individual examples of legal and political decisions. This reviewer is a professor of constitutional law, not a philosopher, so perhaps my impatience with frequent forays by the author into philosophical matters merely reflects my interests. Nonetheless, I believe the book would have been improved by more discussion of legal cases and specific political decisions and fewer flights into abstract debates involving St. Augustine, Alexis de Tocqueville, Karl Marx and others. In the same vein, I found Jackson’s fondness for expressing ideas in paradoxical terms to be occasionally enlightening, but too frequently unnecessarily confusing. Having said that, this book provides many productive insights into the conservative rejection of fundamental constitutional principles that currently tears at the fabric of political society.



**Nathan Goetting**

## **THE SECOND AMENDMENT HUSTLE**

I'm a left-wing law professor. My favorite judge is Chief Justice Earl Warren. The one I agree with most is Associate Justice William O. "Wild Bill" Douglas. However, consistent with the spirit of a constitutional amendment even more important than the one we're discussing today—the First—I'd like to thank the Federalist Society ("FedSoc"), a bar association that, depending on the day, either depresses or repulses me, for inviting me here this morning. I'm confident I speak for the vast majority of my comrades on the academic left when I say that, despite all the false and breathless reports from right-wing media, we don't fear debate. In fact, many of us can't get quite enough of it, especially where groups like FedSoc and Dr. Halbrook's client, the National Rifle Association ("NRA"), are concerned.

I'm here to convince you of four things:

My first point is that you don't need to be an anti-gun stereotype like Beto O'Rourke to believe an assault weapons ban along the lines of the federal statute that expired in 2004<sup>1</sup> is perfectly consistent with the Second Amendment. One can believe guns have a place in our society, and even enjoy using them recreationally, while acknowledging that the gun lobby's increasingly dogmatic Second Amendment orthodoxy is ahistorical nonsense. We have a special duty to try to be reasonable when debating incendiary issues like this one, even when we believe the other side's reasoning is completely backward. Discourse is impossible unless we are as willing, or at least almost as willing, to be persuaded as we are to persuade.<sup>2</sup>

I was assigned one of Dr. Halbrook's books as a law student studying the Second Amendment. The text was fascinating and, unlike virtually

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Nathan Goetting is Professor of Criminal Justice & Jurisprudence at Adrian College and Articles Editor for *NLGR*. This essay has been adapted from a response to a speech by NRA attorney Stephen P. Halbrook. It was delivered at the invitation of the Toledo Student Chapter of the Federalist Society, after which both speakers were questioned by the audience. The event took place on November 6, 2019—at high noon.

everything else I was required to read in law school, I couldn't set it down. I came away from that book convinced he was wrong on the key question of whether the Second Amendment created an individual right, independent of the militia, to self-defense. However, we have some core beliefs in common and I admire some aspects of his scholarship.

As best I can tell, the two primary arguments for a right to possess a gun for personal purposes offered by gun industry lawyers is that the Second Amendment constitutionalized the common law right to self-defense (recognized in *District of Columbia v. Heller*<sup>3</sup>) and the Declaration of Independence's revolutionary right<sup>4</sup> to rebel against oppressive government, the so-called "insurrectionist theory."<sup>5</sup> Morally and politically, I support both these rights. But they have nothing to do with the Second Amendment.

I think non-criminal citizens of sound mind should have the constitutional right to own, transport, and use guns, including handguns and "assault" rifles, for personal self-defense and the defense of others. I own a handgun and will freely admit that blowing inanimate objects into smithereens while practicing with it is all sorts of fun. Most people who disagree need to actually try it for the first time or chill out and loosen up. When my three-year-old son knocked over a pop can with a pellet gun for a first time the other day I jumped two feet off the ground and pumped my fist like an idiot. But the primary reason I own a .45 is that I don't want any home invader who selects my house to have a pleasant experience.

I also stand foursquare behind what Lincoln called the natural "revolutionary right"<sup>6</sup> to possess guns in rebellion against intrusive government. This puts me in the illustrious company of Daniel Shays, John Brown, Emma Goldman, and the original Black Panther Party—right where a left-wing guy like me wants to be—but nowhere near the mindset of James Madison when drafting the Bill of Rights.

My second point is that, my philosophical attachment to these rights notwithstanding, they have nothing, as I said earlier, to do with the Second Amendment. The right of rebellion exists nowhere in the Constitution for the simple reason that the purpose of that document was to construct a stable government that would make the exercise of such a right unnecessary. Moreover, it would be especially ironic for Madison to have located such a political self-destruct button in the Second Amendment, which specifically

seeks to regulate militias whose purpose, Article I, Sect. 8 tells us, was to “suppress insurrections.”<sup>7</sup>

The Second Amendment likewise cares little and says nothing about an individual right to self-defense. No meaningful contingent of scholars or jurists ever thought it did, until the “industrious band” of Second Amendment revisionists, Garry Wills calls them,<sup>8</sup> got together in the 1970s and hatched their new understanding. However, a strong argument can and should be made that the common law right to defend oneself and others with a gun exists under the Fifth and Fourteenth Amendment’s Due Process Clauses. These are the same provisions that confer the unenumerated yet still fundamental rights to marry,<sup>9</sup> raise children,<sup>10</sup> have sex,<sup>11</sup> use birth control,<sup>12</sup> and otherwise be free from obnoxious and intrusive government interference. These rights are all aspects of what Justice Brandeis called the right to be “let alone,” which he termed “the most comprehensive of rights, and the right most valued by civilized men.”<sup>13</sup>

Like any good left-wing legal realist at the National Lawyers Guild, and unlike every right-wing “originalist” member of FedSoc I know of, my libertarian revulsion against an overweening government requires that I interpret the Constitution’s Due Process Clauses expansively so as to recognize more of these substantive freedoms, including the ancient common law right, recognized by Blackstone<sup>14</sup> and routinely enforced in state and federal courts since the nation’s founding, to defend oneself and others with a firearm.

The basic human right to defend oneself against physical aggression passes any test the Supreme Court has used in the past to recognize fundamental rights under the due process clauses. It’s “deeply rooted in this Nation’s history and tradition.”<sup>15</sup> It’s “implicit in the concept of ordered liberty.”<sup>16</sup> And so on. If the common law right to self-defense with a gun exists anywhere in the constitution, it’s in these provisions.

Back in the Paleolithic Era when I was a law school TA, I remember explaining a legal theory I believed in and was trying to promote, but that a court had recently rejected. After I sat down, the professor I worked for walked to the podium and nonchalantly announced to the class, “Nathan’s wrong, everybody. You know how I know? The court just said so.”<sup>17</sup>

I leave myself vulnerable the same way today. We all know that, in *Heller*,

the Court said the Second Amendment confers an individual right to possess a gun in the home for self-defense. But if a FedSoc idol like Associate Justice Clarence Thomas can be promiscuous enough with his allegiance to stare decisis to argue—in one of Dr. Halbrook's other gun cases<sup>18</sup>—that *The Slaughter-house Cases*<sup>19</sup> and its 147 years of consistent precedent should be scrapped, and that the individual right to possess a gun actually derives from the Privileges and Immunities Clause, it's hardly immodest of me to suggest that we reexamine a comparatively newborn precedent like *Heller*.

The new gun lobby orthodoxy that prevailed in *Heller* has no reasonable basis in law or fact. I don't have time enough to explain the numerous, perfectly sensible reasons why that's so right now. Fortunately, I don't really need to.

My position is simply the conventional wisdom that prevailed in classrooms and courtrooms without any meaningful opposition for the first 190 years or so of this nation's history. The accepted truths—truisms, really—of this conventional wisdom included that the Second Amendment was fundamentally a military regulation. Madison and other framers and ratifiers had recognized that the collective defense provisions in Art. I, Sect. 8, which split sovereignty over the militia between the federal and state governments, weren't adequate to assuage the fears of the anti-federalists, who worried that without a provision in the Constitution explicitly protecting state militias from federal disarmament, an imperial army of mercenary Hessians, perhaps this time emanating from the federal capitol, might destroy the sovereignty of autonomous state governments. The Second Amendment is of a piece with its fraternal twin, the Third Amendment, which restricts U.S. troops from occupying civilian homes. The objective of both Amendments was to limit the power of the federal armed forces.<sup>20</sup>

My third point is that the triumph of the industrious band representing the gun lobby in *Heller* was, in virtually every sense, a feat of political power, not legal reasoning. It was a victory for well-heeled, mobilized, energetic reactionary political organizations, like the NRA and FedSoc, who paid academics, public relations consultants, and politicians to evangelize their new Second Amendment orthodoxy and implement their agenda, both in society and government.

The Second Amendment theory that prevailed in *Heller*, that individuals possess a Second Amendment right to possess guns for self-defense un-

related to participation in the militia, was generated more or less *ex nihilo* in the 1970s. It was the unifying doctrine of a radical faction of the NRA, many of whom had recently been expelled, that launched the “Revolt at Cincinnati” in 1977.<sup>21</sup> The leadership emerging from the revolt transformed the NRA into an overtly political organization, officially non-partisan but reliably right-wing and Republican. The NRA had supported and believed in the constitutionality of Congress’ first major attempts at gun regulation: the National Firearms Act of 1934<sup>22</sup> and the Federal Firearms Act of 1938.<sup>23</sup> Doing otherwise hadn’t been dreamt of yet. After 1977, things became different.

The conservative legal establishment, which had been pushed to the margins during previous decades of liberal supremacy, had been resurrected by the time of the *Heller* decision. It had taken control of the Supreme Court and, thereby, the Constitution itself. Had *Heller* been heard in 1958, ’68, or ’78—or 1798—rather than 2008, the individual rights argument would’ve gotten zero votes instead of the five it needed to win. *Heller* was the triumph of politics over law, ideology over reason. It was Thrasymachus destroying Socrates.

Republican jurists who came of age before the new orthodoxy were particularly aggrieved by what was going on in this area of the law. Chief Justice Warren Burger thought it was a hustle. He famously said that the Second Amendment “has been the subject of one of the greatest pieces of fraud, I repeat the word fraud, on the American public by special interest groups that I have ever seen in my lifetime.”<sup>24</sup> Associate Justice John Paul Stevens wrote that *Heller* is “unquestionably the most clearly incorrect decision that the Supreme Court announced during my tenure on the bench.”<sup>25</sup> And he served on the court for over 100,000 years. (Actually, 34 1/2).

My fourth and final point is that while the argument for an individual right to possess a gun under the Second Amendment fails whatever the approach to judging one uses, its failure is especially egregious from an originalist perspective. The ascendancy of the new Second Amendment orthodoxy paralleled, and was integrated into, FedSoc’s and other right-wing legal organizations’ mainstreaming of the originalist manner of judicial interpretation. This approach similarly existed on the margins of legal thought until—alongside the gun movement—right-wing groups popularized it just a few decades ago. The most astounding fact regarding the *Heller* case—in

which both the individual rights theory and the originalist approach to judging explicitly coalesce—is how, by deemphasizing the genuine concerns of the framers and ratifiers, originalism’s greatest champion, Associate Justice Antonin Scalia, exposes originalism as a pretext for achieving long-sought political outcomes.

With that, I turn to the bar association currently stocking the judiciary full of “originalist” judges in Scalia’s mold - my hosts today, The Federalist Society.

George Washington, who presided over the constitutional convention, admonished us not to form political parties.<sup>26</sup> “The Father of the Constitution,” James Madison, lamented the rise of political factions.<sup>27</sup> Yet the current president has effectively outsourced the selection of federal judges—whose signature quality must be independence—to this faction of well-funded, deeply connected legal activists, exclusively aligned with the Republican Party.<sup>28</sup>

The judges FedSoc curates and selects for Donald Trump are themselves members of FedSoc and promote the legal and political objectives of their faction. Were they not reliable in this way, they’d never have been selected as judges in the first place. Whatever Washington and Madison originally intended—whatever their words meant when they wrote them—it couldn’t have been this.

## NOTES

- 1 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 § 110102, 108 Stat. 1769, 1997-8.
- 2 The most beautiful and essential expression of this sentiment is in Plato's *Gorgias*, where Socrates explains to his interlocutor, "Now if you are one of my sort, I should like to cross-examine you, but if not I will let you alone. And what is my sort? you will ask. I am one of those who are very willing to be refuted if I say anything which is not true, and very willing to refute any one else who says what is not true, and quite as ready to be refuted as to refute..." (Jowett Translation), available online at <http://classics.mit.edu/Plato/gorgias.html>.
- 3 *District of Columbia v. Heller*, 554 U.S. 570 (2008).
- 4 The Declaration of Independence is an aspirational and philosophical document, not law.
- 5 See generally Stephen P. Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 Geo. Mason U. L. Rev. 1 (1981).
- 6 See Lincoln's First Inaugural Address, available online at <http://www.abrahamlincolnonline.org/lincoln/speeches/1inaug.htm>.
- 7 See Akhil Reed Amar, BILL OF RIGHTS, 56-57 (1998) (italicizing the word "necessary," emphasizing the language in the Second Amendment recognizing that the rights it contains are "necessary to the security of a free State").
- 8 Garry Wills, *To Keep and Bear Arms*, The New York Review of Books, September 21st, 1995, pg 62.
- 9 *Loving v. Virginia*, 388 U.S. 1 (1967).
- 10 *Meyer v. Nebraska*, 262 U.S. 390 (1923).
- 11 *Lawrence v. Texas*, 539 U.S. 558 (2003).
- 12 *Griswold v. Connecticut*, 381 U.S. 479 (1965).
- 13 *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928).
- 14 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Book 1, Ch. 1, § 177 (1765-77).
- 15 431 U.S. 494, 503 (1977).
- 16 *Palko v. Connecticut*, 302 U.S. 319 (1937).
- 17 That professor was Philip J. Prygoski. If there was ever a greater constitutional law teacher, I haven't met him.
- 18 *McDonald v. City of Chicago*, 561 U.S. 742, 805.
- 19 *The Slaughter-House Cases*, 83 U.S. 36 (1873).
- 20 See Amar, *supra* note 6, at 59-63 (referring to the Second and Third Amendments as "siblings").

- 21 Mark Waldman, *How the NRA Rewrote the Second Amendment*, POLITICO MAGAZINE (May 19, 2014), available online at <https://www.politico.com/magazine/story/2014/05/nra-guns-second-amendment-106856?o=1>. For a lengthier and more comprehensive history of the gun rights movement, see Mark Waldman, *THE SECOND AMENDMENT: A BIOGRAPHY* (2015).
- 22 26 U.S.C. § 5861; I.R.C. § 5861.
- 23 52 Stat. 1250 (1938).
- 24 *Warren Burger and NRA: Gun Lobby's Big Fraud on Second Amendment*, MILWAUKEE INDEPENDENT (Oct. 4, 2017), available online at <http://www.milwaukeeindependent.com/syndicated/warren-burger-and-nra-gun-lobbys-big-fraud-on-second-amendment/>.
- 25 John Paul Stevens, *The Supreme Court's Worst Decision of My Tenure*, THE ATLANTIC (May 14, 2019), available online at <https://www.theatlantic.com/ideas/archive/2019/05/john-paul-stevens-court-failed-gun-control/587272/>.
- 26 See George Washington's Farewell Address, available online at <https://www.presidency.ucsb.edu/documents/farewell-address>.
- 27 See James Madison, Federalist No. 10, available online at <https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-10>.
- 28 Lydia Wheeler, *Meet the Powerful Group Behind Trump's Judicial Nominations*, THE HILL (Nov. 16, 2017), available online at <https://thehill.com/regulation/court-battles/360598-meet-the-powerful-group-behind-trumps-judicial-nominations>.



## Preface, Continued....

“Navigating *Miller v. Alabama* with COMPAS: How Risk Assessment Instruments Square with a Meaningful Opportunity for Release,” Emily Barber questions whether these assessment instruments are compatible with *Miller’s* underlying purpose: giving children a second chance.

Next, Mathew L.M. Fletcher, Professor of Law and Director of the Indigenous Law & Policy Center at Michigan State University College of Law— one of the world’s leading scholars in Indian law—reviews *North American Genocides: Indigenous Nations, Settler Colonialism, and International Law*, written by human rights activists and scholars Laurelyn Whitt and Alan W. Clarke. Clarke is a longstanding member of the NLG and contributing editor of our *Review*. Fletcher’s review inspires readers to further explore this essential area of human rights scholarship.

We have another excellent and timely book review by former National Lawyers Guild President Michael Avery. In 2013, Avery co-authored *The Federalist Society: How Conservatives Took the Law Back from Liberals* with Daniele McLaughlin, a book that presented a captivating account of the ascendancy of the legal right. His expertise in this area made him an ideal person to review NLG member Jack Jackson’s recent work, *Law Without Future: Anti-Constitutional Politics and the American Right*, which seeks to explain how the meaning of the Constitution has changed in the era of Donald Trump.

Speaking of *The Federalist Society*, we close this issue with a fiery assault upon it by long-time NLG member and our Articles Editor, Nathan Goetting, Professor of Criminal Justice and Jurisprudence at Adrian College. Last fall, Goetting was invited to respond to a speech sponsored by the Toledo Student Chapter of *The Federalist Society* at the University of Toledo College of Law by prominent National Rifle Association (NRA) lawyer Stephen P. Halbrook. Naturally, Goetting saw this as an opportunity to participate in an urgent battle of ideas against FedSoc and the NRA, two of the nation’s most dangerous political organizations primed to take over the judiciary. “The Second Amendment Hustle” is an adaptation of Goetting’s remarks at the event, where he made his case against the NRA to a NRA-friendly audience, and he made his case against *The Federalist Society* to one of its student chapters.

## NOTES

- 1 *Janus v. AFSCME*, 138 S. Ct. 2448 (2018).
- 2 *Citizens United v. FEC*, 558 U.S. 310 (2010).
- 3 *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 560 U.S. 48 (2010), where Chief Justice Roberts concurred with the judgment but not with Kennedy’s decision; *Miller, supra*, note 4.
- 4 *Stanford v. Kentucky* 492 U.S. 361 (1989).
- 5 *Miller v. Alabama*, 567 U.S. 460 (2012).

## National Lawyers Guild Review

### Submission Guidelines

*National Lawyers Guild Review* is published quarterly by the NLG. Our readership includes lawyers, scholars, legal workers, jailhouse lawyers and activists. With that audience in mind, we seek to publish lively, insightful articles that address and respond to the interests and needs of the progressive and activist communities. We encourage authors to write articles in language accessible to both legal professionals and intelligent non-experts. Submissions that minimize legal jargon are especially encouraged.

Though we are open to manuscripts of any length, articles typically run about 7,000 words. Pages in issues of *NLGR* generally contain about 425 words.

Submit your manuscript in Microsoft Word format electronically as an attachment to an email. For reference, we use the *Chicago Manual of Style*. Citations should appear as **endnotes** and follow Bluebook style. Citations should identify sources completely and accurately. Lengthy textual commentary and string cites are discouraged.

Include a short sentence or two describing your professional affiliation, background and area(s) of legal specialization. This description will appear with the article if it is accepted for publication. Please also include a phone number and ground mail address.

Manuscripts should be sent to the Articles Editor at [nlgreview.articles@nlg.org](mailto:nlgreview.articles@nlg.org), whereupon they will be forwarded to the Editor-in-Chief for review by members of the NLGR's editorial board. If accepted, manuscripts will be edited, and the edited manuscripts will be returned to the author for review; however, because of production schedules, late changes are prohibited and authors generally do not see typeset proofs. We make every effort to clear any changes with the author.