

Lifers After *Montgomery*: More SCOTUS Guidance Is Necessary to Protect the Eighth Amendment Rights of Juveniles

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I. INTRODUCTION

Henry Montgomery was a seventeen-year-old from the segregated town of Scotlandville, just outside of Baton Rouge, Louisiana in 1963.¹ He was skipping school on November 13, 1963 when stopped by East Baton Rouge Sherriff's Deputy Charles Hurt.² During the stop, Montgomery—a “slow learner” with an IQ in the low seventies—became fearful and struck Deputy Hurt with a single shot from a .22 caliber pistol.³ In the days following the shooting, over 300 law enforcement personnel from surrounding jurisdictions descended on Scotlandville to apprehend suspects and administer extrajudicial beatings.⁴ Montgomery was tried and convicted of Hurt's murder and sentenced to a life term without the possibility of parole.⁵ In subsequent decades, juveniles who committed similar crimes that shocked the public conscience became known as “super-predators” prone to impulsive violence with no concept of the future.⁶ This stereotype created a national demand for tougher sentencing laws for juveniles, often carrying heavily racialized implications.⁷

This Note argues that the Eighth Amendment guarantees a parole hearing for juveniles after twenty-five years of incarceration as part of its jurisprudence on juvenile life without parole sentences. The Eighth Amendment's prohibition of cruel and unusual punishment guarantees individuals the right not to be subjected to excessive sanctions.⁸ While the U.S. Supreme Court continues to allow life without parole sentences for the rare juveniles who are deemed

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¹ Katy Reckdahl, *Man Jailed 50 Years for Murder Is at Center of Supreme Court Hearing on Youth Life Sentences*, JUV. JUST. INFO. EXCHANGE (Oct. 11, 2015), <https://jjie.org/2015/10/11/henry-montgomery-imprisoned-for-50-years-for-killing-a-deputy-is-at-center-of-supreme-court-hearing-on-youth-life-sentences/> [<https://perma.cc/4N2R-9F66>]; Grace Toohey, *Board Denies Parole to Man Who Served More Than 50 Years After Killing Deputy When He Was Juvenile*, THE ADVOCATE (Feb. 19, 2018), www.theadvocate.com/baton_rouge/news/courts/article_acca953e-1579-11e8-aa66-1b036f45b902.html [<https://perma.cc/GD2N-KZB5>].

² Reckdahl, *supra* note 1.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See Kevin Drum, *A Very Brief History of Super-Predators*, MOTHERJONES (Mar. 3, 2016), <https://www.motherjones.com/kevin-drum/2016/03/very-brief-history-super-predators/> [<https://perma.cc/7M7U-B5X2>] (describing the racialized impact of sentencing trends from the 1970s to the present).

⁷ *Id.*

⁸ “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

“irreparab[ly] corrupt[ed]” or permanently incorrigible,⁹ the Court has not required states to implement specific measures to protect the Eighth Amendment rights of juvenile defendants, even after applying its juvenile life without parole jurisprudence retroactive to previous sentences as a substantive right.¹⁰ In response, some states have banned juvenile life without parole by statute or found it unconstitutional in state court. With these actions, states often point to discoveries in the field of juvenile brain science¹¹ and the corresponding Supreme Court jurisprudence based on “the evolving standards of decency that mark the progress of a maturing society.”¹²

Despite the Court’s holdings, other states have displayed a vigorous insistence on sentencing juveniles to life terms or consecutive terms that aggregate into a functional life sentence.¹³ As a result, the procedural requirements for state constitutional compliance are unclear, creating an uneven application of the Eighth Amendment and jeopardizing the substance of its protections for juveniles.¹⁴ Without more guidance, states will continue to diverge until the constitutional protections the Supreme Court intended for juveniles beginning with *Graham v. Florida*¹⁵ are an ineffective safeguard against long and disproportionate terms, even after *Miller v. Alabama*¹⁶ and *Montgomery v. Louisiana*.¹⁷

This Note examines the arc of U.S. Supreme Court jurisprudence on juvenile criminal sentencing and concludes that the Court must require a parole hearing for juveniles after twenty-five years of incarceration. Part II discusses the evolution of the Supreme Court’s jurisprudence on juvenile criminal sentencing, from its prohibition on juvenile executions in *Roper v. Simmons* to its ban on juvenile life without parole sentences for non-homicide offenses in *Graham*. Part III describes the disparate approaches among the states based on the linguistic gaps in the Court’s rulings in *Graham*, *Miller*, and *Montgomery*. Part IV describes the injustice of inconsistency these linguistic gaps continues to create for juveniles, depending on the state in which the crime was committed.

⁹ See *Miller v. Alabama*, 567 U.S. 460, 479–80 (2012) (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005); *Graham v. Florida*, 560 U.S. 48, 63 (2010)).

¹⁰ See *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016).

¹¹ See Josh Rovner, *Juvenile Life Without Parole: An Overview*, SENT’G PROJECT (Oct. 13, 2017), <http://www.sentencingproject.org/publications/juvenile-life-without-parole/> [<https://perma.cc/L68Z-NKZH>].

¹² *Roper*, 543 U.S. at 561; see also *State v. Bassett*, 428 P.3d 343 (Wash. 2018) (holding juvenile life without parole sentences to be unconstitutional).

¹³ See Rovner, *supra* note 11, at 3 (“Thirty states still allow life without parole as sentencing option for juveniles.”).

¹⁴ See *infra* Parts IV.V. A–C.

¹⁵ *Graham v. Florida*, 560 U.S. 48, 82 (2010) (imposing a categorical ban on juvenile life without parole for non-homicide offenses).

¹⁶ *Miller v. Alabama*, 567 U.S. 460, 479–80 (2012) (prohibiting a sentence of life without parole absent a finding of permanent incorrigibility).

¹⁷ *Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016) (holding *Miller* applies retroactively to juveniles sentenced prior to 2012).

Due to tough on crime politics and the confines of federalism, Part V argues states are incapable of remedying the inconsistencies in juvenile sentencing law without intervention from the Court directing parole hearings for juveniles after twenty-five years. Part VI briefly concludes by advocating for progress that allows juveniles hope for redemption without compromising public safety.

II. OVERVIEW OF *ROPER*, *GRAHAM*, *MILLER*, AND *MONTGOMERY*

The U.S. Supreme Court's gradual imposition of bright-line rules against the death penalty and mandatory life without parole for juveniles places the sentencing practices of many states into question. *Roper*'s categorical ban on the death penalty for juveniles is supported by the absence of penological justifications for such a sentence due to the diminished culpability of all juveniles.¹⁸ *Graham*'s ban on juvenile life without parole sentences for non-homicide crimes expanded on *Roper*'s reasoning by deeming juveniles who do not kill to be half as culpable as adults who kill.¹⁹ *Miller* held the imposition of mandatory life without parole sentences on juveniles to be unconstitutional.²⁰ Subsequently, the Court determined *Miller*'s holding applies retroactively to all juveniles in *Montgomery*, giving thousands the potential to have a meaningful opportunity to obtain release.²¹

A. How *Roper* Applies to All Juveniles

In abolishing the death penalty for juveniles in all cases, the Supreme Court grounded its reasoning in language that presumably applies to all juvenile criminal defendants. First, the Court stated, "Once the diminished culpability of juveniles is recognized, it is evident that the penological justifications for the death penalty apply to them with lesser force than to adults."²² In applying the protections of the Eighth Amendment to juveniles, the Court is unequivocal in its statement that the penological justifications of retribution and deterrence are less applicable to juveniles because of their diminished capacity.²³ Importantly, the Court notes the professional consensus among psychiatrists precluding certain personality diagnoses during adolescence, whether the juvenile is a criminal defendant or not.²⁴

¹⁸ *Roper v. Simmons*, 543 U.S. 551, 571 (2005).

¹⁹ *Graham*, 560 U.S. at 69.

²⁰ *Miller*, 567 U.S. at 489.

²¹ *Montgomery*, 136 S. Ct. at 736.

²² *Roper*, 543 U.S. at 571.

²³ *Id.* at 571–72.

²⁴ *Id.* at 573. Psychiatrists are forbidden from "diagnosing any patient under 18 as having antisocial personality disorder, a disorder also referred to as psychopathy or sociopathy, and which is characterized by callousness, cynicism, and contempt for the feelings, rights, and suffering of others." *Id.* (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 701–706 (4th ed. text, rev. 2000)).

B. *The Graham Gap*

An analysis of *Graham* should begin with the Court's notation that life without parole is an especially harsh sentence for juveniles that "forswears altogether the rehabilitative ideal."²⁵ In banning juvenile life without parole sentences for non-homicide offenses in *Graham*, the Court submitted that "when compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability."²⁶ *Graham* was also the Court's first acknowledgment that the United States is the only country on Earth that imposes juvenile life without parole sentences for any offense.²⁷ Most significantly, the Court's opinion in *Graham* recognizes the unacceptable risk of an erroneous conclusion about the incorrigibility of a juvenile and the importance of granting the offender to an opportunity "demonstrate maturity and reform" with a categorical rule.²⁸ The Court recognized life without parole as "the second most severe penalty permitted by law" and the most severe punishment available to juvenile defendants after *Roper*.²⁹ The Court is also direct in its assertion that "[l]ife without parole is an especially harsh punishment for a juvenile."³⁰

Despite the apparent strength of the Court's bright-line rule, the conservative justices seized on the limits of the majority opinion in *Graham*, noting that the holding does not expressly prevent juveniles from being sentenced to long periods of incarceration defined by a term of years.³¹ This limitation is an inference from the language of the majority opinion and states have seized on this dissenting language to circumvent the obligations of *Graham*.³² The decision has led to litigation and legislative activity across the country attempting to clarify the boundaries of the Court's opinion.³³

²⁵ *Graham v. Florida*, 560 U.S. 48, 74 (2010).

²⁶ *Id.* at 69.

²⁷ *Id.* at 81.

²⁸ *Id.* at 78–79.

²⁹ *Id.* at 69 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991)). The Court elaborates on the relative severity of life without parole sentences, noting "life without parole sentences share some characteristics with death sentences that are shared by no other sentences." *Id.* at 69. Though "[a] death sentence is unique in its severity and irrevocability," a life without parole is like the death penalty in that "[i]t deprives the convict of the most basic liberties without giving hope of restoration." *Id.* at 69–70.

³⁰ *Id.* at 70. "Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender. A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only . . . This reality cannot be ignored." *Id.* at 70–71.

³¹ *Graham*, 560 U.S. at 113 n.11 (Thomas, J., dissenting) ("[I]t seems odd that the [Supreme] Court counts only those juveniles sentenced to life without parole and excludes from its analysis all juveniles sentenced to lengthy term-of-years sentences (e.g., 70 or 80 years' imprisonment."); *Id.* at 124 (Alito, J., dissenting) ("Nothing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole.").

³² See *infra* Part I.V.A–C.

³³ *Id.*

C. *Miller* and *Montgomery*'s Ban on Mandatory Juvenile Life Without Parole

Miller is an affirmation from the majority of the Supreme Court that juvenile life sentences should be treated as analogous to capital punishment for adults.³⁴ In abolishing mandatory life without parole for juveniles, the Court borrowed language from *Graham* to assert that such mandatory sentencing schemes prevent an individualized sentencing decision for each juvenile and thus violate the Eighth Amendment's principle of proportionality.³⁵ An individualized sentencing hearing is guaranteed for juveniles and such procedural protections exist for those facing the most severe punishment a court can impose.³⁶ The Court has used similar individualized sentencing principles in its adult death penalty jurisprudence to prevent the random imposition of the ultimate punishment and impose procedural discipline on the states.³⁷

The *Montgomery* Court expanded on the *Miller* holding by announcing that an individualized sentencing determination is a substantive right under the Eighth Amendment and applies retroactively to juveniles previously sentenced to life without parole.³⁸ The decision imposed new obligations on dozens of states and impacted hundreds with defined life without parole sentences handed down prior to the *Miller* decision.³⁹ Despite the Court's assertion that there is a developing "national consensus" against the imposition of juvenile life without parole,⁴⁰ the Eighth Amendment's limits on juvenile sentencing are still amorphous after *Montgomery*.⁴¹

³⁴ *Miller v. Alabama*, 567 U.S. 460, 474 (2012) ("*Graham* makes plain these mandatory schemes' defects in another way: by likening life-without-parole sentences imposed on juveniles to the death penalty itself. Life-without-parole terms, the Court wrote, 'share some characteristics with death sentences that are shared by no other sentences.'" (quoting *Graham*, 560 U.S. at 69)).

³⁵ *Id.* at 489.

³⁶ *See, e.g., Sumner v. Sherman*, 483 U.S. 66, 85 (1987) (abolishing mandatory death penalty statutes devoid of individualized sentencing considerations).

³⁷ *See id.* ("[A]ny legitimate state interests can be satisfied fully through the use of a guided-discretion statute that ensures adherence to the constitutional mandate of heightened reliability in death-penalty determinations through individualized-sentencing procedures.").

³⁸ *Montgomery v. Louisiana*, 136 S. Ct. 718, 733–736 (2016).

³⁹ Matt Ford, *A Retroactive Break for Juvenile Offenders*, THE ATLANTIC (Jan. 26, 2016), <https://www.theatlantic.com/politics/archive/2016/01/montgomery-alabama-supreme-court/426897/> [<https://perma.cc/DS7N-5LW8>].

⁴⁰ *Graham v. Florida*, 560 U.S. 48, 62 (2010).

⁴¹ *Id.* at 82.

The Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide. A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term.

D. *Are There Still Juvenile Lifers After Miller and Montgomery?*

Following *Miller* and *Montgomery*, some commentators expressed a cautious optimism that legislative action in states would institute safeguards to prevent the overuse of juvenile life without parole sentences.⁴² However, despite the Supreme Court's rulings, nearly 10,000 juveniles still have juvenile life without parole or virtual life sentences.⁴³ Justice Sotomayor's opinion in *Tatum v. Arizona* seems to imply the Court will require a forward-looking approach to declare a juvenile permanently incorrigible, as opposed to a backward-looking inquiry focusing on the facts of the criminal misdeed.⁴⁴

III. DISPARATE APPROACHES AMONG THE STATES AFTER *GRAHAM*, *MILLER*, AND *MONTGOMERY*

The uncertainty in the law after *Miller* and *Montgomery* has led states to explore an array of options.⁴⁵ Professors Doriane Lambelet Coleman and James E. Coleman, Jr., described this array of options as “legislative choices.”⁴⁶ While

⁴² See, e.g., Doriane Lambelet Coleman & James E. Coleman, Jr., *Getting Juvenile Life Without Parole “Right” After Miller v. Alabama*, 8 DUKE J. CONST. L. & PUB. POL'Y 61, 68–69 (2012) (“[B]ecause our goal in this essay is to offer suggestions for how states might implement *Miller* responsibly, we proceed on the basis it is possible at least to get [juvenile life without parole] more right than not, and that there are approaches that might be effective to minimize the risk of error.”).

⁴³ Matt Ford, *The Reckoning over Young Prisoners Serving Life Without Parole*, THE ATLANTIC (July 14, 2017), <https://www.theatlantic.com/politics/archive/2017/07/juvenile-life-without-parole/533157/> [<https://perma.cc/3YJV-RUCD>].

[M]ore than 200,000 people are serving either life in prison or a “virtual” life sentence: They haven’t been explicitly sentenced to spend their natural lives behind bars, but their prison terms extend beyond a typical human lifespan. Of these prisoners, thousands were sentenced as juveniles. More than 2,300 are serving life without parole, often abbreviated LWOP, and another 7,300 have virtual life sentences. Only after they serve decades in prison do members of the latter group typically become eligible for parole.

Id.

⁴⁴ *Tatum v. Arizona*, 137 S. Ct. 11, 12 (2016) (Sotomayor, J., concurring).

It is clear after *Montgomery* that the Eighth Amendment requires more than mere consideration of a juvenile offender’s age before the imposition of a sentence of life without parole. It requires that a sentencer decide whether the juvenile offender before it is a child “whose crimes reflect transient immaturity” or is one of “those rare children whose crimes reflect irreparable corruption” for whom a life without parole sentence may be appropriate. There is thus a very meaningful task for the lower courts to carry out on remand.

Id. at 13.

⁴⁵ See *infra* Part IV.

⁴⁶ Coleman & Coleman, *supra* note 42, at 69–75 (describing the “The Legislative Choice to End JLWOP,” “The Legislative Choice to Delay the Parole Decision,” and “The

Coleman & Coleman argue the Court should have announced a categorical rule barring juvenile life without parole in *Miller*,⁴⁷ they also seek to accommodate the public's interest in permanently excluding a juvenile offender from society in rare cases.⁴⁸ This framework for understanding the Court's juvenile sentencing jurisprudence has created several different approaches in the states and a patchwork of sentencing schemes has followed.⁴⁹

An Associated Press investigation of outcomes for juveniles with life without parole sentences in 2017 revealed "very different brands of justice from place to place."⁵⁰ Many states have struggled to implement reforms consistent with the spirit of the Court's juvenile sentencing jurisprudence,⁵¹ creating a wanton and freakish penalty that "smacks of ... a lottery system."⁵² The disparate reactions of the states is indicative of the unconstitutional nature of the penalty itself.⁵³

Legislative Choice to Permit the Sentence of JLWOP According to Strict Procedural Safeguards").

⁴⁷ *Id.* at 62. "Imposing terminal punishments on children is negligent because it allows the responsible adults and the state as 'back-up parent' to abandon their childrearing and child protection obligations with impunity, and (relatedly) because it assumes that we can know without ever trying that a child cannot be rehabilitated." *Id.* at 64.

Imposing such a terminal punishment on children is also cruel (in the common if not also the legal sense of this term) because the judgment, at the time it is made, can never be based on evidence "beyond reasonable doubt," which we should require for the extraordinary decision to 'throw away' a child.

Id. at 65.

⁴⁸ *Id.* at 67–68 ("[T]he public is understandably afraid of and has an interest in permanently incapacitating true psychopaths as well as others whose environments have so deeply and permanently damaged them that they are, in effect, the equivalent of psychopaths."); see also *Roper v. Simmons*, 543 U.S. 551, 598–603 (2005) (O'Connor, J., dissenting) (exploring when defendants are sufficiently depraved to merit the death penalty).

⁴⁹ See *infra* Part IV.

⁵⁰ Sharon Cohen & Adam Geller, *AP Exclusive: Parole for Young Lifers Inconsistent Across U.S.*, ASSOCIATED PRESS (July 31, 2017), <https://www.apnews.com/a592b421f7604e2b88a170b5b438235f> [<https://perma.cc/VR84-F6M2>].

⁵¹ See *infra* Parts IV, V.A–C.

⁵² *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (overruling the imposition of three death sentences on Eighth Amendment grounds). Justice Stewart described the administration of death sentences as unconstitutionally "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.* at 309 (Stewart, J., concurring). Justice Brennan concluded a death sentence is unconstitutional when "inflicted arbitrarily" so as to resemble a "lottery system." *Id.* at 293 (Brennan, J., concurring). Justice Douglas had a different explanation for the selective administration of the death penalty, calling the discretionary statutes authorizing the sentences "unconstitutional in their operation" and "pregnant with discrimination." *Id.* at 256–57 (Douglas, J., concurring).

⁵³ See *infra* Part V.

A. *Ban Juvenile Life Without Parole*

Today, twenty states and the District of Columbia ban juvenile life without parole as a sentencing option, and five more states ban the sentence in most cases.⁵⁴ Passage of more reforms could lead the Supreme Court to recognize a new developing “national consensus”⁵⁵ against the practice of juvenile life without parole, but such a standard has been criticized as giving too much deference to state legislatures.⁵⁶ In addition, juvenile life without parole remains undefined, limiting the scope of the rule in *Graham*.⁵⁷ It appears the Court will have to step in and define the limits *Graham* imposes on functional juvenile life without parole with more specificity in the future.

B. *Grant Juvenile Life Without Parole Prisoners a Resentencing Hearing*

After the Court’s *Montgomery* decision, states are required to resentence juveniles originally sentenced to life without parole to a non-life sentence or give them a parole hearing.⁵⁸ However, the Court did not define resentencing procedures for compliance with *Montgomery*’s holding.⁵⁹ Thus, confusion reigns about the states’ obligations upon resentencing a juvenile with a life without parole sentence.⁶⁰ For states with hundreds of juveniles sentenced to life without parole, resentencing has become a large burden after *Miller* and *Montgomery*.⁶¹ The process is expensive for underfunded state and local

⁵⁴ *States That Ban Life Without Parole for Children*, CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH (2018), <https://www.fairsentencingofyouth.org/media-resources/states-that-ban-life/> [https://perma.cc/9GF2-7H6X].

⁵⁵ See *Graham v. Florida*, 560 U.S. 48, 62 (2010).

⁵⁶ Kevin White, *The Constitutional Limits of the “National Consensus” Doctrine in Eighth Amendment Jurisprudence*, 2012 BYU L. REV. 1371, 1374 (2012) (“[A] national consensus-only approach would grant legislatures an impermissibly broad power to define the contours of the Constitution. More specifically, a national consensus-only approach would essentially undermine the policies that gave rise to adoption of the Eighth Amendment.”). The Court has explicitly recognized the limits of the state legislatures’ ability to interpret the Eighth Amendment, stating “community consensus, while ‘entitled to great weight,’ is not itself determinative of whether a punishment is cruel and unusual.” *Graham*, 560 U.S. at 67 (quoting *Kennedy v. Louisiana*, 554 U.S. 407, 434 (2008)).

⁵⁷ See *infra* Parts IV, V.

⁵⁸ “A State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole, rather than by resentencing them.” *Montgomery v. Louisiana*, 136 S. Ct. 718, 744 (2015) (internal citation omitted).

⁵⁹ See *infra* Part VI.

⁶⁰ See *Montgomery*, 136 S. Ct. at 736 (2016).

⁶¹ See, e.g., Bryn Stole, *With New Law on the Books, Louisiana Courts Prepare to Resentence Hundreds of Juvenile Murderers*, THE ADVOCATE (July 23, 2017), http://www.theadvocate.com/baton_rouge/news/courts/article_dc5ae4c2-6f28-11e7-9633-2bee1fbaf113.html [https://perma.cc/9x66-M3AC] (describing the volume of resentencing cases required in Louisiana after *Montgomery*).

government agencies.⁶² For prosecutors and defense attorneys working on resentencing cases, at least some evidence has been lost forever.⁶³ In older cases, a strong possibility exists that witnesses and relatives will be dead or impossible to locate.⁶⁴ Most troublingly for resentencing after *Montgomery*, the cost of obtaining the basic mitigating evidence necessary to formulate a case to support a non-life sentence is often prohibitive for public defense agencies.⁶⁵ Defense attorneys also fear prosecutors will be able to effectively price them out of obtaining mitigating evidence by seeking life without parole sentences again at every resentencing.⁶⁶ As a practical matter, the expense of assembling the evidence necessary for resentencing threatens the constitutional guarantees embedded within the Court's jurisprudence.

C. Institute Procedural Safeguards at Sentencing

States wishing to maintain juvenile life without parole as a punishment after *Miller* are required to develop sentencing findings that support the imposition of that punishment. States, including Arizona, continued to sentence new juvenile defendants to life without parole after *Miller* and *Montgomery*.⁶⁷ The Court rebuked some of these sentences in *Tatum v. Arizona*, but did not issue a ruling with the force of a majority opinion that defines compliance procedures supporting sentencing findings that would allow a juvenile life without parole sentence.⁶⁸ Pennsylvania requires the sentencing court to find that the juvenile defendant is permanently incorrigible beyond a reasonable doubt to impose a juvenile life without parole sentence.⁶⁹ Many other states have struggled to define a coherent framework that meets the Supreme Court's standard for a

⁶² *Id.* (estimating the expense for public defenders to be \$50,000 to \$75,000 per case).

⁶³ *Id.* (“In south Louisiana, where destructive hurricanes have washed away documents and scattered families, chasing down foster care records or former neighbors can be a daunting and time-consuming enterprise.”).

⁶⁴ *Id.* (describing the difficulty of finding relatives of all those involved in old cases). Attorneys have turned to old newspaper obituaries and online databases to track down people affected by these cases. *Id.*

⁶⁵ *Id.* Defendant Dexter Allen's attorney had no money to pay for mental health experts and “an investigator who volunteered to work for free couldn't track down all of [Allen's] school records.” *Id.*

⁶⁶ *Id.* (“Chris Murrell, director of the Promise of Justice Initiative . . . fears prosecutors . . . will at least file for hearings in nearly all [resentencing cases after *Montgomery*]—triggering expensive background investigations for defense attorneys to prepare for possible hearings.”).

⁶⁷ *See, e.g., Tatum v. Arizona*, 137 S. Ct. 11, 13 (2016) (Sotomayor, J., concurring).

⁶⁸ *Id.*

⁶⁹ *See Commonwealth v. Batts*, 163 A.3d 410, 457 (Pa. 2017).

finding of permanent incorrigibility.⁷⁰ The result is a messy mix of successful habeas petitions and affirmed life sentences.⁷¹

D. Use Constructive Life Sentences as a Substitute for Juvenile Life Without Parole

The Supreme Court's focus in outlawing the death penalty and limiting the availability of juvenile life without parole was juveniles' potential for rehabilitation based on an individualized assessment, not an aggregation of their offenses to prove incorrigibility.⁷² However, states have attempted to undermine an individualized assessment for juveniles by sentencing them to long term of years sentences or maximum terms to be served consecutively in defiance of the Court's ruling in *Graham*.⁷³ For example, a Nebraska juvenile originally sentenced to life without parole was resentenced to a definite ninety-year term.⁷⁴ In Ohio, a trial court sentenced a juvenile to consecutive terms totaling 141 years instead of a juvenile life without parole sentence.⁷⁵

IV. THE INJUSTICE OF STATE INCONSISTENCY: SAME CRIME, DIFFERENT TIME

There is no discernable standard for what constitutes a functional life without parole sentence, triggering the protections of *Graham*.⁷⁶ This allows states to avoid the rehabilitative ideals outlined in the Court's juvenile sentencing jurisprudence by imposing a sentence of a term of years or an aggregation of consecutive sentences on juveniles.⁷⁷ A stream of recent rulings from state appellate courts underscores the need for clarification from the

⁷⁰ See text accompanying notes 71–90.

⁷¹ See *Olivier v. Cain*, No. 15-5069, 2016 WL 3459887, at *1 (E.D. La. June 24, 2016); *Gillam v. Cain*, No. 14-2129, 2016 WL 3060254, at *1 (E.D. La. May 31, 2016); Bryn Stole, 'Worst of the Worst': Judge Says Inmate Who Murdered at 17 Irredeemable, Again Sentences Him to Life, THE ADVOCATE (Apr. 19, 2017), http://www.theadvocate.com/baton_rouge/news/courts/article_c60bc1fc-251b-11e7-9b9c-6fc86718b9b6.html [<https://perma.cc/5B64-TxA2>].

⁷² See *Miller v. Alabama*, 567 U.S. 460, 477–78 (2012). "*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Id.* at 489.

⁷³ See, e.g., *State v. Ali*, 895 N.W.3d 237, 239 (Minn. 2017) *cert. denied*; *Willbanks v. Dep't of Corr.*, 522 S.W.3d 238, 246–47 (Mo. 2017) *cert. denied*; *Vasquez v. Commonwealth*, 781 S.E.2d 920, 926 (Va. 2016); see also *infra* Part V (discussing a Maryland trial court's 100-year sentence for a juvenile convicted of four non-homicide offenses).

⁷⁴ *State v. Garza*, 888 N.W.2d 526, 534 (Neb. 2016), *cert. denied* 138 S. Ct. 83 (2017).

⁷⁵ *State v. Moore*, 76 N.E.3d 1127, 1130 (Ohio 2016), *cert. denied*, 138 S. Ct. 62 (2017).

⁷⁶ See *infra* Part V.

⁷⁷ See *infra* Part VI.

Supreme Court if the spirit of its juvenile sentencing jurisprudence is to be of significance.⁷⁸

Some states have decided there are no constitutional limits on a sentence for a single crime committed by a juvenile, as long as the sentence is expressed as a term of years. In upholding a ninety-year term for a juvenile, the Nebraska Supreme Court stated that the defendant's "characterization of his sentence as a de facto life sentence is immaterial to our analysis of whether his sentence is excessive."⁷⁹ Furthermore, the Nebraska high court held that so long as a juvenile defendant is sentenced to a term of years and will someday be eligible for parole, the requirements of *Miller* are satisfied.⁸⁰

In Oregon, juveniles are being sentenced to long terms, including the 800-month (approximately sixty-seven years) sentence at issue in *White v. Premo*.⁸¹ After being sentenced to a determinate life term for aggravated murder to be served concurrently to the 800-month term for murder, the juvenile was resentenced to a 288-month term for the aggravated murder after *Miller*.⁸² In addition, the offender was prevented from raising a constitutional argument against his sentence because he hadn't raised the argument in his initial post-conviction petition, despite the fact the *Miller* decision had not yet been issued at the time of his conviction.⁸³ Thus, the juvenile's sentence for the lesser offense of murder is longer than his sentence for the more serious offense of aggravated murder as a result of Oregon procedural law and the state's reaction to the Court's jurisprudence.⁸⁴

Other states have decided that when a juvenile is convicted of multiple crimes, there is no constitutional protection against a sentence the juvenile will not outlive. Georgia, Missouri, and Virginia have undermined the Court's jurisprudence by "elevat[ing] form over substance and permit[ing] the label of the sentence to supersede the actual result of the imposed sentence."⁸⁵ The Georgia high court was direct and unanimous in its assertion that the Supreme Court's jurisprudence does not affect the aggregation of sentences or the functional equivalent of a life sentence.⁸⁶

To justify circumventing the Court's jurisprudence, the Missouri Supreme Court argued, "At no point did the Supreme Court consider a juvenile offender sentenced to multiple fixed-term periods and whether such terms, in the aggregate, were equal to life without parole."⁸⁷ In explaining its decision to

⁷⁸ *Id.*

⁷⁹ *Garza*, 888 N.W.2d at 535.

⁸⁰ *Id.* at 535–36.

⁸¹ *See White v. Premo*, 399 P.3d 1034, 1035 (Or. Ct. App. 2017).

⁸² *Id.* at 1037.

⁸³ *Id.* at 1039.

⁸⁴ *See id.* at 1037.

⁸⁵ *Veal v. State*, 810 S.E.2d 127, 128 (Ga. 2018).

⁸⁶ *Id.* at 128–29.

⁸⁷ *Willbanks v. Dep't of Corr.*, 522 S.W.3d 238, 243 (Mo. 2017), *cert. denied*, 138 S. Ct. 304 (2017).

uphold a long aggregated sentence, the majority of the court argued that the existence of multiple fixed terms changes the application of the Supreme Court's modified penological justifications for juveniles and stated, "[the defendant] and the dissent have failed to show these penological goals are not served by sentencing juveniles to multiple fixed-term sentences."⁸⁸ The Missouri high court also noted language from dissenting Justices in *Miller* prospectively excluding juveniles sentenced to a term of years from its holding.⁸⁹

In Virginia, *Vasquez v. Commonwealth* contains a graphic account of a series of crimes perpetrated by two juveniles during a home invasion that culminated in a sexual assault against a single victim.⁹⁰ In recounting the brutality of the crimes, the Virginia Supreme Court unwittingly outlines a perverse incentive of its own creation: by failing to effectively differentiate between sentences for homicide and non-homicide crimes, juveniles may be encouraged to kill their victims, a risk accentuated by their relative immaturity.⁹¹

The Virginia Supreme Court also meticulously rejected appeals from the two juvenile defendants on the implications of *Graham*.⁹² Instead of giving "precedential treatment to the 'reasoning' in *Graham*, which generalized that 'children are simply less culpable' than adults and have a 'greater capacity for reform,'" the Virginia high court focused on the "subtle distinction[s]" that

⁸⁸ *Id.*

⁸⁹ *Graham v. Florida*, 560 U.S. 48, 113 n.11 (2010) (Thomas, J., dissenting) ("[I]t seems odd that the [Supreme] Court counts only those juveniles sentenced to life without parole and excludes from its analysis all juveniles sentenced to lengthy term-of-years sentences (e.g., seventy or eighty years' imprisonment).").

⁹⁰ *Vasquez v. Commonwealth*, 781 S.E.2d 920, 923 (Va. 2016).

⁹¹ *See id.*

Still armed with a knife, Vasquez then pulled the victim toward the window and told her that she would have to leave with them. Valentin pushed Vasquez away from the victim. Before leaving, Vasquez approached the victim with the knife, "jab[bed] it at [her] stomach," and warned her that they would "come back with thirty guys and kill [her]" if she called the police. Police arrested Vasquez and Valentin that same night. They had in their possession the property stolen from the townhouse. They made various self-incriminating statements to the police and made similar inculpatory remarks to each other. Valentin admitted to breaking into the townhouse, stealing property, and raping the victim at knifepoint. "What fun is raping a bitch," he said, "and running?" Reflecting on the episode, Valentin concluded: "We're sixteen and we're getting tried as an adult. [sic] Should have killed that bitch."

Id. (citations omitted); *see also Graham v. Florida*, 560 U.S. 48, 69 (2010) ("[D]efendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of [life without parole punishment] than are murderers."); *Kennedy v. Louisiana*, 554 U.S. 407, 445 (2008) ("[B]y in effect making the punishment for child rape and murder equivalent, a State that punishes child rape by death may remove a strong incentive for the rapist not to kill the victim.").

⁹² *Vasquez*, 781 S.E.2d at 925.

“makes clear that the Supreme Court did not squarely address aggregate term of years sentences.”⁹³ The opinion in *Vasquez* was emblematic of the reactionary limitations on the Supreme Court’s juvenile sentencing jurisprudence in an important way: in justifying the sentences imposed on juveniles, whether they are sentenced to life without parole or an aggregated sentence, many state courts focus on sordid details of the crimes, rather than the modified penological objectives for juveniles outlined by the Supreme Court.⁹⁴ Based on the serious offenses at issue in *Roper*, *Graham*, *Miller*, *Montgomery*, and *Tatum*, the Virginia Supreme Court’s reactionary approach is under-inclusive and the Eighth Amendment protections described in aforementioned Supreme Court cases should guide all juvenile sentences.⁹⁵ Furthermore, each of the preceding decisions failed to take into account the childhood experiences of the juvenile, which includes the “family and home environment.”⁹⁶

Despite the existence of reactionary forces limiting the impact of the Supreme Court’s jurisprudence on the only nation that still allows juvenile life without parole, the Court’s holdings have impacted the development of state juvenile sentencing law.⁹⁷ Since the *Miller* holding, thirteen states and the District of Columbia have banned juvenile life without parole despite, “the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime.”⁹⁸ The Court has characterized this as developing “national consensus” against the imposition of mandatory life without parole sentences on juveniles,⁹⁹ given the majority of juvenile life without parole sentences come from just three states.¹⁰⁰ In addition,

⁹³ *Id.* at 925–26, 928.

⁹⁴ *Id.* at 922–23.

⁹⁵ *Id.* at 925.

⁹⁶ *Miller v. Alabama*, 567 U.S. 460, 477 (2012); see also Sara B. Johnson et al., *Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy*, J. ADOLESCENT HEALTH 216, 219 (2009) (finding “[b]ehavior in adolescence . . . is a function of multiple interactive influences including experience, parenting, socio-economic status, nutrition, psychological well-being, and social relationships and interactions”); Rovner, *supra* note 11, at 4 (“[f]indings from a survey of people sentenced to life in prison as juveniles . . . found . . . 79% witnessed violence in their homes regularly, 32% grew up in public housing, 40% had been enrolled in special education classes, fewer than half were attending school at the time of their offense, 47% were physically abused, 80% of girls reported histories of physical abuse and 77% of girls reported histories of sexual abuse.”).

⁹⁷ CONNIE DE LA VEGA ET AL., UNIV. OF S.F. L. SCH., CTR. FOR L. & GLOB. JUST., CRUEL & UNUSUAL: U.S. SENTENCING PRACTICES IN A GLOBAL CONTEXT 59, 61 (2012), available at <http://www.usfca.edu/sites/default/files/law/cruel-and-unusual.pdf> [<https://perma.cc/T92J-BC8L>].

⁹⁸ *State v. Bassett*, 394 P.3d 430, 444 (Wash. Ct. App. 2017) *aff’d* 428 P.3d 343 (Wash. 2018).

⁹⁹ *Graham v. Florida*, 560 U.S. 48, 61 (2010).

¹⁰⁰ *Id.* at 62–63 (2010); Rovner, *supra* note 11; THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW 3 (2017). Among the thirty states that allow juvenile life without parole, only three states—Pennsylvania, Michigan, and Louisiana— account for

several states have responded to the Court with thoughtful reforms that protect the Eighth Amendment rights of juveniles.

Perhaps the best example of thoughtful and effective state reforms is found in Wyoming. In response to the Supreme Court's jurisprudence, the Wyoming legislature amended the laws governing juvenile sentencing to mandate parole eligibility for juveniles after twenty-five years.¹⁰¹ To protect the Eighth Amendment rights of juveniles, the Wyoming Supreme Court has not overlooked the horrific nature of the crimes at issue or the possibility that some people may "turn out to be irredeemable, and thus deserving of incarceration for the duration of their lives."¹⁰² However, the Wyoming judiciary recognized that the U.S. Supreme Court intended for lifetime punishments to be rare and does not allow the aggregation of sentences that result in the functional equivalent of life without parole without considering "the teachings of the *Roper/Graham/Miller* trilogy."¹⁰³ With these considerations, combined with the legislative mandate of parole eligibility for juveniles after twenty-five years, Wyoming has created a framework for protecting the Eighth Amendment rights of juveniles that is reflective of the Supreme Court's holdings. The Wyoming high court upheld these principles with its ruling in *Sam v. Wyoming*, which struck down a sentence of fifty-two years to life for a juvenile defendant.¹⁰⁴ While Wyoming's reforms are laudable, they are of no consequence to juveniles in Georgia, Oregon, or Virginia creating a constitutional issue requiring the Court's attention.

V. DIRECTION FROM SCOTUS: THE EIGHTH AMENDMENT REQUIRES A PAROLE HEARING FOR JUVENILES AFTER TWENTY-FIVE YEARS

Recent history indicates the states will be unable to self-regulate in a way that provides constitutional consistency for juvenile defendants, especially given the "tough on crime" mindset that has become a mainstay in American political rhetoric. The last several decades have been characterized by strong nationwide pressures toward prison growth on a scale unprecedented in human history.¹⁰⁵ However, the ability to address this unfortunate phenomenon is

about two-thirds of the juvenile life without parole sentences being served. *Id. But see Graham*, 560 U.S. at 124 (Alito, J., dissenting) ("[N]othing in the Court's opinion affects the imposition of a sentence to a term of years without the possibility of parole.") Thus, this statistic does not account for functional juvenile life without parole sentences that impact thousands more juveniles.

¹⁰¹ WYO. STAT. ANN. §§ 6–2–101(b), 6–10–301(c) (2017).

¹⁰² *Bear Cloud v. State*, 334 P.3d 132, 144 (Wyo. 2014) (quoting *Graham*, 560 U.S. at 75).

¹⁰³ *Id.* at 141–42, 144.

¹⁰⁴ *Sam v. Wyoming*, 401 P.3d 834, 860 (Wyo. 2017), *cert. denied*, 138 S. Ct. 1988 (2018).

¹⁰⁵ See *Fact Sheet: Trends in U.S. Corrections*, THE SENTENCING PROJECT (June 2018), <https://www.sentencingproject.org/publications/trends-in-u-s-corrections/> [<https://perma.cc>

almost always limited by confines of federalism.¹⁰⁶ In describing his role in advancing criminal justice reform, President Barack Obama emphasized “states and localities oversee most of policing, as well as 90% of the prison population.”¹⁰⁷ President Obama recognized the political consequences state governors and public officials face when “correct[ing] injustices in the system ... and reminding people of the value of second chances.”¹⁰⁸ At the state level, political pressure to avoid the perception of leniency on criminal defendants stems from the obligation to run for reelection and represent the interests of the community for a short period of time, relative to a life sentence.¹⁰⁹ The pressure dissuading governors from using their clemency power described by President Obama also applies to the legislatures that authorized mandatory life sentences¹¹⁰ and to most state judges making sentencing decisions.¹¹¹

State legislatures are also susceptible to the influence of reactionary, tough-on-crime advocacy groups interested in preventing criminal justice reform. These groups can include police associations, victims’ advocacy groups, and prosecuting attorneys organizations.¹¹² Prosecutors have already flexed their political muscle to prevent juvenile sentencing reform, most notably in Louisiana, where the Louisiana District Attorney Association (LDAA) staged a last-minute intervention that prevented the legislature from eliminating juvenile life without parole sentences.¹¹³ The LDAA took full advantage of the political effectiveness using scare tactics to criticize departures from tough on crime

/3ZA3-34N5] (detailing the 500% population increase in U.S. prisons and jails over the last forty years); Edward E. Rhine et al., *Improving Parole Release in America*, 28 FED. SENT’G REP. 96, 103 (2015).

¹⁰⁶ See generally *United States v. Lopez*, 514 U.S. 549 (1995) (limiting the ability of the federal government to convert the general police power retained by states).

¹⁰⁷ Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 838 (2017).

¹⁰⁸ *Id.*; see also *Graham v. Florida*, 560 U.S. 48, 69–70 (2010) (noting the likelihood of being granted executive clemency is only a “remote possibility”).

¹⁰⁹ Obama, *supra* note 107, at 819.

¹¹⁰ *Id.* at 838.

¹¹¹ A total of thirty-nine states hold elections for trial courts of general jurisdiction and intermediate appellate courts. Thirty-eight states hold elections for their high courts. AM. BAR ASS’N, FACT SHEET ON JUDICIAL SELECTION METHOD IN THE STATES (2018), available at https://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.auth_checkdam.pdf [<https://perma.cc/8GR6-YTCA>].

¹¹² See e.g., Associated Press, *Justice Varies for Juvenile Lifers in U.S. Prisons*, N.Y. DAILY NEWS (July 31, 2017), www.nydailynews.com/news/national/justice-varies-juvenile-lifers-u-s-prisons-article-1.3370922 [<https://perma.cc/45VZ-HL7W>]. Sheriff Michael Bouchard of Oakland County, Michigan described juveniles up for resentencing after the *Montgomery* decision as “young Hannibal Lecters.” *Id.* The prosecutor is seeking no parole in forty-four of forty-nine cases. *Id.*

¹¹³ Jessica Pishko, *‘We’re Basically Guessing on These Cases’: Louisiana’s Disastrous Resentencing Hearings*, NATION (Dec. 22, 2017), <https://www.thenation.com/article/were-basically-guessing-on-these-cases-louisianas-disastrous-resentencing-hearings/> [<https://perma.cc/NM88-G95N>].

policies and publicly accused members of the legislature of risking the safety of Louisianans.¹¹⁴ The political backlash was so swift and effective that Louisiana prosecutors retained the ability to seek juvenile life without parole and were permitted to seek life without parole for those seeking resentencing after *Montgomery*.¹¹⁵

In addition, state judiciaries are not above the reactionary political pressure that can have undue influence on juvenile sentencing law. On December 22, 2016, the Ohio Supreme Court decided *State v. Aalim (Aalim I)*, which required a discretionary process for a juvenile defendant's case to be transferred to adult court, rather than mandating a transfer to adult court for certain offenses.¹¹⁶ The *Aalim I* decision was vacated upon reconsideration less than six months later after two justices in the majority were forced off the court by Ohio's mandatory retirement age, including the author of the majority opinion.¹¹⁷ The new justice casting the decisive vote reversing *Aalim I* received a "Not Recommended" rating from the Ohio State Bar Association¹¹⁸ and is the son of the Ohio Attorney General and 2018 governor-elect, whose office litigated the state's position before the Ohio Supreme Court in 2016.¹¹⁹

One dissenting justice lamented the reconsideration decision in *Aalim II*, noting "there is nothing new to reconsider here; the only thing that has changed is the makeup of this court as a result of the 2016 election."¹²⁰ In her dissent, the

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *State v. Aalim (Aalim I)*, 83 N.E.3d 862, 870 (Ohio 2016), *reconsideration granted, decision vacated* ("We now recognize that because children are constitutionally required to be treated differently from adults for purposes of sentencing, juvenile procedures themselves also must account for the differences in children versus adults. The mandatory-transfer statutes preclude a juvenile-court judge from taking any individual circumstances into account before automatically sending a child who is 16 or older to adult court. This one-size-fits-all approach runs counter to the aims and goals of the juvenile system, and even those who would be amenable to the juvenile system are sent to adult court. Juvenile-court judges must be allowed the discretion that the General Assembly permits for other children. They should be able to distinguish between those children who should be treated as adults and those who should not."). *State v. Aalim (Aalim II)*, 83 N.E.3d 883, 896 (Ohio 2017).

¹¹⁷ *Aalim II*, 83 N.E.3d at 896; *Judith Ann Lanzinger*, BALLOTPEDIA (Mar. 18, 2018), https://ballotpedia.org/Judith_Ann_Lanzinger [<https://perma.cc/93T2-ZFD6>]; *Paul Pfeifer*, BALLOTPEDIA (Mar. 18, 2018), https://ballotpedia.org/Paul_Pfeifer [<https://perma.cc/857P-VYAD>].

¹¹⁸ *Aalim II*, 83 N.E.3d at 897 (DeWine, J., concurring); *see also OSBA Announces Supreme Court of Ohio Candidate Ratings for the 2016 Election*, OHIO ST. BAR ASS'N. (Feb. 17, 2016), <https://www.ohiobar.org/ForPublic/PressRoom/Pages/OSBA-announces-Supreme-Court-of-Ohio-candidate-ratings-for-the-2016-Election.aspx> [<https://perma.cc/975T-35CQ>].

¹¹⁹ *See generally* Jessie Balmert, *Mike DeWine-John Husted: What the GOP Team Means for the 2018 Race*, CIN. ENQUIRER (Nov. 30, 2017), <https://www.cincinnati.com/story/news/politics/2017/11/30/dewine-husted-what-gop-team-means-2018-race/908589001/> [<https://perma.cc/2Y2A-MK6G>] (discussing the money, organizational capacity, and name recognition associated with the DeWine name).

¹²⁰ *Aalim II*, 83 N.E.3d at 914 (O'Neill, J., dissenting).

Chief Justice was more apologetic about the implications of the reconsideration decision, asserting the majority bowed “to the basest instincts of an outspoken faction of our society—fear and anger...[i]n its effort to punish the appellant.”¹²¹ The Chief Justice also noted the majority’s abdication of its judicial prerogative to the reactionary interests controlling the legislative and executive branches stating, “the majority’s decision today brings us one step closer to the anarchy about which Madison warned...the judiciary’s role [is to] ensur[e] that no legislative act contrary to the Constitution be allowed to stand.”¹²² Finally, the Chief Justice hinted at the appropriateness for review by the U.S. Supreme Court, noting the role of the U.S. Constitution in protecting justice for Ohio’s children and the potential the impact of the majority’s decision would be short-lived.¹²³

Ohio’s odyssey with juvenile transfer law is illustrative of the short-term political pitfalls that interrupt the formulation of Constitutional rights, which includes the issue of juvenile life without parole. Justice Judith Lanzinger, the author of the majority opinion in *Ohio v. Moore*—which invalidated a 112-year sentence citing *Graham* on the same day as the *Aalim I* decision—also left the court due to the age limit, placing the *Moore* precedent in the same political jeopardy as the *Aalim I* precedent.¹²⁴

Maryland’s adventure with juvenile life without parole is illustrative of the same see-sawing that occurred in Ohio. In *McCullough v. State*, the Court of Special Appeals of Maryland upheld a 100-year sentence for a juvenile convicted of four non-homicide offenses, displaying a degree of receptiveness to the Supreme Court’s rehabilitative ideals.¹²⁵ To support its decision, the court

¹²¹ *Id.* at 900 (O’Connor, J., dissenting).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *State v. Moore*, 76 N.E.3d 1127, 1137 (Ohio 2016) (quoting *Montgomery*, 136 S. Ct. at 736–37) (“The intent was not to eventually allow juvenile offenders the opportunity to leave prison in order to die but to live part of their lives in society. The court stated in *Montgomery*, a case involving a defendant who had been convicted of murder as a juvenile, ‘In light of what this Court has said in *Roper*, *Graham*, and *Miller* about how children are constitutionally different from adults in their level of culpability, prisoners like *Montgomery* must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored.’”).

¹²⁵ *McCullough v. State*, 168 A.3d 1045, 1071 (Md. Ct. Spec. App. 2017), *rev’d sub nom.* *Carter v. State*, 192 A.3d 695 (Md. 2018). At his sentencing hearing, Matthew Timothy McCollough read the following statement:

Your Honor, I would like to say what happened on May 7th was a tragedy. I’d like to apologize for what happened that day and I’d like to apologize for putting the victims and their families through the pain and suffering. And I know that a punishment is acceptable, and I’m here to accept the punishment. Thank you.

Id. at 1046. The sentencing judge responded by characterizing his crimes as “vicious and heinous,” asserted McCullough had shown no remorse, and referred to him as a “coward” and a “suburban terrorist” before handing down the 100-year sentence for four non-homicide offenses. *Id.* at 1046–47.

cited decisions from states that consistently test the limits of constitutional permissibility with their juvenile criminal sentencing, including Arizona, Louisiana, and Florida.¹²⁶ In addition, the Maryland court argued that aggregating sentences for separate convictions reflected a series of judgments about each offense that serve the goals of punishment, deterrence, and rehabilitation.¹²⁷ Finally, the court cited precedent from courts in Maryland and other jurisdictions regarding sentencing decisions for adult defendants convicted of multiple crimes in this juvenile case.¹²⁸ This series of judgments is seemingly incompatible with the modified penological goals outlined by the Supreme Court in its juvenile sentencing jurisprudence.

In constitutional matters, it is the prerogative of the Supreme Court to collaborate with the states and their institutions to protect “the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.”¹²⁹ The Court must exercise this prerogative and collaborate with the states to eliminate juvenile life without parole and develop an alternative that protects the constitutional rights of juveniles and public safety.

Though the Court of Appeals of Maryland reversed the sentence of the trial court in the *McCullough* case and remanded for resentencing, it simultaneously highlighted the need for specific direction to define the constitutional rights of juvenile criminal defendants. Despite the fact that *McCullough*’s aggregated 100-year sentence was found unconstitutional, the court ordered that he “be resentenced to a disposition that is not equivalent to life without parole” without articulating the limits of this standard and encouraging trial judges to “freely and openly disclose the factors weighed in arriving at the final disposition.”¹³⁰ Presumably, the original Maryland sentencing court was aware of the Supreme Court’s past juvenile sentencing jurisprudence. However, while the Court of Appeals of Maryland’s recited the Court’s holdings in *Roper*, *Graham*, and *Miller*, it did not provide enhanced guidance in the context of Maryland sentencing law, nor did it crystallize the malleable standards embedded in

¹²⁶ *Id.* at 1053–54, 1059–61.

¹²⁷ *Id.* at 1067 (internal citation omitted).

¹²⁸ *Id.* at 1067–69. “[E]ach sentence is a separate punishment for a separate offense.” *Id.* at 1067 (citing *Lucero v. People*, 394 P.3d 1128 (Colo. 2018)). “[I]t is wrong to treat stacked sanctions as a single sanction.” *Id.* at 1069 (citing *Pearson v. Ramos*, 237 F.3d 881, 886 (7th Cir. 2001)).

¹²⁹ *In re Gault*, 387 U.S. 1, 20 (1967).

¹³⁰ *Carter v. State*, 192 A.3d 695 (Md. 2018). The court further opined that *McCullough* must be parole eligible before serving fifty years of his sentence, as required by Maryland parole eligibility law. *Id.* Ironically, had *McCullough* been sentenced to life without parole at his original trial, he would have been eligible for parole after serving forty-three years because of the reforms contained in CR § 14-101. *Id.* The court did not explicitly comment on the seven year discrepancy between the two outcomes, though it did imply the sentencing court should examine factors like life expectancy and the circumstances of the juvenile’s crimes on remand. *Id.*

consecutive sentencing determinations.¹³¹ Without enhanced guidance, Maryland sentencing courts and other courts around the country are left to contend with the substantive constitutional rights of those convicted as juveniles under amorphous descriptions from appellate courts and the intervening interpretations provided by litigants.

After considering the aforementioned political realities, a viable fix could come from state parole systems. When properly managed, state parole systems can act as a safeguard against the “tough on crime” attitudes that have informed criminal justice policies for decades, or at least act as a vehicle for an opportunity to obtain release for rehabilitated young person. Despite the political pressure elected officials face, the Supreme Court has recognized the practice of releasing prisoners on parole before the end of their sentences is an integral part of the penological system for nearly fifty years.¹³² Its purpose is to reintegrate individuals into society as soon as they are able and alleviate the costs of keeping an individual in prison.¹³³ States also retain enforcement power over parolees with the ability to impose conditions of parole and the power to revoke parole and force parolees serve out the balance of their sentence if conditions are violated.¹³⁴

In *Roper*, *Graham*, *Miller*, and its predecessors, the Supreme Court presumed “the evolving standards of decency that mark the progress of a maturing society” would limit the availability of harsh punishments to juveniles through the gears of federalism and state governance.¹³⁵ In each of its holdings in juvenile sentencing law, the Court outlined how each of the penological justifications apply differently to juveniles as compared to adults.¹³⁶ Implicit in its jurisprudence was the expectation that states would respond by reforming their juvenile sentencing laws to limit the availability of juvenile life without parole sentences.¹³⁷ While some states have met this expectation by instituting reforms in keeping with the spirit of Supreme Court jurisprudence, other states have resisted the Court’s interpretation of the Eighth Amendment’s protections

¹³¹ *Id.*

¹³² *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) (“During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system.”) (internal citation omitted).

¹³³ *Id.*

¹³⁴ *Id.* at 478–79.

¹³⁵ *Roper*, 543 U.S. at 561; *Miller*, 567 U.S. at 469.

¹³⁶ See *Miller*, 567 U.S. at 472–73 (citing *Roper*, 543 U.S. at 571); *Graham v. Florida*, 560 U.S. 48, 71–74 (2010). The penological justification of retribution is not as strong with a minor because they are less blameworthy. Deterrence is not as effective because immaturity and recklessness make juveniles less likely to consider punishment. Incapacitation is an ineffective justification because deciding a juvenile will forever be a danger to society is inconsistent with a proper understanding of youthfulness. Rehabilitation is not a justification because juvenile life without parole inherently eliminates the rehabilitative ideal.

¹³⁷ Sarah Childress, *Why States Are Changing Course on Juvenile Crime*, FRONTLINE (Dec. 17, 2014), <https://www.pbs.org/wgbh/frontline/article/why-states-are-changing-course-on-juvenile-crime/> [https://perma.cc/JN3L-JJCD].

as applied to juveniles.¹³⁸ As a result, the less-blameworthy juveniles declared ripe for rehabilitation by the Supreme Court are denied the benefits of parole consideration, while society is saddled with the cost of their continued incarceration.¹³⁹

The Court's jurisprudence makes special mention of the influence of peers in the decision-making processes of juveniles.¹⁴⁰ The realities of juvenile brain development have been documented in studies examining their developmental psychology.¹⁴¹ Such realities should be a prime consideration when determining sentences for juveniles involved in a crime with multiple defendants. Juvenile prisoners are the most susceptible to this dynamic, as they will spend a higher proportion of their lives incarcerated relative to any other group of the prison population.¹⁴²

To date, the Court's broadest and most direct holding is its ban on capital punishment for juveniles.¹⁴³ Moving forward, the Supreme Court should connect its jurisprudence on juvenile sentencing to the basic purposes of parole it articulated in *Morrissey* to announce new Eighth Amendment protections for juveniles sentenced to juvenile life without parole. The Court should also define functional life without parole sentence as any sentence greater than twenty-five years and include such sentences in its new Eighth Amendment protections. In announcing new substantive rights, the Court should make explicit that the rehabilitative ideal is the dominant penological goal in mandating a meaningful opportunity to obtain release for all juveniles. The Court should further articulate the penological goal of rehabilitation is best achieved with the opportunity for parole after twenty-five years in all juvenile criminal sentences.

¹³⁸ *Id.*

¹³⁹ *See id.*

¹⁴⁰ *Roper*, 543 U.S. at 569; *Miller*, 567 U.S. at 471 (“*Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing.... [C]hildren ‘are more vulnerable . . . to negative influences and outside pressures,’ including from their family and peers; they have limited ‘contro[l] over their environment’ and lack the ability to extricate themselves from horrific, crime producing settings . . . [A] child’s character is not as ‘well formed’ as an adult’s; his traits are ‘less fixed’ and his actions less likely to be ‘evidence of irretrievab[le] deprav[ity].’”).

¹⁴¹ *See generally* Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEVELOPMENTAL PSYCHO. 625 (2005) (finding risk taking and risky decision-making decreased with age, participants took more risks, focused more on the benefits than the costs of risky behavior, and made riskier decisions when in peer groups than alone; and peer effects on risk taking and risky decision-making were stronger among adolescents and youths than adults).

¹⁴² *Graham v. Florida*, 560 U.S. 48, 70 (2010). “Life without parole is an especially harsh punishment for a juvenile. Under this sentence a juvenile offender will on average serve more years and a greater percentage of his life in prison than an adult offender.” *Id.*

¹⁴³ *Roper*, 543 U.S. at 575. (“[T]he death penalty cannot be imposed on juvenile offenders.”).

A. *Procedural Safeguards at Sentencing Will Never Protect Juvenile's Eighth Amendment Rights*

On top of the incentive to “max and stack” instead of making an individualized assessment of each juvenile, states can simply resentence to the same offenses with little to no procedural oversight.¹⁴⁴ Thus, the incentives for prosecutors are the same for juvenile and adult defendants alike: charge the highest counts and seek the maximum penalty for each offense.¹⁴⁵ As a result, judges sentencing juvenile defendants are confined by their state’s sentencing procedures for allied or related offenses, rather than the ideals outlined by the Supreme Court in its juvenile sentencing jurisprudence.¹⁴⁶ Without additional protection from an intervening statute or guidance from the Supreme Court, protections for juvenile defendants charged as adults can be easily undermined.

The inadequacy of procedural safeguards at sentencing is not limited to stacked sentences. Juveniles deemed permanently incorrigible also face the risk of a wrong determination, which is inherently colored by racial bias.¹⁴⁷ Juveniles sentenced in the past also face the expense of looking backward and cannot demonstrate their rehabilitative progress, however relevant it may be to having been labeled permanently incorrigible.¹⁴⁸

B. *Risk of Wrong Determination*

Though juvenile life without parole sentences are supposed to be reserved for the “worst of the worst,”¹⁴⁹ states have shown a pattern of applying juvenile life without parole in an uneven manner.¹⁵⁰ Even after the Court’s pronouncements in *Montgomery*, where the State of Louisiana was a named litigant, prosecutors are asking for life without parole at resentencing at

¹⁴⁴ See Pishko, *supra* note 113 (detailing the prosecutorial zeal for life without parole on resentencing).

¹⁴⁵ *Id.*

¹⁴⁶ See e.g., *Veal v. State*, 810 S.E.2d 127, 128 (Ga. 2018) (accepting the elevation of form over substance in examining the consequences of juvenile sentencing). In *Veal*, the relevant Georgia statutory provision will require the defendant to spend sixty years in prison before he is eligible for a parole hearing due to his aggregated sentence. *Id.* at 128.

¹⁴⁷ Rovner, *supra* note 11 (“23.2% of juvenile arrests for murder involve an African American suspected of killing a white person, 42.4% of [juvenile life without parole] sentences are for an African American convicted of this crime. White juvenile offenders with African American victims are only about half as likely (3.6%) to receive a juvenile life without parole sentence as their proportion of arrests for killing an African American (6.4%).”); see also *supra* Part IV.

¹⁴⁸ See Pishko, *supra* note 113.

¹⁴⁹ *Miller v. Alabama*, 567 U.S. 460, 489 (2012).

¹⁵⁰ See Rovner, *supra* note 11, at 4 (detailing the racial disparities present in the imposition of juvenile life without parole sentences).

alarming high rates.¹⁵¹ Juvenile life without parole sentencing decisions are also colored by inescapable questions of race. Nationwide, black defendants have been twice as likely to receive a juvenile life without parole sentence as white defendants sentenced for the same crimes.¹⁵² Similar disparities have been rebuked by the Supreme Court offensive to the purpose of the Eighth Amendment in the context of the death penalty.¹⁵³

There is also significant concern that state court systems are ill-equipped to handle the determination of permanent incorrigibility. A Washington court describes this problem effectively, stating “the sentencing court is placed in the impossible position of predicting . . . which juveniles will prove to be irretrievably corrupt. The sentencing court must separate the irretrievably corrupt juveniles from those whose crimes reflect transient immaturity—a task even expert psychologists cannot complete with certainty.”¹⁵⁴ The court described an “unacceptable risk that that juvenile offenders whose crimes reflect transient immaturity will be sentenced to life without parole” because of inadequate state procedural fixes in response to the *Miller* ruling.¹⁵⁵ The Massachusetts Supreme Court has also determined “a conclusive showing of traits such as an ‘irretrievably depraved character,’ can never be made, with integrity, by the Commonwealth at an individualized hearing to determine whether a sentence of life without parole should be imposed on a juvenile homicide offender.”¹⁵⁶

This problem is accentuated for the juveniles originally sentenced decades ago. The prosecutors handling resentencing cases after *Montgomery* often have little knowledge of the cases for which they are seeking an affirmation of the

¹⁵¹ See Pishko, *supra* note 113 (“The failed reforms have allowed harsh sentencing to continue unabated. Leon Cannizzaro, the district attorney of Orleans Parish, has sought 29 life without parole sentences for juveniles out of the 45 current unresolved cases. In Calcaseiu Parish, the prosecutor John DeRosier is seeking life without parole in 7 in 8. Hillar Moore, the former president of the LDAA sought life without parole again in 38 percent of cases in his district. And the new president of the LDAA, Ricky Babin, is seeking [life without parole] for four in five cases in his district.”).

¹⁵² JOHN R. MILLS ET AL., PHILLIPS BLACK PROJECT, NO HOPE: RE-EXAMINING LIFETIME SENTENCES FOR JUVENILE OFFENDERS 10, available at <https://static1.squarespace.com/static/55bd511ce4b0830374d25948/t/5600cc20e4b0f36b5caabe8a/1442892832535/JLWOP+2.pdf> [<https://perma.cc/F2UD-USNF>]; see also *supra* Part IV and accompanying footnotes.

¹⁵³ See *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam) (reversing three death penalty sentences under the Eighth and Fourteenth Amendments). Justice Marshall noted execution of African Americans was far more likely and impermissible stating, “A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro.” *Id.* at 364 (Marshall, J., concurring) (internal citation omitted). Justice Douglas said this application of criminal punishment was “pregnant with discrimination” and “an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments.” *Id.* at 256–57 (Douglas, J., concurring).

¹⁵⁴ *State v. Bassett*, 394 P.3d 430, 445 (Wash. Ct. App. 2017), *aff’d* 428 P.3d 343 (Wash. 2018).

¹⁵⁵ *Id.*

¹⁵⁶ *Diatchenko v. Dist. Attorney for Suffolk Dist.*, 1 N.E.3d 270, 283–84 (Mass. 2013) (internal citation omitted).

life sentence.¹⁵⁷ The Orleans Parish district attorney believes parole boards are the best bodies to handle the question of a juveniles' rehabilitative potential, saying "we're basically guessing on these cases...I think this is an unfair call for the district attorney."¹⁵⁸ Similar problems, as well as opposition and uncertainty, have created an uneven patchwork of results in other states resentencing juveniles.¹⁵⁹

C. Expense of Looking Backward

The determination of a juvenile's permanent incorrigibility has been applied inconsistently across the states before and after the *Miller* ruling.¹⁶⁰ As a result, litigating a juvenile's eligibility for juvenile life without parole is speculative at the time of sentencing and expensive in hindsight. In fact, the bill for "looking back" at the juvenile in the context of a resentencing can range from \$50,000 to \$75,000 per case.¹⁶¹ Other estimates place the bill on understaffed and overworked offices at \$56,000 per case.¹⁶² This expense is impractical for cash-strapped state and local governments and poorly funded public defense agencies across the country and exacerbated by prosecutors who continue to seek life without parole sentences for juvenile defendants, new and old.¹⁶³ Arizona will have to refine its procedures for determining a juvenile permanently incorrigible after the Court deemed them inadequate in *Tatum v. Arizona* without providing additional guidance.¹⁶⁴ Thus, states will be left to resentence people for their youthful crimes years after their original sentencing without all of the relevant evidence or the benefit of specific guidance from the Supreme Court.

D. States Are Equipped to Monitor the Rehabilitation of Juveniles

States can readily and easily use institutional records to make parole decisions, as opposed to having evidentiary hearings about the juvenile immediately following the offense.¹⁶⁵ However, not all state reforms fully

¹⁵⁷ Pishko, *supra* note 113.

¹⁵⁸ *Id.*

¹⁵⁹ See generally Cohen, *supra* note 50 (describing the range of reactions from interested parties, including the victims' families, prosecutors, and the deaths of family members during the defendant's incarceration).

¹⁶⁰ See *supra* Part III.D.

¹⁶¹ Stole, *supra* note 58.

¹⁶² Pishko, *supra* note 113.

¹⁶³ *Id.*

¹⁶⁴ *Tatum v. Arizona*, 137 S Ct. 11, 11 (2016) (Sotomayor, J., concurring).

¹⁶⁵

Extending parole eligibility to juvenile offenders does not impose an onerous burden on the States, nor does it disturb the finality of state convictions. Those prisoners who have shown an inability to reform will continue to serve life sentences. The opportunity for

protect the Eighth Amendment rights of juveniles. Prior to the *Montgomery* decision, several states confronted the question of whether the Eighth Amendment required retroactive resentencing for those with juvenile life without parole sentences. Kentucky has prohibited juvenile life without parole since 1987 and provides juveniles with an opportunity for parole after twenty-five years.¹⁶⁶ However, even after *Montgomery*, Kentucky has refused to apply its ban on juvenile life without parole retroactively to two people previously convicted and sentenced.¹⁶⁷ Though it had no juveniles with life without parole sentences at the time,¹⁶⁸ Kansas also outlawed juvenile life without parole in 2011 by making all those sentenced to life terms eligible for parole after twenty-five years.¹⁶⁹

Nevada had sixteen juvenile life without parole prisoners in 2015 when it outlawed the sentence in most instances and retroactively applied sentencing protections to previously convicted juveniles.¹⁷⁰ Nevada law requires sentencing courts to consider the differences between juvenile and adult defendants, though these protections do not apply to cases involving multiple victims.¹⁷¹

release will be afforded to those who demonstrate the truth of *Miller's* central intuition—that children who commit even heinous crimes are capable of change.

Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016).

¹⁶⁶ KY. REV. STAT. ANN. § 640.040(1), (3) (LexisNexis 2014); THE PHILLIPS BLACK PROJECT, JUVENILE LIFE WITHOUT PAROLE AFTER *MILLER V. ALABAMA* 41 (2015), available at <https://static1.squarespace.com/static/55bd511ce4b0830374d25948/t/55f9d0abe4b0ab5c061abe90/1442435243965/Juvenile+Life+Without+Parole+After+Miller++.pdf> [https://perma.cc/CC7L-EBNU].

¹⁶⁷ THE PHILLIPS BLACK PROJECT, *supra* note 166, at 41. Kevin Stanford was seventeen when he was charged and subsequently convicted and sentenced to death for the rape and murder of a store clerk. Associated Press, 4 in *Kentucky Seek New Sentences for Juvenile Murder Cases*, COURIER J. (July 31, 2017), <https://www.courier-journal.com/story/news/crime/2017/08/01/4-kentucky-seek-new-sentences-juvenile-murder-cases/527984001/> [https://perma.cc/8FJG-R6XB]. When he first went to prison, Stanford was classified as mentally disabled, but has since earned an associate's degree, participated in prison programming, and earned the support of a prison warden and pastor for his clemency application. *Id.* David Buchanan was Stanford's accomplice and did not shoot the victim, but received a functional life sentence after the Kentucky Parole Board denied his first request for release. *Id.*; see also *Graham v. Florida*, 560 U.S. 48, 69 (2010) (“When compared to an adult murderer, a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability.”). Sophal Phon was sixteen when he was ordered to kill by the gang's leader. Associated Press, *supra* note 167; see also *Graham*, 560 U.S. at 68 (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)) (“[Juveniles] are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure.”).

¹⁶⁸ THE PHILLIPS BLACK PROJECT, *supra* note 166, at 39.

¹⁶⁹ KAN. STAT. ANN. § 21-6618 (2011 & Supp. 2017); KAN. STAT. ANN. § 21-6620(b)(1) (Supp. 2017).

¹⁷⁰ THE PHILLIPS BLACK PROJECT, *supra* note 166, at 61.

¹⁷¹ NEV. REV. STAT. § 176.015 (LexisNexis 2016).

Massachusetts provided an excellent model for state governments after *Miller* by mandating parole eligibility for juveniles and evaluating the rehabilitative progress of its juvenile population. First, the Massachusetts Supreme Court abolished juvenile life without parole in 2013 and held its ruling applied retroactively.¹⁷² The legislature responded by guaranteeing parole eligibility for all juveniles by statute.¹⁷³ Significantly, Massachusetts also provides statutory protections for incarcerated juveniles distinct from those sentenced to a prison term as an adult.¹⁷⁴ Massachusetts law differentiates between the mandatory term of incarceration for first and second-degree murder, depending on whether the offender is a juvenile or adult.¹⁷⁵ In addition, juveniles in Massachusetts have procedural protections to ensure they are afforded the meaningful opportunity to obtain release, as required by *Graham*.¹⁷⁶ Unlike their adult counterparts, juveniles convicted of first- or second-degree murder in Massachusetts are entitled to counsel and expert services at their parole hearings.¹⁷⁷ Furthermore, juveniles in Massachusetts are afforded full access to educational and treatment programs and must be placed in minimum security facilities, provided they have met their rehabilitative goals.¹⁷⁸ Thus, states have proven themselves capable of constructing a corrections system responsive to the rehabilitative needs of juveniles, while using parole to protect the Eighth Amendment's demand of proportionality.

E. The Eighth Amendment Requires the Supreme Court to Cap Mandatory Juvenile Terms at Twenty-Five Years

Because of the inconsistency in states' administration of Eighth Amendment protections for juveniles, the Court must respond with a powerful remedy. The most suitable way to recognize the special context of penological

¹⁷² *Diatchenko v. Dist. Attorney for the Suffolk Dist.*, 1 N.E.3d 270, 276–84 (Mass. 2013).

¹⁷³ MASS. GEN. LAWS ANN. ch. 265 § 2 (West 2018); MASS. GEN. LAWS ANN. ch. 279 § 24 (West 2018).

¹⁷⁴ MASS. GEN. LAWS ANN. ch. 119 § 72B (Westlaw through Chapter 207, and sections 19 and 21 of Chapter 228 of the 2018 2nd Annual Session) *amended by* 2014 Mass. Acts ch. 189, § 2 (West).

¹⁷⁵ *Id.* (mandating parole eligibility for juveniles convicted of first-degree murder and parole eligibility for juveniles convicted of second-degree murder after fifteen years, as opposed to twenty-five years for an adult); MASS. GEN. LAWS ANN. ch. 265 § 2 (Westlaw through Chapter 207, and sections 19 and 21 of Chapter 228 of the 2018 2nd Annual Session) *amended by* 2014 Mass. Acts ch. 189, § 2 (West); MASS. GEN. LAWS ANN. ch. 279 § 24 (Westlaw through Chapter 207, and sections 19 and 21 of Chapter 228 of the 2018 2nd Annual Session) *amended by* 2014 Mass. Acts ch. 189, § 2 (West).

¹⁷⁶ *See Diatchenko*, 27 N.E.3d at 353.

¹⁷⁷ *Id.*

¹⁷⁸ MASS. GEN. LAWS ANN. ch. 119 § 72B (Westlaw through Chapter 207, and Sections 19 and 21 of Chapter 228 of the 2018 2nd Annual Session) *amended by* 2014 Mass. Acts ch. 189, § 2 (West).

goals as applied to juveniles and individualize justice for each juvenile defendant is to perform a new evaluation into each offender's criminality and provide an opportunity to obtain release after twenty-five years of incarceration.¹⁷⁹ This requires clarification of the categorical rule first outlined in *Graham* in light of the new developments in brain science to eliminate the risk of a "depriv[ing] the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence."¹⁸⁰ Eliminating juvenile life without parole does not guarantee release of any person with a long sentence.¹⁸¹ Rather, such action would provide that an opportunity for review be granted after a reasonable period of incarceration, taking into consideration the unique circumstances of each defendant.¹⁸²

Though requiring parole hearings for juveniles imposes a new constitutional obligation for states, they would retain discretion about release decisions. In addition, states would be more accountable to the ideals outlined in the Supreme Court's jurisprudence and more likely to identify penological strategies that aid in the rehabilitation of their juvenile population. Such accountability has been wholly inadequate in the view of many commentators, including John O'Hair, who ironically saw more than ninety juveniles sentenced to life when he was prosecutor in Wayne County, Michigan.¹⁸³ A method of compliance that includes parole eligibility after twenty-five years of incarceration is an efficient solution that balances the rights of the offender with the interests of the state.

In considering the proportionality of a twenty-five-year sentence before their first opportunity for parole, the Court should consider that all juveniles sentenced to a life term will have spent more time incarcerated than as a member of society outside of prison.¹⁸⁴ In addition, twenty-five years is a modest floor for parole eligibility, considering the international standard is ten-to-fifteen years and states would retain the ability to allow parole eligibility sooner.¹⁸⁵ Furthermore, it is unlikely any of these juveniles would be released before their fortieth birthdays, depending on their age at the commission of the crime and their states' laws for charging them in adult court. These factors illustrate the

¹⁷⁹ See Richard J. Bonnie & Elizabeth S. Scott, *The Teenage Brain: Adolescent Brain Research and the Law*, 22 CURRENT DIRECTIONS PSYCHOL. SCI. 158 (2013) (exploring the influence of adolescent brain science on law and public policy, including its influence on decisions by the Supreme Court). Professors Bonnie and Scott "argue that current research cannot contribute usefully to legal decisions about individual adolescents and should not be used in criminal trials at the present time, except to provide general developmental information." *Id.*

¹⁸⁰ *Graham v. Florida*, 560 U.S. 48, 69–70 (2010).

¹⁸¹ Rovner, *supra* note 11, at 4.

¹⁸² *Id.*

¹⁸³ Cohen & Geller, *supra* note 50 ("It's taking far too long to get . . . judges and prosecutors to understand that the mandates of the Supreme Court are not optional.").

¹⁸⁴ See *Graham*, 560 U.S. at 70–71 (noting the percentage of a juvenile's life under incarceration is a relevant consideration in weighing the proportionality of sentences).

¹⁸⁵ Rovner, *supra* note 11, at 4–5.

value of the opportunity to obtain release for each juvenile and relieve society of the cost of incarcerating a reformed ex-offender.¹⁸⁶ This reform would also create new opportunities for states to expand on rehabilitative programming for young people based on the evolving body of juvenile brain science that motivated the Court in *Roper*, *Graham*, and *Miller*.¹⁸⁷ Perhaps in the future, developments in juvenile rehabilitative programming spearheaded by the states can make twenty-five-year sentences the harshest expectation for juveniles convicted of the most serious crimes in our society.

F. *Advancements in Brain Science Support a Parole Hearing for Juveniles After Twenty-Five Years in All Cases*

Though public policy is struggling to keep pace with developments in brain science,¹⁸⁸ it is well established that the “relationship between aging and criminal activity has been noted since the beginnings of criminology.”¹⁸⁹ In addition, the Court’s juvenile sentencing jurisprudence rests “not only on common sense . . . but on science and social science as well.”¹⁹⁰ Given its attentiveness to the developing field of brain science in guiding its jurisprudence at the time of sentencing, the Court should also consider empirical evidence of criminality in determining the maximum period of incarceration for juveniles before the Eighth Amendment mandates an opportunity for parole.¹⁹¹ Though

¹⁸⁶ See OFFICE OF THE INSPECTOR GENERAL: U.S. DEP’T OF JUSTICE, THE IMPACT OF AN AGING POPULATION ON THE FEDERAL BUREAU OF PRISONS 1–2 (2016) (finding “aging inmates cost 8% more per inmate to incarcerate”).

¹⁸⁷ Johnson et al., *supra* note 96, at 220. In utilizing brain science research, the ultimate goal should be to formulate policies that “help to reinforce and perpetuate opportunities for adolescents to thrive in this stage of development, not just survive.” *Id.* A proactive approach to research and the attentiveness of policymakers are important next steps. *Id.*

¹⁸⁸ *Id.* Policy mechanisms have not kept pace with the implications of neuroscientific research and policy developments tend to be reactive. *Id.*

¹⁸⁹ Jeffery T. Ulmer & Darrell Steffensmeier, *The Age and Crime Relationship: Social Variation, Social Explanations*, in THE NURTURE VERSUS BIOSOCIAL DEBATE IN CRIMINOLOGY 377 (Kevin M. Beaver et al. eds., 2015).

¹⁹⁰ *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (citing *Roper v. Simmons*, 543 U.S. 551, 569 (2005)). *Roper* notes “[o]nly a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.” *Roper*, 543 U.S. at 570 (internal citations omitted). The holding in *Graham* was grounded in the finding that “developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, [in] parts of the brain involved in behavior control continue to mature through late adolescence.” *Graham*, 560 U.S. at 68 (internal citation omitted).

¹⁹¹ See Bonnie & Scott, *supra* note 179 (describing the emerging importance of brain science on the Supreme Court’s juvenile justice jurisprudence); see also Diatchenko v. Dist. Attorney for Suffolk Dist., 1 N.E.3d 270, 283–84 (Mass. 2013). The Massachusetts Supreme Court succinctly describes the most prudent Constitutional reaction to advancements in brain science stating:

the overall impact of brain development on juvenile sentencing remains incomplete,¹⁹² the Court should look to empirical evidence of declining crime rates as people age to mandate a parole hearing after twenty-five years.¹⁹³ The vast literature of developmental criminology supports this policy, as younger age is a risk factor for ongoing violent behavior, while the risk of recidivism decreases with older age.¹⁹⁴

A growing body of scientific evidence supports the reexamination of life-without-parole sentences for juveniles. For example, Dr. Leah H. Somerville's research focuses on the changes of the maturing brain and its effects on how people think.¹⁹⁵ In Dr. Somerville's research, adolescents performed at levels comparable to adults on cognition tests under controlled conditions.¹⁹⁶ However, when under pressure, adolescent scores plummeted relative to their adult counterparts, suggesting a diminished ability to replicate their normal decision-making process while under emotional distress.¹⁹⁷ The implications of this research should be a particularly strong consideration when a juvenile's misdeed is preceded by emotional trauma or is made under the influence of

Given current scientific research on adolescent brain development, and the myriad significant ways that this development impacts a juvenile's personality and behavior, a conclusive showing of traits such as an 'irretrievably depraved character,' can never be made, with integrity, by the Commonwealth at an individualized hearing to determine whether a sentence of life without parole should be imposed on a juvenile homicide offender. Simply put, because the brain of a juvenile is not fully developed, either structurally or functionally, by the age of eighteen, a judge cannot find with confidence that a particular offender, at that point in time, is irretrievably depraved.

Id. (internal citations omitted).

¹⁹² See Bonnie & Scott, *supra* note 179, at 161 ("Currently, the only legitimate use of adolescent brain research in individual cases is to provide decision makers with general descriptions of brain maturation.").

¹⁹³ See NAT'L RESEARCH COUNCIL, UNDERSTANDING AND PREVENTING VIOLENCE, VOLUME 3: SOCIAL INFLUENCES 18 (Albert J. Reiss & Jeffrey A. Roth eds., 1994) (finding "[a]ge is one of the major individual-level of correlates of violent offending . . . arrests for violent crime peak around age 18 and decline gradually thereafter") (internal citations omitted); see also John Monahan et al., *Age, Risk Assessment, & Sanctioning: Overestimating the Old, Underestimating the Young*, 41 LAW & HUM. BEHAV. 192 (2017) ("That older people commit crime, particularly violent crime, at lower rates than younger people is a staple in criminology and has been known for as long as official records have been kept.").

¹⁹⁴ Middle-aged people (from twenty-six to forty years old) were significantly less likely to reoffend than their younger counterparts, with the risk of recidivism decreasing beyond forty years of age. *Id.* at 200. This data matches the conclusion of brain scientists who have documented evidence of brain maturation well into the twenties. See Johnson et al., *supra* note 96, at 1.

¹⁹⁵ Carl Zimmer, *You're an Adult. Your Brain, Not So Much*, N.Y. TIMES (Dec. 21, 2016), <https://www.nytimes.com/2016/12/21/science/youre-an-adult-your-brain-not-so-much.html> [on file with *Ohio State Law Journal*].

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

drugs or alcohol. When considered in tandem with the Court's jurisprudence, juvenile brain science research supports the assertion that juveniles are less culpable than adults, are capable of rehabilitation, and need not be incapacitated for the rest of their lives for the sake of public safety.

VI. CONCLUSION

Today, Henry Montgomery is a gentle, soft-spoken inmate in his early 70s at Angola State Penitentiary.¹⁹⁸ His institutional record is nearly spotless, and he has developed trade skills, mentored other inmates, and participated in programming options, even those not designed for his rehabilitative objectives.¹⁹⁹ On the outside, Montgomery's hometown of Scotlandville is now formally a part of Baton Rouge,²⁰⁰ and the term "super-predator" has been rejected as a racist term by the leaders of every major national political movement.²⁰¹ Though he was denied release after the Supreme Court's ruling in his favor, Montgomery retains a positive attitude and hopes to get a second chance from the Louisiana Parole Board at his next hearing.²⁰² Unfortunately, thousands of other juveniles are left without the glimmer of hope that Henry Montgomery has sustained, even when "the law said he was going to die in prison."²⁰³

Though the Supreme Court is reluctant to adopt bright-line rules that constrain the sentencing options of the states, the Court must act to protect the rights of juveniles if they are to receive any Eighth Amendment protection across the country. The Court has already categorically banned capital punishment for juveniles in a case that also gave rise to its jurisprudence in *Graham, Miller, and Montgomery*.²⁰⁴ The disparate reaction of the states to Supreme Court jurisprudence has created a messy hodgepodge that threatens the very application of the Eighth Amendment to juvenile sentences.²⁰⁵ It's time the Supreme Court provides guidance that outlaws juvenile life without parole and standardizes parole eligibility at twenty-five years after sentencing. Doing so

¹⁹⁸ Reckdahl, *supra* note 1; Toohey, *supra* note 1.

¹⁹⁹ Reckdahl, *supra* note 1; Toohey, *supra* note 1.

²⁰⁰ Reckdahl, *supra* note 1.

²⁰¹ Hillary Clinton was roundly criticized for using the term during the 2016 presidential election. Notwithstanding his own racist proclamations, the 45th President called her a "bigot" and Reince Priebus reminded voters of her use of "super-predator" in defense of his statement. On the left, Bernie Sanders called the term "racist" and Clinton apologized for her word choice and expressed regret for her advocacy for the underlying policy choices. Allison Graves, *Did Hillary Clinton Call African-American Youth "Superpredators?"*, POLITIFACT (Aug. 18, 2016), <http://www.politifact.com/truth-o-meter/statements/2016/aug/28/reince-priebus/did-hillary-clinton-call-african-american-youth-su/> [on file with *Ohio State Law Journal*].

²⁰² Toohey, *supra* note 1.

²⁰³ Toohey, *supra* note 1.

²⁰⁴ See *Roper v. Simmons*, 543 U.S. 551, 561 (2005).

²⁰⁵ See *supra* Part III. A–D.

will breathe life into the Court's rulings in *Graham*, *Miller*, and *Montgomery* and provide new hope for kids long denied an opportunity for redemption.

