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Where Are You, Congress?: Silence Rings in Congress as Juvenile Offenders Remain in Prison for Life

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Where Are You, Congress?

SILENCE RINGS IN CONGRESS AS JUVENILE OFFENDERS REMAIN IN PRISON FOR LIFE

INTRODUCTION

When Evan Miller was fourteen years old, he made a poor decision to set a fire that resulted in the death of his violent drug-dealing neighbor.[1] This decision almost landed Miller in prison for the rest of his life.[2] The phrase "children are different,"[3] however, has held great power in the United States court system. After the Supreme Court's decision in *Miller v. Alabama*, courts could no longer sentence children to death nor could they give sentences of life in prison without parole (LWOP).[4] Thus, young Evan Miller got a second chance at a real life.[5] Neither the Supreme Court nor Congress, however, has provided clear guidance for the constitutionality of de facto life sentences.[6]

In 2012, the Supreme Court held in *Miller v. Alabama* that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders."[7] The Court reasoned that juveniles should be treated differently from adults and ultimately receive less jail time[8] for

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[1] Miller v. Alabama, 567 U.S. 460, 468 (2012).

[2] *See id.* at 469.

[3] *Id.* at 480.

[4] *Id.* at 479. The term "LWOP" is known and used by preeminent scholars in this field and will be treated as such in this note. *See, e.g.*, Barry C. Feld, *A Slower Form of Death: Implications of* Roper v. Simmons *for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L., ETHICS & PUB. POL'Y 9, 9 (2008); Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 684 (1998); Julian H. Wright Jr., Note, *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All*, 43 VAND. L. REV. 529, 532 (1990).

[5] *See Miller*, 567 U.S. at 479.

[6] A de facto LWOP sentence tacks on years to the original sentence, which equates to a lifer spending the rest of their life in prison without the possibility of parole. Julian Zhu, *Know More: De Facto Life Sentences*, RESTORE JUST., https://restorejustice.org/know-more-de-facto-life/ [https://perma.cc/QG68-Q7CA].

[7] *Miller*, 567 U.S. at 479. In *Miller*, the Court expanded a prior decision in *Graham v. Florida*, which held that sentencing a juvenile to life without parole for a non-homicidal crime constitutes cruel and unusual punishment and therefore violates the Eighth Amendment. *See id.*; Graham v. Florida, 560 U.S. 48, 82 (2010).

[8] The Supreme Court in *Miller* used the precedents of *Roper v. Simmons*, 534 U.S. 551 (2005) and *Graham v. Florida*, 560 U.S. 48 (2010) to come to the conclusion that children

crimes committed during childhood, due to diminished culpability and higher probability of reform.[9] *Miller* set a standard that emphasized a rehabilitative nature to the juvenile justice system due to juveniles' "lack [of] maturity and a fully developed sense of responsibility" during the commission of a crime.[10] Additionally, courts will take into consideration, and in some cases weigh heavily, the fact that children are especially vulnerable to negative influences.[11]

Thus, *Miller* advanced the principle that juvenile defendants deserve special considerations during sentencing; however, several questions remained about the applicability of this general rule for a juvenile already serving their now unconstitutional LWOP sentences (lifers).[12] The Supreme Court ruling in *Miller* is important because it (1) established that mandatory minimums of LWOP for juveniles were unconstitutional and (2) left a question as to how courts should interpret "life without parole."[13] Four years later, in *Montgomery v. Louisiana*, the Supreme Court held that *Miller* must be applied retroactively "because it necessarily carr[ies] a significant risk that a defendant—here, the vast majority of juvenile offenders—faces a punishment that the law cannot impose upon [him/her]."[14] The Court required states to permit all lifers, regardless of the atrocity of the crimes committed, to be given the opportunity to prove they have been rehabilitated and deserve a chance to be granted parole.[15]

Miller, therefore, shifted the legal atmosphere for juvenile sentencing by giving lifers an opportunity to present proof of successful rehabilitation. Expectedly, this shift led to some pushback in the judicial community and inconsistencies about whether de facto LWOP constitutes a violation of the Supreme Court's holding

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ultimately are "less deserving of the most severe punishments." *Miller*, 567 U.S. at 471 (quoting *Graham*, 560 U.S. at 68).

[9] *Miller*, 567 U.S. at 471.

[10] Anna K. Christensen, Note, *Rehabilitating Juvenile Life Without Parole: An Analysis of* Miller v. Alabama, 4 CAL. L. REV. CIR. 132, 134 (2013).

[11] *Id.*

[12] The term "lifers" is used broadly by many stakeholders in the field of criminal law to refer to those serving life sentences and will be used throughout this note. *See e.g.*, MARC MAUER ET AL., SENTENCING PROJECT, THE MEANING OF "LIFE": LONG PRISON SENTENCES IN CONTEXT 1 (2004), https://www.sentencingproject.org/publications/the-meaning-of-life-long-prison-sentences-in-context/ [https://perma.cc/7U2J-TYGQ].

[13] *See Miller*, 567 U.S. at 465.

[14] Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) (first alteration in original) (internal quotation marks omitted) (quoting Schriro v. Summerlin, 542 U.S. 348, 352 (2004)).

[15] *Id.* at 736.

in *Miller*[16] and by extension, the Eighth Amendment.[17] A de facto LWOP sentence tacks on years to an offender's original sentence that equates to a lifer spending the rest of their life in prison without the possibility of parole.[18] Notably, there has been tension between the Third and the Eighth Circuits as to the proper application of *Miller* to de facto LWOP.[19]

In 2014, in light of the recent *Miller* decision, the District Court of New Jersey ordered that Corey Grant, who committed his crime at sixteen years old, be resentenced.[20] The court then gave Grant a new term of sixty-five additional years without parole.[21] After scientific calculations, the court determined that this sentencing would essentially equate to Grant's life expectancy, thereby becoming de facto LWOP.[22] Analyzing the case under the plain meaning of *Miller*, the Third Circuit joined the Seventh, Ninth and Tenth Circuits and determined that de facto LWOP did, in fact, violate the Eighth Amendment.[23] But, when the Eighth Circuit heard a case with similar facts in 2016, it decided that a new sentence of six hundred additional months was not unconstitutional because, under a formalistic analysis, the state did not violate the Eighth Amendment by pursing de facto LWOP for juvenile offenders.[24] This Circuit's decision diverged from most other circuits in the country, particularly the Third Circuit, concerning the proper application of *Miller* and by extension, de facto LWOP.

Thus, although Supreme Court precedent has changed the way courts have sentenced juveniles in the United States, it has failed to establish a clear and consistent rule for de facto LWOP cases. Congress too has failed to help, remaining noticeably silent on the issue. Congress recently reauthorized the Juvenile Justice

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[16] *See, e.g.*, Kelly Scavone, Note, *How Long Is Too Long?: Conflicting State Responses to De Facto Life Without Parole Sentences After* Graham v. Florida *and* Miller v. Alabama, 82 FORDHAM L. REV. 3439, 3442 (2014) ("Responses in state courts to the issue of virtual LWOP sentences after *Miller* . . . have varied significantly.").

[17] The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[18] Zhu, *supra* note 6.

[19] *See* United States v. Grant, 887 F.3d 131, 146 (3d Cir.), *reh'g granted en banc*, *opinion vacated*, 905 F.3d 285 (3d Cir. 2018) (holding that it is unconstitutional for non-corrigible juvenile offenders to spend their lives in prison through elongated prison sentences); United States v. Jefferson, 816 F.3d 1016, 1019 (8th Cir. 2016) (holding that a juvenile offender can spend life in prison through term of years).

[20] *Grant*, 887 F.3d at 136. Arguments for United States v. Grant were reheard on February 20, 2019; at the time of this note, no new judgment had been released. *See Grant*, 905 F.3d at 285 (granting government's petition for rehearing).

[21] *Grant*, 887 F.3d at 135.

[22] *Id.* at 142.

[23] *Id.*; *see* Budder v. Addison, 851 F.3d 1047, 1059–60 (10th Cir. 2017); McKinley v. Butler, 809 F.3d 908, 914 (7th Cir. 2016); Moore v. Biter, 725 F.3d 1184, 1188, 1192 (9th Cir. 2013).

[24] United States v. Jefferson, 816 F.3d 1016, 1018–19 (8th Cir. 2016).

and Delinquency Prevention Act of 1974, which, although a positive step for the treatment of juveniles in federal prisons, has failed to provide any prevention for de facto life sentences to juvenile offenders.[25] Further, in late December 2018, Congress signed into law the First Step Act, an act that focuses on prison reform, but fails to protect juveniles sentenced to LWOP in the federal prison system.[26] Until Congress passes a bill directly banning juvenile LWOP in the federal prison system, juvenile offenders around the country may still find themselves spending their entire lives in prison.

Children are not considered mature enough to vote, drink alcohol, nor serve on a jury,[27] and yet the criminal justice system treats juvenile offenders as mature enough to pay for their crimes for the remainder of their lives. Without a clear remedy in sight, juvenile offenders face uncertain fates and unequal treatment in the justice system, both on the state and federal level. Due to the serious nature surrounding juvenile sentencing, it is crucial that Congress band facto LWOP to fully establish that children are, in fact, treated differently from adults in the United States. Additionally, in light of courts' conflicting applications of *Miller* and the inconsistencies this creates, Congress must create a statute that ensures a resentencing hearing for lifers after twenty years, and the new sentence given must not exceed fifteen additional years.

Part I of this note examines the historical foundation of the Supreme Court's decision in *Miller* and what the aftermath of its holding meant for court applications moving forward. Part II discusses what *Miller* meant for the juvenile de facto LWOP cases in both the Third and Eighth Circuits and how these disagreements in interpretation have impacted juvenile sentencing. Next, Part III analyzes each state within the Third

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[25] *See* Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (codified at 34 U.S.C. § 11101 (2018)); Lacey Johnson, *JJPDA Reauthorization Passes Congress After 16 Years*, JUV. JUST. INFO. EXCHANGE (Dec. 13, 2018), https://jjie.org/2018/12/13/jjdpa-reauthorization-passes-congress-after-16-years/ [https://perma.cc/3LNX-J7CQ] ("The JJDPA sets core safety standards for juvenile offenders that states must follow in order to qualify for federal grants. It also aims to prevent delinquency and curb racial and ethnic disparities in juvenile justice systems.").

[26] *See* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (2018) (codified as amended in scattered sections of 8 U.S.C.); Angela Chapin, *Crime Bill Would Not Prevent Kids from Being Sentenced to Die in Prison, Advocates Say*, HUFFPOST (Dec. 7, 2018), https://www.huffingtonpost.com/entry/first-step-act-juvenile-sentence-life-without-parole_us_5c097d8fe4b04046345a4049 [https://perma.cc/277X-NRD8].

[27] *See Fact Sheets – Age 21 Minimum Legal Drinking Age*, CENTERS FOR DISEASE CONTROL & PREVENTION (Aug. 3, 2018), https://www.cdc.gov/alcohol/fact-sheets/minimum-legal-drinking-age.htm [https://perma.cc/ZZ86-98C4]; *Juror Qualifications*, U.S. CTS., https://www.uscourts.gov/services-forms/jury-service/juror-qualifications [https://perma.cc/9UAG-DR97]; *Voter Registration Age Requirements by State*, USA.GOV. (Apr. 3, 2018), https://www.usa.gov/voter-registration-age-requirements [https://perma.cc/MRT3-SHB3].

and Eighth Circuits and emphasizes how even within the same circuit, state level approaches vary greatly. Further, Part III additionally discusses how Congress has failed to introduce a statute to set uniform standards for juvenile sentencing on all levels. Finally, Part IV searches for a solution and, in doing so looks to international custom for insight on successful approaches to juvenile sentencing. Further, Part IV suggests that Congress enact a concrete law to apply consistency to juvenile sentencing and repair the conflicting circuit decisions.

I. BACKGROUND AND AFTERMATH OF *MILLER*

A. What the Eighth Amendment Means for Juvenile Sentencing

The Supreme Court and lower courts across the United States have struggled with interpreting the Eighth Amendment. Specifically, the Cruel and Unusual Punishment Clause presents problems with sentencing in the criminal justice system.[28] The Clause prevents the government from disproportionally punishing a citizen for the crimes that they commit.[29] This tension between properly paying for one's crime and excessive punishment peaked in the 1980s and 1990s. For example, in *Penry v. Lynaugh*, a divided Supreme Court held that executing a mentally ill offender did not violate the Eighth Amendment,[30] however, on the same day, the Court held in *Stanford v. Kentucky* that the Constitution did not bar capital punishment for offenders over fifteen years of age.[31] This clear tension in employing of the Cruel and Unusual Punishment Clause marked the beginning of a long road to problematic application within courts throughout the years.

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[28] The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. "Traditional history explains this provision as outlawing torture and barbarous punishments . . . ." Charles Walter Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378, 378 (1980).

[29] For example, "[a] sentence of life imprisonment without parole may be acceptable for some crimes, but it would violate the Constitution to condemn anyone to die in prison for shoplifting or simple marijuana possession." Bryan A. Stevenson, *The Eighth Amendment: A Contemporary Perspective*, CONST. CTR., https://constitutioncenter.org/interactive-constitution/amendments/amendment-viii/the-eighth-amendment-a-progressive-perspective/clause/10 [https://perma.cc/ND4A-QPN4].

[30] *See* Penry v. Lynaugh, 492 U.S. 302 , 340 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002); William M. Robinson, Miller Time: The Eighth Amendment Earthquake in Sentencing Law for Juvenile and Youthful Offenders and Its Aftershocks in California, at 7 (unpublished manuscript), http://www.sdap.org/downloads/research/criminal/wmr17.pdf [https://perma.cc/F9ES-VKUV].

[31] Stanford v. Kentucky, 492 U.S. 361, 380 (1989), *abrogated by* Roper v. Simmons 543 U.S. 551 (2005).

In 2005, to cure some of the tension, the Court began to rely on developmental research and neuroscience to ban adult sentences on juvenile offenders as violative of the Eighth Amendment.[32] This new scientific approach helped the Court determine that children could not possibly be considered to have the same level of maturity as adults, and therefore punishing children as such was considered cruel and unusual.[33] The Eighth Amendment includes "evolving standards of decency" as objectively viewed by society and as subjectively viewed by the Court's analysis.[34] By 2005, there was a shift in the Court's view of the categorical differences between children and adults. Courts now apply the Eighth Amendment after examination of the age and characteristics of the litigant in question.[35]

B. The Buildup to Miller

In the landmark case *Miller v. Alabama*, the Supreme Court reaffirmed "that children are different from adults and that those developmental differences are of constitutional dimension."[36] Although this ruling seemed like a new trend in the U.S. judicial system, a group of progressive reformers, the "Child Savers," had advocated the concept that "children are different" as early as the nineteenth century.[37] This group championed the rights of juvenile offenders with its goal to create a separate court for children based on the belief that children were more likely than adults to be rehabilitated and should be adjudicated as such.[38] Cook County, Illinois founded the first juvenile court, with its goal to separate juveniles from adults and to provide more opportunities for rehabilitation.[39] Over the next twenty-five years, almost every state in the country followed suit and established their own juvenile courts.[40] The concept of rehabilitation diminished over time as the country pushed towards weighing retribution over

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[32] Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J.L. & SOC. CHANGE 285, 291 (2012).

[33] *See* Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

[34] Levick et al., *supra* note 32, at 292 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958)).

[35] *Id.*

[36] Robin Walker Sterling, *"Children Are Different": Implicit Bias, Rehabilitation, and the "New" Juvenile Jurisprudence*, 46 LOY. L.A. L. REV. 1019, 1022 (2013); *see* Miller v. Alabama, 567 U.S. 460, 480 (2012).

[37] Sterling, *supra* note 36, at 1023–24.

[38] *Id.*

[39] Levick et al., *supra* note 32, at 286.

[40] *See* A.B.A. Div. for Pub. Educ., *The History of Juvenile Justice*, A.B.A., https://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf [https://perma.cc/AT23-6PM9].

rehabilitation.[41] The United States' judicial system slowly developed into one that gave juveniles life sentences without the possibility of ever achieving freedom.[42] Ultimately, it was "public sentiment [that] swayed the dramatic policy shift during the 1990s that allowed for more juveniles to be tried as adults, subjecting them to adult sentences."[43] However, the idea that children could be rehabilitated and therefore deserved more lenient treatment in the court system became part of a larger conversation in the judicial system through a string of Supreme Court decisions.

In 2005, the Supreme Court began to rely on neurological findings that showed the differences between children and adults when it ruled on *Roper v. Simmons*.[44] The Court used these findings to identify three characteristics that differentiated juveniles from adults:

> (1) immaturity and underdeveloped awareness of responsibility, manifesting itself in propensities to engage in reckless behavior and impetuous and ill-considered actions and decisions; (2) a vulnerability and susceptibility to negative influences and outside pressures, including peer pressure; and (3) less character development than adults with more transitory, and fewer fixed, personality traits which enhance a minor's amenability to rehabilitation.[45]

Due to these findings, juveniles could not fairly receive a death sentence, which historically had been saved for the nation's most dangerous criminals.[46] The next time that the Supreme Court viewed a case about juvenile sentences, it took the opportunity to expand the view that children deserve to be treated differently. In 2010, the Supreme Court in *Graham v. Florida* held that life sentences without the possibility of parole for juvenile offenders convicted of non-homicidal cases violated the Cruel and Unusual Punishment Clause and reasoned that the Constitution did not allow such severe and irrevocable punishment for juveniles.[47] At a minimum, under the Eighth Amendment, juvenile offenders have

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[41] "Rehabilitation goes directly against the 'tough on crime' mantra that was introduced in the 1980's." James Bernard et al., *Perceptions of Rehabilitation and Retribution in the Criminal Justice System: A Comparison of Public Opinion and Previous Literature*, J. FORENSIC SCI. & CRIM. INVESTIGATIONS, Oct. 2017, at 1, 1.

[42] *See* Megan Annitto, Graham's *Gatekeeper and Beyond: Juvenile Sentencing and Release Reform in the Wake of* Graham *and* Miller, 80 BROOK. L. REV. 119, 122 (2014).

[43] Annito, *supra* note 42, at 122.

[44] *See* Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

[45] Martin R. Gardner, *Youthful Offenders and the Eighth Amendment Right to Rehabilitation: Limitations on the Punishment of Juveniles*, 83 TENN. L. REV. 455, 482 (2016); *see Roper*, 543 U.S. at 569–70.

[46] "Capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." *Roper*, 543 U.S. at 568 (internal quotation marks and citation omitted).

[47] *See* Graham v. Florida, 560 U.S. 48, 82 (2010); Levick et al., *supra* note 32, at 299–300.

a "right to be free from a sentencing scheme that mandates life in prison without possibility of parole."[48] When read together, *Graham* and *Roper* provided the framework for courts that the "Eighth Amendment . . . force[s] a more rigorous examination of permissible sentencing options for juvenile offenders."[49] These cases laid the groundwork for *Miller* and all the cases that follow regarding juvenile sentencing.

C. Miller*,* Montgomery*, and the Aftermath*

In 2012, the Supreme Court confronted *Miller*, a case involving a fourteen-year-old boy charged with murder in the course of arson, who was given a statutorily mandated punishment of life without parole.[50] One night, Evan Miller and his friend got into an altercation with Miller's violent drug-dealing neighbor, Cole Cannon.[51] Cannon grabbed Miller by the throat and Miller's friend hit Cannon over the head with a baseball bat in an effort to free Miller.[52] Once released, "Miller grabbed the bat and repeatedly struck Cannon with it."[53] The boys covered up the evidence of their crime and lit two fires around the trailer where Cannon's body remained. Cannon ultimately died from a combination of his injuries and smoke inhalation. Due to his age, Alabama law initially required Miller to be charged as a juvenile but allowed the case to be removed to adult court.[54] The state charged Miller as an adult for murder in the course of arson, which carried a heavy mandatory minimum of life in prison without parole.[55] A jury found Miller guilty and he began his sentence.[56] The Alabama Court of Criminal Appeals later affirmed the decision because such punishment was not overly harsh in comparison to the crime committed.[57]

After the Alabama Supreme Court denied review, Miller appealed the case to the United States Supreme Court, which granted certiorari in 2011.[58] The Court's opinion turned mainly on a belief that had been laid out for generations by *Roper* and

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[48] Gardner, *supra* note 45, at 487–88.

[49] Levick et al., *supra* note 32, at 300.

[50] Miller v. Alabama, 567 U.S. 460, 465 (2011). This case also dealt with the trial of another fourteen-year-old boy who the district court sentenced to LWOP for felony murder and aggravated robbery; however, this note will only focus on the case of Evan Miller. *Id.* at 465–66.

[51] *Id.* at 468.

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* at 468–69.

[56] *Id.* at 469.

[57] *Id.*

[58] *Id.*

Graham, that children are constitutionally different from adults due to their diminished culpability and great prospects for reform.[59] The majority took issue with mandatory minimums because it fundamentally prevented the sentencing authority from assessing the proportionality of the offender's characteristics to the crimes they committed.[60] Ultimately, the analysis focused on the individual application of the law to children who had different upbringings.[61] *Miller* put forth five unique factors to consider when sentencing youth: "(1) age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks; (2) family and home environment; (3) circumstances of the offense; (4) legal competency, i.e. ability to deal with police and lawyers; and (5) possibility of rehabilitation."[62] The idea of empathy for children came to the forefront of the conversation for juvenile sentencing.

In *Miller*, the Court acknowledged the horrendous crime that Miller committed, but partially excused his conduct on the drugs and alcohol present at the time.[63] But the Court took its analysis even further to take Miller's "pathological background" into consideration as contributions to the commission of his crime.[64] By the time he was fourteen years old, Miller had been physically abused by his stepfather, neglected by his addict mother, moved in and out of foster care, and had even attempted suicide four times in his short life, the first time being at six years old.[65] Thus, although Miller deserved punishment for the murder he committed, a judge needed to examine all of his individual life circumstances before determining the appropriate sentence.[66]

Although the Court did not create a categorical ban on all LWOP sentences, it did ban all mandatory minimums of LWOP for juvenile offenders based on the Eighth Amendment's Cruel and Unusual Punishment Clause.[67] Additionally, it held that before sentencing juveniles, courts must view youth related

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[59] *Id.* at 477–78.

[60] *Id.* at 474. After an offender is convicted, they return to court for a sentencing judge to determine the amount of time that they will serve in prison. The sentencing judge receives guidance from several sources in order to sentence a defendant and considers a variety of mitigating factors. *Id.* at 476.

[61] "[E]very juvenile will receive the same sentence as every other—the [seventeen]-year-old and the [fourteen]-year-old . . . , the child from a stable household and the child from a chaotic and abusive one." *Id.* at 477.

[62] Alice Reichman Hoesterey, *Confusion in* Montgomery*'s Wake: State Responses, the Mandates of* Montgomery*, and Why a Complete Categorical Ban on Life Without Parole for Juveniles Is the Only Constitutional Option*, 45 FORDHAM URB. L.J. 149, 157 (2017) (internal quotation marks omitted).

[63] *Miller*, 567 U.S. at 478.

[64] *Id.*at 478–79.

[65] *Id.* at 467.

[66] *Id.* at 479.

[67] *Id.*

mitigating evidence[68] to determine the proper sentence for each offender, since non-homicide offenders deserved an opportunity to be released based on maturity and rehabilitation.[69] Although the Court focused mainly on LWOP sentences, its analysis "seemed to indicate that individualized sentencing that incorporates the mitigating factors of youth must always be used when considering harsh or lengthy sentences for juvenile offenders."[70] Ultimately, *Miller* emphasized the importance of individualized sentencing that focused on the nature of the juvenile's circumstances along with their lack of maturity.[71]

In 2016, the Supreme Court granted certiorari in *Montgomery v. Louisiana*[72] to decide if *Miller* should be applied retroactively.[73] The Court decided that *Miller* created a categorical rule that made sentencing a juvenile to LWOP excessive, except for the rare occasions where the crime reflected "irreparable corruption."[74] It expanded *Miller* and held not only that courts should apply *Miller* retroactively, but also that LWOP is unconstitutional for almost all juvenile offenders, including the "vast majority of juvenile homicide offenders."[75] In fact, a sentencing court must determine that a juvenile offender is "irreparably corrupt or permanently incorrigible" before it imposes a sentence of LWOP on a juvenile.[76] The Court explained, however, that finding a juvenile worthy of such a sentence would be incredibly rare.[77]

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[68] Youth related mitigating evidence is a factor that courts consider before sentencing that attributes some of the offender's mistakes to characteristics associated with youth and immaturity. *Id.* at 475–76.

[69] *See id.* at 478; Hoesterey, *supra* note 62, at 157.

[70] Scavone, *supra* note 16, at 3454; *see Miller*, 567 U.S. at 489.

[71] Four justices dissented and expressed their concerns that the majority made no attempt to limit the scope of their decision and criticized the majority opinion as "a way station on the path to further judicial displacement of the legislative role in prescribing appropriate punishment for crime." Gardner, *supra* note 45, at 491 (quoting *Miller*, 567 U.S. at 500 (Roberts, C.J., dissenting)).

[72] Montgomery v. Louisiana, 136 S. Ct. 718, 725 (2016). After *Miller*, state courts across the country were left to decide if *Miller*'s holding was procedural or substantive. If procedural, the ruling would not be applicable to the facts of previous cases and therefore would not be applied retroactively. If substantive, courts would have to retroactively apply *Miller*, which would mean the approximately 2,015 incarcerated persons serving mandatorily sentenced LWOP at the time would receive new opportunities for parole through resentencing hearings. Without a mandatory retroactive application, *Miller* meant lifers in each state were not receiving the same level of treatment as some remained in prison while others received new sentences. *See id.* at 734–35.

[73] Hoesterey, *supra* note 62, at 152.

[74] *Id.* at 159 (quoting *Montgomery*, 136 S. Ct. at 724).

[75] *Id.* at 152; *see Montgomery*, 136 S. Ct. at 734.

[76] Hoesterey, *supra* note 62, at 172; *see Montgomery*, 136 S. Ct at 734.

[77] "In fact, the majority mentions *eight times* in the opinion that only irreparably corrupt juveniles may constitutionally receive sentences of life without parole." Hoesterey, *supra* note 62, at 173.

Nevertheless, many states still refuse to comply with the new "irreparable corruption" standard, as many states remain content to leave discretion to the sentencing judge.[78] One line in *Montgomery* explains that neither *Miller* nor *Montgomery* required a "formal fact-finding requirement."[79] Although *Miller* did not impose a formal fact-finding requirement, states still could not sentence a child to LWOP[80] because "*Miller* established that [juvenile LWOP] is disproportionate under the Eighth Amendment."[81] Regardless, several states have disregarded *Montgomery*'s expansion and have only used the case to recognize the retroactive application of *Miller*.[82] Ultimately, *Miller* created an inconsistency of two analytical approaches—the plain meaning analysis and the formalistic analysis. This conflict has led to uncertainty as courts across the country struggle to resolve questions of juvenile sentencing.

II. THE THIRD CIRCUIT AND EIGHTH CIRCUIT: AN INTERPRETIVE SPLIT

A plain reading of *Miller* begins with the premise that through the advancements in neurological development that correlate with one's progression of age, a juvenile's deficiencies in judgment are likely be reformed.[83] This interpretation indicates that the Court intended for juvenile offenders to be able to return to society once neurological development is complete and thus rehabilitation has occurred. Language that LWOP reflects "an irrevocable judgment about [an offender's] value and place in society[] [is] at odds with a child's capacity for change,"[84] logically concludes that denying a juvenile the chance to be released back into society is unconstitutional, regardless of the use of the phrase "life without parole" in the sentence. Conversely, a formalistic interpretation of *Miller* applies a narrowly defined set of rules. Therefore, under this analysis, unless a court specifically sentenced a juvenile to "life in prison without parole," it would not be unconstitutional. The Court did not indicate the proper interpretation of its language and seemingly kept it vague.[85] It is

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[78] *Montgomery*, 136 S. Ct. at 735; *see* Hoesterey, *supra* note 62, at 161.

[79] *Montgomery*, 136 S. Ct. at 735; *see* Hoesterey, *supra* note 62, at 161.

[80] Stephanie Singer, Note, *A Proposed Solution to the Resentencing of Juvenile Lifers in Pennsylvania Post* Montgomery, 10 DREXEL L. REV. 695, 728 (2018).

[81] *Montgomery*, 136 S. Ct. at 735.

[82] Hoesterey, *supra* note 62, at 161.

[83] *See Miller*, 567 U.S. at 472.

[84] *Id.* at 473 (first alteration in original) (internal quotation marks and citation omitted).

[85] Hoesterey, *supra* note 62, at 156.

illogical, however, that the Court intended only a specific phrase to be unconstitutional, instead of the intent behind the words, especially considering the elaborate language about the possibility of rehabilitation for juveniles.[86]

A. Plain Meaning Approach

Corey Grant was thirteen years old when he joined a gang called E-port Posse, a group known to buy and sell multi-kilograms of cocaine on the streets of New York.[87] In 1989, at sixteen years old, Grant committed various crimes that ultimately led to his arrest.[88] In 1992, Grant was tried as an adult and a jury found him guilty of conspiracy, racketeering under the Racketeering Influenced and Corrupt Organizations Act (RICO), and drug and gun possession.[89] Additionally, in the commission of his RICO crimes, Grant murdered a man and attempted to murder another.[90] At the time, there were "mandatory Sentencing Guidelines of LWOP on the two RICO counts, a concurrent forty-year term of imprisonment on the drug-trafficking counts, and a five-year consecutive term of imprisonment on the gun possession count."[91] In 1992, the court sentenced Grant to LWOP for the RICO crime and a total of forty-five concurrent years without parole for the other crimes.[92]

In 2014, in light of *Miller*, the District Court of New Jersey granted Grant the opportunity to be resentenced.[93] At the resentencing hearing, "the District Court determined that Grant's upbringing, debilitating characteristics of youth, and post-conviction record demonstrated that he had the capacity to reform and that a LWOP sentence was therefore inappropriate under *Miller*."[94] The District Court, however, determined that instead of mandatory LWOP for his RICO conviction, Grant deserved a new term of sixty-five years without parole to run concurrently with the drug charges.[95] At the time of the District Court trial, Grant was forty-one years old and had already

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[86] *Miller*, 567 U.S. at 477–79.

[87] United States v. Grant, 887 F.3d 131, 135 (3d Cir.), *reh'g granted en banc, opinion vacated*, 905 F.3d 285 (3d Cir. 2018).

[88] *Id.*at 135–36.

[89] *Id.* at 136.

[90] *Id.*

[91] *Id.*

[92] *Id.* at 134.

[93] Grant made a 28 U.S.C. § 2255 motion, requesting the court to vacate his sentence. *Id.* at 136.

[94] *Id.* at 135.

[95] *Id.*

served twenty-two years in prison.[96] The new term of years sentenced by the District Court would mean that, "assuming good time credit," Grant, at the earliest, would be eligible for release at the age of seventy-two.[97] On appeal, Grant cited various life expectancy estimates and contended that his life expectancy was seventy-two; thus, he would likely die in prison for a crime he committed when he was sixteen years old.[98]

The Third Circuit relied on both *Roper* and *Graham* as its foundation for the principle that LWOP for juveniles is a harsh punishment, especially since a juvenile offender would spend a greater percentage of their life in prison compared to an adult offender with the same sentence.[99] The court noted that *Miller* encouraged individualized sentencing before imposing LWOP.[100] Further, under *Miller*, courts were required to take into account the youth-related mitigating evidence, such as immaturity, family and home environments, incapacity and, importantly, the potential for rehabilitation.[101]

The Third Circuit interpreted *Miller* using the plain meaning approach and found that, "[t]hus, while not a categorical bar, *Miller* effectively prohibits LWOP for nearly all juvenile offenders."[102] Therefore, *Grant* applied the plain meaning of *Miller*. Under this analysis, the Supreme Court could not logically have intended that the inclusion of the word "life" made the sentencing unconstitutional. Rather, courts employing the plain meaning approach have maintained that, at some point, a juvenile will become a rehabilitated and productive member of society and thus is undeserving of confinement for the duration of their life.

The issue of de facto LWOP in *Grant* was one of first impression for the Third Circuit.[103] Ultimately, the court held that it violated the Eighth Amendment because it is inherently disproportionate to a crime committed by a juvenile who is particularly vulnerable.[104] Importantly, *Grant* interpreted the plain meaning of *Miller* to apply not only to LWOP but to sentences that systematically equate to LWOP for crimes committed as juveniles.[105] In order to give effect to this interpretation of Supreme Court precedent, the court emphasized

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96 *See id.*
97 *Id.* at 137.
98 *Id.* at 142.
99 *Id.* at 139.
100 *Id.* at 140.
101 *Id.* at 140–41.
102 *Id.* at 141.
103 *Id.* at 142.
104 *Id.*
105 *Id.*

that treating children differently from adults would be applied across the board in all forms of sentencing.[106] Further, "[a] sentence for a juvenile offender who is not incorrigible but that still results in [them] spending the rest of [their] life in prison does not appreciate the categorical differences between children and adults" that is laid out in the language of *Miller*.[107] By finding de facto LWOP constitutional, an offender would still spend the remainder of their life in prison without the possibility of parole and therefore, "it would make little sense if sentencing courts could circumvent *Miller* and eradicate this constitutionally required [standard] simply by imposing extraordinarily high term-of-years sentences."[108]

Although *Miller* is sufficiently silent on de facto LWOP, the *Grant* court chose to interpret this silence as inclusive of all sentences that would require a non-incorrigible[109] juvenile to spend the remainder of their life in prison.[110] It reasoned that *Miller* turned on the particularly harsh sentences that the juveniles faced, not the sentence's formal designation.[111] Which means that *Miller*'s main purpose was to prevent juveniles from lifelong incarceration, not to simply rid the juvenile sentencing system of the words "life without parole." Therefore, the Third Circuit found it is unconstitutional when, in one way or another, a juvenile is faced with spending their life in prison.[112] Ultimately, the Third Circuit held that, "defendants such as Grant should have a chance for release before retirement age. Following this, the en banc Third Circuit vacated the court's initial opinion and judgment pending the en banc court's decision."[113]

B. Formalistic Approach

Robert James Jefferson joined the 6-0 Tres gang when he was sixteen years old and soon began participating in the gang's criminal activity.[114] The state charged and convicted Jefferson of

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[106] *Id.* at 143.

[107] *Id.*

[108] *Id.*

[109] The court separates two classes of juvenile offenders as "non-incorrigible" offenders "who are capable of reform and 'whose crimes reflect transient immaturity'" and the very rare "incorrigible" offenders "who have no capacity for change and 'whose crimes reflect irreparable corruption'" *Id.* (quoting *Miller*, 567 U.S. at 479–80).

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] Anton Tikhomirov, *A Meaningful Opportunity for Release:* Graham *and* Miller *Applied to* De Facto *Sentences of Life Without Parole for Juvenile Offenders*, 60 B.C. L. REV. II.-332, II.-337 (Electronic Supplement, 2019) (emphasis omitted).

[114] United States v. Jefferson, 816 F.3d 1016, 1017 (8th Cir. 2016).

conspiracy to distribute drugs, participation in the firebombing murder of five children when he was still sixteen, and a drive-by shooting at seventeen.[115] Due to the then-mandatory sentencing guidelines, the court sentenced Jefferson to LWOP.[116] After *Miller*, Jefferson filed a petition and requested resentencing in light of the ruling.[117] The district court granted the petition, vacated the original sentence and "varied downward" on "a sentence of [six hundred] months in prison."[118]

On appeal, the Eighth Circuit faced a similar question as the Third Circuit about whether a sentence of de facto LWOP violated the holding in *Miller*.[119] Jefferson argued that his new six hundred month—a fifty-year sentence—equated to de facto LWOP because it did not meet the "contemporary standards of decency."[120] Such conclusion, he contended, could be drawn inexorably from the plain meaning of *Miller*.[121] The court of appeals in *Jefferson* strongly disagreed, applied the formalistic approach, and said, "[t]he Court in *Miller* did not hold that the Eighth Amendment categorically prohibits imposing a sentence of life without parole on a juvenile offender."[122] The court concluded that *Miller*'s categorical ban on LWOP sentences did not explicitly include de facto life sentences and therefore it did not even consider the argument of expanding *Miller* to include it.[123]

The court employed a formalistic approach in their interpretation of *Miller* and allowed a judge or jury the opportunity to consider youth related evidence to mitigate before sentencing.[124] Therefore, since the district court mitigated those circumstances in Jefferson's resentencing, it complied with what the court understood as the only mandatory rule laid out in *Miller*.[125] In fact, the court even concluded that Jefferson had been "amenable to rehabilitation" and, in the sixteen and a half years spent in prison, he had "no disciplinary history."[126] Although the court expressed

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[115] *Id.*

[116] *Id.* Additionally, the convictions and sentencing were affirmed on direct appeal. *See* United States v. Jefferson, 215 F.3d 820 (8th Cir. 2000).

[117] *Jefferson*, 816 F.3d at 1018. Jefferson filed a petition under 28 U.S.C. § 2255(a) to have his sentence vacated. *Id.*

[118] *Id.*

[119] *Id.* at 1017–18.

[120] *Id.* at 1018.

[121] *Id.*

[122] *Id.*

[123] *Id.* at 1019.

[124] *Id.* ("The [*Miller*] Court ruled that a sentencing court must make 'individualized sentencing decisions' that take into account 'the distinctive attributes of youth' before it imposes a [LWOP] sentence on a juvenile."(quoting Miller v. Alabama, 567 U.S. 460, 472, 489 (2012))).

[125] *Id.* at 1019.

[126] *Id.* at 1020.

sympathy for Jefferson's childhood struggles, it still decided that another fifty years in prison would be an acceptable new sentence for Jefferson.[127] During resentencing, "[t]he district court ha[d] wide latitude to weigh the [childhood factors] and assign some factors greater weight than others."[128] Based on the premise of the formalistic approach, however, the simple exclusion of the word "life" from a juvenile offender's sentence means that someone like Jefferson, for example, could be sentenced to one hundred consecutive years in prison. Such an outcome could not logically fit with the established presumption in *Miller* that juveniles are constitutionally required to have an opportunity for release after maturation and rehabilitation.

C. Diametrically Opposed: The Third and Eighth Circuits

The Third and the Eight Circuits' applications of *Miller,* the plain meaning approach and the formalistic approach, differ fundamentally. The Third Circuit reasoned that *Grant* intended to focus on the treatment of juveniles over everything else. Although *Miller* did not expressly extend its holding to include those who were sentenced to de facto LWOP, its plain meaning implied that offenders should not spend the rest of their lives in prison for crimes committed as children.[129] Therefore, in the Third Circuit, when a non-incorrigible juvenile is sentenced to de facto LWOP, that sentencing "violates the Eighth Amendment because it lacks an adequate constitutional justification to make it a proportionate sentence."[130] Under the plain meaning approach, the language of the Supreme Court indicates that a juvenile can be rehabilitated before dying in prison and must have the opportunity for such rehabilitation.[131] According to *Grant*, courts must provide a juvenile offender with a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[132] *Grant* approached *Miller* in a way that extended beyond the bare requirements by looking at the meaning that the Supreme Court intended.

Conversely, the Eighth Circuit analyzed *Miller* through a formulistic approach, which focused on the base requirement that a juvenile is entitled to a hearing that weighs the mitigating

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[127] *Id.* at 1020–21.

[128] *Id.* at 1021 (internal quotation marks and citation omitted).

[129] *See* United States v. Grant, 887 F.3d 131, 143–44 (3d Cir.), *reh'g granted en banc, opinion vacated*, 905 F.3d 285 (3d Cir. 2018).

[130] *Id.* at 143–44.

[131] Miller v. Alabama, 567 U.S. 460, 472 (2012).

[132] *Grant*, 887 F.3d at 144 (citation omitted).

youth-related evidence of the crime into factoring the length of sentencing.[133] In the Eighth Circuit, the fact that a juvenile offender has the *opportunity* to be resentenced under *Miller* is technically sufficient under this narrow approach.[134] Since *Miller* did not condemn nor even speak to the notion of de facto LWOP, individual courts have a right to decide the proportionality of the new sentence.[135] Even though the court expressed its empathy for Jefferson and understood that he had been rehabilitated during his time in prison, under a formalistic approach, a court can decide that a juvenile is still worthy of spending their life in prison.[136] Emphasizing that the narrow formalistic approach forces a court away from many of the ideas the *Miller* court intended, such as the likelihood of juvenile rehabilitation and reentry into society, a court could rely on *Miller* and still force a juvenile offender to spend the rest of their life in prison, explicitly contradicting the plain meaning of the language of the Court.[137]

D. The Impact of the Circuit Split on Juvenile De Facto LWOP

The two different approaches have exaggerated the already grave consequences faced by incarcerated juvenile offenders, as they have left juvenile offenders experiencing different consequences, possibly for the same crime.[138] Even in applying the more expansive plain meaning approach, courts still defer to the judges' discretion by providing a caveat for "exceptional cases."[139] As a result of these competing interpretations, the split among the circuit courts become problematic and created inconsistency in sentencing across the country. This inconsistency, when interpreting the same language, is indicative of the *Miller* court's failure to concretely lay out its reasoning.

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[133] *Jefferson*, 816 F.3d at 1020.

[134] *See id.*

[135] *See id.*

[136] *Id.*

[137] *See id.*

[138] Such grave consequences include exacerbated mental health issues, increased recidivism, and a reduced probability of high school completion. For more information on these consequences, see Anna Aizer & Joseph Doyle, *What Is the Long-Term Impact of Incarcerating Juveniles?*, VOX (July 16, 2013), https://voxeu.org/article/what-long-term-impact-incarcerating-juveniles [https://perma.cc/7C9Y-H7FA]; Dev. Serv's. Grp., Inc., *Intersection Between Mental Health and the Juvenile Justice System*, OFF. JUV. JUST. & DELINQ. PREVENTION (2017), https://www.ojjdp.gov/mpg/litreviews/Intersection-Mental-Health-Juvenile-Justice.pdf [https://perma.cc/7NLS-URZQ].

[139] ALISON M. SMITH, CONG. RESEARCH SERV., LSB10123, THIRD CIRCUIT INVALIDATES DE FACTO LIFE SENTENCES FOR "NON-INCORRIGIBLE" JUVENILE OFFENDERS 3 (2018).

Ultimately, the confusion lies in whether *Miller* should be applied in a narrow way, only to those specifically sentenced to LWOP, or if *Miller* should be applied in a broad way, to encompass all juvenile offenders sentenced to life in prison.[140] The Court must address the confusion for the maintenance of justice within the court system to avoid arbitrary and unpredictable punishments.[141] Currently, the different approaches create opposing outcomes for similar cases with similar facts. In applying the plain meaning approach, the court would likely determine that individualized standards mean holding the juvenile offenders to a different standard when their crimes reflect transient immaturity.[142] This approach weighs such transient immaturity and the ability to be rehabilitated most heavily, which trickles down to any sentence that would disproportionately reflect the individualized standard. Therefore, the Third Circuit, which applies the plain meaning approach to *Miller*, is very likely to find that it should extend to de facto LWOP for juveniles.[143] Conversely, applying the formalistic approach focuses on the narrow and rigid aspects of the law.[144] A court using this approach is likely to hold the severity of one's crimes at a greater weight than any other factor, especially the ability of juveniles to be rehabilitated.[145] The Eighth Circuit analyzes *Miller* with the formalistic approach, which therefore greatly narrows its holding.

The differing holdings in *Grant* and *Jefferson* demonstrate the issue with having a circuit split on the interpretation of *Miller*.[146] Both offenders were serving prison sentences for committing crimes such as murder and drug possession in the late-1980s and early-1990s when they were teenage boys involved in gangs.[147] Both offenders came from similar backgrounds and ultimately joined violent gangs and participated in crimes associated with those groups.[148] The Third and Eighth Circuits, however, handled the similar sets of facts with the conflicting approaches, which resulted in opposite outcomes. Grant had part of his new sentence vacated and remanded for a new sentence consistent with the plain meaning of *Miller*;[149] Jefferson did not

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[140] *See* Hoesterey, *supra* note 62, at 183.

[141] *Id.* at 179.

[142] *See* United States v. Grant, 887 F.3d 131, 143 (3d Cir.), *reh'g granted en banc, opinion vacated*, 905 F.3d 285 (3d Cir. 2018); *supra* Section II.A.

[143] *See* Miller v. Alabama, 567 U.S. 460, 477 (2012).

[144] *See supra* Section II.B.

[145] *See* United States v. Jefferson, 816 F.3d 1016, 1021 (8th Cir. 2016) ("[T]he district court properly gave significant weight to the extreme severity of Jefferson's crimes . . . .").

[146] *See Grant*, 887 F.3d at 135; *Jefferson*, 816 F.3d at 1018.

[147] *See Grant*, 887 F.3d at 136; *Jefferson*, 816 F.3d at 1017.

[148] *See Grant*, 887 F.3d at 136; *Jefferson*, 816 F.3d at 1017.

[149] *See Grant*, 887 F.3d at 155.

have as lucky of an outcome, as the court held that *Miller* provided him with enough justice under the law to receive a resentencing hearing, resulting in Jefferson spending another 600 months in prison.[150] It is incredibly problematic that *Miller* should allow for two men with similar backgrounds, crimes, and stories to spend a different number of years of their lives in prison.

III. STATE ACTION TO ADDRESS YOUTH SENTENCING

A. State Action in the Third Circuit

The last decade of Supreme Court jurisprudence on LWOP has led to inconsistency as courts consider the sentencing of juveniles throughout the country. Several states within the Third Circuit have taken actions to ban juvenile LWOP completely, while others have taken smaller steps to reducing the possibility of resentencing a lifer to a de facto LWOP sentence, yet not banning it all together. Therefore, despite residing in the same circuit, a juvenile in New Jersey, for example, faces different sentencing consequences than a juvenile in Pennsylvania.

New Jersey: A Strong Ban on Juvenile LWOP

In 2017, New Jersey eliminated all juvenile LWOP by passing legislation that requires a sentence for juveniles convicted of murder to be: "(1) a term of [thirty] years, during which the juvenile is not eligible for parole; or (2) a specific term of years that shall be between [thirty] years and life imprisonment, of which the juvenile shall serve [thirty] years before being eligible for parole."[151] This legislation has limited the possibility for a juvenile to spend life in prison through LWOP or de facto LWOP.[152] After thirty years, the juvenile is either released from prison or made eligible for a parole hearing.[153] This law inevitably had a major impact on the decision in *Grant*.[154] Therefore, given state legislation and the holding in *Grant*, juvenile offenders and current lifers are unlikely to be sentenced to de facto LWOP in New Jersey.

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[150] *See Jefferson*, 816 F.3d at 1019.

[151] *New Jersey*, JUV. SENT'G PROJECT (2018), https://juvenilesentencingproject.org/new-jersey/ [https://perma.cc/89VF-AHGV]; *see* N.J.S.A. § 2C:11-3(b)(1).

[152] *See* N.J. REV. STAT. § 2C:11-3.

[153] *See* JUV. SENT'G PROJECT, *supra* note 151.

[154] *See Grant*, 887 F.3d at 141–42 (citing N.J. REV. STAT. § 2C:11-3(b)(5)).

Delaware: A Moderate View

Following *Miller*, Delaware lawmakers revised the state's sentencing laws to allow any juvenile offender sentenced to life in prison for an offense other than first degree murder, to be eligible for sentence modification after twenty-five years.[155] Further, the bill provides a sentencing judge discretion to allow a juvenile who is convicted of first degree murder and sentenced to life to seek sentence modification after thirty-five years.[156] Most importantly, it permits the sentencing court to order that multiple terms of incarceration imposed on a person for crimes committed, while they were under the age of eighteen, to be served concurrently to avoid de facto LWOP.[157]

Pennsylvania: A Mixed Bag

Pennsylvania has had a more difficult time with consistency in juvenile sentencing. After *Miller*, "[w]hen the juvenile lifer resentencing process began, Pennsylvania had the largest number of individuals who were juveniles at the time they committed their crimes and were later sentenced to life without parole."[158] Today, juvenile LWOP remains a discretionary option for juveniles convicted of murder, and any life sentence given to juveniles excludes the possibility of parole.[159] Although this legislation seems disheartening for juvenile offenders, every lifer may file a petition to be resentenced and, if a sentence is modified, they may be considered for parole as required by state law.[160] The Pennsylvania General Assembly enacted legislation for convictions after June 24, 2012 that states:[161]

For a 1st degree murder conviction		For a 2nd degree murder conviction	
Age 15 to 17	Minimum of 35 years to life	Age 15 to 17	Minimum of 30 years to life
Age 15 or younger	Minimum of 25 years to life	Age 15 or younger	Minimum of 20 years to life

155 An Act to Amend Title 11 of the Delaware Code Relating to Criminal Sentences, S.B. 09, 147th Gen. Assemb. (Jan. 24, 2013), https://legis.delaware.gov/BillDetail/22426 [https://perma.cc/6J5T-E57A].

156 S.B. 09.

157 *Id.*

158 PA. BD. OF PROB. & PAROLE, "JUVENILE LIFERS": FROM RE-SENTENCING TO REENTRY, at 1 (2008), https://www.pbpp.pa.gov/Information/publications/Documents/Juvenile%20Lifers%20Fact%20Sheet%20FINAL%20with%20quotes.pdf [https://perma.cc/8T3N-9HL6] [hereinafter "JUVENILE LIFERS"]. Further, as of 2013, Pennsylvania still had a greater number of lifers who were actively serving juvenile LWOP sentences (444) than any other state. *See* Alesa Liles & Stacy C. Moak, *Changing Juvenile Justice Policy in Response to the US Supreme Court: Implementing* Miller v. Alabama, 15 YOUTH JUST. 76, 85 (2015).

159 "JUVENILE LIFERS," *supra* note 158, at 1.

160 *Id.*

161 18 PA. CONS. STAT. § 1102.1; *see also* "JUVENILE LIFERS," *supra* note 158, at 1.

Although LWOP for juveniles might still be an option, this new law shows the potential for Pennsylvania to end juvenile LWOP in the future.[162]

B. State Action in the Eighth Circuit

Like the Third Circuit, the states within the Eighth Circuit have been inconsistent. Overall, these state legislatures have enacted more polarizing and conflicting laws than the states in the Third Circuit. Some states have banned LWOP all together, while others have taken an extremely lenient approach to sentencing legislation. Therefore, a juvenile could again spend drastically different lengths of time in prison for similar crimes, even within the same circuit, simply because of the state in which they committed the crime.

Minnesota: Confusion and Judicial Discretion

Since *Miller*, seven of the eight lifers were resentenced to allow for an opportunity for release after serving thirty years of their sentence.[163] The Minnesota first degree murder statute,[164] however, continues to permit a life sentence at the discretion of the judiciary.[165] Members from both sides of the aisle are pushing for a bill to address the confusion.[166] Minnesota is one of few states that has not outwardly conformed to the majority of state legislation around the country.[167] It is likely that the fact that juvenile LWOP and by extension, de facto LWOP, is not prohibited in the state of Minnesota impacted the court's decision in *Jefferson* to allow the resentencing court to give Jefferson an additional 600 months.[168]

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[162] *See A State by State Look at Juvenile Life Without Parole*, ASSOCIATED PRESS (July 31, 2017), https://apnews.com/9debc3bdc7034ad2a68e62911fba0d85 [https://perma.cc/2R95-DEV4].

[163] Mike Cook, *Should Life Without Parole Be a Sentence for the Most Heinous Juvenile Offenders?*, MINN. LEGIS. (Feb. 28, 2018), https://www.house.leg.state.mn.us/SessionDaily/Story/13030 [https://perma.cc/2VJR-JWQF].

[164] MINN. STAT. § 609.185.

[165] Cook, *supra* note 163.

[166] *Id.*

[167] "Twenty-one states have never had life without parole for juveniles, [thirteen] have a discretionary form of life without parole for juveniles and eight have changed laws to include factors from the *Miller* case. There was no discussion of a penalty for failure to comply or a deadline." *Id.* (emphasis added).

[168] United States v. Jefferson, 816 F.3d 1016, 1018 (8th Cir. 2016).

Missouri: Poor Implementation

In 2016, the Missouri legislature passed a law that allows juvenile offenders to seek parole in front of a review board after serving twenty-five years of their sentence, which would avoid both LWOP and de facto LWOP.[169] The application of this law, however, has been inconsistent and nearly nonexistent.[170] A district court judge held in October 2018 that a number of the Missouri parole board's policies, practices, and customs have deprived "meaningful and realistic opportunity to secure release upon demonstrated maturity and rehabilitation."[171] The judge ordered the state to fix the policies within sixty days to allow for juvenile offenders to have a realistic opportunity in front of a parole board to prove they are worthy of parole.[172]

Arkansas: A Moderate Law

In Arkansas, the legislature passed the Fair Sentencing of Minors Act (FSMA) in 2017,[173] which allowed prisoners sentenced as juveniles to become eligible for parole after twenty-five years for first degree murder and thirty years for capital murder.[174] The FSMA meant that "[o]ffenders re-sentenced under the law would still be given life terms, and it would be up to the Parole Board to approve the release of the inmates."[175] Although the FSMA had bipartisan support for protecting juvenile offenders, inmates did not favor it because prior to the introduction of this Act, inmates charged with murder were able to go before a judge to seek new

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[169] *See* MO. REV. STAT. § 558.047.

[170] *See* Robert Patrick, *Missouri Violated Rights of Inmates Convicted as Juveniles Who Are Serving Life Without Parole, Judge Says*, STL. TODAY (Oct. 14, 2018), https://www.stltoday.com/news/local/crime-and-courts/missouri-violated-rights-of-inmates-convicted-as-juveniles-who-are/article_5f507dc8-0442-5319-8269-aa645fab0a38.html [https://perma.cc/5W6P-ZWN8].

[171] *Id.*

[172] *Id.*

[173] S.B. 294, 91st Gen. Assemb. Reg. Sess. (Ark. 2017).

[174] John Moritz, *High Court Rules on Youth Terms*, ARK. DEMOCRAT GAZETTE (Sept. 22, 2017), https://www.arkansasonline.com/news/2017/sep/22/high-court-rules-on-youth-terms-2017092-1/ [https://perma.cc/88DB-334D].

[175] *Id.*

> The Parole Board shall ensure that a hearing to consider the parole eligibility of a person who was a minor at the time of the offense that was committed before, on, or after March 20, 2017, takes into account how a minor offender is different from an adult offender and provides a person who was a minor at the time of the offense that was committed before, on, or after March 20, 2017, with a meaningful opportunity to be released on parole based on demonstrated maturity and rehabilitation.

ARK. CODE ANN. § 16-93-621.

sentences for ten to forty years or life with parole.[176] Before the FSMA, inmates also had the possibility to receive time off for good behavior; therefore, inmates previously had a greater chance to serve less time than they would in the best possible outcome under the FSMA.[177] In May 2018, the Arkansas Supreme Court noted that "[t]he emergency clause of the FSMA states that . . . under the *Miller* and *Montgomery* decisions . . . the [FSMA] is immediately necessary in order to make [juvenile offenders] eligible for parole."[178] The Arkansas Supreme Court approved judges in the state's largest county to hear resentencing hearings for juvenile offenders, which ultimately could set the course of consistency for state courts in applying the FSMA.[179] This ruling helps avoid all de facto LWOP for juvenile offenders.

Iowa: A Recent Total Ban

Following the lead of *Miller*, the Iowa General Assembly enacted Iowa Code Sections 902.1(2) and (3) in 2015 that said a juvenile who committed murder in the first degree shall be sentenced to: "1) life with no possibility of parole unless the Governor commutes the sentence; 2) life with the possibility of parole after serving a minimum term of confinement determined by the court; or 3) life with the possibility of parole."[180] A juvenile who commits any felony other than first degree murder shall be sentenced to "1) life with the possibility of parole after serving a minimum term of confinement determined by the court; or 2) life with the possibility of parole."[181] While this legislation eliminated mandatory LWOP for juveniles, it still gave the judiciary discretion to impose such sentences. Further, in 2018, using *Miller*, the Supreme Court of Iowa found Section 902.1(2)(a)(1) unconstitutional; therefore, the district court no longer has the option to sentence a juvenile offender convicted of first degree murder to LWOP.[182] The state remained silent, however, on de facto LWOP specifically.

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[176] Moritz, *supra* note 174.

[177] *Id.*

[178] Harris v. State, 547 S.W.3d 64, 68 (Ark. 2018) (internal quotation marks and citation omitted).

[179] *Arkansas Court OKs New Sentence Hearings for Juvenile Lifers*, THV11 (May 25, 2018), https://www.thv11.com/article/news/local/arkansas-court-oks-new-sentence-hearings-for-juvenile-lifers/91-558202885 [https://perma.cc/B9YE-FG8K].

[180] JOSEPH MCENIRY, LEGISLATIVE SERV'S AGENCY, LEGISLATIVE GUIDE, at 5 (Dec. 2015), https://www.legis.iowa.gov/docs/publications/LG/14969.pdf [https://perma.cc/V58T-F592]; *see* IOWA CODE § 902.1 (2), (3).

[181] MCENIRY, *supra* note 180, at 5; *see* IOWA CODE § 901.1(3)(a).

[182] *See* State v. Zarate, 908 N.W.2d 831, 836 (Iowa 2018).

Nebraska: Opportunities for Parole Exist

In 2013, Nebraska passed a law stating that juveniles who are convicted of the most serious crimes must serve forty years to life.[183] However, those juvenile offenders are eligible for parole after serving at least half of their minimum sentence.[184] This law requires the sentencing judges to consider the youth related mitigating factors laid out in *Miller,* such as age and intellectual capacity.[185] Further, "[i]t also requires the state parole board to review these inmates' cases once a year after they begin serving their sentences and consider similar mitigating factors."[186] Therefore, juvenile offenders in Nebraska cannot spend life in prison without a review for parole, which effectively limits the possibility of de facto LWOP.

North Dakota: Not a Complete Ban, But Pretty Close

In April 2018, the North Dakota state legislature unanimously passed House Bill No. 1195.[187] "Under the new law, individuals sentenced as children to lengthy prison terms are entitled to have their sentences reviewed by judges after they have served [twenty] years."[188] Further, if the petition is rejected, the juvenile offender can reapply after an additional ten years.[189] An earlier version of this bill called for a total ban on juvenile LWOP, and to replace such sentencing with life with the possibility of parole; however, "that option meant that juveniles would still serve much longer than adults for their crimes, because 'life' would be calculated at their life expectancy, and they would be required to serve [eighty-five] percent of that time."[190] It is rare that a juvenile is sentenced to life in prison in North Dakota and the state has focused on "balanc[ing] the need to hold [juveniles] accountable for harm they've caused and tak[ing] into account their age and unique characteristics."[191]

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[183] *A State by State Look at Juvenile Life Without Parole*, *supra* note 162.

[184] *Id.*

[185] *Id.*; *see* NEB. REV. STAT. ANN. § 29-2204.

[186] *A State by State Look at Juvenile Life Without Parole*, *supra* note 162.

[187] *See* H.B. 1195, 116th Cong., 1st Sess. (N.D. 2018); *North Dakota Abolishes Juvenile Life-Without-Parole Sentences*, EQUAL JUST. INST. (Apr. 21, 2017), https://eji.org/news/north-dakota-abolishes-juvenile-life-without-parole-sentences [https://perma.cc/Y3CW-M6BJ].

[188] *North Dakota Abolishes Juvenile Life-Without-Parole Sentences*, *supra* note 187.

[189] Caroline Grueskin, *New ND Law Makes All Juveniles Eligible for Release from Prison*, GRAND FORKS HERALD (Apr. 20, 2017), https://www.grandforksherald.com/news/4254307-new-nd-law-makes-all-juveniles-eligible-release-prison [https://perma.cc/WQ8R-CBQA]; *see* H.B. 1195, 116th Cong., 1st Sess. (N.D. 2018).

[190] Grueskin, *supra* note 189.

[191] *Id.*

South Dakota: A Complete Ban on LWOP

Following *Miller*, in 2013, the South Dakota legislature passed the Attorney General's sponsored legislation to authorize, but not mandate, LWOP for a juvenile offender if they are convicted of a high-level felony.[192] However, in 2016, South Dakota eliminated juvenile LWOP by amending SDCL Section 22-6-1 and enacting SDCL Section 22-6-1.3.[193] The new Section 22-6-1.3 states that, "[t]he penalty of life imprisonment may not be imposed upon any defendant for any offense committed when the defendant was less than eighteen years of age."[194] The amended Section 22-6-1 provides that, "[i]f the defendant is under the age of eighteen years at the time of the offense and found guilty of a Class A, B, or C felony, the maximum sentence may be a term of years in the state penitentiary."[195] The law, however, remained silent on the possibility that such term of years sentences could equate to de facto LWOP. Before these reforms took place, South Dakota held one of the highest juvenile incarceration rates; however, that number has steadily declined and is currently lower than ever.[196]

IV. REMEDYING THE INCREASING SPLIT

A. Congressional Inaction

In 1984, Congress responded to a widespread call for reform of federal sentencing by enacting the Sentencing Reform Act (SRA).[197] The goals of this act were to achieve honesty, uniformity, and proportionality within the realm of sentencing and it abolished discretionary release on parole.[198] The federal sentencing guidelines of the SRA went into effect in 1987 with agreement on both sides of the political aisle that "the structured

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[192] Danielle Ferguson, *200-Year Sentence for Juvenile Upheld as Constitutional*, ARGUS LEADER (Apr. 21, 2017), https://www.argusleader.com/story/news/crime/2017/04/21/200-year-sentence-juvenile-upheld-constitutional/100739086/ [https://perma.cc/PZY3-6KGJ].

[193] *See* S.B. 140, 91st Sess., Legis. Assemb. (S.D. 2016); S.D. CODIFIED LAWS § 22-6-1; *South Dakota*, JUV. SENT'G PROJECT (2019), https://juvenilesentencingproject.org/south-dakota-sb140/ [https://perma.cc/9LS3-QTZS].

[194] S.D. CODIFIED LAWS § 22-6-1.3.

[195] S.D. CODIFIED LAWS § 22-6-1.

[196] Mark Walker, *South Dakota's Juvenile Justice Reforms Led to Fewer Children Sentenced*, ARGUS LEADER (Sept. 4, 2017), https://www.argusleader.com/story/news/2017/09/04/after-reforms-fewer-kids-sentenced-incarceration-after-conviction-south-dakota-juvenile-justice/598347001/ [https://perma.cc/22SP-LQ35].

[197] Amy L. Anderson & Cassia Spohn, *Lawlessness in the Federal Sentencing Process: A Test for Uniformity and Consistency in Sentence Outcomes*, 27 JUST. Q. 362, 363 (2010); *see* Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987.

[198] Anderson & Spohn, *supra* note 197, at 363.

sentencing reforms were designed to curb discretion and reduce unwarranted disparity."[199] The SRA seemed to suggest a relatively neutral solution to a growing problem of sentencing issues in the country.[200]

Today, the failure of both state legislatures and federal courts to uniformly apply *Miller*, combined with Congress's inaction, has only escalated the detrimental effects of this confusion.[201] In 2015, the House of Representatives introduced a resolution titled "Expressing the need to eliminate life without parole for children."[202] However, Congress merely introduced the bill before it was referred to the Subcommittee on Crime, Terrorism, Homeland Security, and Investigations, where no further action has since been taken.[203] In 2009, Congress entertained the idea of mandating states to require that juveniles have the opportunity to parole hearings along with a proposal of the Juvenile Justice Accountability and Improvement Act of 2009 (JJAIA).[204] JJAIA suggested the use of Congress's Spending Power[205] "to condition federal funds allocated for crime control on states' creation of meaningful parole or supervised release

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[199] *Id.*

[200] The SRA created the United States Sentencing Commission whose goal is to

> 1. establish sentencing policies and practices for the Federal criminal justice system that assure the meeting of the purposes of sentencing;
>
> 2. provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records that have been found guilty of similar criminal conduct; and
>
> 3. reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.

Sentencing Reform Act and Legal Definition, U.S. LEGAL, https://definitions.uslegal.com/s/sentencing-reform-act/ [https://perma.cc/YS2E-B3N5].

[201] *See* Perry L. Moriearty, *The Trilogy and Beyond*, 62 S.D. L. REV. 539, 540–41 (2017) ("[S]ome state legislatures have readily incorporated [the Supreme Court's] developmental framework into their juvenile life without parole sentencing schemes, while others have yet to take any action at all. The net effect is 'an incoherent patchwork' of responses to *Graham* and *Miller* in some states, alongside the rapid rejection of juvenile life without parole as a punishment in others." (footnotes omitted)).

[202] Expressing the Need to Eliminate Life Without Parole for Children, H.R. Res. 382, 114th Cong. (2015).

[203] Expressing the Need to Eliminate Life Without Parole for Children, H.R. Res. 250, 115th Cong. (2017).

[204] Scott R. Hechinger, *Juvenile Life Without Parole: An Antidote to Congress's One-Way Criminal Law Ratchet?*, 35 N.Y.U. REV. L. & SOC. CHANGE 408, 413 (2011); *see* Juvenile Justice Accountability and Improvement Act, H.R. 2289, 111th Cong. (2009).

[205] *Spending Power*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/spending_power [https://perma.cc/Q47K-WBCY] ("Under Article I, Section 8, Clause 1 of the Constitution, Congress is granted the power to lay and collect taxes in order to pay the Debts and provide for the common Defense and General Welfare of the United States. As required by *United States v. Butler*, 297 U.S. 1 (1936), Congress must exercise its power to tax and spend for the general welfare." (emphasis added) (internal quotation marks omitted)).

opportunities for individuals convicted of crimes they committed before the age of eighteen."[206] Members of the House of Representatives introduced this version of JJAIA in 2007, 2009, and again in 2011, but no versions ever made it out of the introductory stages.[207]

In December 2018, Congress and the President signed a revised version of JJAIA, under a larger bill, the Juvenile Justice and Delinquency Prevention Act (JJDPA).[208] However, the Act is unspecific, merely promising to evaluate the impact and outcomes that prosecution has on juveniles in the criminal justice system.[209] Although the signing of this Act is a positive step for the treatment of juveniles in federal prisons, the unspecific nature and broad accountability would fail to provide any prevention of de facto life sentences for juvenile offenders.[210] Similarly, Congress signed the First Step Act in December 2018, which also focused on prison reform, but failed to specifically protect juveniles sentenced to LWOP in the federal prison system.[211] Until Congress passes a bill directly banning juvenile LWOP and de facto LWOP in federal prisons, children around the country may still find themselves spending their entire life in prison.

Congress has continuously introduced bills expressing contempt with juvenile LWOP sentencing, which demonstrates the legislature's ongoing desire to improve the treatment of juvenile offenders. However, Congress has not taken a clear stance on juvenile LWOP, which has led to inconsistencies in federal application and thus, state application. Although Congress could only enact sentencing guidelines and restrictions for those convicted of federal crimes, it is possible that Congress's input would provide a template for states and give advocates additional leverage to challenge state sentences. Further, states

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[206] Hechinger, *supra* note 204, at 413.

[207] The JJAIA was introduced in the House of Representatives and was referred to the House Committee on the Judiciary and then referred to the Subcommittee on Crime, Terrorism, and Homeland Security where it remained untouched. *See id.*; Juvenile Justice Accountability and Improvement Act of 2011, H.R. 3305, 112th Cong.

[208] Juvenile Justice Reform Act of 2018, H.R. 6964, 115th Cong.

[209] *See* Juvenile Justice Reform Act of 2018, H.R. 6964, 115th Cong. § 207.

[210] "The JJDPA sets core safety standards for juvenile offenders that states must follow in order to qualify for federal grants. It also aims to prevent delinquency and curb racial and ethnic disparities in juvenile justice systems." Lacey Johnson, *JJPDA Reauthorization Passes Congress After 16 Years*, JUV. JUST. INFO. EXCHANGE (Dec. 18, 2018), https://jjie.org/2018/12/13/jjdpa-reauthorization-passes-congress-after-16-years/ [https://perma.cc/MWP5-BGXY].

[211] First Step Act of 2018, PL 115-391, Dec. 21, 2018, 132 Stat 5194. *See* Angelina Chapin, *Crime Bill Would Not Prevent Kids from Being Sentenced to Die in Prison, Advocates Say*, HUFFPOST (Dec. 7, 2018), https://www.huffingtonpost.com/entry/first-step-act-juvenile-sentence-life-without-parole_us_5c097d8fe4b04046345a4049 [https://perma.cc/6LWD-6S63].

are scattered in their approach to juvenile sentencing and any base-level sentence Congress indicated would be beneficial.[212]

B. The United States Stands Alone

The international community has continuously rejected juvenile LWOP but has remained silent on de facto LWOP specifically. The Convention on the Rights of the Child expressly prohibits juvenile LWOP[213] and has been ratified by every country in the world except the United States.[214] Even after *Miller*, the United States is the only country in the world that still sentences juveniles to LWOP.[215] Although "a 2012 study identified nine countries . . . whose laws could potentially allow for a [juvenile] LWOP sentence," none have imposed such a sentence outside of the United States.[216]

Although its view of LWOP is clear, the international community has not spoken directly about de facto LWOP. However, in 2013, the Human Rights Advocates, Inc.[217] submitted a written statement to the UN Secretary-General that discussed violations of international standards.[218] Specifically, the statement addressed how countries issue consecutive sentences, which can result in individuals across the world serving de facto LWOP through decades-long stacked sentences.[219] It found that

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[212] *See supra* Sections III.A, B.

[213] Such sentences also violate:

> International Covenant on Civil and Political Rights[;] United Nations Standard Minimum Rules for the Administration of Juvenile Justice[;] United Nations Guidelines for the Prevention of Juvenile Delinquency[;] United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment[;] American Declaration of the Rights of Duties of Man[; and] Inter-American Convention to Prevent and Punish Torture[.]

Position Statement 58: Life Without Parole for Juvenile Offenders, MENTAL HEALTH AM., http://www.mentalhealthamerica.net/positions/life-without-parole-juveniles#_ftn1 [https://perma.cc/UE4H-MUSV].

[214] Sarah Mehta, *There's Only One Country that Hasn't Ratified the Convention on Children's Rights*: *US*, ACLU (Nov. 20, 2015), https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens [https://perma.cc/K3PF-KS78].

[215] Connie De Le Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 985 (2008).

[216] COLUMBIA LAW SCH., HUMAN RIGHTS INST., CHALLENGING JUVENILE LIFE WITHOUT PAROLE: HOW HAS HUMAN RIGHTS MADE A DIFFERENCE?, at 2 (2014), https://www.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/jlwop_case_study_hri_0.pdf [https://perma.cc/8ELS-DQDY].

[217] This is a non-governmental organization in special consultative status. Written Statement from Human Rights Advocates Inc. to U.N. Secretary-General, U.N. Doc. A/HRC/22/NGO/53 (Feb. 14, 2013), https://digitallibrary.un.org/record/743851/files/A_HRC_22_NGO_53-EN.pdf [https://perma.cc/LN3Y-975E].

[218] *Id.* at 2.

[219] *Id.* at 3.

"the United States is among only [thirty-six] countries ([twenty-one percent]) that continue to allow concurrent sentencing without any cap."[220] In contrast to the United States, the International Criminal Court judges must impose separate sentences for each crime, and "[t]he maximum sentence must be no less than the highest individual sentence pronounced and is capped at either [thirty] years or life imprisonment, which is itself reviewable after [twenty-five] years."[221]

The United States has remained hesitant to follow the international custom of preventing life sentences through consecutive sentences for juveniles. A major step in resolving the inconsistency among states and circuits in the United States is to follow suit with the other major international governing bodies. The United States, through both the Supreme Court and Congress, ought to create a remedy to reduce the ability of the judiciary to sentence juvenile offenders to de facto LWOP.[222]

C. Calling on the Supreme Court

Given that courts continue to apply *Miller* inconsistently, at the next opportunity, the Supreme Court should grant certiorari to ensure the consistent treatment of juvenile offenders across the country.[223] The circuit split was a result of the Supreme Court's

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[220] *Id.* The research found that:

> Seventy-nine countries in the world do not have consecutive sentences or mandate that the lesser offenses must merge with the most serious offense when both are a part of the same act. Forty-four other countries cap the length of time allowed for consecutive sentences; while some countries, like North Korea, have a general cap on all consecutive sentences, and others, like Finland, have a cap for some offenses, but no cap for grave offenses or violent crimes. Eleven others, among them Sweden, Iceland and Hungary, issue only one sentence by enhancing the greatest underlying offense by a mandatory but capped certain number of years or percentage.

Id. (footnotes omitted). It is important to note that this is the most updated set of data that has been published since 2013.

[221] SOO-RYUN KWON ET AL., UNIV. S.F. SCH. OF LAW, CRUEL AND UNUSUAL: U. S. SENTENCING PRACTICES IN A GLOBAL CONTEXT, at 40 (2012). Although the power of the International Criminal Court judges is referring to LWOP for general offenders, it can be assumed that if this court prevents LWOP for adults, it is even more likely to take precautions against juvenile LWOP.

[222] *See Juvenile Life Without Parole (JLWOP)*, JUV. L. CTR., https://jlc.org/issues/juvenile-life-without-parole [https://perma.cc/9CDT-VTB7] ("It is far more expensive to lock individuals up for life than to invest in our schools and our communities. These sentencing practices don't make us safer, and they deny youth who have demonstrated growth and maturity the chance to rejoin their families and communities[ ] and contribute to those communities in meaningful and productive ways.")

[223] In March of 2019, the Supreme Court decided to hear *Mathena v. Malvo*, to decide whether Lee Malvo, who participated in the infamous Washington, D.C. sniper shootings when he was seventeen, was unconstitutionally sentenced to life in prison without parole. Although this case is crucial for juvenile rights in the United States, it is unlikely that

unspecific ruling about how to handle juvenile LWOP. It is crucial for the Supreme Court to be as specific as possible if they were to hear a case regarding de facto juvenile LWOP again. If the Court were not specific enough in its effort to remedy this issue, these inconsistencies would remain even if the Court blatantly held de facto LWOP to be unconstitutional. This is because if, for example, a court determines a male's life expectancy to be seventy-two years, the Eighth Circuit may sentence a juvenile to something just shy of those years.[224] In that way, an offender would practically spend their entire life in prison without being sentenced to de facto LWOP and therefore evade any constitutional violations. Judicial discretion is important; however, an excessive "subjective sentencing procedure will surely not enable a judge to reliably identify the rare incorrigible [offender]."[225] It is, perhaps, most important to narrowly decide a case that either completely bans or allows de facto LWOP for juvenile offenders.

D. A Suggested Solution: Congressional Limits on Sentencing

Due to the scattered views on juvenile sentencing across the states and the judiciary, it is crucial for Congress to have an input on the progression of this split to settle the debate and create a uniform application of *Miller* on the federal level. Allowing discretion to the judges is a positive contribution since most cases depend on the facts at hand in each case. The best solution for Congress, however, is to lay out a rule that completely bans de facto LWOP, yet still allows judges to have some discretion in sentencing. As such, a judge could choose the appropriate amount of years for each offender.

Ideally, there would be a maximum of twenty years and then the juvenile would have a resentencing hearing. The new sentence given would not exceed an additional fifteen years. Therefore, if a court sentenced an offender at seventeen years old, the maximum amount of time they would spend in prison would be thirty-five years, making them fifty-two years old when they are able to leave prison. This way, the most dangerous juvenile offenders would have the opportunity to spend a substantial

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the Court will extend its ruling to discuss de facto LWOP without being specifically requested. *See* Adam Liptak, *Supreme Court Will Hear Case of Lee Malvo, the D.C. Sniper*, N.Y. TIMES (Mar. 18, 2019), https://www.nytimes.com/2019/03/18/us/politics/lee-malvo-supreme-court.html [https://perma.cc/4TMJ-5NG6]. At the time of publication, there are no cases pending to the Court specifically addressing de facto LWOP.

[224] *See* Mark T. Freeman, *Meaningless Opportunities:* Graham v. Florida *and the Reality of de Facto LWOP Sentences*, 44 MCGEORGE L. REV. 961, 982–83 (2014).

[225] Hoesterey, *supra* note 62, at 183.

amount of time in prison and be properly rehabilitated, as *Miller* initially intended with its language. At the same time judges would maintain discretion and determine, based on the crime, how long a juvenile offender should spend in prison under the limitations given. This note proposes adding a paragraph to the current 18 U.S.C. § 5032 statute,[226] which would authorize the courts to reduce the terms of imprisonment imposed on defendants convicted as adults for offenses committed before defendants have reached eighteen years of age. The new paragraph would look as follows:

> Regarding the sentencing of defendants convicted for crimes committed prior to attaining eighteen years of age: (1) a juvenile sentenced to more than twenty years in prison for an act committed prior to their eighteenth birthday shall have the opportunity to have a resentencing hearing after spending twenty years in prison, and (2) such resentencing hearing shall not commit the offender to more than fifteen additional years in prison.

While many prominent criminal justice reform scholars and advocacy organizations have begun to call for a reduction, and even abolition, of youth incarceration, this note provides a meaningful step forward to ensure that youth sentencing is conducted in a uniform and just manner while simultaneously ensuring those who have committed crimes are held accountable.[227] A utilitarian calculus of these reform models, including widespread reduction or abolition, exposes considerable issues in today's society; indeed, there is a "logic behind deterrence . . . [that] is firmly rooted in the utilitarian calculus that to deter the rational offender requires the pain of imprisonment to outweigh the pleasure derived from crime."[228] Further, it is understood that "[c]rime governance thrives when we are able to imagine we have addressed interpersonal violence, theft, and other problems by depositing certain people in prison."[229] To be most effective, prisons must be regulated properly

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[226] Delinquency proceedings in district courts; transfer for criminal prosecution, 18 U.S.C. § 5032 (2012).

[227] For further analysis on these scholars and advocacy organizations, see generally *Youth Incarceration*, ACLU, https://www.aclu.org/issues/juvenile-justice/youth-incarceration [https://perma.cc/MDN8-FYHZ]; Lindsay Rosenthal, *The Initiative to End Girls' Incarceration*, VERA INST. JUST., https://www.vera.org/projects/the-initiative-to-end-girls-incarceration/learn-more [https://perma.cc/8WRH-WMXH]; *Reducing Youth Incarceration*, ANNIE E. CASEY FOUND., https://www.aecf.org/work/juvenile-justice/reducing-youth-incarceration/ [https://perma.cc/WN93-NX95].

[228] Ruairí Arrieta-Kenna, *'Abolish Prisons' Is the New 'Abolish ICE'*, POLITICO MAG. (Aug. 15. 2018), https://www.politico.com/magazine/story/2018/08/15/abolish-prisons-is-the-new-abolish-ice-219361 [https://perma.cc/2MGS-79Q5] (internal quotation marks omitted) (quoting criminologist David Scott).

[229] Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1211 (2015).

to achieve its rehabilitative nature. Therefore, this proposed law would adhere to a utilitarian calculus and would comply with *Miller* by requiring an opportunity for release while considering youth-related factors to mitigate; yet still allow for initial judicial discretion and reasonable punishment for crimes. With such a law, juvenile offenders could serve time for the crimes they committed, while simultaneously allowing offenders to be free of crimes they committed while they were young and immature. Ultimately, boundaries on discretion are important in order to maintain consistency in juvenile sentencing and ensure fair treatment among similarly situated offenders. Such guidelines and restrictions from Congress would provide a template for states to create a uniform standard and give advocates additional leverage for challenging seemingly unconstitutional state and court standards.

CONCLUSION

When the Supreme Court decided in *Miller* that juvenile offenders deserved a chance for resentencing due to their ability to be rehabilitated, prison doors across the country far from flew open. There has been an ongoing battle among the circuits and the states about how to handle juvenile sentencing. As courts in the Third Circuit try to apply *Miller* through its plain meaning, juvenile offenders are likely to feel freedoms that others might never experience. At the same time, courts in the Eighth Circuit attempt to use their own interpretations of *Miller* through a formalistic approach, leaving juvenile offenders still spending their lives in prison for childhood crimes. A Congressional solution banning de facto LWOP altogether would be ideal in order to ensure fairness in the criminal justice system today. A solution is in sight, and together we must reach it for the sake of our future.

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