

A MEANINGFUL OPPORTUNITY TO OBTAIN RELEASE: A PRACTICAL IMPOSSIBILITY

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“There can be no keener revelation of a society’s soul than the way in which it treats its children.” — Nelson Mandela¹

I. BACKGROUND

In 2012, the Supreme Court held that mandatory sentences of life without parole for juveniles (“JLWOP”) violate the Eighth Amendment’s prohibition on cruel and unusual punishment.² The landmark case, *Miller v. Alabama*, echoed earlier decisions³ that recognized “a juvenile’s ‘lessened culpability’ and greater ‘capacity for change.’”⁴ While *Miller* did not categorically ban JLWOP, the ruling did require sentencing authorities to consider a juvenile offender’s youth and the “wealth of characteristics and circumstances attendant to it” before such a punishment could be imposed.⁵ In light of these considerations—or rather, the “mitigating qualities of youth”⁶—the Court stressed that a sentence of JLWOP should be an uncommon occurrence and reserved only for those “whose crime reflects irreparable

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1. *Speech by President Nelson Mandela at the Launch of the Nelson Mandela Children’s Fund*, AFR. NAT’L CONG. (May 8, 1995), <http://www.anc.org.za/content/speech-president-nelson-mandela-launch-nelson-mandela-childrens-fund>.

2. *Miller v. Alabama*, 567 U.S. 460, 465 (2012).

3. The two cases that paved the way for *Miller* are *Graham v. Florida* and *Roper v. Simmons*. *Graham v. Florida*, 560 U.S. 48, 74 (2010) (holding that sentencing non-homicide juvenile offenders to life without parole violates the Eighth Amendment); *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (invalidating the death penalty for all offenders under the age of eighteen).

4. *Miller*, 567 U.S. at 465 (quoting *Graham*, 560 U.S. at 68, 74).

5. *Id.* at 476.

6. *Id.* at 462 (quoting *Johnson v. Texas*, 509 U.S. 350, 367 (1993)).

corruption.”⁷ Essentially, for a juvenile’s sentence to pass constitutional muster, the hearing “must provide ‘some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.’”⁸ When *Miller* was decided, twenty-nine jurisdictions required JLWOP for some juveniles convicted of murder,⁹ and an estimated 2575 inmates were serving JLWOP sentences for a crime committed before they were eighteen years old.¹⁰

Three and a half years later, in *Montgomery v. Louisiana*,¹¹ the Supreme Court held that *Miller* applies retroactively; consequently, minors who were sentenced to JLWOP must be given some opportunity to have their sentences reconsidered in light of youth’s mitigating factors.¹² The Court reasoned, “*Miller*’s conclusion that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders raises a grave risk that many are being held in violation of the Constitution.”¹³ After *Miller*, retroactivity was just one of the many issues raised that states had to grapple with. However, the Court’s answer in *Montgomery* undoubtedly raised more questions than it answered. The greatest issue being how to implement the retroactive mandate for, as of a recent estimate, the approximately 2100 inmates currently serving JLWOP sentences.¹⁴

To be sure, *Montgomery* and its predecessors marked a significant shift in the Supreme Court’s Eighth Amendment jurisprudence regarding juveniles.¹⁵ A shift that, according to the Court, resulted from “the evolving standards of decency that mark

7. *Id.* at 479 (quoting *Roper*, 543 U.S. at 573).

8. *Id.* (quoting *Graham*, 560 U.S. at 50).

9. *Id.* at 462. Fifteen jurisdictions allowed discretionary JLWOP; eight jurisdictions had no form of JLWOP at all. *Id.* at 484.

10. ELIZABETH CALVIN ET AL., HUMAN RIGHTS WATCH, AGAINST ALL ODDS: PRISON CONDITIONS FOR YOUTH OFFENDERS SERVING LIFE WITHOUT PAROLE SENTENCES IN THE UNITED STATES I (2012), https://www.hrw.org/sites/default/files/reports/us0112ForUpload_1.pdf.

11. *Montgomery v. Louisiana*, 136 S. Ct. 718, 725 (2016).

12. *Id.* at 736.

13. *Id.*

14. JOSHUA ROVNER, THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW 3 (2017), <http://www.sentencingproject.org/publications/juvenile-life-without-parole>.

15. U.S. CONST. amend. VIII.

the progress of a maturing society.”¹⁶ Indeed, in *Miller*, the Court’s decisions relied in part on advances in science relating to developmental psychology and neuroscience that continue to show fundamental disparities between adult and juvenile minds to ultimately reach the proposition that “children are different.”¹⁷ However, the Court then notes that “history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults.”¹⁸ If children have long been regarded as different from adults, why has our criminal justice system continued to treat them the same; and what does that say about our evolving standards of decency or societal progress?

The notion that “children are different” is hardly a point worth arguing against, and yet our criminal justice system has failed to consistently apply that adage in youth sentencing. The need for juvenile justice reform, particularly concerning juvenile sentencing, is prompted by the fact that adolescence is uniquely marked by “transient rashness, proclivity for risk, and inability to assess consequences.”¹⁹ Of the Court’s four penological justifications for the imposition of a punishment—retribution, deterrence, incapacitation, and rehabilitation—JLWOP fails to accomplish a single one:

Because “[t]he heart of the retribution rational” relates to an offender’s blameworthiness, “the case for retribution is not as strong with a minor as with an adult.” . . . Nor [is] deterrence . . . because “the same characteristics that render juveniles less culpable than adults”—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. . . . Similarly, incapacitation . . . would require “mak[ing] a judgment that the juvenile is

16. *Miller v. Alabama*, 567 U.S. 460, 469–70 (2012) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)); *Graham v. Florida*, 560 U.S. 48, 58 (2010); *Roper v. Simmons*, 543 U.S. 551, 561 (2005); see also *Montgomery*, 136 S. Ct. at 742 (“[Obligating] federal (and after today) state habeas courts to invoke this Court’s Eighth Amendment ‘evolving standards of decency’ jurisprudence to upset punishments that were constitutional when imposed but are ‘cruel and unusual’ . . . in our newly enlightened society.” (citations omitted)).

17. *Miller*, 567 U.S. at 481.

18. *Id.* (quoting *J.D.B. v. North Carolina*, 546 U.S. 261, 262 (2011)).

19. *Id.* at 472.

incorrigible”—but “‘incorrigibility is inconsistent with youth.’” . . . And for the same reason [I]f without parole “forfeits altogether the rehabilitative ideal.” . . . It reflects “an irrevocable judgment about [an offender’s] value and place in society,” at odds with a child’s capacity for change.²⁰

So what, then, does sentencing a child as young as thirteen to die in prison accomplish beyond sending a message that they are irredeemable and that their lives are dispensable? What does this message and our treatment of children reveal about our society’s soul?²¹ According to several reports, the United States is the only developed nation that continues to allow JLWOP.²² Moreover, it is disheartening that the United States is the only member of the United Nations that has not ratified the Convention on the Rights of the Child, which expressly prohibits JLWOP.²³ None of this is intended to deride the substantial progress that has been made in juvenile justice in recent years, but it serves to point out how long it has taken to just get to this point concerning JLWOP and how much further the United States still has left to go.

With a focus on North Carolina, this comment examines what efforts states have undertaken to comply with *Miller* and

20. *Id.* at 472–73 (internal citations omitted) (quoting *Graham*, 560 U.S. at 71–74).

21. See *Speech by President Nelson Mandela*, *supra* note 1.

22. THE PHILLIPS BLACK PROJECT, JUVENILE LIFE WITHOUT PAROLE AFTER MILLER V. ALABAMA I (2015), <https://static1.squarespace.com/static/55bd511ce4b0830374d25948/t/55f9d0abe4b0ab5c061abe90/1442435243965/Juvenile+Life+Without+Parole+After+Miller++.pdf> (hereinafter THE PHILLIPS BLACK PROJECT) (“[T]he United States remains among a minority of nations that continues to sentence juveniles as young as thirteen to die in prison.”); ASHLEY NELLIS, SENTENCING PROJECT, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA 11 (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/Life-Goes-On.pdf> (“The United States is the only country in the world that imposes this sentence on youth.”); ALISON PARKER, AMNESTY INT’L & HUMAN RIGHTS WATCH, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 5 (2005), <https://www.hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf> (“Of the 154 countries for which Human Rights Watch was able to obtain data, only three currently have people serving life without parole for crimes they committed as children, and it appears that those three countries combined have only about a dozen such cases.”).

23. See Sarah Mehta, *There’s Only One Country that Hasn’t Ratified the Convention on Children’s Rights: US*, AM. CIV. LIBERTIES UNION (Nov. 20, 2015, 1:30 PM), <https://www.aclu.org/blog/human-rights/treaty-ratification/theres-only-one-country-hasnt-ratified-convention-childrens>.

whether the Supreme Court's mandate is being effectuated. While many states have taken great strides to eradicate the possibility of JLWOP, this comment argues that more guidance is needed from the Supreme Court before many of the inmates serving JLWOP sentences will have a "meaningful opportunity to obtain release."²⁴ North Carolina's current state of affairs is a testament to that.²⁵ This comment also argues that the Court's suggestion to simply commute JLWOP sentences to life *with* the possibility of parole creates a danger in which the two sentences may potentially differ "in name only,"²⁶ with the endgame of a sentence of life without parole remaining in effect.

Section II will focus on the questions *Miller* and *Montgomery* left unanswered and the general impact these decisions have had on the states. Section III will discuss North Carolina's criminal justice system and the state's legislative and judicial responses to *Miller*. In Section IV, North Carolina will be used as a model to analyze future implications of JLWOP sentences under the hazy directive of parole boards. Section V concludes this comment by exploring what needs to be done to help actualize the Supreme Court's mandate so that juvenile lifers are afforded a meaningful opportunity to obtain release.

II. JUVENILE LIFE WITHOUT PAROLE AFTER *MILLER* AND *MONTGOMERY*

A. Miller

In a broad sense, the Supreme Court's decision in *Miller* was an extension of a relatively new form of Eighth Amendment jurisprudence regarding juveniles, which established that "children are constitutionally different from adults for purposes of

24. *Miller*, 567 U.S. at 479 (quoting *Graham*, 560 U.S. at 75).

25. See *infra* Section IV.

26. In *Miller*, the Court reiterates its argument made in *Graham v. Florida*, which likened life without parole sentences imposed on juveniles to the death penalty because a juvenile will end up spending a significantly greater portion of their natural life in prison compared to an adult who received the same sentence. *Miller*, 567 U.S. at 475. The Court states, "The penalty when imposed on a teenager, as compared with an older person, is therefore 'the same . . . in name only.'" *Id.* (omission in original) (quoting *Graham*, 560 U.S. at 70). In borrowing *Graham's* language of "the same . . . in name only," I modify the phrase to instead highlight the practical similarities a sentence of life *with* parole might have to life *without* parole. *Graham*, 560 U.S. 48, 70 (2010); see *infra* Section II(C).

sentencing.”²⁷ This principle led to the Court’s holding that mandatory sentencing schemes which fail to differentiate between juvenile and adult homicide offenders run afoul of the Eighth Amendment’s prohibition on cruel and unusual punishment.²⁸ The unconstitutionality of JLWOP rests in the uncertainty that the mandatory punishment is proportionate to the crime committed.²⁹ As such, *Miller* requires sentencing authorities to consider the mitigating factors of youth before sentencing a child to JLWOP to differentiate between “the juvenile offender whose crime reflects unfortunate yet transient immaturity and the rare juvenile offender whose crime reflects irreparable corruption.”³⁰

Miller and its predecessors relied on three fundamental distinctions between juveniles and adults in reaching their holdings:

First, children have a “lack of maturity and an underdeveloped sense of responsibility,” leading to recklessness, impulsivity, and heedless risk-taking. Second, children “are more vulnerable . . . to negative influences and outside pressures,” . . . they have limited “contro[l] over their own environment” and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child’s character is not as “well formed” as an adult’s; his traits are “less fixed” and his actions less likely to be “evidence of irretrievabl[e] deprav[ity].”³¹

In light of these differences, the Court offered some guidance on what factors must be taken into account before the “imposition of a State’s most severe penalt[y] on juvenile offenders.”³² First and foremost, a sentencing hearing must consider the juveniles chronological age and “its hallmark features,” which include “immaturity, impetuosity, and failure to

27. *Miller*, 567 U.S. at 471; see also *Graham*, 560 U.S. at 66–67; *Roper v. Simmons*, 543 U.S. 551, 602–03 (2005) (O’Connor, J., dissenting).

28. *Miller*, 567 U.S. at 469–70.

29. See *id.* at 479–80.

30. *Id.*

31. *Id.* at 471 (citations omitted) (quoting *Roper*, 543 U.S. at 569–70).

32. *Id.* at 474.

appreciate risks and consequences.”³³ Next, the Court goes on to list several other factors that should always be taken into account in juvenile sentencing proceedings: (1) “the family and home environment”; (2) “the circumstances of the homicide offense, including the extent of [the juvenile’s] participation”; (3) the impact of “familial and peer pressures”; (4) the juvenile’s “inability to deal with police officers or prosecutors . . . or [the juvenile’s] incapacity to assist his [or her] own attorneys”; and (5) “the possibility of rehabilitation.”³⁴ While not foreclosing the possibility that a juvenile may still be sentenced to JLWOP after these factors are considered, the Court predicts that “appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon.”³⁵ In other words, the Court hoped that this ruling would substantially curtail JLWOP sentences.

B. Montgomery

In January 2016, the Supreme Court granted certiorari in *Montgomery v. Louisiana* to resolve the question of whether the holding in *Miller* applies retroactively to juvenile offenders whose sentences were final when *Miller* was decided.³⁶ The Supreme Court of Louisiana held that *Miller* did not have retroactive effect for cases on state collateral review.³⁷ *Miller*’s retroactivity hinged on whether the Court’s ruling created a new substantive rule, which the Constitution requires to be retroactive;³⁸ or if *Miller* created a procedural rule, which relates to the manner a defendant’s culpability is determined and is not required to apply retroactively.³⁹ In establishing that *Miller* did indeed announce a substantive rule of constitutional law—and therefore does apply

33. *Id.* at 477.

34. *Id.* at 477–78.

35. *Id.* at 479.

36. *Montgomery v. Louisiana*, 136 S. Ct. 718, 725 (2016).

37. *Id.* at 727. Collateral review is a separate action to challenge the lawfulness of imprisonment. *Id.* Louisiana “allows a prisoner to bring a collateral attack on his or her sentence by filing a motion to correct an illegal sentence.” *Id.* at 726.

38. *Id.* at 729 (“The Court now holds that when a new substantive rule of constitutional law controls the outcome of a case, the Constitution requires state collateral review courts to give retroactive effect to that rule.”).

39. *Id.* at 730 (“[W]here procedural error has infected a trial, a conviction or sentence may still be accurate and the defendant’s continued confinement may still be lawful . . . for this reason, a trial conducted under a procedure found unconstitutional in a later case does not automatically invalidate a defendant’s conviction or sentence.”).

retroactively⁴⁰—the Court revisited its analysis from three years earlier.⁴¹ In doing so, the Court found that *Miller* “did more than require a sentencer to consider a juvenile offender’s youth before imposing life without parole; it established that the penological justifications for life without parole collapse in light of ‘the distinctive attributes of youth.’”⁴²

To recap, *Miller* requires courts to consider whether a crime “reflects unfortunate yet transient immaturity” before sentencing a juvenile to JLWOP.⁴³ *Montgomery*, on the other hand, extended that requirement retroactively, and requires the similar but different question of whether a juvenile’s crime “*reflected* only transient immaturity.”⁴⁴ The question of *Miller*’s retroactive application was just one of many that lingered on after the Court’s 2012 opinion. While *Montgomery* answered the question of retroactivity, it raised many other questions, and states were largely left to their own devices when it came to answering them.

C. Questions Raised and a Brief Survey of State Responses

After declaring that *Miller* applies retroactively, the Court took it upon itself to offer some advice on how states may remedy potential *Miller* violations for the estimated 2575 individuals that were serving JLWOP sentences when the case was decided.⁴⁵ Rather than holding resentencing hearings for each of these offenders, the Court suggested that a state could simply allow those currently serving JLWOP sentences to be considered for

40. *Id.* at 731.

41. *See id.* at 733–34.

42. *Id.* at 734 (quoting *Miller v. Alabama*, 567 U.S. 460, 472 (2012)). It is worth noting that Louisiana made a salient argument that *Miller* was more procedural because, rather than categorically barring a punishment for all juvenile offenders, it only required that the sentencing authority follow a *process* to consider the mitigating factors of youth before imposing JLWOP. *Id.*; *see also id.* at 743–44 (Scalia, J., dissenting) (“All of the statements relied on by the majority do nothing more than express the *reason* why the new, youth-protective *procedure* prescribed by *Miller* is desirable . . .”). However, the Court countered that *Miller* is substantive because after the ruling, there was a significant risk that the vast majority of juvenile offenders now face a punishment that the law cannot impose on them. *Id.* at 734.

43. *Miller*, 567 U.S. at 479.

44. *Montgomery*, 136 S. Ct. at 736 (emphasis added).

45. *Miller*, 567 U.S. at 460; ELIZABETH CALVIN ET AL., *supra* note 10, at 1. The number of inmates currently incarcerated with JLWOP sentences is estimated to be around 2700. ROVNER, *supra* note 14, at 2.

parole.⁴⁶ Essentially, the Court is proposing that states commute all JLWOP sentences to life *with* parole sentences and let the parole boards decide whether an offender has demonstrated an ability to reform.⁴⁷ Beyond that loaded suggestion,⁴⁸ however, the Court left to the states “the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.”⁴⁹ This raised the issue of how states are to implement the Court’s mandate, and what law will be applied in future sentencing as well as resentencing for current juvenile lifers.⁵⁰ While judges generally have discretion when imposing sentences, they are still bound by statutory limits set by the legislature.⁵¹ This raises an important question for state courts: What sentence can be given to juveniles convicted of first-degree murder if a jurisdiction lacks an applicable and constitutional alternative to life without parole?⁵²

States have responded to this question in various ways.⁵³ Some states enacted new legislation that altered existing sentencing laws to allow for an alternative sentence to JLWOP⁵⁴ or banned JLWOP sentences entirely.⁵⁵ Other states have responded

46. *Montgomery*, 136 S. Ct. at 736.

47. *Id.* (“Allowing those offenders to be considered for parole ensures that juveniles whose crimes reflected only transient immaturity—and who have since matured—will not be forced to serve a disproportionate sentence in violation of the Eighth Amendment.”).

48. In reality, this suggestion creates more questions than answers. *See infra* Section IV.

49. *Montgomery*, 136 S. Ct. at 735 (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986)).

50. Samantha Melamed, *Juvenile Lifers Will Get New Sentences, but What Law Applies?*, PHILLY.COM (Mar. 11, 2016, 3:01AM), http://www.philly.com/philly/news/20160311_Juvenile_lifers_will_get_new_sentences_but_what_law_applies_.html.

51. *Apprendi v. New Jersey*, 530 U.S. 466, 467 (2000).

52. *See* Marsha L. Levick & Robert G. Schwartz, *Practical Implications of Miller v. Jackson: Obtaining Relief in Court and Before the Parole Board*, 31 L. & INEQ. 369, 389 (2013).

53. *See generally* THE PHILLIPS BLACK PROJECT, *supra* note 22.

54. *See generally id.* (including the following states: Arizona, Delaware, Florida, Louisiana, Michigan, Nebraska, North Carolina, Pennsylvania, and Washington). Alabama has passed new legislation in May 2016 to comply with *Miller*’s requirements. Kent Faulk, *New Alabama Law Says Juveniles Convicted of Capital Murder Must Serve 30 Years Before Parole Eligibility*, AL.COM, http://www.al.com/news/birmingham/index.ssf/2016/05/new_alabama_law_says_juveniles.html (last updated May 25, 2016, 12:58 PM).

55. *See generally* THE PHILLIPS BLACK PROJECT, *supra* note 22 (including the following states: Connecticut, Hawaii, Massachusetts, South Dakota, Texas, Vermont, and Wyoming). A few other states who allowed for discretionary JLWOP sentencing have now abolished JLWOP entirely after *Miller*. *Id.* (including the following states: Nevada, Utah,

through the judiciary, with courts outlining remedies for juvenile sentencing that comply with *Miller*.⁵⁶ However, while adding an alternative to life without parole complies with *Miller* insofar as JLWOP is no longer “mandatory,” these laws still give courts the discretion to choose a life without parole sentence. A few jurisdictions have still not amended their laws in any way to fulfill the Supreme Court’s mandate, including the federal government.⁵⁷ For instance, Virginia was one of the states identified by the Court with unconstitutional mandatory sentencing laws, but it has not changed the law to comply with *Miller*. The state’s supreme court argued that it does not violate the Eighth Amendment as the law also allows a judge to suspend a life sentence, and therefore the sentence is not *mandatory*.⁵⁸ It remains to be seen whether judges actually exercise that discretionary authority.⁵⁹ Virginia and other states that still allow JLWOP highlight a problematic reality that exists even after *Miller*: there is no guarantee that JLWOP sentences will be uncommon.

How states are handling the retroactive application of *Miller* also varies. Some states, like North Carolina and Connecticut, have enacted legislation that provides retroactive application of the Supreme Court’s mandate by allowing judicial sentencing review for JLWOP sentences before *Montgomery* was decided.⁶⁰ Additionally, at least sixteen state courts have ruled that *Miller* applied retroactively out of fundamental fairness.⁶¹ After

and West Virginia). Since the report by the Phillips Black Project, Arkansas has also eliminated the possibility of JLWOP. S. 294, 91st Gen. Assemb., Reg. Sess. (Ark. 2017).

56. THE PHILLIPS BLACK PROJECT, *supra* note 22 (including the following states: Illinois, Minnesota, Mississippi, Missouri, and Ohio). The Iowa Supreme Court categorically barred JLWOP sentences for youth, but Iowa’s sentencing statutes still allow it. *State v. Sweet*, 879 N.W.2d 811, 839 (Iowa 2016).

57. *See generally* THE PHILLIPS BLACK PROJECT, *supra* note 22 (including the following jurisdictions: The Federal Government, Idaho, New Hampshire, New Jersey, and Virginia).

58. *Jones v. Commonwealth*, 763 S.E.2d 823, 825 (Va. 2014).

59. Mallory Noe-Payne, *In Virginia, Juveniles Sentenced to Life Without Parole Wait in Limbo*, WVTF CLASSICS (Oct. 21, 2016), <http://wvtf.org/post/virginia-juveniles-sentenced-life-without-parole-wait-limbo#stream/0>.

60. N.C. GEN. STAT. § 15A-1340.19C (2015); N.C. SENTENCING & POLICY ADVISORY COMM’N, REPORT ON SENTENCING OF MINORS CONVICTED OF FIRST DEGREE MURDER PURSUANT TO SESSION LAW 2012-148, SECTION 2 7 (2013), <http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/SB-635-Commission-Report-to-GA.pdf>; THE PHILLIPS BLACK PROJECT, *supra* note 22, at 17.

61. John R. Mills et al., *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 556 (2016).

Montgomery, the states that were not applying *Miller* retroactively had to figure out a procedure to provide an opportunity for review, either through resentencing hearings, the parole board, or possibly both.⁶² North Carolina is an example of the latter, where a judge has the decision-making power over resentencing hearings and the parole board has decision-making power over releasing an inmate on parole if a juvenile lifer's sentence is reduced to life *with* parole.⁶³ Connecticut is a notable example because its legislation automatically made juvenile lifers parole eligible after serving sixty percent of their sentence or twelve years, whichever is greater.⁶⁴ Other states have also vacated all mandatory JLWOP sentences and either remanded them for individualized resentencing hearings or changed them so that the inmate is eventually eligible for parole.⁶⁵ While this is certainly an improvement, parole eligibility does not necessarily mean a juvenile lifer will eventually be released.⁶⁶

Beyond the issues just discussed, questions remain about what sentences qualify as mandatory JLWOP. Because the Supreme Court requires that juvenile sentencing must provide "some meaningful opportunity to obtain release,"⁶⁷ does that requirement extend to sentences that are not called "life without parole" but essentially mean the same thing?⁶⁸ This question has not been directly addressed in the Court's Eighth Amendment jurisprudence, and state courts have come to different conclusions.⁶⁹ However, this is an important issue because offenders sentenced to this type of de facto life without parole should be afforded the same protections that *Miller* and

62. Liliana Segura, *Supreme Court Gives New Hope to Juvenile Lifers, but Will States Deliver?*, INTERCEPT (Jan. 26, 2016 5:51 PM), <https://theintercept.com/2016/01/26/montgomery-v-louisiana-supreme-court-gives-new-hope-to-juvenile-lifers-will-states-deliver/>.

63. N.C. GEN. STAT. §§ 15A-1340.19C–1340.19D (2012).

64. THE PHILLIPS BLACK PROJECT, *supra* note 22, at 18.

65. *See generally id.*

66. *See infra* Section IV.

67. *Miller v. Alabama*, 567 U.S. 460, 479 (2012).

68. *See State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013) (determining that a sentence of 52.5 years is not technically life without parole, but such a lengthy sentence amounts to the same thing).

69. *See Kelly Scavone, How Long Is Too Long?: Conflicting State Responses to De Facto Life Without Parole Sentences After Graham v. Florida and Miller v. Alabama*, 82 FORDHAM L. REV. 3439, 3456–67 (2014).

Montgomery offer to offenders with the same sentence called by a different name.

Lastly, there are other practical issues raised by *Miller* and *Montgomery* regarding how states are going to fund resentencing hearings for indigent offenders. One estimate for the costs of resentencing juvenile lifers in *Louisiana* was three million dollars for the first year alone.⁷⁰ There, public defenders worried how the Court's "unfunded" mandate would be fulfilled.⁷¹ Philadelphia allocated \$1.5 million to prosecutors and defenders for the first year of resentencing hearings, but not all states have established where the funding for these hearings will come from.⁷² This is why some advocate that states should just allow all juvenile lifers to be eligible for parole and let the parole board determine if they should be released rather than hold hearings.⁷³ However, as discussed below, this raises other problems for states.⁷⁴ For now, suffice it to say that *Miller* and *Montgomery* far from settled the issues surrounding JLWOP. The next section will analyze North Carolina's response to these cases and explore whether the Supreme Court's mandate is actually being effectuated.

III. JUVENILE LIFE WITHOUT PAROLE IN NORTH CAROLINA

A. An Overview of North Carolina's Juvenile Justice System

North Carolina was one of the twenty-nine jurisdictions that had mandatory life without parole at the time *Miller* was decided.⁷⁵ However, North Carolina was the first state to amend its sentencing laws to comply with *Miller's* requirements when the General Assembly ratified Senate Bill 635 on July 3, 2012.⁷⁶ While the Legislature's quick response is commendable, in practice, it is still unclear if the bill provides a meaningful opportunity to obtain

70. Segura, *supra* note 62.

71. Della Hasselle, 'Unfunded Mandate' of Individualized Sentencing Hearings for Some Juveniles Causing Headaches for Public, NEW ORLEANS ADVOC. (Jan. 3, 2017, 8:00 PM), http://www.theadvocate.com/new_orleans/news/courts/article_72df7220-d215-11e6-ae77-bf111ab0e451.html.

72. Melamed, *supra* note 50.

73. ROVNER, *supra* note 14, at 4-5.

74. *See infra* Section IV.

75. N.C. SENTENCING & POLICY ADVISORY COMM'N, *supra* note 60, at 4.

76. *Id.* at 1, 4; *see also* S. 635, 2011 Gen. Assemb. Reg. Sess. (N.C. 2012).

release for the seventy-nine inmates serving JLWOP sentences in North Carolina.⁷⁷ It is helpful to take a brief look at North Carolina's treatment of juveniles in the criminal justice system before analyzing what Senate Bill 635 has accomplished.

To start, North Carolina stands alone in its treatment of juvenile offenders. This is because North Carolina has the age of criminal responsibility set at sixteen and prosecutes both sixteen and seventeen year olds in adult criminal courts.⁷⁸ New York is the *only* other state that prosecutes juveniles that age in adult court; however, New York is less stringent because juveniles are allowed to petition to be heard in juvenile court.⁷⁹ Of the forty-eight other states, forty-three have set the age of criminal responsibility at eighteen, and the five other states have it set at age seventeen.⁸⁰ Additionally, North Carolina allows a child as young as thirteen years old to be transferred to adult court if they have committed a felony.⁸¹ Juvenile courts are designed to “implement the most targeted, juvenile-specific, effective interventions for rehabilitation within a framework of parental and community involvement to include mental health, education, and social services participation in the continuum of care.”⁸² Adult courts, on the other hand, are not equipped to accomplish any of these goals, which is likely why North Carolina is one of just two states that automatically prosecute sixteen-year-olds as adults.⁸³ North Carolina's historical treatment of juveniles offers a backdrop upon which to analyze how Senate Bill 635 has played out in the court system.

B. The North Carolina Legislature's Response to Miller

North Carolina was incredibly quick to pass legislation to comply with the requirements of *Miller*—the General Assembly ratified S.B. 635 just eight days after the Court's decision was

77. THE PHILLIPS BLACK PROJECT, *supra* note 22, at 69 (current as of July 2015).

78. JESSICA SMITH, N.C. COMM'N ON THE ADMIN. OF LAW & JUSTICE, CRIMINAL INVESTIGATION & ADJUDICATION COMM., JUVENILE REINVESTMENT 7 (2016), <http://nccri.minallaw.sog.unc.edu/wp-content/uploads/2017/01/Juvenile-Reinvestment-FINAL-12.20.2016.pdf>.

79. *Id.*

80. *Id.*

81. N.C. GEN. STAT. § 7B-2200 (2015).

82. SMITH, *supra* note 78, at 8.

83. *See id.*

issued.⁸⁴ The Bill was titled “An Act to Amend the State Sentencing Laws to Comply with the United States Supreme Court Decision in *Miller v. Alabama*” (the “Act”).⁸⁵ The Act established new sentencing procedures and added an alternative sentence of life imprisonment *with* parole for offenders convicted of first degree murder who are under eighteen at the time of the offense.⁸⁶ Following the Court’s mandate, the new sentencing procedures require a sentencing court to consider mitigating factors of youth and include findings of the absence or presence of those factors in its decision.⁸⁷

In addition to the basic requirements for compliance with *Miller*, the Act also included a section with provisions for “assignment for resentencing” which allowed for retroactive application of the new sentencing requirements.⁸⁸ On top of that, the Act abolished JLWOP if the sole basis for the conviction was the felony murder rule.⁸⁹ That was a remarkably progressive move that went above the call of the Court, but certainly fits within *Miller*’s “evolving standards of decency” jurisprudence.⁹⁰ Regrettably, certain portions of the Act diminished what should have been a laudable advancement in juvenile justice.

The Act’s most blatant transgression undercutting its impact on juvenile justice is the presumption of JLWOP in the new sentencing provision. The Act states, “[t]he court shall consider any mitigating factors in determining whether, based upon all the circumstances of the offense and the particular circumstances of the defendant, the defendant should be sentenced to life imprisonment with parole instead of life imprisonment without parole.”⁹¹ The presumption lies in the Act’s use of the word

84. See S. 635, 2011 Gen. Assemb. Reg. Sess., 2012 N.C. Sess. Laws 713 (ratifying bill on July 3, 2012); *Miller v. Alabama*, 567 U.S. 460, 460 (2012) (issuing decision on June 25, 2012).

85. *Id.*

86. N.C. SENTENCING & POL’Y ADVISORY COMM’N, *supra* note 60, at 1.

87. *Id.* at 7. The non-exclusive list of factors include: age at the time of the offense; immaturity; ability to appreciate the risks and consequences of the conduct; intellectual capacity; prior record; mental health; familial or peer pressure exerted upon the defendant; likelihood that the defendant would benefit from rehabilitation in confinement; and any other mitigating factor or circumstance. *Id.* at 6–7.

88. *Id.* at 7.

89. N.C. GEN. STAT. § 15A-1340.19B(a)(1) (2015).

90. *Miller v. Alabama*, 567 U.S. 460, 469–70 (2012) (quoting *Estelle v. Gamble*, U.S. 97, 102 (1976)).

91. N.C. GEN. STAT. § 15A-1340.19C(a) (2016).

“instead.”⁹² The Act designates JLWOP as the default sentence, which renders life without parole sentences the norm rather than the exception.⁹³ A sentencing scheme that favors life without parole clearly seems to cut against *Miller*’s directive that JLWOP sentences should be reserved for the “rare juvenile offender whose crime reflects irreparable corruption.”⁹⁴ The North Carolina Court of Appeals, however, declined to extend the Supreme Court’s ruling that far in *State v. James*.⁹⁵ The court agreed that a presumption exists but found it was “commonsense that the sentencing guidelines begin with life without parole” because the statute calls the court to consider mitigating factors rather than aggravating factors and because the “new guidelines were designed to deviate from [the original sentence].”⁹⁶ This constitutional question is pending review in the Supreme Court of North Carolina,⁹⁷ but until then it is difficult to say if North Carolina has made as much progress as some of the other states in complying with the spirit of *Miller*.⁹⁸

C. Judicial Application of *Miller* in North Carolina

In the case of *State v. James*, Defendant Harry James was granted a resentencing hearing following *Miller*, where he was “resentenced” to life without parole again.⁹⁹ This result highlights another problematic reality that even if a juvenile lifer is granted a resentencing hearing, there is no guarantee that their sentence of life without parole will ever change. Unlike the constitutional argument on appeal, the North Carolina Court of Appeals agreed with James’s other argument that the trial court did not issue sufficient findings of fact on the absence or presence of mitigating

92. *Id.*

93. *Id.*

94. *Miller*, 567 U.S. at 479–80 (quoting *Roper v. Simmons*, U.S. 551, 573 (2012)).

95. *State v. James*, 786 S.E.2d 73, 79 (N.C. Ct. App. 2016).

96. *Id.* at 80.

97. *State v. James*, 796 S.E.2d 6, 7 (N.C. 2017) (granting discretionary review).

98. *But see* Molly F. Martinson, *Negotiating Miller Madness: Why North Carolina Gets Juvenile Resentencing Right While Other States Drop the Ball*, 91 N.C. L. REV. 2179, 2207 (2013) (“As compared to the reactions of the other mandatory LWOP jurisdictions, the bill passed by the North Carolina legislature is truly groundbreaking.”).

99. *James*, 786 S.E.2d at 77. In addition to arguing that N.C. GEN. STAT. § 15A-1340.19C(a) was unconstitutional, the defendant contended that the trial court failed to make sufficient findings of fact as to whether there was a presence or absence of mitigating factors. *Id.* at 82.

factors.¹⁰⁰ The appeals court found that, rather than identifying which of its findings of facts were considered mitigating or not, the trial court simply listed the facts it took into consideration.¹⁰¹ As such, the court held that this ran counter to the requirements of *Miller* and reversed and remanded the new sentence.¹⁰² This opinion was filed in May, and a new resentencing has not yet happened so uncertainty remains as to whether the court will dole out another JLWOP sentence or find the presence of mitigating factors that warrant a lesser punishment. James is not alone, however, as it appears that other North Carolina courts are facing similar troubles properly considering mitigating factors.¹⁰³

In *State v. Lovette*, the defendant faced an almost identical trial history, but on appeal, the North Carolina Court of Appeals found that the resentencing of JLWOP was appropriate.¹⁰⁴ The Court of Appeals concluded that the lower courts findings fully supported its conclusion of the absence of sufficient mitigating factors to support a lesser punishment.¹⁰⁵ It is worth noting that the trial court observed that the defendant was not “irretrievably corrupt” and that there was a “possibility of rehabilitation.”¹⁰⁶ To reiterate an earlier point, the Supreme Court counseled against imposing JLWOP sentences except in those rare cases where a juvenile’s “crime reflects irreparable corruption,” and explicitly stated the “possibility of rehabilitation” as a mitigating factor courts should take into account.¹⁰⁷ North Carolina also lists the possibility of rehabilitation as a mitigating factor in juvenile sentencing.¹⁰⁸ Nevertheless, the court of appeals found that the trial court thoroughly weighed all of the relevant factors in coming

100. *Id.* at 84.

101. *Id.* The court noted that many of the lower courts findings of fact spoke directly to the mitigating factors they were required to consider, going as far to say that the findings show James experienced many of the things that affect development. *Id.* at 83.

102. *Id.* While the constitutionality of N.C. GEN. STAT. § 15A-1340.19C(a) is pending appeal in the North Carolina Supreme Court, the remand to the lower court only deals with the issue of resentencing and properly considering the absence or presence of mitigating factors. *Id.*

103. *See State v. Antone*, 770 S.E.2d 128, 130 (N.C. Ct. App. 2015).

104. *State v. Lovette*, 758 S.E.2d.399, 410 (N.C. Ct. App. 2014) (appealing new JLWOP sentence after a post-*Miller* resentencing proceeding).

105. *Id.*

106. *Id.* at 408.

107. *Miller v. Alabama*, 567 U.S. 460, 478–80 (2012).

108. N.C. GEN. STAT. § 15A-1340.19C(a) (2016).

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to its decision and properly delineated the lack of other mitigating factors to warrant life with parole.¹⁰⁹ While *Lovette* presents a case where the lack of other mitigating factors may truly have necessitated a life without parole sentence,¹¹⁰ the court of appeals' ruling inadvertently reduced the threshold for JLWOP that stems from *Miller* after *Lovette*, "a finding of 'irreparable corruption' is not required."¹¹¹ Coupled with the legislative presumption of JLWOP, North Carolina courts have continued to chip away at *Miller's* effectiveness, almost reducing it to nothing.¹¹²

IV. IMAGINING LIFE WITH PAROLE

In *Montgomery*, the Court held "[a] State may remedy a *Miller* violation by permitting juvenile homicide offenders to be considered for parole rather than by resentencing them."¹¹³ This implies that the Court views parole as an appropriate way to provide juveniles a meaningful opportunity for release. However, it is hard to reconcile this suggestion with the other requirements *Montgomery* and its predecessors put forth regarding individualized sentencing hearings where the mitigating qualities of youth can be properly taken into account. While the consideration of these factors is required in juvenile sentencing, there is no requirement that these same factors must be considered when an inmate serving a juvenile life sentence is reviewed for parole. Beyond endorsing parole as an alternative to resentencing hearings, nowhere does the Court require the same procedural safeguards

109. *Lovette*, 758 S.E.2d at 409.

110. *Id.* at 410 ("The trial court's findings support its conclusion. The trial court considered the circumstances of the crime and defendant's active planning and participation in a particularly senseless murder. Despite having a stable, middle-class home, defendant chose to take the life of another for a small amount of money. Defendant . . . had no psychiatric disorders or intellectual disabilities that would prevent him from understanding risks and consequences as others his age would. Despite these advantages, defendant also had an extensive juvenile record Defendant was neither abused nor neglected, but rather the evidence indicates for most of his life he had two parents who cared deeply for his well-being in all regards.").

111. *Id.* at 407–08.

112. According to information provided by the North Carolina Department of Public Safety's Division of Adult Correction and Juvenile Justice, fifteen of sixteen juvenile homicide offenders who have received resentencing hearings were resentenced to life without parole. Brief of the UNC Cr. for Civil Rights et al., as Amici Curiae Supporting Plaintiff-Appellee Shaun A. Hayden and in Support of Affirmance, *Hayden v. Butler*, 667 F. App'x 416, 4 (4th Cir. 2016) (No. 15-7676).

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

to extend to parole. This is problematic for many reasons, but mainly because “no one has documented an example in contemporary practice, or from any historical era, of a parole-release system that has performed reasonably well in discharging its goals.”¹¹⁴ A report on sentencing written by the drafters of the Model Penal Code called parole boards “failed institutions” where “procedural protections available to prisoners in the parole-release context are unacceptably poor when compared to those attending the judicial sentencing process.”¹¹⁵ Additionally, parole boards are incredibly susceptible to political pressure and often operate behind closed doors.¹¹⁶

If parole boards offer less procedural protections that are “unacceptably poor” when compared to judicial sentencing process, how are they to effectively accomplish what the Court set out to do in *Miller* and *Montgomery*? This section offers a summary of North Carolina’s parole system to illustrate that much guidance is still needed from the Supreme Court if it truly supports placing JLWOP release power in the hands of such failed institutions.

A. Parole in North Carolina

North Carolina’s Post Release Supervision and Parole Commission consists of four members who are appointed by the governor.¹¹⁷ The four commissioners are responsible for making all discretionary release decisions and would therefore be responsible for the decision to grant parole to any inmate sentenced to JLWOP for felony murder.¹¹⁸ The independent

114. KEVIN R. REITZ, AM. L. INST., MODEL PENAL CODE: SENTENCING, TENTATIVE DRAFT NO. 2, at 8–9 (Mar. 25, 2011), <https://robinainstitute.umn.edu/publications/model-penal-code-sentencing-tentative-draft-no-2> (“Research, historical inquiry, and the firsthand experience of participants in the drafting process support the judgment that parole boards, when acting as prison-release authorities, are failed institutions.”).

115. *Id.* at 8–9. (“The parole process lacks transparency, employs no enforceable decision rules, often generates little or no record of proceedings, generally requires only that boilerplate reasons—or none at all—be given for decisions, includes no guarantee of appointed counsel, and provides no meaningful prospect of appeal.”).

116. *Id.* at 9; see also Beth Schwartzapfel, *Life Without Parole: Inside the Secretive World of Parole Boards, Where Your Freedom May Depend on Politics and Whim*, MARSHALL PROJECT (July 10, 2015, 2:15 PM), <https://www.themarshallproject.org/2015/07/10/life-without-parole#.MGA8zNNtq>.

117. *Post-Release Supervision and Parole Commission: Administrative Functions*, N.C. DEP’T PUB. SAFETY, <https://www.ncdps.gov/About-DPS/Boards-Commissions/Post-Release-Supervision-Parole-Commission/Administrator> (last visited Feb. 15, 2018).

118. *Id.*

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agency has “a staff of thirty-six people, including a psychologist, two lead parole case analysts, and sixteen parole case analysts.”¹¹⁹ Case analysts prepare written reports for each parole case and each analyst is responsible for approximately 4338 offenders.¹²⁰ The commissioners then use the reports to vote on each of the two-thousand plus cases they review every month.¹²¹ In addition to many other responsibilities, a commissioner casts approximately ninety-one votes in a typical day.¹²² The records created, received, and used during parole decisions, along with the reasons for parole denial, are all considered confidential and not subject to disclosure.¹²³

The discussion in an order from a United States District Court in North Carolina shed a lot of light on the constitutionality of the parole board in light of the Supreme Courts recent jurisprudence.¹²⁴ Through discovery, it was uncovered that the parole process in North Carolina makes no distinction between felony offenders, whether adult or juvenile.¹²⁵ Furthermore, there is no notice given to a juvenile offender in advance of his or her parole review, and there is no opportunity for a juvenile offender to be heard during the course of the review.¹²⁶ This means there is no chance that any of the mitigating factors required by *Miller* will ever be considered when a juvenile lifer is eligible for parole in North Carolina. What is worse, evidence shows that if age is ever considered, “juvenile offenders face an even *harsher* treatment during parole reviews because the young age at which the crime is committed may actually be used as a negative factor in parole consideration.”¹²⁷ In short, North Carolina’s parole system lacks any meaningful process to effectuate the Supreme Court’s mandate. Unfortunately for juvenile lifers, North Carolina is not the only state with this problem.¹²⁸

119. Hayden v. Keller, 134 F. Supp. 3d 1000, 1002 (E.D.N.C. 2015).

120. *Id.*

121. *Id.*

122. *Id.* The commissioners make independent votes and do not consult one another when casting their ballots. *Id.*

123. *Id.* at 1003.

124. *Id.* at 1006–11.

125. *Id.* at 1004.

126. *Id.* at 1002.

127. *Id.* at 1009; Miller v. Alabama, 567 U.S. 460, 467 (2012).

128. See generally REITZ, *supra* note 114.

V. CONCLUSION: LIFE WITH OR WITHOUT PAROLE—A
DISTINCTION WITHOUT DIFFERENCE

Clearly the Supreme Court had a greater vision for our nation's treatment of juveniles in deciding *Montgomery* and its predecessors than is reflected in the current state of affairs. While some states have made great strides in eradicating the possibility for juvenile life without parole, other states—like North Carolina—have missed the mark in complying with the recent Eighth Amendment Jurisprudence. If children are truly going to be treated as children in our criminal justice system, more guidance is needed from the Supreme Court on how to ensure procedural protections for a class of individuals where it is largely lacking, especially in the area of parole-release discretion. Until then, our evolving standards of decency have a long way to go.