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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

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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

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ABSTRACT

In 2012, the United States Supreme Court in Miller v. Alabama *held that mandatory life without parole sentences for juvenile offenders are unconstitutional. Several years later, the Court in* Montgomery v. Louisiana *determined that* Miller *must be applied retroactively. However,* Montgomery *did more than decide the issue of retroactivity—it expanded* Miller*'s holding. Following the decision in* Montgomery*, state courts have split over whether the decision requires additional protections for juveniles facing life without parole sentences. This Article outlines the differing state responses to* Montgomery*, examining disagreements over when* Montgomery*'s protections are triggered and what procedural safeguards are required at sentencing. It then proceeds to argue that* Montgomery *does in fact mandate additional procedures beyond what many states have implemented.* Montgomery *is itself a groundbreaking decision that requires significant changes to current juvenile life without parole sentencing schemes. Even if states implement the additional protections necessitated by* Montgomery*, the reasoning behind this, as well as prior opinions, make a categorical ban on life sentences without parole the only constitutional option for juveniles.*

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INTRODUCTION

Since 2005, the United States Supreme Court has issued a series of decisions that have expanded the reach of Eighth Amendment protections and greatly narrowed the punishments available for juveniles convicted of serious offenses. First, the Court held that capital punishment for all juvenile offenders is unconstitutional under the Eighth Amendment.[1] Several years later, the Court held that a sentence of life without parole for juvenile nonhomicide offenders constitutes cruel and unusual punishment, and is thus unconstitutional.[2] Then, in 2012, the Supreme Court in *Miller v. Alabama*[3] held that the Eighth Amendment prohibits *mandatory* life without parole sentences for juveniles convicted of homicide.[4] In so holding, the Court espoused the rule that "children are different" from adults and that courts must consider youth as a mitigating factor prior to imposing the harshest sentences on juvenile offenders.[5]

Following *Miller*, state courts were left to determine if the ruling applied retroactively to the over 2000 incarcerated persons[6] serving mandatory life without parole sentences for crimes committed as juveniles. State supreme courts split. Some state courts found that the rule was procedural and consequently not retroactive.[7] Other

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1. Roper v. Simmons, 543 U.S. 551, 578 (2005); *see infra* Section I.A.

2. Graham v. Florida, 560 U.S. 48, 82 (2010); *see infra* Section I.A.

3. 567 U.S. 460 (2012).

4. *Id.* at 479.

5. *Id.* at 480.

6. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, JUVENILE LIFE WITHOUT PAROLE (JLWOP), at 17 (2010), http://www.ncsl.org/documents/cj/jlwopchart.pdf [https://perma.cc/YFD5-2GTV] (reporting that 2574 juvenile offenders have been sentenced to life without parole, of which 2105 were sentenced as a mandatory sentence).

7. Fourteen states found *Miller* retroactive: Arkansas, Connecticut, Florida, Illinois, Iowa, Massachusetts, Mississippi, Nebraska, New Hampshire, New Jersey, Ohio, South Carolina, Texas, and Wyoming. JOSH ROVNER, THE SENTENCING PROJECT, JUVENILE LIFE WITHOUT PAROLE: AN OVERVIEW 3 (2017), http://www.sentencingproject.org/wp-content/uploads/2015/12/Juvenile-Life-Without-Parole.pdf [https://perma.cc/5KQ8-XRCW]. Another six passed juvenile sentencing

state courts found that *Miller* was substantive, and therefore retroactive.[8] As a result of the split, the United States Supreme Court granted certiorari in *Montgomery v. Louisiana*[9] to determine whether *Miller* should apply retroactively.[10]

The *Montgomery* Court found that *Miller* applied retroactively.[11] However, the *Montgomery* decision did far more. The Court greatly expanded its more limited holding in *Miller*, concluding that life without parole is unconstitutionally excessive for the vast majority of juvenile homicide offenders.[12] *Montgomery* makes clear that more is required of a sentencing court than mere consideration of the mitigating qualities of youth.[13] However, many state sentencing schemes remain noncompliant with the increased sentencing requirements prescribed by *Montgomery*.[14]

This Article proceeds in four parts. Part I reviews the Supreme Court's Eighth Amendment jurisprudence as it relates to juveniles, providing necessary background to the *Montgomery* decision. Part I then proceeds to analyze the fundamental holdings of both *Miller* and *Montgomery*. Part II examines state responses to *Montgomery,* outlining five key areas where state court decisions have split in terms of *Montgomery*'s requirements and application, and the reasons for the differing conclusions. These responses are diagramed in further detail in the appendices. Part III analyzes the fundamental holdings of *Montgomery* and argues that *Montgomery* established heightened sentencing requirements. This Part evaluates the five areas of state discord, and explains how states should rule on these pressing questions. Part IV demonstrates the deficiencies of the *Montgomery* decision, and ultimately argues that such shortcomings necessitate a complete categorical ban on life without parole for juvenile offenders.

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legislation that applied retroactively: California, Delaware, Nebraska, Nevada, North Carolina, and Wyoming. *Id.*

8. Seven states concluded that *Miller* was not retroactive: Alabama, Colorado, Louisiana, Michigan, Minnesota, Montana, and Pennsylvania. *Id.*

9. 136 S. Ct. 718 (2016).

10. *Id.* at 725.

11. *Id.* at 734.

12. *Id.*

13. *See infra* Part III.

14. *See infra* Parts II and III.

I. THE ROAD TO *MONTGOMERY*

A. *Roper* and *Graham*: The Groundwork for *Miller*

The Supreme Court's 2005 decision in *Roper v. Simmons*[15] laid the groundwork for *Miller* and *Montgomery* by espousing the belief that children are constitutionality different from adults for the purposes of criminal sentencing.[16] The Supreme Court held in *Roper* that a capital sentence for a juvenile defendant violates the Eighth Amendment's prohibition against "cruel and unusual punishment."[17] Under the doctrine of proportionality, the Eighth Amendment not only prohibits abhorrent punishments, such as torture, but also forbids excessive punishments that are disproportionate to the crime committed.[18] In *Roper*, the Court concluded that juveniles categorically differ from adults in terms of culpability, thus rendering a death sentence unconstitutionally excessive.[19]

The Court cited three primary factors to support its conclusion that the death penalty is a disproportionate punishment for juvenile offenders.[20] First, the *Roper* Court noted that juveniles have a "lack of maturity and an underdeveloped sense of responsibility."[21] Second, the Court explained that juveniles are more susceptible than adults to "negative influences and outside pressures."[22] Third, the *Roper* Court emphasized that the character and personality traits of juveniles are still developing and are "less fixed."[23] These factors led to the conclusion that juveniles have a diminished degree of moral culpability compared to adult offenders and a greater chance of successful reform.[24] In light of these developmental differences, the Court determined that the rationales for imposing capital sentences on adults—deterrence and retribution—do not adequately justify

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15. 543 U.S. 551 (2005).

16. *Id.* at 575.

17. *Id.* at 560–61, 568.

18. *See id.* at 560–65 (considering objective factors, including state legislative actions, jury decisions, international opinion, and opinion polls, as well as the Court's independent judgment, to determine whether a punishment is grossly out of proportion to a crime). *See generally* Atkins v. Virginia, 536 U.S. 304 (2002); Coker v. Georgia, 433 U.S. 584 (1977). For more on the Court's Eighth Amendment proportionality doctrine, see generally Scott W. Howe, *The Eighth Amendment as a Warrant Against Undeserved Punishment*, 22 WM. & MARY BILL RTS. J. 91 (2013).

19. *See* 543 U.S. at 575.

20. *Id.* at 569.

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

22. *Id.*

23. *Id.* at 570.

24. *Id.*

imposing such sentences on minors.[25] As a result, a death sentence for a minor is disproportionate and, thus, cruel and unusual under the Eighth Amendment.

The *Roper* decision is significant in connection with *Montgomery* and *Miller* in two primary ways. First, the Supreme Court based its holding in *Roper* largely on scientific studies showing that juveniles are biologically different from adults in ways that make them less culpable for their actions.[26] These same scientific studies are cited in the Court's subsequent decisions regarding the constitutionality of life without parole for juvenile offenders.[27] The Court gave great weight to these studies and considered them to be an important factor in determining appropriate punishments for youths.[28] Most notably, these very studies trusted by the Court support the assertion that it is impossible to determine when a juvenile is incorrigible.[29]

Second, the *Roper* Court determined that even if a juvenile demonstrates a sufficient level of depravity to justify a death sentence, a case-by-case method of individualized sentencing for juveniles would still be insufficient.[30] Individualized sentencing would pose too great a risk that the brutality of a crime would overpower the mitigation of youth, especially given that even juveniles who commit "heinous" crimes may be redeemable.[31] Further, it would likely be impossible for a sentencing court to differentiate such incorrigible juveniles from those whose crimes do not reflect permanent depravity, as even expert psychologists are unable to make such a determination.[32] The Court thus determined that a categorical ban was required because a case-by-case approach would create an unacceptable risk that a juvenile offender would be given the death penalty despite insufficient culpability.[33] This language emphasizing the difficulty of a case-by-case approach will

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25. *See id.* at 571–72.

26. *Id.* at 569.

27. Miller v. Alabama, 567 U.S. 460, 471–72 (2012); Graham v. Florida, 560 U.S. 48, 68, 72–73 (2010).

28. *See Roper*, 543 U.S. at 569–70.

29. Montgomery v. Louisiana, 136 S. Ct. 718, 735 (2016) (holding that only the rare incorrigible juvenile offender may be sentenced to life without parole); *see infra* Section III.A. Thus, the scientific impossibility of identifying these few irredeemable juveniles is highly problematic for accurate implementation of the Court's rule. *See infra* Section IV.A.

30. *See* 543 U.S. at 570, 572–73.

31. *Id.*

32. *Id.* at 573.

33. *Id.* at 572–73.

likely be relevant in future litigation addressing whether the Constitution requires a categorical bar on juvenile life without parole.[34]

Five years after *Roper*, the Court in *Graham v. Florida*[35] considered the constitutionality of life in prison without parole for juvenile offenders who commit nonhomicide offenses.[36] Until *Graham*, the Supreme Court was reluctant to apply the Eighth Amendment's proportionality doctrine outside of the capital context.[37] However, in *Graham*, the Court analogized the sentence of life without parole for juveniles to a capital sentence for adults.[38] The Court explained that life without parole is the most severe sentence that a juvenile can receive and "guarantees [the juvenile] will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character."[39]

As in *Roper*, the *Graham* Court developed a categorical rule prohibiting life without parole sentences for juvenile nonhomicide offenders.[40] The Court cited the same concerns that motivated the invalidation of the death penalty for juveniles in the life without parole context.[41] The *Graham* Court cited the precedent of *Roper* that a juvenile offender "is not as morally reprehensible" as an adult offender.[42] The Court again cited "developments in psychology and brain science" as evidence of juveniles' lessened moral culpability based on "fundamental differences between juvenile and adult minds."[43] The Court in *Graham* again doubted that a case-by-case approach could accurately distinguish the "few incorrigible juvenile offenders from the many that have the capacity for change."[44]

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34. *See infra* Part IV.

35. 560 U.S. 48 (2010).

36. *Id.* at 52–53.

37. *Id.* at 102 (Thomas, J., dissenting) ("For the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone."); *see also* Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 175–90 (2008).

38. Graham v. Florida, 560 U.S. 48, 79 (2010).

39. *Id.*

40. *Id.* at 82.

41. *See id.* at 66.

42. *Id.* at 68 (citing Thompson v. Oklahoma, 487 U.S. 815, 835 (1988)).

43. *Id.*

44. *Id.* at 77.

B. *Miller*'s Holding

Two years after *Graham*, the Court in *Miller* considered the case of two juvenile offenders convicted of homicide who were sentenced to life in prison without parole under a mandatory sentencing scheme.[45] The Court held that sentencing schemes that mandate life in prison without parole for juvenile offenders violate the Eighth Amendment's prohibition on cruel and unusual punishment.[46] The Court explained that *Roper* and *Graham* "establish[ed] that children are constitutionally different from adults for the purposes of sentencing"[47] and, as such, it would contravene what we know about juvenile development to impose the most severe penalties on juveniles "as though they were not children."[48]

Although the *Miller* Court relied heavily on the reasoning set forth in *Graham* and *Roper*, unlike in those cases, the Court stopped short of issuing a categorical prohibition on life without parole for juveniles.[49] Instead, the Court contemplated precedents in the capital context that elucidate the importance of individualized sentencing.[50] Specifically, the Court examined two capital cases: *Woodson v. North Carolina*[51] and *Eddings v. Oklahoma*.[52] *Woodson* invalidated a statute imposing a mandatory death penalty sentence because it failed to consider the character of the offender.[53] *Eddings* held that the background and development of a juvenile defendant must be considered in assessing culpability in capital sentencing.[54] Analogizing to capital jurisprudence, the *Miller* Court stressed the importance of individualized sentencing for juveniles facing the most severe punishments.[55]

Despite its holding that juveniles are entitled to individual sentencing prior to receiving a sentence of life without parole, the

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

46. *See id.* at 479.

47. *Id.* at 471.

48. *Id.* at 474.

49. *See id.* at 479 ("Because that holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles.").

50. *See id.* at 476.

51. 428 U.S. 280 (1976).

52. 455 U.S. 104 (1982).

53. *See Woodson*, 428 U.S. at 304.

54. *See Eddings*, 455 U.S. at 116. This case was decided before *Roper* held that death sentences for juvenile offenders are unconstitutional.

55. *Miller*, 567 U.S. at 475.

Court provided little guidance on what this process would entail.[56] The Court identified five factors, often referred to as the "*Miller* factors," that a court should consider during individualized sentencing.[57] These five factors are: (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."[58] However, nowhere does *Miller* state that these five factors *must* be considered.[59] Instead, the only mandate is that a sentencer must "take into account how children are different, and how those differences *counsel against* irrevocably sentencing them to a lifetime in prison."[60] What specific procedures to employ and what evidence to consider is left to the discretion of the states.

After *Miller*, it was clear that states could no longer sentence juveniles to life without parole under a mandatory sentencing scheme.[61] Furthermore, a sentencing court was now obligated to consider youth-related mitigating evidence prior to imposing a life without parole sentence.[62] Even with its new mandates, the opinion left many questions regarding proper implementation unanswered, including retroactivity.

C. *Montgomery* Expands *Miller* into a Categorical Rule

The Supreme Court in *Miller* did not address whether states were required to apply the decision retroactively. The legal principle for when to give retroactive effect to a new rule was established by the plurality decision in *Teague v. Lane*.[63] The *Teague* decision established that new criminal procedure rules are generally not

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56. *See id.* at 480.

57. *See id.* at 477.

58. *Id.* at 477–78.

59. Many states have incorporated the *Miller* factors into new post-*Miller* legislation. *See* FLA. STAT. ANN. § 921.1401(2) (West 2014); 730 ILL. COMP. STAT. ANN. 5/5-4.5-105 (West 2016); MO. ANN. STAT. § 565.033(2) (West 2016); NEB. REV. STAT. ANN. § 28-105.02(2) (West 2017); N.C. GEN. STAT. ANN. § 15A-1340.19B(c) (West 2012); 18 PA. STAT. AND CONS. STAT. ANN. § 1102.1(d) (West 2012); WASH. REV. CODE ANN. § 10.95.030(3)(b) (West 2015). Additionally, some state supreme courts have mandated that sentencing courts consider the factors articulated in *Miller*. *See, e.g.*, Aiken v. Byars, 765 S.E.2d 572, 577 (S.C. 2014); People v. Gutierrez, 324 P.3d 245, 268 (Cal. 2014); *Ex parte* Henderson, 144 So. 3d 1262, 1284 (Ala. 2013).

60. *Miller*, 567 U.S. at 480 (emphasis added).

61. *See id.* at 489.

62. *See id.* at 480.

63. 489 U.S. 288, 310 (1989) (plurality opinion).

applied retroactively on collateral review, with two exceptions.[64] First, new rules of constitutional law must be applied retroactively if they are *substantive*.[65] Substantive rules are those that forbid "criminal punishment of certain primary conduct," and those that prohibit "a certain category of punishment for a class of defendants because of their status or offense."[66] Second, new *procedural* rules are given retroactive effect only if they are considered "watershed" rules of criminal procedure, meaning the new procedure implicates the fundamental fairness and accuracy of the criminal proceeding.[67] However, in the more than twenty-seven years since *Teague* was decided, the Supreme Court has never deemed a procedural rule to be "watershed."[68]

States were divided on whether the rule announced in *Miller* should apply retroactively.[69] Several state supreme courts deemed *Miller* a procedural rule that did not rise to the level of a "watershed" rule.[70] Therefore, these courts denied retroactive application of *Miller*.[71] This interpretation found support in the text of *Miller*, which stated that the decision did not "categorically bar a penalty for a class of offenders or type of crime"[72] and that instead *Miller* "mandates only that a sentencer follow a certain *process*."[73]

However, a larger number of states found *Miller* retroactive.[74] These states interpreted *Miller* as a substantive change in sentencing

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64. *See id.* at 311.

65. *See id.*; *see also* Penry v. Lynaugh, 492 U.S. 302, 329 (1989).

66. *Penry*, 492 U.S. at 330.

67. The Supreme Court usually cites to the pre-*Teague* case of *Gideon v. Wainwright*, 372 U.S. 335 (1963), as an example of a new rule that would be considered "watershed." *See Teague*, 489 U.S. at 311 (plurality opinion); *see also* Saffle v. Parks, 494 U.S. 484, 495 (1990) (interpreting *Teague*). For more on *Teague* and the "watershed" rule, see generally Ezra D. Landes, *A New Approach to Overcoming the Insurmountable Watershed Rule Exception to* Teague's *Collateral Review Killer*, 74 MO. L. REV. 1 (2009).

68. *Eighth Amendment—Retroactivity of New Constitutional Rules—Juvenile Sentencing*—Montgomery v. Louisiana, 130 HARV. L. REV. 377, 383–84 (2016).

69. *See supra* notes 7–8 and accompanying text.

70. *See* People v. Carp, 852 N.W.2d 801, 821 n.10 (Mich. 2014); State v. Tate, 130 So. 3d 829, 841 (La. 2013); Chambers v. State, 831 N.W.2d 311, 330 (Minn. 2013); Commonwealth v. Cunningham, 81 A.3d 1, 9 (Pa. 2013).

71. *See Teague*, 489 U.S. at 311 (plurality opinion).

72. Miller v. Alabama, 567 U.S. 460, 483 (2012).

73. *Id.* (emphasis added).

74. *See* Falcon v. State, 162 So.3d 954, 961 (Fla. 2015); People v. Davis, 6 N.E.3d 709, 722 (Ill. 2014); State v. Mantich, 842 N.W.2d 716, 731 (Neb. 2014); Jones v. State, 122 So.3d 698, 702 (Miss. 2013); State v. Ragland, 836 N.W.2d 107, 115 (Iowa 2013); Diatchenko v. Dist. Att'y for Suffolk Dist., 1 N.E.3d 270, 281 (Mass. 2013).

statutes because the decision prohibited a type of punishment—*mandatory* life without parole—for a class of defendants—juveniles.[75] These courts acknowledged that while *Miller* did have a procedural component, the procedural element was a direct result of the *substantive* change of law prohibiting *mandatory* life without parole sentences.[76] Hence, these state courts concluded that, despite the Court's statement that only a certain process must be followed, the holding was substantive.[77] The Supreme Court granted review in *Montgomery v. Louisiana* to determine whether or not *Miller* should apply retroactively.[78]

The Supreme Court in *Montgomery* sided with those state courts that found *Miller* substantive and retroactive, but for much different reasons. *Montgomery* explained that *Miller* was substantive because it established that a life without parole sentence is unconstitutional for the "vast majority" of "juvenile offenders whose crimes reflect the transient immaturity of youth."[79] Acknowledging the procedural component in *Miller*, the *Montgomery* Court explained that the individualized sentencing procedure required by *Miller* was merely to "separate those juveniles who may be sentenced to life without parole from those who may not."[80] Thus, according to *Montgomery*, *Miller* did more than just invalidate *mandatory* life without parole sentencing schemes and require individualized sentencing. *Miller* created a categorical rule, holding that "sentencing a child to life without parole is excessive for all but the rare juvenile offender whose crime reflects irreparable corruption."[81]

In dissent, Justice Scalia denounced the majority's holding in *Montgomery*.[82] He argued that, despite the majority's claim to ban sentences of life without parole only in rare cases, the text of *Miller* "stated, quite clearly, precisely the opposite."[83] He criticized the majority, accusing it of "not applying *Miller*, but rewriting it."[84] Justice Scalia pointed out that the Court made life without parole a "practical impossibility" because under *Montgomery* "even when the

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75. *See generally* cases cited *supra* note 74.
76. *See generally* cases cited *supra* note 74.
77. *See generally* cases cited *supra* note 74.
78. 136 S. Ct. 718, 725 (2016).
79. *Id.* at 734.
80. *Id.* at 735.
81. *Id.* at 724 (internal quotation marks omitted).
82. *See id.* at 737, 743 (Scalia, J., dissenting).
83. *Id.* at 743 (Scalia, J., dissenting).
84. *Id.*

procedures that *Miller* demands are provided the constitutional requirement is not necessarily satisfied."[85] He then accused the majority of seeking a "devious way of eliminating life without parole for juvenile offenders."[86]

Justice Scalia's claim that the majority restructured *Miller*'s holding finds support in the text of the two decisions, as the *Montgomery* opinion frequently runs contrary to *Miller*. For example, while *Miller* claimed to require "*only* that a sentencer follow a certain process" before sentencing a juvenile to life without parole,[87] *Montgomery* clarified that *even if* a court follows this exact process, the "sentence still violates the Eighth Amendment for a child" who is not incorrigible.[88] Following a certain process cannot be the *only* requirement for constitutional sentencing if, after following the process, the sentence may still be unconstitutional. Similarly, *Miller* expressly held that the opinion did "not categorically bar a penalty."[89] However, in *Montgomery* the Court claimed that *Miller* did in fact categorically bar a sentence of life without parole for all juveniles except the "rarest" youth whose crime reflects "permanent incorrigibility."[90]

This conflicting language has led to confusion regarding what exactly *Montgomery* holds and what impact it should have on sentencing procedures.[91] Although the *express* holding of *Montgomery* is that *Miller* is a substantive constitutional rule that must be given retroactive effect, the accompanying opinion goes significantly beyond the mere issue of retroactivity.[92] Contradictory text and vague holdings have left state courts with the task of evaluating whether and to what extent *Montgomery* requires additional protections for juveniles facing life without parole. Predictably, state courts have split regarding several key issues presented in *Miller* and *Montgomery*.[93]

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85. *Id.* at 743–44 (Scalia, J., dissenting).

86. *Id.* at 744 (Scalia, J., dissenting).

87. Miller v. Alabama, 567 U.S. 460, 483 (2012) (emphasis added).

88. *Montgomery*, 136 S. Ct. at 734.

89. *Miller*, 567 U.S. at 483.

90. *Montgomery*, 136 S. Ct. at 734.

91. *See infra* Part II (detailing the conflicting state interpretations of the holdings of *Montgomery*).

92. *See Montgomery*, 136 S. Ct. at 723; *see also supra* notes 79–88 and accompanying text (outlining the language of the opinion).

93. *See infra* Part II.

II. CONFLICTING STATE RESPONSES TO *MONTGOMERY*

The failure of the Supreme Court to clearly articulate exactly how states must comply with this new substantive rule, as well as the prevalence of unclear and often conflicting language throughout the *Montgomery* opinion, has resulted in considerable splits among state courts over what is required for constitutional juvenile sentencing. Although state courts disagree on several major issues, the key distinctions stem from the degree to which a state court views *Montgomery* as a directive to establish broad protections for juvenile homicide offenders facing the possibility of life imprisonment. While some states remain content to leave more discretion to a sentencing court, others view *Montgomery* as an obligation to provide additional protections for those juveniles.

A. Procedural Protections Required at Sentencing Proceedings

1. Finding of Irreparable Corruption

Miller and *Montgomery* clearly require a sentencing proceeding where youth is considered.[94] However, states are split over what else, if anything, is required to make a sentencing proceeding constitutional. One crucial disagreement among state courts is whether or not *Montgomery* mandates a sentencing court to make an express determination of "irreparable corruption"[95] prior to sentencing juveniles to life without parole. Many state courts have concluded that the clear language of *Montgomery* mandates such a finding.[96] One such court was the Georgia Supreme Court.[97] In *Veal v. State*, the court acknowledged that *Montgomery* changed the requirements for sentencing juveniles to life without parole.[98] The

94. *See supra* Section I.C.

95. *Montgomery*, 136 S. Ct. at 734.

96. *See infra* Figure 1 and Appendix B (detailing the differing conclusions of state courts); *see also* Landrum v. State, 192 So. 3d 459, 466 (Fla. 2016); Veal v. State, 784 S.E.2d 403, 412 (Ga. 2016); Commonwealth v. Batts, 163 A.3d 410, 433 (Pa. 2017); People v. Nieto, 52 N.E.3d 442, 454–55 (Ill. App. Ct. 2016); Luna v. State, 387 P.3d 956, 961 (Okla. Crim. App. 2016); People v. Hyatt, 891 N.W.2d 549, 555 (Mich. Ct. App. 2016); People v. Padilla, 209 Cal. Rptr. 3d 209, 215–16 (Cal. Ct. App. 2016), *appeal docketed*, 387 P.3d 741 (Cal. 2017). Notably, Iowa required a finding of irreparable corruption after *Miller* but before *Montgomery*. Iowa was the only state to require such a finding prior to *Montgomery*. The court reasoned that because juveniles are less culpable and more capable of change, only those who are irreparable should suffer such a harsh sentence. *See* State v. Seats, 865 N.W.2d 545, 556–57 (Iowa 2015).

97. *Veal*, 784 S.E.2d at 411–12.

98. *See id.* at 410.

court stated that prior to *Montgomery*, the sentencing court had broad discretion to sentence a juvenile homicide offender to life without parole, so long as the court first contemplated the defendant's youth.[99] However, the Georgia Supreme Court then stated dramatically, in a stand-alone paragraph, "[b]ut then came *Montgomery*."[100] The Georgia court explained that *Montgomery* changed its prior understanding of *Miller* and made clear that sentencing a juvenile who is redeemable to life without parole is unconstitutional.[101] In order to determine if life without parole is permissible, the court must determine whether the juvenile is one of the rare offenders for whom the sentence is permitted.[102] This requires a "specific determination that he is irreparably corrupt."[103] Without such a determination on the record, the sentence violates the Constitution.[104]

Echoing Georgia, the Pennsylvania Supreme Court stated that, based on "competent evidence," a sentencing court must conclude that a defendant "will forever be incorrigible, without any hope for rehabilitation."[105] Without such a finding, life without parole is "beyond the court's power to impose."[106] Similarly, the Florida Supreme Court explained that failing to make the distinction between juveniles who are irreparably corrupt and those whose crimes reflect transient immaturity "would mean life sentences for juveniles would not be exceedingly rare, but possibly commonplace."[107] Other courts, including the Oklahoma Court of Criminal Appeals,[108] the highest court in Oklahoma for criminal matters, as well as lower appellate courts in Illinois,[109] California,[110] and Michigan,[111] have reached the same conclusion.

A smaller number of courts have held that *Montgomery* does not mandate a finding of irreparable corruption prior to imposing a

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99. *See id.*
100. *Id.*
101. *See id.*
102. *See id.* at 412.
103. *Id.* at 411.
104. *Id.* at 412.
105. Commonwealth v. Batts, 163 A.3d 410, 435 (Pa. 2017).
106. *Id.*
107. Landrum v. State, 192 So. 3d 459, 466 (Fla. 2016).
108. *See* Luna v. State, 387 P.3d 956, 962 (Okla. Crim. App. 2016).
109. *See* People v. Nieto, 52 N.E.3d 442, 455 (Ill. App. Ct. 2016).
110. *See* People v. Padilla, 209 Cal. Rptr. 3d 209, 221 (Cal. Ct. App. 2016).
111. *See* People v. Hyatt, 891 N.W.2d 549, 552 (Mich. Ct. App. 2016).

sentence of life without parole on a juvenile defendant.[112] These courts, including the Washington Supreme Court[113] and lower appellate courts in Tennessee,[114] California,[115] and Illinois,[116] based their holdings largely on the following quote in *Montgomery*: "*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility."[117] Although the Washington Supreme Court acknowledged that *Miller* established a substantive rule—one that "draws a line" between children who are irredeemable and those who are immature—it found that no specific fact-finding was required to effectuate the substantive rule.[118] Rather the court merely "encouraged" sentencing courts to "be as detailed and explicit as possible" at sentencing.[119]

The Virginia Supreme Court in *Jones v. Commonwealth* also concluded that *Montgomery* does not require a finding of irreparable corruption.[120] However, the Virginia court utilized a different approach than the above courts. The *Jones* court claimed that *Montgomery*'s explicit language holding juvenile life without parole unconstitutional for all but the rarest incorrigible juvenile offenders is *not* binding on the Virginia court.[121] The court alleged that they are bound only "by holdings, not language" and thus the binding precedent of *Montgomery* is limited solely to the "question" for decision in *Montgomery*: "whether *Miller*'s prohibition on mandatory life without parole for juvenile offenders' should be applied retroactively."[122] Thus, the Virginia Supreme Court contends that "the precedential holding in *Montgomery* amounts simply to: *Miller* is retroactive."[123] Under such an interpretation, a finding of irreparable

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112. *See infra* Figure 1 and Appendix B (detailing the differing conclusions of state courts).

113. *See* State v. Ramos, 387 P.3d 650, 659 (Wash. 2017).

114. *See* Brown v. State, No. W2015-00887-CCA-R3-PC, 2016 WL 1562981, at *6 (Tenn. Crim. App. Apr. 15, 2016), *appeal denied*, Aug. 19, 2016, *cert. denied*, 137 S. Ct. 1331 (2017).

115. *See* People v. Blackwell, 207 Cal. Rptr. 3d 444, 462 (Cal. Ct. App. 2016); People v. Willover, 203 Cal. Rptr. 3d 384, 395–96 (Cal. Ct. App. 2016).

116. *See* People v. Stafford, 61 N.E.3d 1058, 1068–69 (Ill. App. Ct. 2016); People v. Holman, 58 N.E.3d 632, 642–43 (Ill. App. Ct. 2016), *appeal docketed*, 60 N.E.3d 878 (Ill. 2016).

117. Montgomery v. Louisiana, 136 S. Ct. 718, 735 (2016).

118. *See Ramos*, 387 P.3d at 665.

119. *Id.* at 665–66.

120. *See* 795 S.E.2d 705, 709 (Va. 2017).

121. *See id.* at 721.

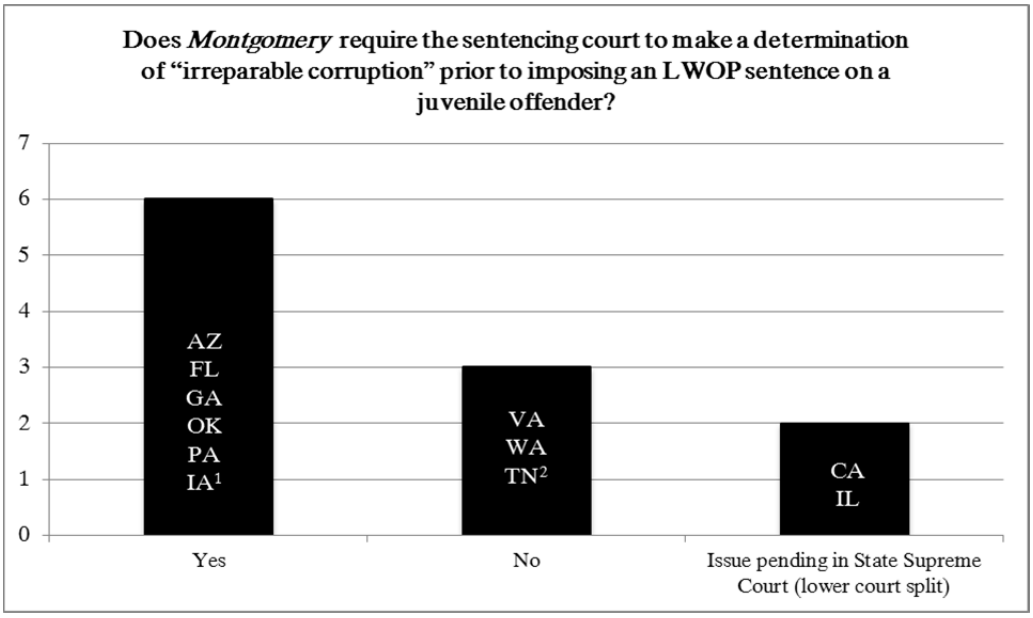
122. *Id.*

123. *Id.* at 724 (Powell, J., dissenting).

corruption is clearly not required, as the Virginia court does not consider life without parole unconstitutional for redeemable juveniles.[124]

Of the states that have considered the question of whether a finding of incorrigibility is required, a greater number have found in the affirmative.[125] However, this question has yet to be addressed by many state supreme courts, and legislators in those states have failed to pass legislation mandating such a finding. Thus, a finding of irreparable corruption is not explicitly required in the majority of states that still allow for juvenile life without parole sentences.

Figure 1. Irreparable Corruption Determination Required Prior to Imposing Life Without Parole ("LWOP"): State Supreme Court Interpretations



[1] The Iowa Supreme Court required a finding of irreparable corruption prior to *Montgomery*.

[2] The Tennessee decision was in the Court of Appeals, but the Tennessee Supreme Court denied review.

2. Presumption Against Life Without Parole

An additional point of discord between states is whether *Miller* and *Montgomery* create a presumption against life without parole at sentencing. Prior to *Montgomery*, five state supreme courts held that

124. *See id.* at 709, 721.
125. *See* Appendix B.

Miller dictates a presumption against juvenile life without parole.[126] Relying on language in *Miller* that life sentences for juvenile homicide offenders should be "uncommon," and that juveniles as a class are typically less culpable, the state supreme courts in Connecticut, Iowa, Utah, Missouri, and Indiana all held that there must be a presumption against imposing a life sentence without the opportunity for parole.[127]

Following *Montgomery*, the Pennsylvania Supreme Court in *Commonwealth v. Batts* came to the same conclusion, holding that there must be a presumption against life without parole, and a juvenile can only receive such a sentence if the state can prove beyond a reasonable doubt that the juvenile cannot ever be rehabilitated.[128] In reaching this conclusion, the *Batts* majority emphasized that such sentences are supposed to be "rare" and limited to "exceptional circumstances."[129] Additionally, because the "vast majority of adolescents change," it should be presumed that a juvenile is part of that vast majority.[130]

However, not all states have taken this approach. The Nebraska Supreme Court held that a presumption against life without parole was "not required by the U.S. Supreme Court . . . and we will not create one."[131] As such, there is no presumption in favor of either sentence.[132] The California Supreme Court, after *Miller* but before *Montgomery*, failed to establish a presumption in favor of release, despite holding that a presumption in favor of life without parole "would raise a serious constitutional question under *Miller*."[133] However, the California Supreme Court has recently granted review of this issue, to determine if, post-*Montgomery*, there is now a presumption in favor of an opportunity for release.[134]

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126. *See* Commonwealth v. Batts, 163 A.3d 410, 416 (Pa. 2017); State v. Riley, 110 A.3d 1205, 1214 (Conn. 2015); State v. Houston, 353 P.3d 55, 77, 83 (Utah 2015); State v. Seats, 865 N.W.2d 545, 555 (Iowa 2015); State v. Hart, 404 S.W.3d 232, 241 (Mo. 2013); Conley v. State, 972 N.E.2d 864, 871 (Ind. 2012).

127. *See* cases cited *supra* note 126.

128. *See Batts*, 163 A.3d at 452–55.

129. *Id.* at 452.

130. *Id.*

131. State v. Mantich, 888 N.W.2d 376, 384 (Neb. 2016).

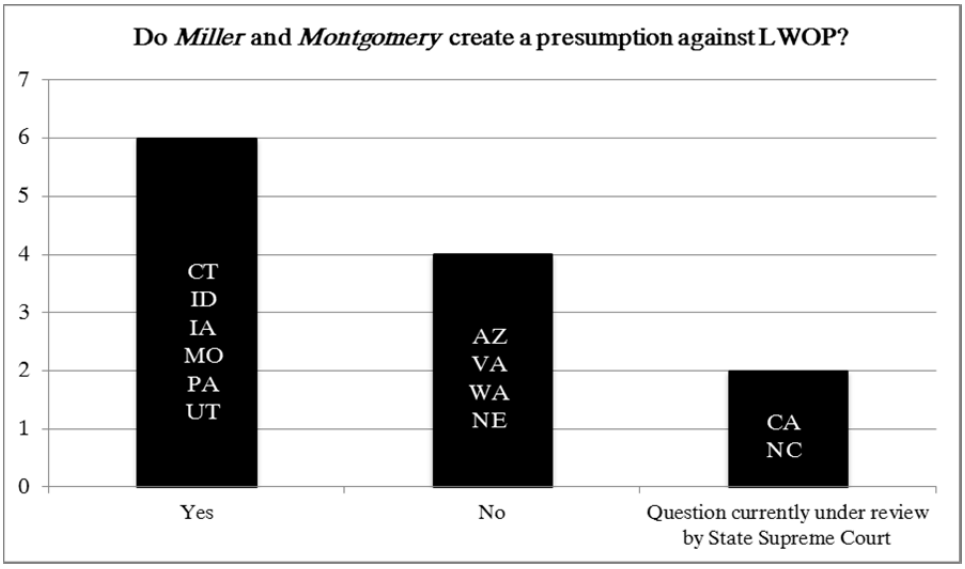
132. *See id.*

133. People v. Gutierrez, 324 P.3d 245, 263 (Cal. 2014).

134. *See* News Release, Sup. Ct. of Cal., Summary of Cases Accepted and Related Actions During Week of January 23, 2017 (Jan. 27, 2017), www.courts.ca.gov/documents/ws012317.pdf [https://perma.cc/859S-EB4D] (providing statement of the issue in People v. Arzate, No. B259259, 2016 WL 5462821, at*1 (Cal. Ct. App. Sept. 29, 2016)). However, the California legislature recently passed legislation that

Other states have upheld sentencing schemes that presume a sentence of life without parole for juvenile homicide offenders, leaving defendants to prove they are part of the constitutionally protected class for whom such a punishment is excessive. The Supreme Court of Washington recently upheld a sentencing scheme that makes life without parole the presumptive sentence and places "the burden on the juvenile offender to prove an exceptional sentence is justified."[135] The Washington court reasoned that placing the burden of proof on the juvenile defendant to prove that he should receive an "exceptional" sentence below the default does not run afoul of *Miller* because the Supreme Court did not create such a clear procedure.[136] Likewise, both the Arizona and Virginia Supreme Courts place the burden on juvenile defendants to show that they are ineligible for a life without parole sentence.[137]

Figure 2. Presumption Against Life Without Parole: State Supreme Court Interpretations[138]



effectively ends juvenile life without parole in California, as it mandates parole hearings after twenty-five years of incarceration for all juveniles serving life without parole sentences. *See* S.B. 394, 2017 Leg., Reg. Sess. (Cal. 2017). It is unclear if the California Supreme Court will still consider this issue, or if the court will instead consider the issue moot due to the legislative action.

135. State v. Ramos, 387 P.3d 650, 659 (Wash. 2017).

136. *See id.* at 663.

137. *See* Jones v. Commonwealth, 795 S.E.2d 705, 726 (Va. 2017) (Powell, J., dissenting); State v. Valencia, 386 P.3d 392, 396 (Ariz. 2016).

138. For additional information, see Appendix E.

B. When the Protections of *Miller* and *Montgomery* Are Triggered

1. Application to Discretionary Life Without Parole Sentences

There is disagreement among state courts regarding what types of sentences trigger the protections of *Miller* and *Montgomery*. One such division concerns whether *Miller* and *Montgomery*'s protections apply only to juveniles sentenced under *mandatory* sentencing statutes, or if such protections also apply to juveniles sentenced to life without parole under *discretionary* sentencing schemes.[139]

Even before *Montgomery*'s expansion of *Miller*, several state supreme courts held *Miller* applicable to both mandatory and discretionary life without parole sentences.[140] The South Carolina Supreme Court, for example, in holding *Miller* applicable to non-mandatory life without parole sentences, explained that "*Miller* does more than ban mandatory life sentencing schemes for juveniles; it establishes an affirmative requirement that courts fully explore the impact of the defendant's juvenility on the sentence rendered."[141] Similarly, other states noted that *Miller* requires a sentencing court to *actually* consider the defendant's youth prior to imposing life without parole—just allowing discretion is inadequate.[142] However, other state courts concluded that the requirements of *Miller* are triggered *only* by *mandatory* life without parole sentences, as evidenced by the repeated use of the word "mandatory" in the *Miller* decision.[143]

Following *Montgomery*, some states reversed their earlier position, instead holding that *Montgomery*'s clarification of *Miller* illustrates that the protections of *Miller* apply to discretionary sentences as well. The Georgia Supreme Court reversed its prior holding,[144] explaining that its earlier understanding of *Miller* was incorrect.[145] The Georgia court held that *Miller*, as interpreted by *Montgomery*, is applicable to

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139. *See* Appendix C.

140. *See, e.g.*, State v. Riley, 110 A.3d 1205, 1213 (Conn. 2015); Aiken v. Byars, 765 S.E.2d 572, 577–78 (S.C. 2014); People v. Gutierrez, 324 P.3d 245, 249 (Cal. 2014).

141. *Aiken*, 765 S.E.2d at 577.

142. *See Riley*, 110 A.3d at 1216; Beach v. State, 348 P.3d 629, 638 (Mont. 2015); State v. Seats, 865 N.W.2d 545, 555-56 (Iowa 2015); State v. Long, 8 N.E.3d 890, 894 (Ohio 2014).

143. *See, e.g.*, State v. Purcell, No. CA–CR 13–0614 PRPC, 2015 WL 2453192, at *1 (Ariz. Ct. App. May 21, 2015), *vacated*, Purcell v. Arizona, 137 S. Ct. 369 (2016) (mem.); Pennington v. Hobbs, 451 S.W.3d 199 (Ark. 2014); Foster v. State, 754 S.E.2d 33, 37 (Ga. 2014); Conley v. State, 972 N.E.2d 864, 879 (Ind. 2012).

144. *See Foster*, 754 S.E.2d at 37.

145. *See* Veal v. State, 784 S.E.2d 403, 410 (Ga. 2016).

discretionary sentences.[146] Similarly, the Arizona Supreme Court, which initially refused review on the appellate court decisions finding *Miller* applicable only to mandatory sentences,[147] authored an opinion post-*Montgomery* holding *Miller*'s protections pertinent to discretionary sentences.[148] This decision came after the United States Supreme Court vacated and remanded a series of Arizona cases for reconsideration in light of *Montgomery*.[149] One such case was *Purcell v. Arizona*, in which the sentencing court did in fact consider the defendant's youth at sentencing as a statutory mitigating factor.[150] Additionally, other states including Florida,[151] Washington,[152] and Oklahoma[153] determined, with the guidance of *Montgomery*, that *Miller*'s protections are not limited to mandatorily imposed life without parole sentences.

Despite the clear trend towards finding *Miller* applicable to discretionary sentences of life without parole, such a finding is not universal. The United States Supreme Court recently remanded *Jones v. Virginia*, a life without parole case, back to the Virginia Supreme Court for reconsideration in light of *Montgomery*.[154] In this case, the juvenile defendant took a plea deal for life without parole in order to avoid a death sentence (as he was convicted prior to *Roper*).[155] As a result of the plea, the sentencing court *never* considered youth or its mitigating circumstances at sentencing.[156] Upon reconsideration, the Virginia Supreme Court maintained that *Miller* and *Montgomery* apply only to punishments imposed under a mandatory life without parole sentencing statute.[157] The Virginia court claimed that because the defendant was sentenced under a statute that allowed for the *opportunity* to present mitigating evidence, Jones's sentence was not unconstitutional.[158] According to

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146. *See id.*

147. *See* State v. Purcell, No. CA–CR 13–0614 PRPC, 2015 WL 2453192, at *1 (Ariz. Ct. App. May 21, 2015), *review denied* (Ariz. Jan. 5, 2016), *vacated*, 137 S. Ct. 369 (2016).

148. *See* State v. Valencia, 386 P.3d 392, 393 (Ariz. 2016).

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

150. *See id.* at 12 (Sotomayor, J., concurring) (citing *Purcell*).

151. *See generally* Atwell v. State, 197 So. 3d 1040 (Fla. 2016).

152. *See generally* State v. Ramos, 387 P.3d 650 (Wash. 2017).

153. *See generally* Luna v. State, 387 P.3d 956 (Okla. Crim. App. 2016).

154. *See* 136 S. Ct. 1358 (2016).

155. *See* Jones v. Commonwealth, 795 S.E.2d 705, 713 (Va. 2017).

156. *See id.*

157. *See id.* at 711.

158. *See id.* at 713.

the majority, because Jones was not *denied* the right to present mitigation, but instead opted not to utilize the right, *Montgomery* and *Miller* do not apply.[159] Additionally, the Missouri Supreme Court recently held that "once mandatory life in prison without the possibility of parole was off the table," *Miller* no longer had any application to the defendant's murder conviction.[160]

2. De Facto Life Without Parole Sentences

States also split as to whether *Miller* and *Montgomery* apply only to sentences labeled "life without parole," or if their protections are triggered by *any* lengthy sentence, including aggregate sentences imposed for multiple convictions, that denies a defendant a "meaningful opportunity to obtain release."[161] On the one hand, several state supreme courts have held lengthy prison terms as "de facto" life without parole sentences, requiring individualized sentencing as mandated by *Miller*.[162] The Supreme Court of Washington recently held that *Miller* applied to a juvenile defendant's eighty-five year sentence, concluding that *Miller* "clearly . . . applies to any juvenile homicide offender who might be sentenced to die in prison without a meaningful opportunity to gain early release based on demonstrated rehabilitation."[163] The Supreme Court of Illinois concluded that a mandatory aggregate sentence of ninety-seven years imprisonment amounted to a de facto life without parole sentence because the juvenile "defendant will most certainly not live long enough to ever become eligible for release."[164] Similarly, the Indiana Supreme Court noted that a lengthy sentence of 150 years "forswears

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159. *See id.*

160. State v. Nathan, 522 S.W.3d 881, 891 (Mo. 2017).

161. The phrase "meaningful opportunity for release" is found in *Graham v. Florida*, 560 U.S. 48, 50 (2010).

162. *See* Appendix D.

163. State v. Ramos, 387 P.3d 650, 660 (Wash. 2017).

164. People v. Reyes, 63 N.E.3d 884, 888 (Ill. 2016); *see also* People v. Caballero, 55 Cal. 4th 262 (2012) (holding that a 110-years-to-life sentence was cruel and unusual under *Miller*). Courts have also held that de facto life sentences in nonhomicide cases clearly implicate the protections of *Graham*. *See generally* State v. Moore, 76 N.E.3d 1127 (Ohio 2016) (112-year sentence was effectively a life without parole sentence and thus implicated *Graham*); Henry v. State, 175 So. 3d 675 (Fla. 2015) (remanding a 90-year sentence because *Graham* is not limited to "life in prison" but instead the question is whether offender has a meaningful opportunity at release); State v. Boston, 363 P.3d 452 (Nev. 2015) (stating that a sentence of 100 years in prison before parole violates *Graham*).

altogether the rehabilitative ideal" of *Miller.*[165] The majority of state courts that have considered this issue focus on whether or not a juvenile actually has an opportunity for release, rather than the exact label of the sentence, and find *Miller* applicable to de facto sentences.[166]

However, among states that read *Miller* as applicable to lengthy sentences, there is a significant discrepancy over how long a sentence must be to prompt *Miller* protections. On the low end, the Supreme Court of Wyoming held that an aggregate term of forty-five years was a de facto sentence of life without parole and implicated *Miller*.[167] However, some states that replaced their mandatory life without parole sentencing statute created mandatory *minimum* sentences of a similar length. For example, juveniles convicted of capital murder in both Florida and Nebraska must be sentenced to a minimum of forty years imprisonment.[168]

On the other hand, several states have held that a sentence must be explicitly labeled as "life without parole" to trigger the Court's Eighth Amendment protections.[169] The Nebraska Supreme Court concluded that a sentence with the possibility of parole, however remote, does not trigger *Miller*, stating that the defendant's "characterization of his sentence [of ninety years] as a de facto life sentence is immaterial" to the analysis.[170] The Missouri Supreme Court in *State v. Nathan* similarly held that *Miller* does not apply to consecutive sentences that together amount to the "functional equivalent" of life without parole.[171] In *Nathan* the defendant was granted a resentencing hearing following *Miller* for his first-degree murder conviction.[172] At resentencing the jury failed to find Nathan irreparably corrupt, leading the court to vacate his first-degree murder conviction and resentence him to life *with* the possibility of parole for that conviction.[173] However, Nathan was convicted of other crimes associated with a home-invasion robbery and murder, including

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165. Brown v. State, 10 N.E.3d 1, 8 (Ind. 2014) (quoting Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012)).

166. *See* Appendix D.

167. *See, e.g.*, Bear Cloud v. State, 334 P.3d 132 (Wyo. 2014).

168. *See* FLA. STAT. ANN. § 775.082(1)(b)(1) (West 2017); NEB. REV. STAT. ANN. § 28-105.02 (West 2017).

169. *See, e.g.*, State v. Garza, 888 N.W.2d 526, 535–36 (Neb. 2016), State v. Nathan, 522 S.W.3d 881 (Mo. 2017).

170. *Garza,* 888 N.W.2d at 535.

171. *See Nathan*, 522 S.W.3d at 893.

172. *See id.* at 883.

173. *See id.* at 896.

burglary, kidnapping, assault, and armed criminal action.[174] Despite finding Nathan ineligible for life without parole, the court ordered all the sentences to run consecutively—giving Nathan a sentence of 300 years in prison.[175] The court held that *Miller* does "not address the constitutional validity of consecutive sentences, let alone the cumulative effect of such sentences," and thus Nathan's sentence did not violate *Miller*.[176]

3. Criminal Offenses Eligible for Life Without Parole

State legislatures have also taken different approaches towards determining what crimes should be eligible for life without parole. Most states only allow life without parole sentences for minors convicted of first-degree murder, rather than lesser homicide offenses.[177] However, this is not the case in all states. In Louisiana, juveniles convicted of first-degree or second-degree murder remain eligible to receive a life without parole sentence.[178] Second-degree murder includes offenders who had "intent to kill or to inflict great bodily harm" and death by unlawful distribution of a controlled substance.[179] Notably, only adults convicted of first-degree murder are eligible for the death penalty in Louisiana.[180] This means minors are eligible for life without parole for a greater number of offenses than adults are eligible for the death penalty, despite both sentences being reserved for only the most morally culpable homicide defendants.

Other states have narrowed the eligible offenses prospectively, but maintain life without parole as a possible sentence for second-degree murder in re-sentencing hearings mandated under *Montgomery*'s

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174. *See id.* at 883.

175. *See id.* at 883, 899.

176. *Id.* at 891.

177. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-752 (2017); ALA. CODE § 13A-5-43.1 (LexisNexis 2017); ARK. CODE ANN. § 5-4-104 (West 2017); CAL. PENAL CODE § 190.5 (West 2017); FLA. STAT. ANN. § 775.082(1)(b)(1) (West 2017); GA. CODE ANN. § 16-5-1 (West 2017); MD. CODE ANN., CRIM. LAW § 2-304 (West 2017); Legis. B. 44, 103 Leg., 1st Sess. (Neb. 2013) (amending NEB. REV. STAT. §§ 28-101, 83-1,135, enacting NEB. REV. STAT. §§ 28-105.02, 83-1, 110.04), https://nebraskalegislature.gov/FloorDocs/103/PDF/Slip/LB44.pdf [https://perma.cc/2BNK-X2NG]; N.H. REV. STAT. ANN. § 630:1-a(III) (2017); N.C. GEN. STAT. ANN. § 15A-1340.19B (2017); OHIO REV. CODE. ANN. § 2929.03(E) (West 2017); OKLA. STAT. ANN. tit. 21, § 701.9 (West 2017); 18 PA. STAT. AND CONS. STAT. ANN. § 1102.1 (West 2017); WASH. REV. CODE ANN. § 10.95.030(3)(a) (West 2017).

178. *See* LA. CODE CRIM. PROC. ANN. art. 878.1(a) (2017).

179. LA. STAT. ANN. § 14.30(a) (2017).

180. LA. STAT. ANN. § 14:30.C.(1) (2017).

retroactivity holding. For example, Pennsylvania revised its juvenile sentencing statute and no longer allows life without parole sentences for juveniles convicted of second-degree murder.[181] This is in line with Pennsylvania's death penalty sentencing scheme.[182] However, the Pennsylvania Supreme Court held that the new sentencing statute "applies only to minors convicted of murder on and after the date *Miller* was issued . . . ."[183]

Other states have modeled their juvenile life without parole sentencing statutes on death penalty statutes, reasoning that both punishments are reserved for the worst offenders. For example, Missouri has not only narrowed the class of juveniles eligible to those convicted of first-degree murder, but has required a finding of an aggravating factor prior to eligibility for such a sentence, much like that which is required to sentence an adult to death.[184] Thus, the criminal offenses for which a juvenile may receive life without parole, although limited to homicide by *Graham*, still vary by state.

III. THE CONSTITUTIONAL MANDATES OF *MONTGOMERY*

Montgomery requires states to do more to protect juveniles from excessive sentences. Part III examines the requirements of *Montgomery*, and argues how states should change their current sentencing practices to comply with *Montgomery*'s mandates.

A. Courts Must Make a Determination of "Irreparable Corruption" Prior to Sentencing a Juvenile to Life Without Parole

Montgomery made clear that mere consideration of youth is *not* enough to render a sentence of life without parole constitutional; the Eighth Amendment requires more.[185] Specifically, a sentencing court must determine that a youth is irreparably corrupt or permanently incorrigible prior to imposing a sentence of life without parole.[186]

The importance of making such a finding is repeatedly emphasized throughout the text of *Montgomery.* The Court held life without parole "excessive for all but 'the rare juvenile offender whose crime

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181. 18 PA. STAT. AND CONS. STAT. ANN. § 1102.1 (West 2017).

182. 18 PA. STAT. AND CONS. STAT. ANN. § 1102 (West 2017).

183. Commonwealth v. Batts, 66 A.3d 286, 293 (Pa. 2013).

184. MO. ANN. STAT. § 565.034 (West 2017).

185. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 734 (2016) (citing Miller v. Alabama, 567 U.S. 460, 472–73 (2012)) ("*Miller*, then, did more than require a sentencer to consider a juvenile offender's youth before imposing life without parole . . . .").

186. *See id.*

reflects irreparable corruption' . . . ."[187] The Court again stated that, "*Miller* did bar life without parole . . . for all but the rarest of juvenile offenders, those whose crimes reflect permanent incorrigibility."[188] In fact, the majority mentions *eight times* in the opinion that only irreparably corrupt juveniles may constitutionally receive sentences of life without parole.[189] Because life without parole is an excessive punishment for juveniles whose crimes reflect "transient immaturity,"[190] a sentencer must determine whether a juvenile is irreparably corrupt and thus one of the rare juveniles for whom a sentence of life without parole is constitutional.

Despite this repetitive language, several states have determined no such finding is required.[191] These holdings rest on one line in *Montgomery* that states that no formal fact-finding is required.[192] However, when considering the overall language of the *Montgomery* opinion, it is clear that this sentence should not be considered the controlling rule. The majority mentions just *once* that there is no formal fact-finding required—far fewer than the eight times the Court mentions that only irredeemable youth may be sentenced to life

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187. *Id.* at 724 (citing *Miller*, 567 U.S. at 479).

188. *Id.* at 734.

189. There are eight separate sentences in the *Montgomery* opinion that highlight the importance of determining if a juvenile's crime reflects "irreparable corruption," "irretrievable depravity," and "permanent incorrigibility" or "transient immaturity." *Id.* at 733 ("The Court recognized that a sentencer might encounter the rare juvenile offender who exhibits such *irretrievable depravity* that rehabilitation is impossible and life without parole is justified.") (emphasis added); *id.* at 734 ("Even if a court considers a child's age . . . that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet *transient immaturity*.'") (emphasis added); *id.* ("Because *Miller* determined that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects *irreparable corruption*,' it rendered life without parole an unconstitutional penalty for 'a class of defendants' . . . whose crimes reflect the *transient immaturity* of youth.") (emphasis added) (citations omitted); *id.* ("*Miller* did bar life without parole, however, for all but the rarest of juvenile offenders, those whose crimes reflect *permanent incorrigibility*.") (emphasis added); *id.* ("*Miller* drew a line between children whose crime reflect *transient immaturity* and those rare children whose crimes reflect irreparable corruption.") (emphasis added); *id.* at 735 ("*Miller*'s substantive holding that life without parole is an excessive sentence for children whose crimes reflect *transient immaturity*.") (emphasis added); *id.* ("That *Miller* did not impose a formal factfinding requirement does not leave States free to sentence a child whose crime reflects *transient immaturity* to life without parole.") (emphasis added); *id.* at 736 ("[P]risoners like Montgomery must be given the opportunity to show their crime did not reflect *irreparable corruption* . . . .") (emphasis added).

190. *Id.* at 734.

191. *See supra* Section II.A.

192. *See Montgomery*, 136 S. Ct. at 735.

without parole.[193] Markedly, the Court follows the assertion that there is no required finding of fact with the following statement: "[t]hat *Miller* did not impose a formal factfinding requirement *does not* leave States free to sentence a child whose crime reflects transient immaturity to life without parole."[194] Because a state is not free to sentence a juvenile whose crime reflects transient immaturity to life without parole, a sentencer must determine that a juvenile does not fall in that protected class. Without making such a determination, there is a substantial risk that the state has sentenced a child whose crime reflects transient immaturity to a constitutionally excessive sentence. The lack of a "formal factfinding requirement" noted in the opinion is thus better read as the Court failing to tell the states exactly *how* they make this determination. Nonetheless, the determination must still be made.

Additional evidence that *Montgomery* requires a finding of irreparable corruption comes from interpretations of *Montgomery* written by members of the Supreme Court. Justice Scalia, who was joined in dissent by Justices Thomas and Alito, read *Montgomery* as establishing an "'incorrigibility' requirement."[195] Additional evidence also comes from more recent Supreme Court decisions. In *Adams v. Alabama*,[196] a decision to vacate and remand for reconsideration in light of *Montgomery*, Justice Sotomayor, joined by Justice Ginsburg, noted that there was "no indication" that the factfinders "asked the question *Miller* required them not only to answer, but to answer correctly: whether petitioners' crimes reflected 'transient immaturity' or 'irreparable corruption.'"[197] Five justices, outside the language of the *Montgomery* majority opinion, have thus stated their belief that *Montgomery* requires a determination of irreparable corruption prior to a life without parole sentence.[198]

The Supreme Court has clearly established that under the Eighth Amendment the sentence of life without parole is disproportionate for juveniles whose crimes reflect transient immaturity, rather than irreparable corruption. Sentencing courts, after giving mitigating effect to the characteristics and circumstances of youth, must determine whether a juvenile is irreparably corrupt. A sentence of life without parole for a child who is not found to be irreparably

193. *See* discussion *supra* note 189.
194. *Montgomery*, 136 S. Ct. at 735 (emphasis added).
195. *Id.* at 744 (Scalia, J., dissenting).
196. 136 S. Ct. 1796 (2016).
197. *Id.* at 1800 (Sotomayor, J., concurring).
198. *See id.*; *see also Montgomery*, 136 S. Ct. at 744 (Scalia, J., dissenting).

corrupt is void. However, the vast majority of states that continue to have life without parole sentences available for juveniles have failed to require a finding of irreparable corruption by the sentencer.

B. A Possibility of Release Must Be the Presumptive Sentence

To comply with *Miller* and *Montgomery*, states must create a presumption against life without parole sentences for juvenile offenders. The burden must be on the state to rebut this presumption by showing that the juvenile defendant is one of the rare juvenile offenders whose crime reflects permanent incorrigibility. A failure to create such a presumption and corresponding burden ignores the fundamental holdings of *Miller* and *Montgomery* and will necessarily result in unconstitutional sentencing.

The Court in *Montgomery* made clear that sentences of life without parole for juveniles should be extraordinarily rare.[199] The use of the word "rare" was not just *dicta*, but was used with intention, as evidenced by consistent repetition throughout the opinion.[200] The Court stressed how rare such sentences should be by noting *six* separate times that life without parole is only constitutional for the "rare" juvenile.[201] The Court states an additional two times that life without parole is unconstitutional for the "vast majority" of juvenile homicide defendants.[202] The Court makes abundantly clear that such a sentence should only be issued in "exceptional circumstances."[203] Intuition tells us that if an outcome is exceptionally rare, it should not be presumed. However, states across the nation are ignoring this fundamental principle by failing to create a presumption against life

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199. *See* discussion *infra* note 197.

200. *See* discussion *infra* note 197.

201. *Montgomery*, 136 S. Ct. at 726 (" . . . the Court explained that a lifetime in prison is a disproportionate sentence for all but the *rarest* of children, those whose crimes reflect "'irreparable corruption.'") (emphasis added); *id.* at 733 ("The Court recognized that a sentence might encounter the *rare* juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified.") (emphasis added); *id.* at 734 (" . . . sentencing a child to life without parole is excessive for all but "'the *rare* juvenile offender whose crime reflects irreparable corruption . . . .'") (emphasis added); *id.* at 734 ("*Miller* did bar life without parole, however, for all but the *rarest* of juvenile offenders, those whose crimes reflect permanent incorrigibility.") (emphasis added); *id.* ("After *Miller*, it will be the *rare* juvenile offender who can receive that same sentence.") (emphasis added); *id.* ("*Miller* drew a line between children whose crimes reflect transient immaturity and those *rare* children whose crimes reflect irreparable corruption.") (emphasis added).

202. *Id.* at 734, 736.

203. *Id.* at 736.

without parole for juveniles.[204] This violates the Court's mandate that such sentences be rare.

Additionally, failing to presume that a juvenile is redeemable violates the core principles upon which *Miller* and *Montgomery* rest—that children are developmentally different and must be treated differently from adults.[205] *Montgomery* plainly established that life without parole is unconstitutional for juvenile offenders whose crimes reflect "transient immaturity."[206] However, both immaturity and its transient nature are central features of adolescent brain development, present in *all* juvenile offenders.[207] Both *Miller* and *Montgomery*, discussing *Graham*, acknowledged that juveniles characteristically lack maturity and impulse control, as the "parts of the brain involved in behavior control" have not fully matured.[208] Additionally, the *Montgomery* Court recognized that a child's "traits are 'less fixed' and his actions less likely to be evidence of 'irretrievable depravity.'"[209] These traits of transient immaturity, characteristic of all juveniles, led the Court to conclude that juveniles are less culpable and in need of greater constitutional protection.[210] Presuming that a juvenile offender's crime was *not* the result of transient immaturity contradicts the science on which the *Roper*, *Graham*, *Miller*, and *Montgomery* cases rest.

Having life without parole as the presumptive sentence for juvenile homicide offenders, or failing to have any presumption at all, places the responsibility of proving transient immaturity on the juvenile defendants themselves. This is highly problematic as juveniles are in an exceptionally poor position, due to qualities inherent in youth, to undertake such an important and difficult task.[211] The Court acknowledged in *Graham*, and reiterated in *Miller*, that the "features

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204. *See supra* Part II.

205. *See, e.g.*, *Montgomery*, 136 S. Ct. at 736; Miller v. Alabama, 567 U.S. 460, 479 (2012).

206. *Montgomery*, 136 S. Ct. at 734.

207. *See Miller*, 567 U.S. at 480; *see also* Roper v. Simmons, 543 U.S. 551, 570 (2005) ("[T]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient") (quoting Johnson v. Texas, 509 U.S. 350, 368 (1993)).

208. *Miller*, 567 U.S. at 471; *see Montgomery*, 136 S. Ct. at 733.

209. *Montgomery*, 136 S. Ct. at 733 (quoting *Miller*, 567 U.S. at 461).

210. *See supra* Part II (explaining the reasoning in *Miller* and *Montgomery*).

211. *See* Graham v. Florida, 560 U.S. 48, 78 (2010); *see also* Brief for NAACP Legal Def. & Educ. Fund, Inc. et al., Amici Curiae in Support of Petitioners at 7–24, Graham v. Florida, 560 U.S. 48 (2010) (Nos. 08-7412, 08-7621); Thomas Grisso, *The Competence of Adolescents as Trial Defendants*, 3 PSYCHOL. PUB. POL'Y & L. 3, 3 (1997).

that distinguish juveniles from adults also put them at a significant disadvantage in criminal proceedings."[212] This results in, as the Supreme Court stated, the juvenile's unique "incapacity to assist his own attorneys."[213] Placing responsibility on juveniles, who by their very nature are impulsive and immature, to prove an issue of constitutionality is irresponsible at best.

Furthermore, requiring a juvenile to prove that he can be rehabilitated is especially questionable considering the known difficulty of making such a determination. The Court has repeatedly recognized the "great difficulty . . . of distinguishing at this early age between 'the juvenile offender . . . '" who is irreparable and the juvenile offender who is redeemable.[214] Even expert psychologists have difficulty identifying those juveniles whose crimes reflect transient immaturity.[215] It is objectionable to require a juvenile to prove a fact that even experts cannot reliably show. Placing the burden on a juvenile to show that he can be rehabilitated creates an unacceptably high risk that he will be unconstitutionally sentenced to life without parole.

In order to effectuate the Court's mandate that only the rare irreparably corrupt youthful offender receive a sentence of life without parole, a state must create a presumption against life without parole. Anything else would undermine the Court's ruling that such sentences be reserved for the rare incorrigible juvenile.

C. Both Mandatory and Discretionary Life Without Parole Sentences Must Comply with *Montgomery* and *Miller*

Montgomery makes explicit that the protections it affords to child defendants apply whenever a juvenile is sentenced to life without parole, regardless of whether the juvenile is sentenced under a mandatory or discretionary sentencing statute. *Montgomery* outright *requires* courts to consider age-related mitigating evidence prior to sentencing a juvenile to life without parole.[216] If a sentencing judge is merely *allowed* to consider evidence of youth under a discretionary scheme but either fails to do so or does not afford the evidence the proper mitigating weight, the sentence would automatically violate

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212. *Graham*, 560 U.S. at 78; *Miller*, 567 U.S. at 478 (quoting *Graham*, 560 U.S. at 78).

213. *Miller*, 567 U.S. at 478.

214. *Id.* at 479 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)).

215. *See Graham*, 560 U.S. at 68; *Roper*, 543 U.S. at 573.

216. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 733 (2016).

Miller and *Montgomery*.[217] Although the Virginia Supreme Court attempted to say that only an "opportunity" to present evidence is required,[218] this is plainly in conflict with the Supreme Court's repeated statements that comprehensive examination of youth is obligatory for constitutional sentencing.[219]

Furthermore, even discretionary sentences issued after the full exploration of youth-based mitigation can violate *Montgomery.* The Court specifically stated that life without parole sentences issued after the contemplation of the defendant's youth could *still* run afoul of the Constitution.[220] Given that mitigating evidence can only be considered under a discretionary sentencing statute, the Court clearly did not limit its holding only to mandatory sentences. Additionally, the Court says that *Miller* is not a procedural decision, meaning the holding is not simply that sentencing courts must allow for discretion.[221]

Further evidence that the Supreme Court intended *Montgomery* to apply to discretionary sentences comes from the series of Arizona cases that were vacated and remanded.[222] In these cases, the minor defendants were sentenced under a discretionary sentencing statute.[223] The Supreme Court, in deciding to remand these cases for reconsideration in light of *Montgomery*, made clear its belief that *Montgomery* applies even to discretionary sentences.[224]

Thus, to comply with *Montgomery*, a state must apply *Montgomery*'s mandates to *all* juvenile defendants facing life without parole sentences, not just those sentenced under a mandatory statute.

D. *Montgomery* Applies to Lengthy Sentences that Are the Equivalent to Life Without Parole

Miller and *Montgomery* placed constitutional limits on the type of sentences that are allowable for children. The Court reasoned that the decreased culpability of children means that incredibly few

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217. *See id.* at 734.

218. *See* Jones v. Commonwealth, 795 S.E.2d 705, 711 (Va. 2017); *see also supra* Section II.B.

219. *See Montgomery*, 136 S. Ct. at 733–35.

220. *Id.* at 734 (quoting Roper v. Simmons, 543 U.S. 551, 543 (2005)) ("Even if a court considers a child's age before sentencing him or her to a lifetime in prison, that sentence still violates the Eighth Amendment for a child whose crime reflects 'unfortunate yet transient immaturity.'").

221. *See id.*

222. *See* Tatum v. Arizona, 137 S. Ct. 11, 11 (2016).

223. *See id.* at 12.

224. *See id.*

deserve to spend their lives in prison, with no opportunity to demonstrate redemption.[225] The Court's judgment that children should not spend their entire lives incarcerated unless they are truly incorrigible applies *whenever* a child faces a lifetime behind bars, regardless of whether the sentence is technically labeled "life without parole." It would violate the principles of *Miller* and *Montgomery* to hold that a youthful offender may be sentenced to a lifetime of incarceration without the procedural and substantive protections required by the Court, simply because the sentence is different in name only.[226] An offender who is sentenced to a lengthy term of years should not be worse off than an offender who was sentenced to life without parole.

Miller's protections should *not only* be activated when the term of years exceeds the predicted life span of the offender, such as a sentence of 200 years. In *Graham*, the Supreme Court held that children convicted of nonhomicide offenses cannot be sentenced to life without parole and that they must instead have a "realistic" and "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."[227] *Graham* thus established that youth who are ineligible for life without parole must have a "meaningful opportunity" for release.[228] Therefore, juvenile homicide offenders who may not be sentenced to life imprisonment must too have such a chance. Thus, the possibility of geriatric release, when the youth has spent over half a century behind bars, cannot be considered a meaningful opportunity. Attempts to circumvent *Miller*'s holding through lengthy sentences should be overturned.

E. States Should Narrow the Juvenile Offenses Eligible for Life Without Parole

In *Miller* and *Montgomery*, the Court analogized the sentence of life without parole for minors to the sentence of death for adults.[229] The Supreme Court repeatedly cited landmark Eighth Amendment death penalty cases, suggesting that the Court's death penalty cases

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225. *See Montgomery*, 136 S. Ct. at 733.

226. *See supra* notes 161–165 and accompanying text for state court decisions that agree with this position.

227. Graham v. Florida, 560 U.S. 48, 75, 82 (2010).

228. *Id.* at 75.

229. *See* Miller v. Alabama, 567 U.S. 460, 475 (2012) ("[W]e viewed [life without the possibility of parole] for juveniles as akin to the death penalty, we treated it similarly to that most severe punishment.").

are highly relevant for the discussion of juvenile life without parole.[230] The fundamental holding of much of the death penalty jurisprudence is that the sentence must be reserved for the "worst of the worst" offenders.[231] Much like death is reserved for the worst adult homicide offenders, life without parole is reserved for the worst juvenile homicide offenders.[232] Given that both punishments are reserved for the most culpable, it would stand to reason that states would make the offenses for which adults can receive the death penalty the same as the offenses for which juveniles can receive life without parole. However, as outlined above, not all states have unified such offenses.[233]

Additionally, in death penalty law, the Supreme Court requires state death penalty statutes to "narrow[ ] the categories of murders for which a death sentence may ever be imposed."[234] Although not binding precedent for juvenile cases, as it applies only in the death penalty context, the death penalty narrowing requirement gives clear guidance on what states should require in order to differentiate the "rare" juvenile offender who represents the worst of the worst. In addition to only making juveniles convicted of first-degree or capital murder eligible for life without parole, there should be some means to further identify the rare juvenile whose crime reflects irreparable corruption. Although it is questionable how well aggravating circumstances actually constrain eligibility,[235] it is one way to ensure there is at least some narrowing of individuals eligible for the worst punishments.

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230. *See supra* Section I.B.

231. *See* Kansas v. Marsh, 548 U.S. 163, 206 (2006) (stating the death penalty must be reserved for the "worst of the worst"); *see also* Roper v. Simmons, 543 U.S. 551, 568 (2005) (stating that capital punishment must be limited to offenders whose culpability makes them "the most deserving of execution").

232. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 733 (2016); *see also supra* Sections I.B., I.C.

233. *See supra* Part II.

234. Jurek v. Texas, 428 U.S. 262, 270 (1976).

235. *See* Chelsea Creo Sharon, *The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. C.R.-C.L. REV. 223, 224 (2011).

IV. *MONTGOMERY* CONTAINS THE SEEDS FOR THE END OF JUVENILE LIFE WITHOUT PAROLE

A. *Montgomery*'s Deficiencies

1. It Is Scientifically Impossible to Reliably Identify Irreparably Corrupt Juveniles

Montgomery's holding that life without parole is only justified for the irreparably corrupt offender is complicated by one significant factor: it is *impossible* to tell with any certainty which juveniles fall into this category. The Court in *Graham* acknowledged this fact, stating that, "juvenile offenders cannot with reliability be classified among the worst offenders."[236] This is because the science of adolescent brain development,[237] on which the Court based its conclusion that "children are different," plainly states that making an accurate determination about a juvenile's permanent character is impossible.[238]

The American Psychological Association ("APA"), in an *amicus* brief filed in *Miller*, stated that, "there is no reliable way to determine that a juvenile's offenses are the result of an irredeemably corrupt character."[239] The APA noted that early predictors for adult psychopathy are strongly lacking. For example, "[o]ne study found that only 16 percent of young adolescents who scored in the top quintile of a juvenile psychopathy measure would eventually be assessed as psychopathic at age 24."[240] Another study showed "no correlation between a youthful homicide offense and the basic psychological measures of persistent antisocial personality."[241]

Similarly, the article "*Guilty by Reason of Adolescence*," which is cited five times by the Court in *Roper*, explains that science "currently lack(s) the diagnostic tools to evaluate psychosocial immaturity reliably on an individualized basis or to distinguish young career criminals from ordinary adolescents who will repudiate their

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236. Graham v. Florida, 560 U.S. 48, 68 (2010) (citing *Roper*, 543 U.S. at 569).

237. *See supra* Section I.A.; *see also supra* Section III.B.

238. Brief for Am. Psychological Ass'n et al. as Amici Curiae Supporting Petitioners at 24–25, Miller v. Alabama, 567 U.S. 460 (2012) (Nos. 10-9646, 10-9647).

239. *Id.* at 25.

240. *Id.* at 21.

241. *Id.* at 22.

reckless experimentation as adults."[242] The article further explained that permanent labels regarding a youth's ability to change are "difficult to defend as applied to individuals whose identity development is still under way."[243] Furthermore, any attempts to litigate the question of "maturity on a case-by-case basis is likely to be an *error-prone* undertaking."[244]

Scientists make clear that any determination about a juvenile's permanent character is completely inconsistent with the science on which *Miller* rests. As the Iowa Supreme Court rightly observed, *Montgomery*'s directive to sentencing courts to separate the incorrigible from the immature asks courts to "do the impossible, namely, to determine whether the offender is 'irretrievably corrupt' at a time when even trained professionals with years of clinical experience would not attempt to make such a determination."[245]

2. Sentences Will Be Arbitrary

Neither *Miller* nor *Montgomery* defines what evidence would support a finding of irreparable corruption nor does either decision provide guidelines for identifying the exceptionally rare juvenile who is eligible for life without parole. The Court made clear that the heinousness of the crime cannot by itself be offered as evidence of an irreparably corrupt youth, because even youth who commit horrific crimes "are capable of change."[246] The crime for which the juvenile is being sentenced is likely the worst thing that he or she has done in life. If a brutal murder is not enough to declare a youth "irreparable," what is?

The Court fails to provide an answer to this question. *Miller* mandates a procedural hearing where the court considers the several factors, known as the "*Miller* factors," in order to distinguish the irreparable from the transiently immature.[247] But without instruction on how to interpret such factors, courts are unable to apply them consistently in any fair way. For example, *Miller* requires sentencing courts to consider evidence of the offender's "family and home

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242. Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOL. 1009, 1016 (2003).

243. *Id.* at 1015.

244. *Id.* at 1016 (emphasis added).

245. State v. Sweet, 879 N.W.2d 811, 837 (Iowa 2016).

246. Montgomery v. Louisiana, 136 S.Ct 718, 733–36 (2016).

247. Miller v. Alabama, 567 U.S. 460, 477–78 (2012).

environment."[248] However, it is undecided what type of family environment supports a finding that a juvenile acted as a result of transient immaturity. In one *Miller* sentencing hearing conducted in Iowa, the sentencing court cited the fact that the juvenile offender had "no family or other support outside of the criminal community" as one of the factors warranting a life without parole sentence.[249] Yet, in another sentencing proceeding conducted in California, the court specifically held that the defendant's family was "not a mitigating factor" because he was "raised in a supportive and financially stable family."[250] Both evidence of significant familial support *and* evidence of a lack of familial support have been used to support an increased sentence. This highlights the key problem with the *Miller* factors: they fail to provide clear guidance, and, without guidance, a judge can construe any facts to support a sentence of life without parole.

Judges have differing views about what is mitigating and what is aggravating and how to weigh such evidence.[251] Therefore, sentencing decisions will necessarily be inconsistent across courts, resulting in arbitrary and unpredictable punishments. Such a subjective sentencing procedure will surely not enable a judge to reliably identify the rare incorrigible defender.

3. Increased Racial Disparities

The inconsistent imposition of juvenile life without parole will inevitably have a significant discriminatory impact on juveniles of color, especially African American youth. Studies conducted prior to the Court's decision in *Miller* highlight the disproportionate rate at which African American juveniles are sentenced to life without

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248. *Id.* at 477.

249. State v. Seats, 865 N.W.2d 545, 552 (Iowa 2015).

250. People v. Jordan, 185 Cal. Rptr. 3d 174, 182 (Cal. Ct. App. 2015), *vacated and reh'g granted*, 381 P.3d 220 (Cal. 2016); *see also* Casiano v. Comm'r of Corr., 115 A.3d 1031, 1061 (Conn. 2015) (citing the fact that the defendant had a "caring, stable family" as evidence in aggravation, making the defendant more morally culpable for his actions).

251. For example, the fact that a murder was not premeditated led 11.8% of jurors to be "much *less*" likely to vote for the death penalty, while 15.8% of jurors viewed that same fact as making them "much *more*" likely to vote for death. *See generally* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1569 (1998) (emphasis added) (outlining research showing the different ways jurors view the same evidence). Although this is a study of jurors, not judges, the article demonstrates that different individuals view different evidence as mitigating and aggravating. *See generally id.*; Ryan W. Scott, *Inter-Judge Sentencing Disparity After* Booker*: A First Look*, 63 STAN. L. REV. 1 (2010) (documenting the sentencing disparities between judges).

parole. A 2012 study showed that 60% of juveniles sentenced to life without parole were African American,[252] despite only representing about 13% of the United States population.[253] A 2005 study showed African American juveniles are sentenced to life without parole at a rate ten times higher than that of white juvenile offenders.[254] Additionally, the race of the victim is a significant factor in sentencing juveniles to life without parole. Although African American juveniles accused of killing a white victim make up only 23.2% of juvenile homicide arrests, they comprise 43.4% of juveniles sentenced to life without parole.[255] Conversely, white offenders accused of killing African American victims make up 6.4% of juvenile homicide arrests, but only 3.6% of juveniles sentenced to life without parole.[256]

The extremely divergent rate at which juveniles of color receive life without parole sentences reflects widespread racial discrimination in both the charging and sentencing of juvenile homicide offenders. What is more, these studies pre-date *Miller*, when twenty-eight states had at least one *mandatory* juvenile life without parole sentencing scheme.[257] The added discretion that stems from *Miller* and *Montgomery* will likely make the disparate racial impact even starker. A number of studies have demonstrated that implicit bias affects the behavior of those in the justice system, including trial judges.[258] Notably, studies have shown that "implicit biases based on racial stereotypes conflate assessments of youth culpability, maturity, sophistication, future dangerousness, and severity of punishment."[259] The very task that trial courts are required to undertake—accurately

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252. ASHLEY NELLIS, THE SENTENCING PROJECT, THE LIVES OF JUVENILE LIFERS: FINDINGS FROM A NATIONAL SURVEY 8 (2012), http://www.sentencingproject.org/wp-content/uploads/2016/01/The-Lives-of-Juvenile-Lifers.pdf [https://perma.cc/3JHW-H3XZ].

253. *QuickFacts: Population Estimates*, U.S. CENSUS BUREAU (July 1, 2016), https://www.census.gov/quickfacts/table/PST045216/00 [https://perma.cc/888L-V8F6].

254. ALISON PARKER, HUMAN RIGHTS WATCH & AMNESTY INT'L, THE REST OF THEIR LIVES: LIFE WITHOUT PAROLE FOR CHILD OFFENDERS IN THE UNITED STATES 39 (2005), https://www.hrw.org/sites/default/files/reports/TheRestofTheirLives.pdf [https://perma.cc/WHP7-NKMP].

255. NELLIS, *supra* note 252, at 3.

256. *Id.*

257. JOSH ROVNER, THE SENTENCING PROJECT, SLOW TO ACT: STATE RESPONSES TO 2012 SUPREME COURT MANDATE ON LIFE WITHOUT PAROLE 1 (2014), http://sentencingproject.org/wp-content/uploads/2015/11/Slow-to-Act-State-Responses-to-Miller.pdf [https://perma.cc/EN48-YFVX].

258. Robin Walker Sterling, *"Children Are Different": Implicit Bias, Rehabilitation, and the "New" Juvenile Jurisprudence*, 46 LOY. L.A. L. REV. 1019, 1066–67 (2013).

259. *Id.* at 1067.

assessing maturity, culpability and future dangerousness—is complicated by implicit bias concerning the mitigating nature of youth in African American children.[260]

Unfortunately, racially biased sentencing on its own will not likely provide sufficient reasoning for the Supreme Court to end juvenile life without parole.[261] However, such disparate sentencing does support a finding that the punishment is being dispensed arbitrarily rather than reserved for the rare incorrigible offender. Furthermore, state courts should consider the discriminatory impact of juvenile life without parole when considering challenges to the constitutionality and acceptability of the practice.

B. A Categorical Ban on Life Without Parole for Juvenile Offenders Is the Only Constitutional Option

Under the current case-by-case approach, sentencers are required to make speculative decisions on prospects for rehabilitation, without sufficient predictive information to support such a conclusion. The failure of both science and sentencing factors to reliably separate irreparable offenders from those whose crimes reflect transient immaturity creates an unjustifiably high risk that courts are issuing unconstitutional sentences. This risk illustrates the need for a categorical ban.

The Court in *Graham* considered taking a case-by-case approach by creating a rule that would require courts to take a juvenile offender's age into consideration at sentencing, much like what the *Miller* Court did.[262] However, the Court found such an approach insufficient to provide adequate constitutional protections.[263] The Court proceeded to cite five reasons why a categorical ban on juvenile life without parole for nonhomicide offenders was necessary.[264] Each

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260. *Id.* at 1068. *See generally* Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679 (2002).

261. However, note that in *McCleskey v. Kemp*, 481 U.S. 279 (1987), the United States Supreme Court held that the racially disproportionate impact of the death penalty in Georgia was not enough to violate the constitution, without a showing that the Georgia death penalty statute had a racially discriminatory purpose. Thus, unless the Supreme Court wants to overturn *McCleskey*, the racially discriminatory impact of life without parole sentences on juveniles will not alone be sufficient for the Supreme Court to create a categorical ban on juvenile life without parole sentences.

262. Graham v. Florida, 560 U.S. 48, 76 (2010).

263. *Id.* at 78.

264. *Id.* at 77–79 (confining the case-by-case sentencing approach because: (1) cannot identify the incorrigible offenders; (2) high risk of erroneous sentencing; (3) differences too large to allow for such a risk; (4) juveniles have impaired criminal

of the five reasons cited applies with equal force to life without parole for *homicide* offenders. Thus, the Court's reasoning in *Graham* actually illustrates why its current approach in *Miller* and *Montgomery* is unsatisfactory.

First, the *Graham* court explained that a categorical approach was necessary because it is impossible to identify the rare incorrigible offender.[265] The Court explained that even if the court believes a juvenile may exhibit sufficient depravity, "it does *not* follow that courts taking a case-by-case proportionality approach could with *sufficient accuracy* distinguish the few incorrigible juvenile offenders from the many that have the capacity for change."[266] The Court directly questioned a sentencer's ability to perform the *very task* it mandates in *Montgomery*.

Next, the Court held that an "unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth."[267] This would likely result in juveniles receiving sentences of life without parole, despite the fact that their "immaturity, vulnerability, and lack of true depravity" require a lesser sentence.[268] The Court determined this risk of error unacceptable, and further evidence of the need for a categorical ban. As homicide cases are typically more brutal and cold-blooded than nonhomicide cases, it stands to reason that the same risk of error exists with equal or greater force in homicide cases.

The Court then explained that "'[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive' a sentence of life without parole for a nonhomicide crime 'despite insufficient culpability.'"[269] Similarly, the Court in *Montgomery* noted that the vast majority of juvenile *homicide* offenders also have insufficient culpability, and that the differences between juveniles and adults are not crime specific.[270]

The fourth problem with a case-by-case approach is its failure to consider the "special difficulties encountered by counsel in juvenile representation,"[271] including the fact that juveniles are at "a

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representation; and (5) juveniles should have a chance to demonstrate maturity and reform).

265. *Id.* at 77.

266. *Id.* (emphasis added).

267. *Id.* at 78.

268. *Id.*

269. *Id.* at 78 (citing Roper v. Simmons, 543 U.S. 551, 572–73 (2005)).

270. Montgomery v. Lousiana, 136 S. Ct. 718, 733 (2016).

271. *Graham*, 560 U.S. at 78.

significant disadvantage in criminal proceedings."[272] The Court then concluded that, "[a] categorical rule avoids the risk that, as a result of these difficulties, a court or jury will erroneously conclude that a particular juvenile is sufficiently culpable to deserve life without parole."[273] Lastly, the Court noted that a categorical approach prohibiting life without parole for juvenile nonhomicide offenders was the only way to ensure that juveniles are given the opportunity to mature and demonstrate reform.[274] Neither of these last two factors are crime specific. Undoubtedly, every factor that led the court to deem a categorical ban necessary in nonhomicide cases equally applies to the sentencing of juvenile homicide offenders to life without parole.

Based on the these factors, the *Graham* Court ultimately concluded that laws "allowing the imposition of these sentences based only on a *discretionary*, *subjective judgment* by a judge or jury that the offender is *irredeemably depraved*, are *insufficient* to prevent the possibility that the offender will receive a life without parole sentence for which he or she lacks the moral culpability."[275]

Miller, as interpreted by *Montgomery*, established such a subjective sentencing scheme, requiring a sentencer to make a discretionary judgment that a juvenile is incorrigible. However, *Graham* already concluded that such subjective determinations, *even* when made after full consideration of youth, are insufficient to shield against the high risk of unconstitutional sentencing.[276] A categorical ban is the only way to adequately protect the rights of the vast majority juvenile offenders.

CONCLUSION

Montgomery held that only juveniles who are irreparably corrupt may be sentenced to life without parole.[277] Without reliable guidance as to how to distinguish an "irreparably corrupt" juvenile from the typical juvenile offender who is capable of rehabilitation, life without parole sentences necessarily will be imposed in an unconstitutional manner.[278] Such reliable guidance is likely impossible, due to the

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272. *Id.*
273. *Id.* at 78–79.
274. *Id.* at 79.
275. *Id.* at 77 (emphasis added).
276. *Id.*
277. *See supra* Section I.C.
278. *See supra* Part IV.

inherently transient nature of the juvenile brain.[279] A future parole board, with the added knowledge that only comes with time, will be in a better position to determine whether or not a juvenile can be rehabilitated.

Based on the conflicting interpretations of *Montgomery* at the state level, the Supreme Court will soon have an opportunity to clarify the holdings of *Miller* and *Montgomery*.[280] It is possible that the Court could continue to adopt a case-by-case approach and merely provide some clarification on the holdings in *Montgomery*. However, if the Court genuinely believes that it is unconstitutional to sentence a juvenile whose crime reflects transient immaturity to life without possibility of parole, the only option for the Court is to issue a categorical ban.[281]

279. *See supra* Section IV.A.
280. *See supra* Part II.
281. *See supra* Section IV.B.

APPENDIX A. STATES THAT ALLOW LWOP FOR JUVENILE OFFENDERS

Which states allow juvenile LWOP sentences and which have outlawed the practice?[1]			
States that permit sentencing juveniles to LWOP		States that have eliminated LWOP sentences for juvenile offenders	
States that currently have juvenile offenders serving LWOP sentences	States that do not have any juvenile offenders currently serving LWOP sentences	States where all juvenile offenders have an opportunity for parole	States that did not make the elimination of LWOP for juveniles retroactive and still have juvenile offenders serving LWOP sentences
Alabama, Arizona, Florida, Georgia, Idaho, Illinois, Indiana, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia, Washington, and Wisconsin	Maine, Missouri, New Mexico, New York, and Rhode Island	Alaska, Arkansas, California, Connecticut, Delaware, District of Columbia, Hawaii, Iowa, Kansas, Massachusetts, Nevada, New Jersey, North Dakota, South Dakota, Vermont, West Virginia, and Wyoming	Colorado, Kentucky, Texas, and Utah

[1] *See* U.S. NEWS, A STATE-BY-STATE LOOK AT JUVENILE LIFE WITHOUT PAROLE (2017), https://www.usnews.com/news/best-states/utah/articles/2017-07-31/a-state-by-state-look-at-juvenile-life-without-parole [https://perma.cc/XK76-WAEX].

APPENDIX B. IRREPARABLE CORRUPTION DETERMINATION

Must a sentencing court find a juvenile to be "irreparably corrupt" prior to imposing a life without parole sentence?		
Yes, there must be an explicit finding		
Court	**Decision**	**Quote(s)**
Arizona Supreme Court	*State v. Valencia*, 386 P.3d 392, 395 (Ariz. 2016)	"Arizona law, when Healer and Valencia were sentenced, allowed a trial court to impose a natural life sentence on a juvenile convicted of first degree murder *without distinguishing crimes* that reflected 'irreparable corruption' rather than the 'transient immaturity of youth.'" (emphasis added)
Florida Supreme Court	*Landrum v. State*, 192 So.3d 459, 467–468 (Fla. 2016)	"Without this individualized sentencing consideration, a sentencer is unable to distinguish between juvenile offenders whose crimes 'reflect transient immaturity' and those whose crimes reflect 'irreparable corruption.' *Failing to make this distinction*, otherwise, would mean life sentences for juveniles would not be exceedingly rare, but possibly commonplace." (emphasis added) "[The court] did not consider whether the crime itself reflected 'transient immaturity' rather than 'irreparable corruption.'"
Georgia Supreme Court	*Veal v. State*, 784 S.E.2d 403, 411 (Ga. 2016)	"The trial court did not, however, make *any sort of distinct determination* on the record that Appellant is *irreparably corrupt or permanently incorrigible*, as necessary to put him in the narrow class of juvenile murderers for whom an LWOP sentence is proportional." (emphasis added)
Oklahoma Criminal Appeals Court (highest court in Oklahoma for criminal appeals)	*Luna v. State*, 387 P.3d 956, 963 (Okla. Crim. App. 2016)	"For the reasons we have discussed, Luna's sentence of life without parole must be vacated and the matter remanded for resentencing to *determine whether the crime reflects Luna's transient immaturity, or an irreparable corruption* and permanent incorrigibility warranting the extreme sanction of life imprisonment without parole." (emphasis added)

Pennsylvania Supreme Court	*Commonwealth v. Batts*, 163 A.3d 410, 108–09 (Pa. 2017)	"If, after a hearing and consideration of all of the evidence presented, the sentencing court *finds* that the Commonwealth has satisfied its burden of proving beyond a reasonable doubt *that the juvenile is so permanently incorrigible* that rehabilitation of the offender would be impossible, the bar against sentencing a juvenile offender to life without the possibility of parole is lifted." (emphasis added)
Iowa Supreme Court *The Iowa Supreme Court required a finding of irreparable corruption post-*Miller* but prior to *Montgomery*.	*State v. Seats*, 865 N.W.2d 545, 556 (Iowa 2015)	"The sentencing judge should only sentence those juveniles to life in prison without the possibility of parole whose crime reflects irreparable corruption."
	State v. Sweet, 879 N.W.2d 811, 833 (Iowa 2016) (interpreting *Seats*)	"We noted that if a life sentence without parole could ever be imposed on a juvenile offender, the *burden was on the state to show that an individual offender manifested 'irreparable corruption*.'" (emphasis added)
California Court of Appeals *Courts of Appeals are split on this issue (see below for courts holding that a determination of irreparable corruption is not required). **In October of 2017, a law was passed that effectively ended juvenile life without parole in the state. It is unclear whether the California Supreme Court will hear arguments and resolve the split with *Padilla* or consider the issue moot.	<u>Expressly held that determination is required</u>: *People v. Padilla*, 209 Cal. Rptr. 3d 209, 220–21 (Cal. Ct. App. 2016), *appeal docketed*, 387 P.3d 741 (Cal. 2017) (requesting briefing on whether a trial court is required to make an irreparable corruption determination before imposing LWOP) <u>Implied that determination is required</u>: *In re Berg*, 202 Cal. Rptr. 3d 786 (Cal. Ct. App. 2016)	"In view of *Montgomery*, the trial court must assess the *Miller* factors with an eye to making an *express determination* whether the juvenile offender's crime reflects permanent incorrigibility arising from irreparable corruption." (*Padilla* at 673) (emphasis added)
Appellate Court of Illinois *Appellate Courts are split on the issue (see below for courts holding that a determination of irreparable corruption is not required). **The Illinois Supreme Court recently granted	*People v. Nieto*, 52 N.E.3d 442, 455 (Ill. App. Ct. 2016)	"The trial court's findings do not imply that it believed defendant was the *rarest* of juveniles whose crime showed that he was permanently incorrigible." (emphasis added)

review on the issue. *See People v. Holman*, 60 N.E.3d 878 (Ill. 2016).		
Court of Appeals of Michigan	*People v. Hyatt*, 891 N.W.2d 549, 552 (Mich. Ct. App. 2016)	"The United States Supreme Court has made unmistakably clear, it is only the truly rare juvenile who will be deserving of the harshest penalty available under the laws of this state, and a life-without-parole sentence is an unconstitutional penalty for all juveniles but those whose crimes reflect irreparable corruption. For this reason, while we conclude that a judge, not a jury, is to make this determination."
No, a sentencing court is not required to find a juvenile "irreparably corrupt" prior to imposing an LWOP sentence		
Court	**Decision**	**Quote(s)**
Virginia Supreme Court	*Jones v. Commonwealth*, 795 S.E.2d 705 (Va. 2017)	Holding that *Miller* merely requires that a defendant have an opportunity to present mitigation, and that judges do not in fact have to consider it.
Washington Supreme Court	*State v. Ramos*, 387 P.3d 650, 659 (Wash. 2017)	"It also *does not require* the sentencing court . . . to make an *explicit finding* that the offense reflects irreparable corruption on the part of the juvenile."
Tennessee Court of Appeals	*Brown v. State*, No. W2015-00887-CCA-R3-PC, 2016 WL 1562981, at *7 (Tenn. Crim. App. Apr. 15, 2016), *appeal denied* (Aug. 19, 2016), *cert. denied*, 137 S. Ct. 1331 (2017)	"As indicated, the Court reiterated that '*Miller* did not require trial courts to make a finding of fact regarding a child's incorrigibility' but only required '[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors . . . to separate those juveniles who may be sentenced to life without parole from those who may not.'"
California Court of Appeals *Courts of Appeals are split on this issue (see above for courts holding that a determination of irreparable corruption is required). **In October of 2017, a law was passed that effectively ended juvenile life without parole in the	*People v. Blackwell*, 207 Cal. Rptr. 3d 444, 462 (2016) *People v. Willover*, 203 Cal. Rptr. 3d 384 (2016)	"Once such a juvenile offender has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, the sentencing court need not find any particular fact before imposing LWOP . . . As the People put it, 'irreparable corruption' is not a factual finding, but merely 'encapsulates the [absence] of youth-based mitigation.'" (*Blackwell*, 462)

state. It is unclear whether the California Supreme Court will hear arguments and resolve the split with *Padilla* or consider the issue moot.		
Appellate Court of Illinois *Appellate Courts are split on the issue (see above for the Illinois court's holding that a determination of irreparable corruption is required). **The Illinois Supreme Court recently granted review on the issue. *See People v. Holman*, 60 N.E.3d 878 (Ill. 2016).	*People v. Stafford*, 61 N.E.3d 1058, 1068–69 (Ill. Ct. App, 2016) *People v. Holman*, 58 N.E.3d 632, *appeal docketed*, 60 N.E.3d 878 (Ill. 2016)	"Although the trial court did not explicitly state defendant was one of the *rarest* of juvenile offenders whose crime showed a life sentence is appropriate, the court's reasoning certainly conveys the same conclusion." (*Stafford*, 1068–69) (emphasis added)

APPENDIX C. DISCRETIONARY VS. MANDATORY SENTENCES

Do *Miller* and *Montgomery* apply to discretionary LWOP sentences, or just to mandatory LWOP sentences?	
Miller and *Montgomery* apply to discretionary LWOP sentences	*Miller* and *Montgomery* apply ONLY to mandatory LWOP sentences
State Supreme Court Decisions[B]	
Arizona Supreme Court *State v. Valencia*, 386 P.3d 392 (Ariz. 2016)	**Arkansas Supreme Court**[*A] *Brown v. Hobbs*, 2014 Ark. 267 (2014)
California Supreme Court[*] *People v. Gutierrez*, 324 P.3d 245(Cal. 2014)	**Indiana Supreme Court**[*A] *Conley v. State*, 972 N.E.2d 864 (Ind. 2012)
Connecticut Supreme Court[*C] *State v. Riley*, 315 Conn. 637 (2015)	**Minnesota Supreme Court**[*C] *State v. Williams*, 862 N.W.2d 701 (Minn. 2015)
Florida Supreme Court *Atwell v. State*, 197 So.3d 1040 (Fla. 2016)	**Missouri Supreme Court** *State v. Nathan*, 522 S.W.3d 881 (Mo. 2017)
Georgia Supreme Court *Dennis v. State*, 300 Ga. 457 (2017)	**South Dakota Supreme Court**[C] *State v. Charles*, 892 N.W.2d 915 (S.D. 2017)
Iowa Supreme Court[*] *State v. Seats*, 865 N.W.2d 545 (Iowa 2015)	**Virginia Supreme Court** *Jones v. Commonwealth*, 795 S.E.2d 705 (Va. 2017)
Montana Supreme Court[*] *Beach v. State*, 379 Mont. 74, 86 (2015)	**Nevada Supreme Court**[*A] *Randell v. State*, No. 61232, 2013 WL 7158872 (Nev. Dec. 12, 2013)
New Jersey Supreme Court[C] *State v. Zuber*, 227 N.J. 422 (2017)	**West Virginia Supreme Court**[*A] *State v. Redman*, No. 13-0225, 2014 WL 1272553 (W.Va. Mar. 28, 2014)
Oklahoma Criminal Appeals Court *Luna v. State*, 387 P.3d. 956 (Okla. Crim. App. 2016)	
Ohio Supreme Court[*] *State v. Long*, 138 Ohio.St.3d 478 (2014)	
South Carolina Supreme Court[*] *Aiken v. Byars*, 410 S.C. 534 (2014)	
Washington Supreme Court *State v. Ramos*, 387 P.3d 650 (Wash. 2017)	

[*] Case decided before *Montgomery v. Louisiana*.
[A] Following this decision, this state eliminated LWOP as a possible punishment for juvenile offenders.
[B] Kentucky does not permit juvenile LWOP sentences, but it has not made the elimination retroactive.
[C] Court interpreting *Miller* and *Montgomery*'s mandates with "de facto" or "effective" LWOP sentences.

APPENDIX D. DE FACTO LWOP SENTENCES

Do *Miller* (and *Graham*) apply to lengthy "de facto" LWOP sentences?	
State Supreme Court cases holding that a lengthy sentence is a de facto life sentence	
Miller applies to de facto LWOP sentences	
Court	**Quote/Holding**
California Supreme Court *People v. Franklin*, 370 P.3d 1053, 1059 (Cal. 2016)	"We now hold that just as *Graham* applies to sentences that are the 'functional equivalent of life without parole sentence,' so too does *Miller* apply to such functionally equivalent sentences."
Connecticut Supreme Court *Casiano v. Comm'r of Corr.*, 115 A.3d 1031, 1048 (Conn. 2015)	"We are nonetheless persuaded that the procedures set forth in *Miller* must be followed when considering whether to sentence a juvenile offender to fifty years imprisonment without parole."
Illinois Supreme Court *People v. Reyes*, 63 N.E.3d 884, 888 (Ill. 2016)	"[T]he sentencing scheme mandated that he remain in prison until at least the age of 105 . . . [u]nquestionably, then, under the circumstances, defendant's term-of-years sentence is a mandatory, de facto life-without-parole sentence. We therefore vacate defendant's sentence as unconstitutional pursuant to *Miller*."
Indiana Supreme Court *Brown v. State*, 10 N.E.3d 1, 8 (Ind. 2014)	"Similar to a life without parole sentence, Brown's 150 year sentence 'forswears altogether the rehabilitative ideal.'"
Iowa Supreme Court *State v. Null*, 836 N.W.2d 41, 71 (Iowa 2013)	"A threshold question is whether a 52.5–year minimum prison term for a juvenile based on the aggregation of mandatory minimum sentences for second-degree murder and first-degree robbery triggers the protections to be afforded under *Miller*—namely, an individualized sentencing hearing to determine the issue of parole eligibility. We think it does."
New Jersey Supreme Court *State v. Zuber*, 152 A.3d 197, 212–13 (N.J. 2017)	"The term-of-years sentences in these appeals—a minimum of 55 years' imprisonment for Zuber and 68 years and 3 months for Comer—are not officially 'life without parole.' But we find that the lengthy term-of-years sentences imposed on the juveniles in these cases are sufficient to trigger the protections of *Miller* under the Federal and State Constitutions."
Washington Supreme Court *State v. Ramos*, 387 P.3d 650, 659 (2017)	"Miller applies equally to literal and de facto life-without-parole sentences[,]" and "it is undisputed that Ramos' 85-year aggregate sentence is a de facto life sentence."
Wyoming Supreme Court *Bear Cloud v. State*, 334 P.3d 132, 144 (Wyo. 2014)	Aggregate sentence of just over 45 years was de facto equivalent of life sentence without parole. "The United States Supreme Court's Eighth Amendment jurisprudence requires that a process be followed before we make the judgment that juvenile 'offenders never will be fit to

	reenter society.' That process must be applied to the entire sentencing package, when the sentence is life without parole, or when aggregate sentences result in the functional equivalent of life without parole."
Using similar reasoning, cases that held *Graham* applicable to de facto LWOP sentences	
Florida Supreme Court *Henry v. State*, 175 So. 3d 675, 679–80 (Fla. 2016)	"Because Henry's aggregate sentence, which totals ninety years and requires him to be imprisoned until he is at least nearly ninety-five years old, does not afford him this opportunity [of release], that sentence is unconstitutional under *Graham*."
Louisiana Supreme Court* *State ex rel. Morgan v. State*, 217 So. 3d 266, 271 (La. 2016) *The Louisiana Supreme Court held that a lengthy sentence for ONE crime can be a de facto life sentence, but that lengthy aggregate sentences do not violate *Graham* (see below).	"Defendant's 99-year sentence [without parole] [w]as an effective life sentence, illegal under *Graham*."
Nevada Supreme Court *State v. Boston*, 383 P.3d 453, 458 (Nev. 2015)	"Boston's aggregate sentences [for nonhomicide crimes], which require him to serve approximately 100 years before being eligible for parole, are without a doubt the functional equivalent of a sentence of life without the possibility of parole."
Ohio Supreme Court *State v. Moore*, 76 N.E.3d 1127, ¶ 59, at 1139 (Ohio 2016)	"We see no significant difference between a sentence of life imprisonment without parole and a term-of-years prison sentence that would extend beyond the defendant's expected lifespan before the possibility of parole."
State Supreme Court cases holding that a lengthy sentence is <u>not</u> a de facto LWOP sentence	
***Miller* and/or *Graham* do not apply to lengthy aggregate sentences**	
Louisiana Supreme Court *State v. Brown*, 118 So. 3d 332, 341 (La. 2013)	"In our view, *Graham* does not prohibit consecutive term of year sentences for multiple offenses committed while a defendant was under the age of 18, even if they might exceed a defendant's lifetime."
Georgia Supreme Court *Adams v. State*, 707 S.E.2d 359, 365 (Ga. 2011)	"Clearly, '[n]othing in the Court's opinion [*Graham*] affects the imposition of a sentence to a term of years without the possibility of parole.'"
Nebraska Supreme Court* *State v. Garza*, 888 N.W.2d 526, 535–36 (2016) *In another case the Nebraska Supreme Court in analyzing a lengthy sentence under *Graham*	"We conclude that Garza's characterization of his sentence as a de facto life sentence is immaterial to our analysis of whether his sentence is excessive." "Both *Miller* and *Tatum* dealt with juvenile defendants who had been sentenced, or resentenced, to life imprisonment without parole for murder. Garza, in contrast, was resentenced to a term

implied that a lengthy sentence could equate to life without parole. *State v. Smith*, 295 Neb. 957 (2017).	of years and is eligible for parole . . . [therefore] we find no merit to his argument that the sentencing court was required by *Miller* or *Tatum* to make a specific finding of 'irreparable corruption.'"
Virginia Supreme Court *Vasquez v. Commonwealth*, 781 S.E.2d 920, 925 (Va. 2016)	"[Defendants] argue only that we should expand *Graham*'s prohibition of life-without-parole sentences to non-life sentences that, when aggregated, exceed the normal life spans of juvenile offenders. For several reasons, we decline the invitation to do so."
Although *Miller* or *Graham* might apply to some lengthy sentences, the court found that the specific length at issue was not a de facto LWOP sentence	
Delaware Supreme Court *Walker v. State*, No. 430, 2016, 2017 WL 443724, at *1 (Del. Jan. 17, 2017)	"Although it may be that the imposition of a specific sentence of years to a minor in a specific case could be deemed the equivalent of a life sentence that the Supreme Court could not logically distinguish from its holding in the trilogy of cases noted earlier, this is not such case. At the time of his heinous crime, Walker was just shy of the age of majority. Life expectancy in the United States is now 78.8 years, which is over a decade beyond when Walker would be eligible for release."
Nebraska Supreme Court* *State v. Smith*, 892 N.W.2d 52, 64 (Neb. 2017) *Nebraska's caselaw interpreting de facto life sentences in homicide cases is confusing—it is unclear if the court finds Miller applicable. *See State v. Garza*, 888 N.W.2d 526 (Neb. 2016).	"Here, the presentence report supports that the average life expectancy for someone Smith's age is 78.8 years, and as discussed above, Smith is eligible for release at 62 years of age. Accordingly, Smith's sentence of 90 years to life imprisonment allows for parole eligibility almost 17 years before his average life expectancy."
South Dakota Supreme Court *State v. Charles*, 892 N.W.2d 915, ¶ 16, at 921 (S.D. 2017)	"A life sentence is commonly understood to mean spending the rest of one's life in prison. This is not to say that a sentence to a term of years for a juvenile homicide offender will always pass constitutional muster. For example, 'term sentences virtually guaranteeing an offender will die in prison without meaningful opportunity for release could be considered a life sentence for the purpose of applying *Graham* or *Miller*.' Because Charles has the opportunity for release at age 60, his sentence does not 'guarantee[ ] he will die in prison without any meaningful opportunity to obtain release.'" (internal citations omitted)
Virginia Supreme Court *Johnson v. Commonwealth*, 793 S.E.2d 326, 331 (Va. 2016)	"The possibility of geriatric release under Code § 53.1-40.01 provides a meaningful opportunity for release that is akin to parole." Because of the possibility of geriatric release, no term of years, no matter how lengthy, is a "de facto" life sentence.

APPENDIX E. PRESUMPTION AGAINST LWOP

Is there a presumption against LWOP and/or is the burden on the state to show that a juvenile deserves LWOP?	
State Supreme Court says YES	**State Supreme Court says NO**
Parole is the presumed sentence and/or the burden falls on the state to prove the youth is eligible for LWOP	**LWOP is the presumed sentence and/or the burden falls on the juvenile defendant to prove that s/he is ineligible for an LWOP sentence**
Connecticut Supreme Court *State v. Riley*, 110 A.3d 1205, 1214 (2015) (presumption in favor of parole)	**Arizona Supreme Court** *See State v. Valencia*, 386 P.3d 392, 396 (Ariz. 2016) (at re-sentencing, the burden is on defendants to show that they are ineligible for LWOP)
Indiana Supreme Court *Conley v. State*, 972 N.E.2d 864, 871 (Ind. 2012) (burden on state to prove LWOP appropriate)	**Virginia Supreme Court** *Jones v. Commonwealth*, 795 S.E.2d 705, 715 (Va. 2017) (burden is on defendants to show that they are ineligible for LWOP)
Iowa Supreme Court *State v. Seats*, 865 N.W.2d 545, 555 (Iowa 2015) (presumption in favor of parole)	**Washington Supreme Court** *State v. Ramos*, 387 P.3d 650, 663 (Wash. 2017) (Washington Sentencing Reform Act places burden of proof on juvenile defendant to show by preponderance of evidence that he or she should receive lower sentence)
Missouri Supreme Court *State v. Hart*, 404 S.W.3d 232, 241 (Mo. 2013) (burden on state to show LWOP is appropriate)	**There is no presumption in favor of either sentence**[1]
Utah Supreme Court *State v. Houston*, 353 P.3d 55, 83 (Utah 2015) (presumption in favor of parole)	**Nebraska Supreme Court** *State v. Mantich*, 888 N.W.2d 376, 384 (2016) (no presumption against LWOP)
Pennsylvania Supreme Court *Commonwealth v. Batts*, 163 A.3d 410, 433 (Pa. 2017) (presumption against LWOP and burden on state to show juvenile is incapable of rehabilitation)	
Review of this issue granted by the State Supreme Court The following courts have granted review to determine whether there needs to be a presumption against juvenile LWOP at sentencing.	
California Supreme Court *See* News Release, Sup. Ct. of Cal., Summary of Cases Accepted and Related Actions During Week of January 23, 2017 (Jan. 27, 2017), www.courts.ca.gov/documents/ws012317.pdf	

[https://perma.cc/859S-EB4D] (providing statement of the issue in *People v. Arzate*, No. B259259, 2016 WL 5462821, at *1 (Cal. Ct. App. Sept. 29, 2016)).
North Carolina Supreme Court *State v. James*, 796 S.E.2d 6 (N.C. 2017) In *State v. James*, 786 S.E.2d 73 (N.C. Ct. App. 2016), the North Carolina Court of Appeals held that the North Carolina sentencing statute creates a presumption in favor of LWOP for juveniles, and that this is in compliance with Miller. The North Carolina Supreme Court granted review of this decision on March 16, 2017.

[1] If a state allows for juvenile LWOP sentences, but is not listed on this table, it means that their Supreme Court has yet to determine if *Miller* or *Montgomery* creates a presumption against LWOP. Since their sentencing statues do not establish a presumption in favor of either sentence, these states should be considered to fall in the "no presumption in favor of either sentence" category.